File No. CI 20-01-26627

THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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

Respondents.

MOTION BRIEF OF THE RECEIVER
(MR. NYGARD LEGAL FEES APPROVAL ORDER)

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THE QUEEN'S BENCH
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Respondents.

MOTION BRIEF OF THE RECEIVER (MR. NYGARD LEGAL FEES APPROVAL ORDER)

I. LIST OF DOCUMENTS

1. Net Receivership Proceeds Order made March 10, 2022;

2. Notice of Motion of the Respondents' dated October 3, 2022;

3. Affidavit of Wayne Onchulenko affirmed October 3, 2022; and

4. Thirteenth Report of the Receiver dated October 11, 2022.

II. LIST OF AUTHORITIES

Tab

1. *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited et al.*, 2022 MBQB 48;

2. *Confectionately Yours Inc.*, *Re*., [2002] OJ No 3569.

III. POINTS TO BE ARGUED

Introduction

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

2. On March 10, 2022, the Honourable Mr. Justice Edmond made an Order (the "**Net Receivership Proceeds Order**"), *inter alia*:

(a) granting the Debtors' motion to authorize or permit payment of the Debtors' reasonable legal fees and disbursements and professional costs incurred and to be incurred in the Receivership Proceedings and to be incurred in the bankruptcy proceeding from the Preserved Proceeds and, if necessary, the Net Receivership Proceeds (as defined in the Twelfth Report of the Receiver dated June 4, 2021 (the "**Twelfth Report**"); and

(b) dismissing the Debtors' motion to authorize or permit payment of reasonable legal fees and disbursements from the Preserved Proceeds or the Net Receivership Proceeds to defend the criminal charges against Mr. Peter J. Nygard ("**Mr. Nygard**").

3. The Respondents are now seeking an Order:

(a) determining the quantum of reasonable legal fees, disbursements and professional costs "incurred by Mr. Nygard in the receivership and bankruptcy proceeding"; and

(b) authorizing payment of the "legal fees and disbursements and professional costs of Peter Nygard from the Preserved Proceeds and, if necessary, the Net Receivership proceeds".

Notice of Motion of the Respondents dated October 3, 2022, at paras 1 and 2

4. This Brief and the Thirteenth Report of the Receiver dated October 11, 2022 (the "**Thirteenth Report**") are being filed on behalf of the Receiver so as to provide this Honourable Court with relevant legal authorities and in response to the Affidavit of Wayne Onchulenko affirmed October 3, 2022 and the Motion Brief of NPL dated October 3, 2022. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Thirteenth Report.

Approval of Legal Fees

5. The factors to be considered in approving the payment of the Debtors' legal fees in this matter were expressly set out in the written reasons for decision in connection with the Net Receivership Proceeds Order, reported as *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited et al.*, 2022 MBQB 48 (the "**Reasons**").

6. In the Reasons, Edmond J. set out as follows:

> The general legal principle governing payment of a debtor's legal costs is that the court has discretion to authorize an advance by the Receiver out of a debtor's assets to pay legal costs required to defend an application providing the defence is not frivolous or vexatious. (See Lloyd W. Houlden, Geoffrey B. Morowetz and Janis P. Sarra's Annotated Bankruptcy and Insolvency Act, 4th ed (Canada: Carswell, 2009) at para. 3.62; King Petroleum Ltd. (Re)197318 C.B.R. (N.S.) 270, [1973] O.J. No. 1324 (Ont. S.C.) (Ont. Sup. Ct.) and Royal Bank v. West-Can Resources Finance Corp.[1990] 77 Alta. L.R. (2d) 43 19903 C.B.R. (3d) 55(Alta. Q.B.))
>
> … I agree with the respondents that putting forth a defence would be hollow without an ability to retain and pay experienced legal counsel in insolvency matters to represent their interests …
>
> In my view, there is no reason to depart from the general principle that the respondents are entitled to representation in the receivership and bankruptcy proceedings. Accordingly, subject to providing statements of account to the Receiver or Trustee in bankruptcy for approval on the basis the costs claimed are reasonable, the Preserved Proceeds may be used to satisfy legal fees and disbursements and professional fees incurred in connection with the receivership and bankruptcy proceedings.
>
> The same governing legal principle as noted above applies in connection with the second issue. In my view, providing statements of account for legal fees and disbursements are submitted to the Receiver or Trustee in bankruptcy for

approval and are reasonable, the fees and disbursements may be paid from the Net Receivership Proceeds. The respondents are entitled to mount a defence and advance legal positions challenging the Receiver and if they elect to do so, the respondents may proceed with an appeal of this decision. If the legal fees and disbursements exceed the remaining balance of the Preserved Proceeds, a portion of the Net Receivership Proceeds may be set aside to cover reasonable fees and disbursements incurred by the respondents.

…

Mr. Nygard is seeking indemnification and priority respecting funds held for the benefit of all of the creditors of the respondents and he has not established that the criminal charges have anything to do with acting as an officer or director of the Debtors. Nor does the evidence satisfy me that he acted honestly and in good faith with a view to promoting the best interests of NPL. I agree that the criminal charges are unproven allegations and Mr. Nygard is innocent unless he is proven guilty beyond a reasonable doubt. …

The fact that the criminal charges relate to incidents alleged to have occurred at one or more of the properties owned by NPL does not assist the respondents' argument. The location of alleged criminal conduct is not part of the test to seek entitlement to indemnification.

The respondents' reference to the civil action is a reference to the Jane Doe proceeding, a class action law suit commenced in the US and referenced in the Receivership Order. NPL is not named as a defendant in the Jane Doe proceeding and I disagree with the submission that NPL's assets will likely be used to satisfy any judgment obtained in that case. Even if I accept that NPL is entitled to the Net Receivership Proceeds, which I do not, the submission advanced is speculative. In light of my ruling in this case, the Net Receivership Proceeds, which includes NPL's assets, will be used to satisfy Common Liabilities of the respondents' creditors in the bankruptcy proceedings. Mr. Nygard has no prior claim or entitlement to any of NPL's assets, including the Preserved Proceeds or the Net Receivership Proceeds.

To conclude on the indemnification issues, the respondents' motion to authorize or permit payment of reasonable legal fees and disbursements and professional costs in the receivership or bankruptcy proceedings is granted. The

> respondents' motion to authorize or permit payment of reasonable legal fees and disbursements from the Preserved Proceeds or the Net Receivership Proceeds to defend the criminal charges against Mr. Nygard is dismissed. [Emphasis added]

White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited et al., 2022 MBQB 48, at paras 133-134, 137- 138, and 151-154 ("***Nygard***") [Tab 1]

7. The Receiver notes that Edmond J. expressly noted that "[t]he respondents are entitled to mount a defence and advance legal positions challenging the Receiver and if they elect to do so". The direction did not extend to legal positions which Mr. Nygard, personally, may seek to advance, in these proceedings.

Ibid, at para 138 [Tab 1]

8. The general factors to be considered in whether to approve of the fees and disbursements of legal counsel in the context of receivership proceedings are set out in *Confectionately Yours Inc., Re*, [2002] OJ No 3569 (Ont CA) [Tab 2], previously relied upon by the Respondents. In particular, Borins J.A. addresses:

(a) the procedure to be followed in assessing remuneration, including, the requirements pertaining to the substance and content of accounts (at paras 37-41); and

(b) the factors to be considered in determining whether remuneration is fair and reasonable (at paras 30, and 42-54).

Confectionately Yours Inc., Re, [2002] OJ No 3569 (Ont CA), at paras 30, 37-54 [Tab 2]

9. As the Debtors' legal fees are to be paid out of funds which would otherwise be available to creditors, the Receiver submits that the standard applicable in the passing of accounts of counsel for the Receiver ought to also apply to the passing of accounts of counsel to the Debtors'.

10. Based on the foregoing, the Receiver submits that the recommendations of the Receiver as set out in the Thirteenth Report should be accepted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October, 2022.

THOMPSON DORFMAN SWEATMAN LLP

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

2022 MBQB 48
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2022 CarswellMan 96, 2022 MBQB 48, 2022 A.C.W.S. 390, 97 C.B.R. (6th) 242

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 10, 2022
Docket: Winnipeg Centre CI 20-01-26627

Counsel: No one for Applicant
Wayne Onchulenko, Fred Tayar, Colby Linthwaite, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere, A. Sherman, for Richter Advisory Group Inc.
Timothy Doyle, for Attorney General of Canada
Domenico Magisano, for Edson's Investment Inc. and Brause Investment Inc.
Donald Douglas, JJ Burnell, Jessica Wuthmann, Linda Galessiere, M. Citak, S. Agarwal, for Interested Creditors

Subject: Corporate and Commercial; Evidence; Insolvency

Headnote

Debtors and creditors --- Receivers — General principles — Miscellaneous

Applicant lender applied for receivership order, and receiver was appointed respecting assets, undertakings and properties of respondent debtors — Numerous orders had been made by court approving actions taken by receiver — Receiver's twelfth report contained recommendations respecting treatment of net receivership proceeds — Receiver noted that debtors and receiver would continue to incur go forward expenses related to receivership proceeding — Receiver brought motion seeking various relief respecting claims to net receivership proceeds — Motion granted — In determining whether there should be substantive consolidation of estates of debtors for creditor purposes, factors considered were difficulty in segregating assets; presence of consolidated financial statements; profitability of consolidation at single location; comingling of assets and business functions; unity of interests in ownership; existence of intercorporate loan guarantees; and transfer of assets without observance of corporate formalities — Elements required to order substantive consolidation were present — All of debtors carried on common enterprise and benefited from centralized manner in which business was operated, and treating debtors as separate entities for creditor purposes would unfairly deprived creditors of benefit of pooled assets and resources — Based on recommendation of receiver, it was fair and reasonable to substantively consolidate debtors for purpose of addressing claims of all creditors, and overall benefit to stakeholders arising from such consolidation outweighed prejudice to any particular creditor — Receiver's allocations were fair and equitable and were approved — Debtor NPL may recover full amount it paid to lenders from borrowers — For purposes of subrogation and application of Mercantile Law Amendment Act, NPL and debtor NEL both participated as co-sureties on same proportionate basis as other guarantors of credit facility — Each guarantor's obligation to contribute to lenders by was limited to one-fifth of total amount paid to lenders by guarantors — As court accepted receiver's allocations and specifically repayments to lenders had been allocated equally to debtor NIP and NPL, neither NIP nor NPL could seek contribution from other under Act, but they could seek contribution from other guarantors — Receiver was granted leave to file assignments in bankruptcy respecting all of debtors, other than

NPL and NEL, and to file applications for bankruptcy orders in court in relation to NPL and NEL on basis that reflected common assets and common liabilities and substantive consolidation of estates of debtors.

Bankruptcy and insolvency --- Receivers — Fees and expenses

Applicant lender applied for receivership order, and receiver was appointed respecting assets, undertakings and properties of respondent debtors — Numerous orders had been made by court approving actions taken by receiver — Receiver's twelfth report contained recommendations respecting treatment of net receivership proceeds — Receiver noted that debtors and receiver would continue to incur go forward expenses related to receivership proceeding — Debtors brought motion seeking order authorizing $1,150,000 be paid from preserved proceeds held in trust pursuant to proceeds preservation agreement and net receivership proceeds to pay legal fees and disbursements — Motion granted in part — Court had discretion to authorize advance by receiver out of debtor's assets to pay legal costs required to defend application provided that defence was not frivolous or vexatious — Submissions advanced by debtors were not frivolous or vexatious, issues were complex and putting forward defence would be hollow without ability to retain and pay experienced legal counsel — Debtors were entitled to representation in receivership and bankruptcy proceedings, and preserved proceeds could be used to satisfy reasonable legal fees, disbursements and professional fees incurred in proceedings — Provided that statements of account for legal fees and disbursements were submitted to receiver or trustee in bankruptcy for approval and were reasonable, fees and disbursements could be paid from net receivership proceeds — Conditions to indemnify debtors' principal for legal costs incurred to defend criminal charges against him had not been met — It was not in best interests of debtor NPL to defend criminal charges of sexual assault and other related offences against former officer or director or person controlling or directing corporation — Criminal charges did not arise from principal performing any duties reasonably expected of officer, director, directing mind or employee of NPL.

Table of Authorities

Cases considered by *Edmond J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (C.S. Que.) — referred to

Abakhan v. Halpen (2008), 2008 BCCA 29, 2008 CarswellBC 110, 39 B.L.R. (4th) 1, 76 B.C.L.R. (4th) 267, 40 C.B.R. (5th) 159, 250 B.C.A.C. 277, 416 W.A.C. 277, [2008] 7 W.W.R. 510 (B.C. C.A.) — considered

Alberta Treasury Branches v. Weatherlok Canada Ltd. (2011), 2011 ABCA 314, 2011 CarswellAlta 1883, 343 D.L.R. (4th) 304, (sub nom. *Trinier v. Shurnaik)* 515 A.R. 148, (sub nom. *Trinier v. Shurnaik)* 532 W.A.C. 148, 68 Alta. L.R. (5th) 400 (Alta. C.A.) — referred to

Atlantic Yarns Inc., Re (2008), 2008 NBQB 144, 2008 CarswellNB 195, 42 C.B.R. (5th) 107, 333 N.B.R. (2d) 143, 855 A.P.R. 143, 2008 NBBR 144, 2008 CarswellNB 750 (N.B. Q.B.) — referred to

Bacic v. Millennium Educational & Research Charitable Foundation (2014), 2014 ONSC 5875, 2014 CarswellOnt 14545, 19 C.B.R. (6th) 286 (Ont. S.C.J.) — considered

Bank of Montreal v. Ladacor AMS Ltd (2019), 2019 ABQB 985, 2019 CarswellAlta 2801 (Alta. Q.B.) — considered

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 187 N.R. 241, 86 O.A.C. 245, 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179, 25 O.R. (3d) 480 (S.C.C.) — considered

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

DBDC Spadina Ltd. v. Walton (2015), 2015 ONSC 2550, 2015 CarswellOnt 5706, 24 C.B.R. (6th) 34, 45 C.L.R. (4th) 313 (Ont. S.C.J. [Commercial List]) — considered

Dunn v. Chubb Insurance Co. of Canada (2009), 2009 ONCA 538, 2009 CarswellOnt 3715, 75 C.C.L.I. (4th) 29, 97 O.R. (3d) 701, 266 O.A.C. 1 (Ont. C.A.) — referred to

Eli Lilly & Co. v. Novopharm Ltd. (1998), 1998 CarswellNat 1061, 1998 CarswellNat 1062, 161 D.L.R. (4th) 1, 227 N.R. 201, [1998] 2 S.C.R. 129, 152 F.T.R. 160 (note), 80 C.P.R. (3d) 321 (S.C.C.) — considered

Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (2003), 2003 MBCA 71, 2003 CarswellMan 229, 10 R.P.R. (4th) 1, 173 Man. R. (2d) 300, 293 W.A.C. 300, 34 C.P.C. (5th) 21, [2003] 9 W.W.R. 385 (Man. C.A.) — considered

Gill v. Cheema (2018), 2018 BCSC 1453, 2018 CarswellBC 2303 (B.C. S.C.) — considered

JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp. (2006), 2006 CarswellOnt 4619, 25 C.B.R. (5th) 156 (Ont. S.C.J.) — considered

Kaptor Financial Inc. v. SF Partnership, LLP (2016), 2016 ONSC 6607, 2016 CarswellOnt 17052, 41 C.B.R. (6th) 262 (Ont. S.C.J. [Commercial List]) — considered

King Petroleum Ltd., Re (1973), 18 C.B.R. (N.S.) 270, 1973 CarswellOnt 87 (Ont. S.C.) — referred to

Manitoba (Securities Commission) v. Crocus Investment Fund (2007), 2007 MBCA 36, 2007 CarswellMan 98, 31 C.B.R. (5th) 1, 28 B.L.R. (4th) 246, [2007] 7 W.W.R. 32, 39 C.P.C. (6th) 321, 214 Man. R. (2d) 44, 395 W.A.C. 44 (Man. C.A.) — considered

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2016), 2016 ONCA 332, 2016 CarswellOnt 6785, 36 C.B.R. (6th) 1, 130 O.R. (3d) 481, 348 O.A.C. 131 (Ont. C.A.) — referred to

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — referred to

Northland Properties Ltd., Re (1989), 34 B.C.L.R. (2d) 122, *(*sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, *(*sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 1989 CarswellBC 334 (B.C. C.A.) — referred to

PSINET Ltd., Re (2002), 2002 CarswellOnt 1261, 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — referred to

Redstone Investment Corp. (Receiver of), Re (2016), 2016 ONSC 4453, 2016 CarswellOnt 15863, 40 C.B.R. (6th) 181 (Ont. S.C.J.) — followed

Royal Bank of Canada v. Atlas Block Co. (2014), 2014 ONSC 1531, 2014 CarswellOnt 2780 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. West-Can Resources Finance Corp. (1990), 77 Alta. L.R. (2d) 43, 3 C.B.R. (3d) 55, 1990 CarswellAlta 239 (Alta. Q.B.) — considered

Shumilak v. Shumilak (2013), 2013 MBQB 54, 2013 CarswellMan 86, 30 R.P.R. (5th) 234, 289 Man. R. (2d) 208, [2013] 9 W.W.R. 187 (Man. Q.B.) — referred to

Syncrude Canada Ltd. v. Hunter Engineering Co. (1989), [1989] 3 W.W.R. 385, *(*sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 1 S.C.R. 426, *(*sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 57 D.L.R. (4th) 321, *(*sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 92 N.R. 1, *(*sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 35 B.C.L.R. (2d) 145, 1989 CarswellBC 37, 1989 CarswellBC 703 (S.C.C.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — referred to

Windham Sales Ltd., Re (1979), 26 O.R. (2d) 246, 31 C.B.R. (N.S.) 130, 1 P.P.S.A.C. 73, 8 B.L.R. 317, 102 D.L.R. (3d) 459, 1979 CarswellOnt 227 (Ont. S.C.) — referred to

Wong v. Field (2012), 2012 BCSC 1141, 2012 CarswellBC 2720 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

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

Generally — referred to

s. 49(1) — referred to

s. 49(3) — referred to

Corporations Act, R.S.M. 1987, c. C225
Generally — referred to

s. 19 — referred to

s. 113 — referred to

s. 113(2)(e) — referred to

s. 117 — referred to

s. 119 — referred to

s. 119(1) — referred to
Law and Equity Act, R.S.B.C. 1996, c. 253
s. 34 — referred to
Mercantile Law Amendment Act, R.S.M. 1987, c. M120
Generally — referred to

s. 2 — referred to

s. 3 — referred to

MOTION by receiver seeking various relief respecting claims to net receivership proceeds; MOTION by debtors seeking order authorizing $1,150,000 be paid from preserved proceeds held in trust pursuant to proceeds preservation agreement and net receivership proceeds to pay legal fees and disbursements.

***Edmond J.*:**

Introduction

1 On March 18, 2020, the court granted a receivership order (the "Receivership Order") appointing Richter Advisory Group Inc. (the "Receiver") as the Receiver respecting the assets, undertakings and properties (the "Property") of Nygard Holdings (USA) Limited, Nygard Inc. ("NI") Fashion Ventures Inc., Nygard NY Retail, LLC (collectively the "US Debtors"), Nygard Enterprises Ltd. ("NEL"), Nygard International Partnership ("NIP"), Nygard Properties Ltd. ("NPL"), 4093879 Canada Ltd. ("879") and 4093887 Canada Ltd. ("887") and (collectively NEL, NIP, NPL, 879 and 887 the "Canadian Debtors"). The US Debtors and the Canadian Debtors together are referred to as the "Debtors".

2 The application for the Receivership Order was made by White Oak Commercial Finance, LLC for and on behalf of the applicant and Second Avenue Capital Partners, LLC (the "Lenders") pursuant to security held by the Lenders in the Property of the Debtors in connection with a certain loan transaction and revolving credit facility (the "Credit Facility") governed by the terms and conditions of a credit agreement (the "Credit Agreement"). The capitalized terms in this decision are the same as the defined terms in the Receiver's Twelfth Report and the Receivership Order.

3 Numerous orders have been made by this court approving the actions taken by the Receiver including, the liquidation sale of retail inventory and owned furniture, fixtures and equipment, approving the sale of certain real property in Canada, as well as granting orders to permit a Receiver's Charge, Receiver's Borrowing Charge and a Landlords' Charge creating prior charges on the Property and approving the settlement of certain claims.

4 The Receiver's Twelfth Report provides details of the actions and activities of the Receiver since the filing of the Eleventh Report and contains recommendations respecting the treatment of the "Net Receivership Proceeds" (as defined in the Twelfth Report).

5 An Interim Statement of Receipts and Disbursements ("Interim R & D") prepared by the Receiver is reproduced at paragraph 82 of the Twelfth Report. The Interim R & D shows net receipts of $121,416,000 and disbursements of $42,221,000. The amount distributed to the Lenders including the Receiver's Borrowings, is $66,466,000. The cash on hand as at May 15, 2021, is shown as $12,803,000. The Receiver confirms that all amounts due under the Credit Agreement of approximately $36,000,000 and all Receiver's Borrowings of approximately $30,000,000, subject to the Receiver's Borrowing Charge, were distributed to the Lenders in full satisfaction of the secured amounts owing to the Lenders.

6 The Receiver notes that the Debtors and the Receiver will continue to incur go forward expenses related to the Receivership proceeding including the potential employee priority claims; additional unpaid rent claims subject to the Landlords' Charge and other disbursements, which the Receiver conservatively estimates will total $2,000,000. In addition, the Receiver has identified a tax liability owing to Canada Revenue Agency ("CRA") by NPL which is estimated to be approximately $3,000,000.

7 CRA claims an interest in the Net Receivership Proceeds. The validity and priority of the CRA claim was not argued at the hearing and will be considered at a further hearing, unless the interested parties agree on the priority issue. NPL has acknowledged that there is a CRA claim and is prepared to agree to a reasonable holdback from the Net Receivership Proceeds as security for the CRA claim.

8 This decision addresses claims to the Net Receivership Proceeds. It also addresses a motion by the respondents seeking an order authorizing the sum of $1,150,000 be paid from the Preserved Proceeds held in trust pursuant to the NPL Proceeds Preservation Agreement and the Net Receivership Proceeds. Details of the funds held pursuant to the NPL Proceeds Preservation Agreement and the various claims to the funds being held are described in the Receiver's Twelfth Report (see paras. 67 - 81). The Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement represent net sale proceeds of the sale of two properties that were owned by NPL, described as the Falcon Lake Cottage Property and the Fieldstone Property which are not included as Property defined in the Receivership Order. The funds requested by the respondents are for legal fees and disbursements incurred or to be incurred by some of the respondents and Mr. Peter Nygard personally.

9 The Receiver seeks orders:

a) Declaring that each of the Debtors is jointly liable for the debts and liabilities (the "Common Liabilities") of each of the other Debtors, and the Debtors are joint Debtors with respect to Common Liabilities;

b) Declaring the assets (the "Common Assets") of each of the Debtors shall be treated as "Common Assets" subject to the Common Liabilities;

c) Declaring that the assets and liabilities of the Debtors are properly to be substantively consolidated for the purpose of addressing the claims of creditors of each of the Debtors;

d) Authorizing the Receiver to file assignments in bankruptcy on behalf of each of the Debtors on a basis that reflects the Common Assets and the Common Liabilities, and requesting that the official receiver in bankruptcy appoint Richter Advisory Group Inc. as Trustee in bankruptcy respecting the estates of each of the Debtors;

e) In the alternative, the Receiver is seeking an order:

i) Authorizing the Receiver to file assignments in bankruptcy on behalf of the Debtors, other than NPL and NEL;

ii) Authorizing the Receiver to file applications for bankruptcy orders in this court in relation to the Debtors, NPL and NEL, on a basis that reflects the Common Assets and the Common Liabilities and the substantive consolidation of the estates of the Debtors;

iii) If necessary, lifting the stay of proceedings granted in the Receivership Order to permit bankruptcy applications to be made and directing that, for the purpose of such assignments and applications, the locality of the Debtors shall be Winnipeg, Manitoba and the Receiver shall be appointed as Trustee.

10 The Receiver filed a separate motion dated December 16, 2021 seeking the advice and direction of the court regarding the additional use of the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement and the potential claim to the remaining balance of the Preserved Proceeds by unsecured creditors if the court grants the substantive consolidation of the estates of the respondents.

11 The Receiver also seeks orders approving the Twelfth Report, the Supplementary Twelfth Report and the Second Supplementary Twelfth Report and the conduct, activities and accounts of the Receiver and its counsel.

12 Seven of the nine respondents (excluding NEL and NPL) do not object to an order granting a substantive consolidation of the estates of the respondent corporations, such that the assets and liabilities of those corporations would be treated as common assets and liabilities. Seven of the nine respondents also do no object to an order assigning seven of the nine respondents into bankruptcy as sought by the Receiver.

13 Two of the respondents (NEL and NPL) contest the Receiver's request for an order of substantive consolidation and an order that NEL and NPL should be assigned into bankruptcy. These respondents submit that they own assets and none of the other respondents, nor their creditors, have legally valid claims to those assets. These respondents further submit that NEL and NPL are solvent and were always maintained as legally and financially distinct from the business enterprise engaged in by the other seven respondents. As a result, these respondents submit that granting the orders sought by the Receiver would seriously prejudice NEL and NPL, by divesting them of their assets and rendering them bankrupt.

Documents and Relevant Evidence

14 There are approximately 245 court filings in this receivership proceeding including affidavits, Receiver's reports, briefs and orders. While not all filings are relevant to decide the present issues they provide the background information and context to decide the present contested motions before the court. The primary court filings reviewed to decide the contested motions include:

a) Affidavit of Robert Dean, affirmed March 9, 2020;

b) Affidavit of Debbie Mackie, affirmed March 10, 2020;

c) Affidavit of Greg Fenske, affirmed March 11, 2020;

d) Affidavit of Jamie Jacyk, affirmed March 12, 2020;

e) Affidavit of Greg Fenske, affirmed March 12, 2020;

f) Affidavit of Robert Dean, affirmed March 17, 2020;

g) Affidavit of Laura Leigh Buley, sworn March 17, 2020;

h) Affidavit of Greg Fenske, affirmed March 18, 2020;

i) Confidential Affidavit of Greg Fenske, affirmed March 18, 2020;

j) Receivership Order dated March 18, 2020;

k) Affidavit of Greg Fenske, affirmed April 8, 2020;

l) The First Report of the Receiver dated April 20, 2020;

m) Affidavit of Greg Fenske, affirmed April 24, 2020;

n) The Supplementary First Report of the Receiver dated April 27, 2020;

o) The Second Report of the Receiver dated May 27, 2020;

p) The Supplementary Second Report of the Receiver dated May 31, 2020;

q) The Third Report of the Receiver dated June 22, 2020;

r) Affidavit of Greg Fenske, affirmed June 24, 2020;

s) Affidavit of Peter Nygard, sworn June 25, 2020;

t) The Fourth Report of the Receiver dated June 27, 2020;

u) The Supplementary Third Report of the Receiver dated June 29, 2020;

v) The Fifth Report of the Receiver dated July 6, 2020;

w) The Sixth Report of the Receiver dated August 3, 2020;

x) The Seventh Report of the Receiver dated September 10, 2020;

y) The Supplementary Seventh Report of the Receiver dated September 14, 2020;

z) Order of Edmond J., September 15, 2020 (E/B Settlement Approval Order);

aa) Order of Edmond J., September 15, 2020;

bb) The Eighth Report of the Receiver dated September 28, 2020;

cc) Affidavit of Greg Fenske, affirmed September 29, 2020;

dd) Affidavit of Greg Fenske, affirmed October 6, 2020;

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

ff) Affidavit of Greg Fenske, affirmed October 20, 2020;

gg) The Ninth Report of the Receiver dated November 2, 2020;

hh) Affidavit of Greg Fenske, affirmed November 5, 2020;

ii) Affidavit of Joe Albert, affirmed November 5, 2020;

jj) The Supplementary Ninth Report of the Receiver dated November 10, 2020;

kk) Affidavit of Joe Albert, affirmed November 12, 2020;

ll) Affidavit of Peter Nygard, affirmed November 12, 2020;

mm) The Second Supplementary Ninth Report of the Receiver dated December 30, 2020;

nn) The Tenth Report of the Receiver dated January 21, 2021;

oo) The Eleventh Report of the Receiver dated February 24, 2021;

pp) Affidavit of Greg Fenske, affirmed April 28, 2021;

qq) Affidavit of Robert Martell, affirmed April 28, 2021;

rr) Affidavit of Myron Dyck, affirmed April 28, 2021;

ss) Affidavit of Steve Mager, affirmed April 29, 2021;

tt) Affidavit Derrick Sigmar, affirmed April 29, 2021;

uu) Affidavit of Aaron Wojnowski, affirmed April 29, 2021;

vv) Affidavit of Peter Nygard, affirmed May 3, 2021;

ww) Twelfth Report of the Receiver dated June 4, 2021;

xx) Notice of Motion of the Receiver dated June 4, 2021 with attached draft form of Net Receivership Proceeds Order;

yy) Affidavit of Greg Fenske, affirmed September 7, 2021;

zz) Supplementary Affidavit of Greg Fenske, affirmed September 14, 2021;

aaa) Affidavit of Joe Albert, affirmed October 29, 2021 ("Albert affidavit");

bbb) Affidavit of Debbie Mackie, affirmed October 29, 2021;

ccc) Supplementary Twelfth Report of Receiver;

ddd) Second Supplementary Twelfth Report of Receiver;

eee) Affidavit of Brian Greenspan, affirmed December 9, 2021 ("Greenspan affidavit"); and

fff) Notice of Motion of respondents, dated December 10, 2021.

15 I do not propose to summarize the facts which are relevant to the decision in this case. The facts are reviewed in detail in the numerous reports filed by the Receiver and the affidavits filed on behalf of the respondents. Instead, I propose to review the issues to be decided and the facts relevant to a determination of those issues.

Issues

16 The material filed raises the following issues relevant to the Net Receivership Proceeds motion:

a) What is a substantive consolidation and should it be applied in the facts and circumstances of this case?

b) What is the proper allocation of revenues generated from the sale of assets during the receivership and receivership costs and expenses?

c) What rights of subrogation apply to the respondents and what is the correct interpretation of the provisions of *The* Mercantile Law Amendment Act, C.C.S.M. c. M120 (the "Act") (ss. 2 and 3)?

d) Should one or more or all of the respondents be assigned into bankruptcy, and if so, should the Receiver be appointed as the Trustee in Bankruptcy?

17 The issues relating to the respondents' motion seeking an order authorizing $1,150,000 be paid from the proceeds from the sale of properties that were owned by NPL for legal fees and disbursements are:

a) Should the court grant an order to release the balance of the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement to pay legal fees and disbursements and expert costs incurred by the respondents in connection with the Receivership Proceedings or a bankruptcy proceeding?

b) Should the court grant an order to release a portion of the Net Receivership Proceeds to fund legal fees and disbursements that have been incurred or will be incurred in connection with the Receivership Proceedings or a bankruptcy proceeding?

c) Can a portion of the Net Receivership Proceeds or the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement be used to fund legal fees and disbursements incurred to defend Mr. Nygard in connection with the criminal charges laid against him in Toronto, Ontario?

Issues relevant to the Net Receivership Proceeds motion

a) What is a Substantive consolidation and should it be applied in the facts and circumstances of this case?

18 The orders sought by the Receiver include what is referred to in authorities as a "substantive consolidation" of the estates of the Debtors for creditor purposes. The parties refer to the leading authority on substantive consolidation, *Redstone Investment Corp. (Re)*, 2016 ONSC 4453, [2016] O.J. No. 5205 (QL).

19 In *Redstone*, Morawetz J. (as he then was), defines substantive consolidation as follows:

7 Under a substantive consolidation, a number of affiliated legal entities, typically corporations, are treated as if they were one entity, resulting in the assets of the various debtors being pooled to create a common fund out of which claims of creditors of all the debtors are jointly satisfied. See: Janis Sarra*, "Corporate Group Insolvencies: Seeing the Forest and the Trees"* 2008) 24 B.F.L.R. 63, at. p. 8.

8 The authority for substantive consolidation of bankrupt estates in Canada lies under the equitable jurisdiction of the Superior Court of Justice granted by s. 183(1) of the *Bankruptcy and Insolvency Act* ("BIA"). See: *A. & F. Baillargeon Express Inc. (Trustee of) (Re)*, [1993] Q.J. No. 884 ("Baillargeon"), at para. 23); *Nortel Networks Corporation (Re)*, 2015 ONSC 2987, at para. 216 and *Bacic v. Millennium Education & Research Charitable Foundation, 2014 ONSC 5875*.

20 In *Redstone*, the court reviewed the law respecting substantive consolidation of debtor estates in insolvency proceedings and stated:

78 The following general principles respecting the doctrine of substantive consolidation represent a summary of Canadian case law:

(i) Are the elements of consolidation present, such as the intertwining of corporate functions and other commonalities across the group?

(ii) Do the benefits of consolidation outweigh the prejudice to particular creditors?

(iii) Is consolidation fair and reasonable in the circumstances?

21 The relevant authorities reference the test for substantive consolidation summarized in *Bacic v. Millennium Educational & Research Charitable Foundation*, 2014 ONSC 5875, [2014] O.J. No. 4914 (QL), at para. 113 as follows:

> **113** The test as to substantive consolidation requires the balancing of interest of the affected parties and an assessment whether creditors will suffer greater prejudice in the absence of consolidation and the debtors or any objecting creditors will suffer from its imposition. Regard must be had to the:
>
> (a) difficulty in segregating assets;
>
> (b) presence of consolidated Financial Statements;
>
> (c) profitability of consolidation at a single location;
>
> (d) commingling of assets and business functions;
>
> (e) unity of interests in ownership;
>
> (f) existence of intercorporate loan guarantees; and
>
> (g) transfer of assets without observance of corporate formalities

(See also *Atlantic Yarns Inc. (Re)*, 2008 NBQB 144, 333 N.B.R. (2d) 143; Northland Properties Ltd. (Re)[1988] 29 B.C.L.R. (2d) 257, [1988] B.C.J. No. 1210 (B.C. Sup. Ct.), affirmed in Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada[1989] 34 B.C.L.R. (2d) 122, [1989] B.C.J. No. 63 (B.C.C.A.) and *PSINet Ltd. (Re)*, [2002] C.B.R. (4th) 284, [2002] O.J. No. 1156 (Ont. Sup. Ct.) [Commercial List])

22 In *Redstone*, the court dismissed the motion brought by the Receiver for substantive consolidation of the estate's three corporate entities. In reviewing the test noted above, the court found:

a) The assets of the corporations were separate and easily identifiable;

b) All financial statements, audited and unaudited, were prepared on an entity by entity basis;

c) All three corporations had separate ownership structures; and

d) There were no intercorporate loan guarantees of any third party financing.

(See ***Redstone*** at paras. 80 - 85)

23 Ultimately, the court in *Redstone* determined that there would be a significant prejudice to the creditors of one of the companies if substantive consolidation was ordered.

24 Morawetz J. stated at para. 88:

> **88** As Trainer J. explained in *Northland*, "it would be improper for the court to interfere with or appear to interfere with the rights of the creditors," and that such an appearance would be created if the estates are ordered merged for all purposes. This caution rings true in this case. To order substantive consolidation would require me to ignore written contracts and rely on subjective *ex post facto* evidence.

25 Cases where the courts have found that substantive consolidation is appropriate are in circumstances where the affairs of the debtor corporations were conducted with a disregard for the "niceties of corporate identity and separate juridical personalities", assets were intermingled, and where, due to the manner in which the corporations were operated and the state of corporate records, the allocation of value and claims between the corporations would be burdensome for the receiver. (See *Bacic* at para. 100; A. & F. Baillargeon Express Inc. (Trustee of) (Re), [1993] Q.J. No. 884 (Que. Sup. Ct.)(QL), at paras. 5, 12 - 16; *PSINet Ltd. (Re)* at paras. 2 and 11)

26 Intermingling of assets, operations and liabilities of related corporations is a factor consistently examined. The facts to support such a finding include:

a) Holding common bank accounts through which funds are paid and distributed to pay the expenses and obligations of each of the companies regardless of which entity is entitled to the funds and/or is responsible for the expense or obligation;

b) The presence of intercorporate loans between related companies without the observance of typical corporate formalities;

c) The comingling of records of the related companies such that it is extremely difficult, if not impossible to identify which records belong to each company;

d) The use of common head offices shared by related companies;

e) One entity employing all employees for a group of companies; and

f) Common ownership and/or control, either directly or indirectly, by one individual in a group of companies and/or each entity having substantially the same officers and directors. (See *Bacic* at paras. 100 and 116; *A. & F. Baillargeon Express Inc.*, at paras. 12 - 16; *PSINet Ltd. (Re)*, at paras. 2 and 11)

27 NPL and NEL submit that they should not be subject to a substantive consolidation order. The effect of such an order is the claims of creditors against separate debtors become claims against a single entity. NPL was a real estate holding company and NPL's real property has been sold during the course of the receivership. By virtue of its contribution to the Lenders, NPL submits that it now has a secured claim against the Borrowers and a secured claim against the unlimited Guarantors for contribution under the Credit Agreement. As a holder of the Lenders' security, NPL submits that it has a first claim to the Net Receivership Proceeds and the substantive consolidation order sought would extinguish that claim.

28 NPL submits that it is solvent, asset-rich and a secured creditor of the other respondents. NPL and its owner, NEL submit that the Receiver wants access to NPL's assets to satisfy unsecured creditors' claims of the other Debtors, specifically NIP. For example, employees of NIP and NI are unsecured creditors who will only recover if the Net Receivership Proceeds are available pursuant to a substantive consolidation order. Similarly, landlords, suppliers, vendors, gift card purchasers and taxing authorities who are owed debts by NIP, NI and other Debtors, will clearly be economically advantaged by a substantive consolidation order.

29 Courts in both the US and Canada have found that orders of substantive consolidation are an extraordinary remedy, based in part on the fact that secured creditors may be prejudiced in order to increase the overall return to other creditors, including unsecured creditors.

30 Applying the principles outlined in *Redstone* and the other authorities, I note that the Receiver conducted an extensive review of all of the relevant factors in the Twelfth Report (see paras. 131 - 200). The Receiver, after reviewing all of the applicable factors, concludes that "it is fair and reasonable to substantively consolidate the Debtors for the purposes of addressing claims of unsecured creditors, and that the overall benefit to stakeholders arising from such a consolidation outweighs the prejudice to any particular creditors."

31 I do not intend to conduct an exhaustive review of the factors that are outlined in detail in the Twelfth Report. I am in substantial agreement with the analysis undertaken by the Receiver. I do propose, however, to review the governing factors outlined in *Redstone* and the other relevant authorities noted above:

a) Difficulty in segregating assets;

b) Presence of consolidated financial statements;

c) Profitability of consolidation at a single location;

d) Comingling of assets and business functions;

e) Unity of interests in ownership;

f) Existence of intercorporate loan guarantees;

g) Transfer of assets without observance of corporate formalities.

a) Difficulty in segregating assets

32 NPL, a real estate holding company, held title to assets that can be segregated from the assets of the other respondents. NEL is the parent corporation of NPL. All of NPL's real property has been sold during the course of the receivership. However, the Receiver correctly points out that "... those assets cannot readily be 'segregated' from the substantial investments in those properties and costs thereof being borne by NIP and from the costs incurred by NIP in providing centralized services to NPL and NI (and, in the case of NI, funding certain of the inventory costs which resulted in (e.g.) NI accounts receivable), all without any cash changing hands or ultimate reconciliation of such contributions, investments and costs, to the benefit of stakeholders of NPL and NI, but to the detriment of stakeholders of NIP". (See para. 195 of the Twelfth Report)

b) Presence of consolidated financial statements

33 The Nygard Group of Companies did prepare consolidated financial statements. NPL and NEL are not included in the consolidated financial statements and those two entities prepared their own financial statements. This is a factor that favours the respondents' submission but in my view, it is not a significant factor. The primary questions are whether the elements of consolidation are present, such as the intertwining of corporate functions and other commonalities across the group of corporations and whether the benefits of consolidation outweigh the prejudice suffered by creditors as a result of granting a substantive consolidation order.

c) Profitability of consolidation at a single location

34 NPL held title to the real estate which was used in the operation of the business of the Nygard Group of Companies. The principal business location for all of the Debtors, including NPL and NEL, was the head office located at the Inkster property in Winnipeg. While the respondents submit that NPL held real estate at various locations, and thus profitability was not consolidated at a single location, services for the Debtors including NPL was centralized and performed by employees of NIP at a single location. The services required for the Nygard fashion business as well as NPL's business, including the business functions and accounting was completed primarily at the Inkster property by NIP's employees.

d) Comingling of assets and business functions

35 Other than as explained below, NPL's assets were not necessarily comingled with the assets of the other respondents. NPL's primary commercial assets including the Inkster property, the Notre Dame property, the

Broadway retail property and the Niagara property were used by NIP and the Nygard Group of Companies to operate the fashion business.

36 As to the business functions the evidence establishes:

i) Most of the business functions were carried out by substantially the same directors and officers of all the Debtors.

ii) At the material times, Mr. Nygard exercised general authority and direction over all of the Debtors and their business affairs and functions.

iii) The Debtors including NPL generally operated using NIP bank accounts.

iv) The creditors of each of the Debtors were tracked and managed centrally on one consolidated accounts payable sub-ledger, regardless of which Debtor procured or benefited from the goods or services obtained.

v) NIP incurred and directly paid substantially all expenses on behalf of the Debtors, regardless of which Debtor procured or benefited from the goods or services obtained. The Receiver notes that these expenses were generally captured for accounting purposes, but not on a consistent basis, as intercompany transactions. These transactions were not necessarily on reasonable commercial terms that would be expected with separate arms-length corporations.

vi) The Receiver also noted that the intercorporate transactions between Debtors rarely involved cash actually changing hands and intercompany accounts were often not settled or paid, as you would typically expect among separate arms-length corporations.

vii) NIP advanced substantial funds or paid specific amounts in relation to the development and maintenance of NPL's real property assets, including:

- Approximately $8 million for the development and maintenance of the Falcon Lake Cottage Property, including approximately $2.6 million in labour expenses;
- Approximately $5.6 million in capital improvements and maintenance costs for the Inkster property; and
- Approximately $1 million in capital improvements and maintenance costs for the Notre Dame Property.

viii) Substantially all accounting and payable functions, decision-making, communication functions, marketing and pricing decisions, new business development initiatives, negotiation of material contracts and leases, retail and third party suppliers/services decisions, design and merchandising, and production and distribution functions were managed centrally from the Inkster property head office in Winnipeg.

ix) The Debtors employed approximately 1550 people, 1450 of which were employed by NIP and 100 of which were employed by NI. NIP funded most of the employee costs, notwithstanding that employees provided services and performed functions for the other Debtors including NPL.

x) The IT system for all of the respondents was centralized and used by the Debtors and the broader Nygard organization to maintain the books and records of each of the Debtors.

xi) The records of the Debtors are comingled within the IT system and records which were maintained primarily at the Inkster property.

e) Unity of interests in ownership

37 NPL is owned by NEL, which does not directly own any of the other named respondents, except 879. While this arguably supports a finding that there is no unity of interest in ownership, the evidence satisfies me that at the material times, NPL and all of the respondents were controlled, directly or indirectly, by Mr. Nygard and he had general authority and direction over all of the Debtors.

f) Existence of intercorporate loan guarantees

38 The Receiver reported that the Debtors recorded in excess of $87 million in aggregate intercompany loans as among the Debtors. The Credit Agreement was guaranteed by a number of the respondents, including NPL, who provided a limited recourse guarantee in the amount of $20 million US, plus costs and expenses. Other respondents provided unlimited guarantees to secure the Credit Facility. The operation of the Nygard business generated intercompany loans which are also relevant to NPL's and NEL's submission that they should be excluded from a substantive consolidation order. NPL has an intercompany loan owing to NIP in the approximate amount of $2,500,000 and an intercompany loan owing to 887 (one of the partners of NIP) of approximately $200,000. NEL (NPL's parent company) has an outstanding intercompany loan owing to NIP in the approximate amount of $18,100,000.

g) Transfer of assets without observance of corporate formalities

39 The Receiver noted that there were certain written intercompany agreements between the respondents respecting their business arrangements. However, the payment terms were not regularly complied with. As an example, lease agreements were alleged to have been entered into between NPL and NIP and between NPL and Mr. Nygard respecting the Inkster property. Although there is a lease agreement between NPL and NIP, there is no evidence that any lease payments were actually made. In the case of Mr. Nygard, the evidence of a lease agreement is referenced in his affidavit affirmed June 25, 2020 (see also affidavit Greg Fenske, affirmed June 24, 2020).

40 In a previous decision delivered June 30, 2020, I made the following finding regarding Mr. Nygard's assertion that he was a tenant pursuant to a verbal lease agreement at the commercial property operated by the Nygard Group of Companies at 1340 Notre Dame Avenue:

> There is no evidence of a written tenancy agreement, a lease term, rent paid, renewal terms, utilities, repairs, security or damage deposit paid or any other terms and conditions that are ordinarily agreed to by parties entering into residential tenancy agreements. NPL and Mr. Nygard are sophisticated parties who would be expected to follow the law and document agreements. While it is possible to enter into a verbal tenancy agreement, other documents such as emails, expense reports, or other documents prepared in the ordinary course of business ought to have been produced to evidence the formation of the residential tenancy agreement, and the payment of rent or security deposits. Mr. Nygard produced no such documents or information other than references to the fact that he resided at 1340 Notre Dame, which was where the Nygard group of companies carried on business prior to the receivership order. The evidence establishes that to the extent there was an agreement, it was an accommodation to Mr. Nygard while he was performing duties for and on behalf of the Nygard Group of Companies to use the space on a temporary basis only, not a residential tenancy agreement.

41 Based on my review of all of the evidence, I agree with the Receiver that "[t]he approach taken by the Nygard Group of Companies is consistent with the operation of the Debtors as a common enterprise and cannot be considered to have involved independent arms'-length parties with independent directors acting in the best interests of their respective corporations." (See Twelfth Report of Receiver, at para. 195)

42 In addition, other factors are referenced by the Receiver and its counsel including:

a) At the time the application for the Receivership Order was made the respondents, and specifically the Canadian Debtors, took a consolidated approach in relation to the original NOI proceedings, advancing the position that the Canadian Debtors were insolvent and intended to make a proposal in bankruptcy on behalf of all Canadian Debtors, including NPL;

b) Throughout the receivership proceedings, the affidavit evidence filed on behalf of the Debtors consistently refers to the "Nygard Group of Companies", "Nygard Group Assets" and/or "Nygard Group Resources";

c) The respondents filed evidence from one primary affiant, Mr. Fenske on behalf of the Debtors. Appendix M attached to the Twelfth Report, is a summary of the evidence filed by the Debtors, which I considered in assessing the factors noted above.

43 Ultimately, the court must weigh the various factors and apply the general principles outlined by the court in *Redstone* at para. 78. Applying the general principles and weighing the potential prejudice to the affected parties, I find as follows:

a) While I accept that some of the factors outlined above do not support granting an order of substantive consolidation of the estates of the respondents, a review of all of the factors and the detailed evidence presented in the unique circumstances of this case satisfies me that the elements required to order a substantive consolidation are present;

b) In my view, the benefits of substantive consolidation outweigh the prejudice to particular creditors, including NPL pursuant to its potential right of subrogation. I place a great deal of confidence in the evidence presented and opinion provided by the Receiver, as an officer of the court, particularized in the consolidation analysis and the consolidation summary in the Twelfth Report (see paras. 131 - 200). I agree that CRA and unsecured creditors of NPL may be economically advantaged by substantive consolidation of the Debtors for creditor purposes. If I accept NPL's submission that it is a secured creditor and has a priority interest in the Net Receivership Proceeds then I agree that NPL may be prejudiced as a result of a substantive consolidation order. The prejudice that may be suffered by NPL, and its parent corporation NEL, must be weighed against the claims of the employees, landlords, suppliers and other vendors, gift card purchasers and taxing authorities who are owed debts by NIP, NI and other Debtors who are economically advantaged by substantive consolidation of the Debtors for creditor purposes.

c) In my view, all of the Debtors, including NPL, carried on a common enterprise and benefited from the centralized manner in which the Nygard fashion business was operated, including the work performed by NIP's employees, centralized administrative services and funding provided by NIP. I agree with the Receiver that treating the Debtors and in particular NPL as separate entities for creditor purposes would result in inequitable treatment for creditors and unfairly deprive them of the benefit of pooled assets and resources of the Nygard Group of Companies.

44 The respondents submit that the court in *Redstone*, refused to grant the order for substantive consolidation and the facts in *Redstone* are very similar to the facts before the court in this case. The respondents submit that one creditor, in this case, NPL, has a secured claim that would be eliminated by a substantive consolidation order. In my view, the facts and circumstances in *Redstone* are distinguishable from the facts in this case. While I accept that NPL is a separate corporation within the Nygard Group of Companies, in *Redstone*, Morawetz J. found that the elements of consolidation were not present and specifically stated "... there would also be significant financial prejudice to the creditors of RCC if substantive consolidation were ordered" (at para. 90). His reference to creditors of RCC is a reference to third party investors/creditors who would have suffered a significant financial prejudice. In this case, the alleged significant financial prejudice is being suffered by one of the affiliated corporations within the Nygard Group of Companies that carried on the fashion business as a common enterprise. While I agree NPL's

potential secured claim would be eliminated by a substantive consolidation order, that prejudice must be weighed against the prejudice of all of the other creditors of the respondents that remain unpaid who advanced products, services and resources to the Nygard Group of Companies.

45 NPL's real property holdings have been sold during the course of the receivership and NPL does not own real estate and actively carry on business at this time. Its only asset is a claim to the Preserved Proceeds and the Net Receivership Proceeds.

46 I am satisfied that in the unique circumstances of this case, the benefits of substantive consolidation outweigh the prejudice to particular creditors including NPL and its parent corporation, NEL.

47 Based on the recommendation of the Receiver, I agree that it is fair and reasonable to substantively consolidate the Debtors for the purpose of addressing claims of all creditors and that the overall benefit to the stakeholders arising from such a consolidation outweighs the prejudice to any particular creditor.

b) What is the proper allocation of revenues generated from the sale of assets during the receivership and receivership costs and expenses?

48 The respondents and in particular, NPL and NEL, challenge the allocation of costs and revenue generated during the receivership. NPL submits that the allocations made by the Receiver are arbitrary, unfair and in effect, means that NPL does not have the rights of subrogation accorded by the Act.

49 In assessing the claims to the Net Receivership Proceeds, the Receiver points out at paragraph 87 of the Twelfth Report that the claims to the Net Receivership Proceeds depend upon whether claims are determined on a stand-alone "separate corporation" basis or on the basis that the Debtor should be substantively consolidated for creditor purposes. The Receiver undertakes a review of claims on a separate corporation basis, in part, because NPL has asserted that it has a priority claim to all or a substantial portion of the Net Receivership Proceeds. The Receiver points out that NPL has tax liabilities that are being advanced as a result of the sale of NPL's real property and NPL may have other tax liabilities that may accrue in relation to dispositions of the Falcon Lake Cottage Property and Fieldstone Property.

50 In light of my finding made regarding substantive consolidation of the estates of the Debtors for creditor purposes, it is unnecessary to review the Receiver's separate corporate analysis. However, if my finding regarding substantive consolidation is incorrect, I agree an assessment of the separate corporate analysis is required and therefore the Receiver's allocations must be reviewed.

51 The Receiver explains at paragraph 89 that the determination of claims on a separate corporation basis requires a complex analysis involving:

> (a) identification of receivership proceeds attributable to the realization upon assets of affected Debtors. In this case, only NIP, NPL and NI had assets which were included as Property in the receivership and which were sold or otherwise realized upon by the Receiver;
>
> (b) allocation of expenses incurred by the Receiver as against the proceeds attributable to NIP, NPL and NI asset realizations in the course of the receivership;
>
> (c) allocation of priority claims and court-ordered charges, including statutory priorities, the Receiver's Borrowing Charge, the Receiver's Charge and the Landlords' Charge, as against the proceeds attributable to NIP, NPL and NI asset realizations in the course of the receivership;
>
> (d) allocation of repayment of the Credit Facility from proceeds of NIP, NPL and NI asset realizations, and determination of related subrogation rights, if any; and

(e) reliance upon the Nygard Group financial information in relation to intercompany obligations as among the Debtors and other matters.

52 The Receiver conducted a comprehensive separate corporation analysis at paragraphs 92 - 130 of the Twelfth Report. During the course of the Receivership, the Receiver received proceeds from the realization of the assets of NIP, NI and NPL as follows:

Realizations by Debtor (in $000s)	
NIP	50,917
NI	11,831
NPL	28,579

53 The Receiver made allocations of expenses based on considerations outlined in the Twelfth Report. The Receiver also made allocations respecting the repayment of the Credit Facility. Rather than attempt to summarize the allocations made and analysis conducted by the Receiver, I have attached as Schedule A to this decision a portion of the Twelfth Report which sets out the Receiver's analysis regarding the Net Receivership Proceeds.

54 The respondents submit that the sale of NPL properties generated $28,579,000. The Receiver allocated the sum of $14,192,000 of that amount for distribution to the Lenders in payment of the Credit Facility. The respondents dispute the allocation and argue that it is arbitrary and unreasonable. NPL submits it ought to receive credit for the full amount realized and because that amount exceeds its liability under the limited recourse guarantee, rights of subrogation apply.

55 NEL and NPL challenge the alleged arbitrary allocation of the payments made to the Lenders' and the Receiver's explanation as set forth above in paragraphs 101 and 102 of the Twelfth Report. The respondents also challenge the allocations of costs and expenses made by the Receiver and rely upon an expert report attached to the Albert affidavit.

56 Based on my review of all of the evidence, I agree with most of the assessments made by the Receiver and make the following findings:

a) The Receiver's allocation of receivership costs and expenses was made on a preliminary basis and is not a final analysis of the allocation of the costs and the proceeds recovered during the receivership from the asset realizations of NIP, NI and NPL;

b) The Receiver recorded in excess of 17,000 transactions during the receivership proceedings and it would be time-consuming and complicated to assess each of those transactions and in my view, it is not in the best interests of the creditors to do so;

c) Corporate overhead expenses incurred during the course of the receivership are not readily specifically allocable to a particular Debtor;

d) The Receiver's Borrowings of approximately $30 million were incurred to fund receivership expenses. The Receiver's Borrowing Charge established pursuant to the Receivership Order created a charge against the Property and the Receiver did not allocate Receiver's Borrowings to any particular Debtor;

e) The Receiver allocated repayment of the Credit Facility, referred to as Lender Debt, as set out in paragraph 101 and after taking into account funds received from a Borrower (NI), the Receiver split the remaining balance of Lender Debt between NIP and NPL asset realizations. The amount allocated to NIP and NPL is approximately $14.2 million each.

f) The Receiver estimates the Net Receivership Proceeds allocated between NIP and NPL at paragraph 103 and provides a chart summarizing the separate corporation analysis at paragraph 104. (See attached Schedule "A")

g) The Receiver then applies the implications of intercompany balances between NIP, NI and NPL.

h) I agree with the Receiver that repayments made to the Lenders from proceeds realized from the sale of NPL assets do not affect the historical intercompany debts of NPL to NIP, NPL to 887 and NEL to NIP and also do not create subrogated rights in favour of NPL as against NIP and its assets. The Receiver outlines the correct accounting treatment of the Credit Agreement transactions at paragraph 115 of the Twelfth Report.

57 The respondents submit that the Receiver's analysis amounts to allocations that allocate away NPL's subrogated rights. The respondents attacked the Receiver's allocations and specifically stated that the Receiver failed to provide an explanation for the $14.2 million allocation of payment to the Lenders attributable to NPL.

58 The respondents submit:

a) The allocation is in breach of the Receiver's duty to be impartial, disinterested and to deal with the rights of all interested parties in a fair and even-handed manner;

b) The Receiver cannot legally allocate the proceeds of the sale of NPL's property to the credit of an entity other than NPL, unless and until NPL has been made subject to substantive consolidation order;

c) In contrast to the decision in *Nortel Networks Corp. (RE)*, 2015 ONSC 2987, [2015] O.J. No. 2440 (QL), leave to appeal refused 2016 ONCA 332, 130 O.R. (3d) 481, in which the court made rulings that certain funds would be shared on a pro rata basis, that since NPL's assets consisted of real properties owned by NPL alone and not the collective group of entities, the proceeds of sales of those properties belong to NPL's estate.

59 I start my analysis of these submissions with a brief review of the applicable law governing allocations in receivership proceedings. In assessing the allocation of receivership costs, the authorities establish that allocation of costs amongst related corporations is an exercise of discretion and the result must be fair and equitable.

60 The general principles of law, which govern the allocation of receivership costs is summarized in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531, [2014] O.J. No. 1099, (QL) as follows:

43 As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

(i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

(ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

(iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

(iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

> (vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

45 As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their allocation from BDC, and it was not aware that BDC took issue with the allocation until February 4, 2014.

61 In JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp., 2006 25 C.B.R. 5th 156, [2006] O.J. No. 3048 (Ont. S.C.J.) (QL), the Ontario Supreme Court of Justice considered a Receiver's proposed allocation with respect to amounts secured by the Receiver's charge. The court approved the proposed allocation and noted:

> **42** The obligation on a Receiver in allocating costs from an insolvency proceeding is to exercise its discretion in an equitable manner that does not readjust the priorities between creditors. The allocation:
>
> (a) should be fair and equitable; and
>
> (b) not ignore the benefit or detriment to any creditor.
>
> There is however no requirement that the Receiver be obliged to conduct a strict accounting on a cost-benefit basis as between the creditor classes: *Hunjan International Inc. (Re)* (2006), Carswell Ont. 2718 (Ont. S.C.) at p. 2 and p. 8.
>
> **43** The Receiver submits that the Proposed Allocation is reasonable and in accordance with general principles established by Canadian insolvency courts.
>
> **44** The Receiver submits that the allocation of the Fees is reasonable in the circumstances. Moreover, it has been held that "to require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event: *Hickman Equipment (1985) Ltd.*, [2004] N.J. No. 299 at p. 6.
>
> **45** Where as in this case, the Receiver was appointed for the benefit of interested parties to ensure that all creditors were treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs: *Bank of Nova Scotia v. Norpak Manufacturing Inc.*, [2003] O.J. No. 4818(Ont. C.A.) at p. 2.

62 In *DBDC Spadina Ltd. v. Walton*, 2015 ONSC 2550, [2015] O.J. No. 2023 (QL), the Ontario Superior Court of Justice considered the proposed allocation of professional fees to each of the parties. Newbould J. found:

> **28** Each case is different. This case involves unusual complexity involving the Manager's responsibility for 31 Schedule B properties and several Schedule C properties, all of which were improperly run by the Waltons before the Manager was appointed. The Manager's task was made no easier by challenges raised from the beginning to the end. I accept that the Fee Allocation Methodology in this case allocates costs in a fair and equitable manner and that the discretion of the Manager has been exercised fairly. The fact that one or more

> interested parties is unhappy with the allocation is perhaps understandable but no basis in this case to change what the Manager has proposed to allocate the costs.

63 Applying these principles to this case, I accept that a comprehensive review of over 17,000 transactions would be time-consuming, expensive and the creditors would ultimately bear the costs associated with that review as well as the costs of any associated further litigation.

64 While not perfect, I am satisfied the Receiver has undertaken a review process and allocation methodology that allocates costs in a fair and equitable manner. I am also satisfied that the Receiver has exercised its discretion fairly in the circumstances. It is understandable that NPL and NEL challenge the allocations of the proceeds of sale of NPL's assets on the basis that the allocations prejudice NPL's potential right of subrogation. I considered that factor, but in my view, that is not a sufficient basis to determine that the allocations are unfair. The Receiver explained the complex process of allocations in its reports and I am not satisfied that it is appropriate to interfere with the Receiver's exercise of discretion and the allocation of costs and proceeds of sale in the unique circumstances of this case.

65 The respondents point out that the authorities relied upon by the Receiver deal with the allocation of costs of the receivership. In this case, some of the allocations that are challenged include the allocation of the proceeds of the sale of assets belonging to different entities.

66 The respondents referred the court to two decisions, namely *Royal Bank of Canada v. Atlas Block Co. Ltd.*, 2014 ONSC 1531, [2014] O.J. No. 1099, and *Nortel (Re)*. The *Royal Bank of Canada* case is often cited regarding the principles applicable to cost allocations in receiverships. A portion of that decision dealt with the allocation of the proceeds of various asset sales, but did not set out any guiding legal test applicable to that allocation.

67 In *Nortel (Re)* the respondents reference the decision of Newbould J. who dealt with a complicated cross-border liquidation of the assets of multiple corporations within the Nortel Enterprise and the proper allocation of those proceeds as among the entities and their creditors. Concerning the proceeds of assets sold the court stated at para. 202:

> **202** This is an unprecedented case involving insolvencies of many corporations and bankrupt estates in different jurisdictions. The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions. They were created by all of the RPEs located in different jurisdictions. Nortel was organized along global product lines and global R&D projects pursuant to a horizontally integrated matrix structure and no one entity or region was able to provide the full line of Nortel products and services. R&D took place in various labs around the world in a collaborative fashion. R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis. The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements does not mean that Nortel operated a separate business in each country. It did not.

68 In connection with proceeds referred to as the "lockbox funds", the court stated that the funds should be distributed pro rata and stated:

> **250** The allocation each Debtor Estate will be entitled to receive from the lockbox **funds** is the percentage that all accepted claims against that Estate bear to the total claims against all Debtor Estates.

69 Regarding the pro rata allocation, the court stated:

> **214** A pro rata allocation in this case would not constitute a substantive consolidation, either actual or deemed, for a number of reasons. First, and most importantly, the lockbox **funds** are largely due to the sale of IP and no one Debtor Estate has any right to these **funds**. It cannot be said that these **funds** in whole or in part belonged

> to any one Estate or that they constituted separate assets of two or more Estates that would be combined. Put another way, there would be no "wealth transfer" as advocated by the bondholders. The IFSA, made on behalf of 38 Nortel debtor entities in Canada, the U.S. and EMEA, recognized that the **funds** would be put into a single **fund** undifferentiated as to the Debtor Estates and then allocated to them on some basis to be agreed or determined in this litigation. Second, the various entities in the various Estates are not being treated as one entity and the creditors of each entity will not become creditors of a single entity. Each entity remains separate and with its own creditors and its own cash on hand and will be administered separately. The inter-company claims are not eliminated.
>
> . . . . .
>
> **222** In considering these factors, it is clear beyond peradventure that Nortel has had significant difficulty in determining the ownership of its principle assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio. This amount constitutes over 80% of the total assets of all of the Nortel entities. This issue has taken several years of litigation and untoward costs in the parties attempting to establish an entitlement to it. As the MRDA does not govern how the sales proceeds are to be allocated, there is no one right way to separate them. It cannot be said that there is no question which entity is entitled to the sale proceeds or in what amount. It is clear that these assets are in the language of Dr. Janis Serra "so intertwined that it is difficult to separate them for purposes of dealing with different entities".

70 I disagree with the respondents that these authorities assist to establish governing legal principles and specifically that they support a finding that the sale proceeds of NPL assets belong to NPL alone. The respondents' submission is based on the incorrect assumption that all of the NPL asset sale proceeds in the amount of $28.579 million was paid to the Lenders pursuant to the Credit Facility. As the Receiver points out, that is contrary to what actually happened.

71 The *Royal Bank of Canada* case did not establish guiding leading principles to be employed in allocating sale proceeds. The decision in that case was based on the particular facts before the court. The court accepted the Receiver's proposed allocation of the sale proceeds amongst the debtors and there was evidence filed to support the allocations.

72 The decision of the court in *Nortel (Re)* dealt with the unique fact situation that arose in connection with a very complex multi-jurisdictional insolvency proceeding. Based on the facts before the court, it was determined that the funds should be allocated to the credit of each of the debtor entities on a pro rata basis.

73 Other than establishing that each case is different, I am not satisfied those authorities assist the court with principles that apply in this case. In the unique facts of this case, the Receiver was tasked with allocating the realizations achieved from the sale of assets of NIP, NI and NPL.

74 The Receiver points out in the Second Supplementary Twelfth Report what actually happened upon the sale of the assets and states that none of the NPL asset sale proceeds were used to repay the Credit Facility and that approximately $11.9 million of the NPL asset sale proceeds were used to repay the Receiver's Borrowings. I agree with the Receiver that the allocation of the Receiver's costs and the repayment of the Credit Facility recognizes the payment of such costs based on the actual timing of the receipt of receivership proceeds from various assets owned by NIP, NI and NPL. I disagree with the position advanced by the respondents that the allocation involves any transfer of assets or proceeds as between NI, NIP and NPL.

75 In my view, the legal principles applicable to allocations noted above, apply equally to the allocation of costs and the allocation of proceeds of the sale of assets.

76 As I have explained, the assumption that all NPL asset sale proceeds (totaling $28.579 million) were paid to the Lenders to satisfy the Credit Facility is contrary to what actually happened during the course of the receivership. The Credit Facility was in fact satisfied prior to receipt of the net sale proceeds from the sale of the NPL properties.

77 It is also important to keep in mind that the Receiver's Borrowing Charge secured the Receiver's Borrowings pursuant to the Receivership Order and funded receivership costs and expenses including disbursements. The Receiver's Charge and Receiver's Borrowing Charge are charges against all of the Property and rank in priority to all encumbrances including the Credit Facility. The Receiver's Borrowings during the course of the receivership exceeded $30 million and is captured within "corporate overhead" expenses in the separate corporation analysis conducted by the Receiver in the Twelfth Report. I accept the Receiver exercised its discretion in a reasonable manner to allocate the proceeds of sale of the assets received based on what actually occurred during the receivership and in my view, the allocations are fair and equitable in the circumstances.

78 As to the respondents' submissions, the evidence supports the following findings:

a) The allocations made by the Receiver were fair and equitable and cannot be characterized as in breach of the Receiver's duty to be impartial, disinterested and to deal with the rights of all interested parties in a fair and even-handed manner; and

b) The Receiver allocated the proceeds of the sale of NPL's property as part of the separate corporation analysis. I have found the allocations to be fair and equitable. If I am wrong, I have nevertheless found that the evidence in this case supports granting a substantive consolidation order and therefore the sale of NPL assets can be used to satisfy the common liabilities of the respondents.

79 I turn now to the other submissions advanced by the respondents based upon the Albert affidavit. Mr. Albert provides an opinion regarding the Receiver's separate corporation analysis in the Twelfth Report. The report of Albert Gelman Inc. ("AGI") is attached as Exhibit "B" to the Albert affidavit. The AGI report indicates that the report was requested for the following purposes:

a) To assist counsel to the Canadian Debtors in analyzing the separate corporation analysis set out at page 36 of the Twelfth Report;

b) "To provide Debtors' Counsel with an alternative separate corporation analysis which, in the opinion of AGI incorporates a more reasonable, fair and equitable allocation methodology."

80 The qualifications or expertise of Mr. Albert or AGI to express an opinion that may assist the court in this matter was not challenged. Mr. Albert's curriculum vitae is attached as Exhibit "A" to his affidavit and he is described as one of the founding principals of AGI with more than 30 years of experience. He is a chartered professional accountant and licensed insolvency trustee and has acted in numerous engagements as an officer of the court in such legal capacities as receiver, monitor, inspector, investigative receiver and trustee in bankruptcy. I have no hesitation in accepting that he is qualified to provide opinion evidence within his area of expertise.

81 In its report, AGI challenges the following allocations made by the Receiver:

a) The allocation of the Landlords' Charge in the separate corporation analysis. The Receiver allocated the Landlords' Charge equally in the amount of $1,293,000 to each of NIP and NPL. AGI expresses the opinion that the Landlords' Charge should be allocated entirely to NIP on the basis that NPL was not a party to any of the leases that pertain to the Landlords' Charge;

b) The allocation of corporate overheads based upon the respective gross proceeds of realizations of NIP, NI and NPL. AGI describes the corporate overheads as primarily corporate payables and professional fees. Regarding payables, AGI disputes the allocation of 31% of the corporate payable to NPL on the basis that total property rent charged by NPL to NIP was approximately $1.3 million per annum and the amount allocated exceeds the total amount NPL earns as rental income per annum. AGI expresses the opinion that a reasonable methodology for allocating the corporate payable to NPL would be to consider the amount that

would be charged by an arm's-length property manager. AGI reached out to a commercial real estate broker who expresses the opinion that industrial property management fees charged range from 2.5% to 3% of gross rents. Accepting for the moment that this hearsay evidence is admissible, AGI allocates the sum of $39,000 based on 3% of rental income of $1.3 million versus the Receiver's allocation to NPL; and

c) The allocation of professional fees made by the Receiver based upon respective gross proceeds of realizations. AGI expresses the view a reasonable allocation of the professional fees to NPL is 10%.

82 In response to the opinion expressed by AGI, the Receiver filed a Second Supplementary Twelfth Report and at paragraphs 72 - 89, provided a detailed response to the opinion advanced by AGI. Based on my review of the reports, I prefer the opinion expressed by the Receiver. In my view, the Receiver is in the best position to analyze the costs and expenses and allocate them in a fair and equitable fashion as the Receiver is responsible, as an officer of the court, to do so pursuant to the Receivership Order. In my view, the Receiver acted responsibly and in accordance with its duties to allocate the costs.

83 I accept that the AGI proposed allocations may be appropriate if the costs were being allocated on the basis that the Nygard fashion business was carrying on in the ordinary course of business. However, I agree with the Receiver that AGI's report and opinion ignores the reality of what actually happened during the course of the receivership. The allocations were made during a receivership when employees were terminated and all assets were being liquidated to satisfy the Debtors' obligations under the Credit Facility. In my view, the Receiver's allocations reflect the reality of what actually happened during the receivership and are reasonable.

84 Of the opinions expressed by AGI, I accept that the opinion regarding "direct allocations" does have some merit. NIP leased the properties and the landlords have a claim against the primary tenant, NIP, not NPL. I agree NPL was not a party to the lease agreements relating to the Landlords' Charge. However, in order to gain access to the properties and proceed to the sale of the assets of all of the Debtors, the court granted the Landlords' Charge which provided a charge by the landlords against all of the Property (including NPL's property) captured in the receivership. That decision was not appealed. The Receiver's allocation reflects the fact that the Landlords' Charge grants a prior secured interest against the Property including NPL's property.

85 As to corporate overheads, I agree with the Receiver that what actually happened was that the NPL asset sale proceeds were used to pay Receiver's Borrowings which included the funding of corporate overheads. I agree with the Receiver that AGI's analysis is flawed for the reasons set forth in paragraph 78 of the Receiver's Second Supplementary Twelfth Report.

86 As to professional fees, I accept the Receiver's analysis and opinion that a significant part of the professional time involved in the Receivership Proceedings has been in connection with issues that have been raised by NPL. In my view, the allocation made by the Receiver is to be preferred and is fair and equitable in the circumstances.

87 The respondents challenge the position that Receiver's Borrowings are not advances made pursuant to the Credit Facility and repayment of funding provided under the Receiver term sheet which is not guaranteed by any guarantee given in relation to the Credit Facility. (See Receiver's Supplementary Twelfth Report at para. 60)

88 The respondents submit that the Receiver's Borrowing Charge is not distinct from the security granted under the Credit Agreement. Further, the respondents submit that repayment of the Receiver's Borrowing Charge is enforcement of the Lenders' security is consistent with:

a) The Credit Agreement;

b) The Debenture executed by NPL in favour of the Lenders on December 30, 2019 (the "Debenture");

c) The demand letter sent by counsel for the Lenders to the respondents;

d) The affidavit of Robert L. Dean, affirmed March 9, 2020, filed by the Lenders in support of the Receivership Order; and

e) The Receivership Order.

89 I agree that the relevant terms of the Credit Agreement and the guarantee require the Guarantors to guarantee "... the due and punctual performance of the all Obligations of each other Loan Party." (Clause 11.01 of the Credit Agreement) The NPL guarantee is limited as follows: "The Agent agrees that its recourse against ... ("NPL") pursuant to Mortgages on owned Real Estate of NPL shall be limited to a realized value after all costs and expenses, including enforcement costs of $20,000,000." (the "NPL Guarantee") (Clause 11.05 of the Credit Agreement, page 122) (See Exhibit "D" of the Dean affidavit)

90 Definitions in the Credit Agreement are relevant to the interpretation of the NPL Guarantee including, "Obligations, Loan Parties, Guarantor, Limited Recourse Guarantors, Canadian Holdings, Debtor Relief Laws." I agree with the respondents' submission that NPL guaranteed the repayment of Borrowers' obligations, which included "fees, costs, expenses and indemnities that accrue after the commencement by or against any loan party or any affiliate thereof of any proceeding under any Debtor relief laws." NPL is a limited recourse Guarantor and a key question to determine is how to properly interpret the wording of the NPL Guarantee.

91 The respondents submit that the NPL Guarantee guaranteed repayment of the Borrowers' obligations subject to the $20 million US limit inclusive of the costs, expenses and indemnities of the Receiver. The Receiver submits that the proper interpretation of the of the NPL Guarantee is that the recourse pursuant to the mortgages on owned real estate of NPL is limited to a realized value after all costs and expenses. The reference to including enforcement costs is a reference to costs and expenses. In other words, the realized value limit of $20 million US is after all costs and expenses. Put another way, the proper interpretation of the NPL Guarantee is the value received on the sale of the NPL property plus all costs and expenses including enforcement costs.

92 The primary principle of contract interpretation is to determine the parties' intention from a plain, primary and actual meaning of the words that are used set out in the entire context of the whole contract. (See Thomas G. Heintzman, Bryan G. West & Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters, 2019); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.) (QL); Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba) 2003 MBCA 71, 173 Man.R. (2d) 300 (QL); *Dunn v. Chubb Insurance Co. of Canada*, 2009 ONCA 538, 97 O.R. (3d) 701; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.); *Shumilak v. Shumilak*, 2013 MBQB 54, 289 Man.R. (2d) 208; and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (QL))

93 In *Geoffrey L. Moore Realty Inc.*, the Court of Appeal summarized the principles at para. 26 as follows:

26 In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

94 The Supreme Court of Canada in the decisions of *Eli Lilly & Co.* and *Sattva Capital Corp.* make it clear that it is unnecessary to consider any extrinsic evidence at all when the written contract being interpreted is clear and unambiguous on its face. (See *Eli Lilly & Co.*, at para. 55)

95 In *Sattva Capital Corp.* , the Supreme Court of Canada dealt with interpretation of a written contractual provision and the factual matrix at para. 57 as follows:

> **57** While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62)*.

96 The goal of the court is to determine the objective intentions of the parties in the sense of a reasonable person in the context of the surrounding circumstances. Applying these principles of contract interpretation, the objective intentions of the parties supports a finding that amounts loaned and amounts guaranteed are subject to the costs and expenses and enforcement costs. In my view, the words "after all costs and expenses, including enforcement costs" means the costs and expenses including enforcement costs are in addition to the value of the real property sold. The reference to $20 million US is a reference to the realized value after deducting all costs and expenses including enforcement costs. The reference to including enforcement costs in the NPL Guarantee is not, in my view, a reference to enforcement costs being included in the amount of the limited recourse guarantee of $20 million US. To read the NPL Guarantee in a manner consistent with the respondents' submission would, in my view, give no meaning to the word "after" before the words "all costs and expenses, including enforcement costs." Had the parties intended to limit the recourse to $20 million US inclusive of all costs and expenses and enforcement costs, the NPL Guarantee would have said that. The wording of the NPL Guarantee could simply have stated that NPL's guarantee is limited to $20 million US inclusive of all costs and expenses, including enforcement costs.

97 In my view, applying the objective intentions of the parties in the sense of a reasonable person in the context of the surrounding circumstances, the parties intended the NPL Guarantee to guarantee the Borrowers' debt in the amount of $20 million US plus costs and expenses, including enforcement costs. In my view, the proper interpretation of the NPL Guarantee is that the $20 million US refers to the "realized value" and accordingly all costs and expenses, including enforcement costs are over and above the value recovered upon the sale of the NPL real property assets. It is therefore important for the Receiver to allocate all costs to determine if NPL paid an amount that exceeds the amount guaranteed and for the purpose of assessing the subrogation issues considered below.

98 I am not satisfied that the demand letter, the Dean affidavit or the terms of the Receivership Order assist the respondents' submission. The Dean affidavit simply references the terms of the Guarantee and Credit Agreement and uses the same language found in the Credit Agreement in reference to the NPL Guarantee. Paragraph 24 of the Receivership Order grants a charge over all of the Property which includes NPL's property. The purpose of paragraph 24 is to establish a fixed and specific charge referenced as the Receiver's Borrowing Charge as security for payment of the monies borrowed, together with interest and charges in priority to all other encumbrances. The wording of the Receivership Order favours the position advanced by the Receiver that the Receiver's Borrowing Charge grants a priority over the Property. Paragraph 24 of the Receivership Order also empowers the Receiver to borrow from the applicant in accordance with the terms of the Receiver term sheet.

c) What rights of subrogation apply to the respondents and what is the correct interpretation of the provisions of The Mercantile Law Amendment Act, C.C.S.M. c. M120 (the "Act") (ss. 2 and 3)?

99 In November 2020, NPL took the position that it had satisfied its guarantee obligation and therefore had rights of subrogation pursuant to s. 2 of the Act. NPL submits that the rights of subrogation provide it with security over the assets of the Borrowers and the unlimited Guarantors.

100 In reasons for decision previously delivered on November 19, 2020, I found that NPL and NIP "may have rights of subrogation to the extent that their payments to the Lenders were made on behalf of the Borrowers, as defined in the Credit Agreement."

101 NPL submits that the sale of NPL's assets produced $28,579,000 which exceeds NPL's maximum liability on its guarantee ($20 million US) and therefore NPL has secured subrogated rights against the Debtors and Co-Guarantors. NPL's subrogated claim cannot be subordinated to the unsecured claims against, or by, the Debtors or the Co-Guarantors.

102 The parties agree on the law of subrogation generally. They disagree on the proper application of the law to the facts and circumstances of this case.

Law of Subrogation

103 The relevant sections of the Act provide as follows:

> **Surety entitled to assignment**
>
> 2 Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, is entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty, or other security is or is not deemed at law to have been satisfied by the payment of the debt or performance of the duty; and that person is entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as in the case may be, indemnification for the advances made and loss sustained by the person who has so paid the debt or performed the duty, and the payment or performance so made by the surety is not pleadable in bar of any such action or other proceeding by him.
>
> **Right to recover**
>
> 3 No co-surety, co-contractor or co-debtor is entitled to recover from any other co-surety, co-contractor or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, the last mentioned person is justly liable.

104 In essence, once a surety or a guarantor makes payment of a Borrower's debt, that person or entity becomes subrogated to the rights of the creditor as against the Borrower and any co-guarantor or surety. In this case, NPL may recover the full amount it paid to the Lenders from the Borrowers. A claim against a Co-Guarantor is limited to the proportion of the total debt for which each Co-Guarantor is justly liable.

105 The Canadian text book on Guarantee, Kevin McGuinness, *The Law of Guarantee*, 3rd ed (Markham: LexisNexis 213) comments on the Act as follows:

> §10.40 [...] Under the present rule **not only is a surety who pays off his principal's debt entitled to a transfer of securities held by the creditor, but he or she is also in all respects entitled to all the equities** which the creditor could have enforced.
>
> [...]

> §10.42 A surety is entitled to stand in place of the creditor, and to use all the remedies and, on proper indemnity, to sue in the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, indemnification for the advances made or loss sustained by such person, and the payment or performance made by him is not a defence to such action or other proceeding by him. However, no co-surety, co-contractor or co-debtor is entitled to recover from any other co-surety, co-contractor or co-debtor more than a just proportion to which, as between themselves, the last mentioned person is justly liable. There is no statutory limit on recovery against the principal, since the principal is obliged to indemnify his sureties in full.
>
> [...]
>
> §10.44 [...] A surety for a limited amount has in respect of that amount the same rights as the creditor. To the extent of his liability, therefore, the surety is entitled to the benefit of any security held by the creditor in respect of the whole debt.

106 The leading Canadian textbook on insolvency law by Lloyd W. Houlden, Geoffrey B. Morowetz and Janis P. Sarra, Annotated Bankruptcy and Insolvency Act, 4th ed (Canada: Carswell, 2009) at para. 59(1):

> If a guarantor pays in full the indebtedness of the principal debtor, **the guarantor is entitled to any security held by the principal creditor and becomes a secured creditor.** There is no necessity for any formal transfer of the security to the guarantor; the guarantor stands in the place of the creditor [citations omitted].

(See also *Windham Sales Ltd.*, (1979), 102 D.L.R. (3d) 459, 26 O.R. (2d) 246; *Alberta Treasury Branches v. Weatherlok Canada Ltd.*, 2011 ABCA 314, 68 Alta. L.R. (5th) 400)

107 The general principles of law applicable to the right of contribution between co-guarantors are summarized in *Gill v. Cheema*, 2018 BCSC 1453, [2018] B.C.J. No. 3082, as follows:

> **41** The right to contribution between co-guarantors is rooted in the principles of unjust enrichment.
>
> **42** Paragraph 10.131 of McGuiness, *The Law of Guarantee*, 3rd ed (Markham: LexisNexis, 2013) sets out "five general principles which govern the rights of contribution among co-sureties" which include:
>
> • All co-sureties are bound *prima facie* equally to see to the performance of a guaranteed obligation, and must therefore bear their respective share of any claim made by the creditor equally (or in the proportion as agreed among themselves);
>
> • The right to contribution to which the co-sureties in the case of any particular guaranteed obligation are entitled may be varied by express or implied agreement;
>
> • In the absence of any such agreement, the obligation of each co-surety is determined by dividing the total obligation to which all are liable by the number of solvent sureties;
>
> • The right of any particular co-surety to recover contribution arises upon payment by the surety of more than his share;
>
> • However, even prior to the payment of the creditor, a surety may seek equitable relief (similar to the relief that is available in the case of the surety's right to enforce his or her right of indemnification against the principal)...

> There is no obligation on a surety who seeks contribution to sue all other cosureties, but (except in the case of the insolvency of one of several co-sureties) the surety seeking contribution may recover from each of his co-sureties only an aliquot part of the total liability according to the number of sureties originally liable.

108 In *Abakhan v. Halpen*, 2008 BCCA 29, B.C.L.R. (4th) 267 (QL), the court dealt with a circumstance in which a debtor was assigned into bankruptcy and a lender made demand on three co-guarantors. One of the guarantors made payment to a lender under the guarantees and obtained an assignment of certain remnant debt and the security held by the lender including all of the guarantees of the three guarantors. The guarantor that made payment subsequently advanced a claim against the two other co-guarantors in relation to the amount paid.

109 The court in *Abakhan* precluded the guarantor from collecting the remnant debt from the co-guarantors interpreting s. 34 of the Law of Equity Act, R.S.B.C. 1996 c. 253. The court limited the guarantor's claim against the co-guarantors to the amount paid over and above the proportionate share of the debt repaid to the lender under the guarantees. The guarantor was only entitled to recover one-third of the total amount paid under the guarantees from each co-guarantor. (See *Abakhan* at paras. 12-15, 24)

110 The law of subrogation has been applied in previous cases during receivership proceedings. In *Bank of Montreal v. Ladacor AMS Ltd.*, 2019 ABQB 985, [2019] A.J. No. 1748 (QL), the court addressed the claims of three companies in receivership (Ladacor, Nomads and 236). Dealing with the funds received during the course of the receivership, the court stated:

> **24** Since 236 was also put into receivership, the Receiver took steps to sell 236's main asset, the Days Inn Hotel in Sioux Lookout. Of the roughly $5,000,000 sale proceeds, $4,000,000 were paid by the Receiver to BMO.
>
> **25** Ultimately, the time of the Fourth Report, the Receiver had paid off the secured debt to BMO, the Receiver's borrowings from BMO to enable it to carry on the Receivership, the WEPP claims, CRA and Service Canada trust/priority claims, along with its and its lawyer's fees and disbursements.
>
> **26** The supplemental report and Fifth Report update the figures. As at the time of that report, October 25, the Receiver was holding $10,398 for Nomads, $722,661 for Ladacor, and $637,241 for 236. The Receiver proposes to allocate all of the available proceeds currently in Ladacor's and Nomads' accounts to 236.
>
> . . . . .
>
> **46** BMO was a secured creditor, subject only to the superior WEPP claims and CRA source deduction claims, and the costs of the receivership. The Receiver argues on this application that guarantors (such as Nomads and 236) are entitled to be subrogated to the claims they have paid out on behalf of the principal debtor, Ladacor.
>
> **47** In this case, Nomads and 236 have paid off BMO's claims against Ladacor. Nomads and 236 are entitled to be subrogated to BMO's claim, and to stand in BMO's shoes with respect to any security BMO held against Ladacor. That means, according to the Receiver, that Nomads and 236 are now the primary secured creditors on any of Ladacor's remaining assets.
>
> **48** Additionally, as between guarantors who have paid out on their guarantees, Nomads and 236 are entitled to be treated proportionately, so the debt paid off should be apportioned between them. Where guarantors are equally liable to the obligee, the guarantors are considered to be responsible for equal shares of the debt.
>
> **49** Here, that would mean that each of Nomads and 236 should have paid off half of the debt owed to BMO. Since 236 paid more than half of the BMO debt, there should be an adjustment as between Nomads and 236, in 236's favor.

50 The way the Receiver has accounted for this is that the excess of collections over required payments has left a surplus, some of which now stands to the credit of Ladacor. Because 236 paid more than its half of the obligation, 236 is entitled to recover that excess from Ladacor.

51 Of the $5,834,882 paid to satisfy BMO's claims, $4,000,000 came from 236. The remainder came from Nomads. Because of contribution principles between guarantors, each of the guarantors should have paid $2,917,441. 266 overcontributed by $1,082,559. That amount is owed to it by Nomads.

52 The Receiver proposes to pay the funds remaining in the Nomads account and the Ladacor account (after holdbacks for further administration costs) in the approximate amount of $465,000 (Receiver's Fifth Report). 236 is expected to have approximately $517,000 in its account, so it will recover $982,001. It will be short by approximately $100,559. Because of it standing into BMO's security, it will be Nomads' only secured creditor to that extent.

53 This analysis and position is well supported by the Receiver's first brief for this application. The Receiver cites:

> ***Gerrow v Dorais***, 2010 ABQB 560;
>
> *Mercantile Law Amendment Act 1856*, 19 & 20 Vict, c 97;
>
> ***Karen Matticks v B & M Construction Inc (Trustee of)***, 1992 CarswellOnt 193 (ONCJGD);
>
> Andrews & Millett, *Law of Guarantees*, 7th Ed (London: Sweet & Maxwell, 2015) at para 11-017;
>
> ***Re Windham Sales Ltd***, 1979 CarswellOnt 227 (ONSC in bankruptcy);
>
> ***Wong v Field***, 2012 BCSC 1141;
>
> ***EC&M Electric Ltd v Medicine Hat General & Auxiliary Hospital & Nursing Home District N 69***, 1987 CarswellAlta 25 (ABQB); and
>
> ***Abaklhan v Halpen***, 2006 BCSC 1979, aff'd 2008 BCCA 29.

54 J. Steenhof, as an unsecured creditor of 236, and 145 as an unsecured creditor of Nomads on the Hythe project, agree with this analysis, as does Liberty Mutual. Mr. Klisowsky raises no specific objection to this proposal on the part of the Receiver, but suggests that it is premature. He says that the proper contribution between Nomads and 236 can only be calculated once the assets and liabilities of Nomads and Ladacor (as between those entities) have been properly allocated.

55 I am satisfied that for the purposes of finalizing the Receivership accounts, the monies the Receiver holds to the account of Ladacor and Nomads should be transferred to 236's account as a function of a guarantor's right to subrogation and to contribution rights and obligations as between co-guarantors.

(See also *Wong v. Field*, 2012 BCSC 1141, [2012] B.C.J. No. 1843 (QL), for a discussion regarding claims against co-guarantors, at paras. 20 - 28)

111 Applying these principles to the facts and circumstances of this case, it is important to recognize that pursuant to the Credit Agreement, each of NEL, NIP, NPL, 879 and 887 is a joint and several Guarantor of the Borrowers' obligations to the Lenders. The Lenders had full recourse against NIP, 879 and 887 as they are unlimited Guarantors. NEL and NPL were limited recourse Guarantors respecting the obligations and as noted above, recourse is limited to $20 million US, plus all costs and expenses including enforcement costs.

112 It is also important to recognize as stated by the Receiver in the Second Supplementary Twelfth report as follows: "NPL's guarantee is not limited. Pursuant to the Credit Agreement and related documents, NPL guarantees repayment of the Credit Facility and secures its guarantee obligation by mortgaging certain real properties and pledging (the "Share Pledge") certain shares of 887 in favour of the Lenders. The recourse of the Lenders to the mortgaged real properties is limited to USD$20 million, plus costs and expenses including enforcement costs; there is no such limited recourse to the pledged shares. Accordingly, it was open to the Lenders to recover the full amount of any outstanding obligations under the Credit Agreement by means of realizing upon the Share Pledge, had the pledged shares been of sufficient realizable value. Accordingly, for the purposes of subrogation and the application of *The Mercantile Law Amendment Act*, I agree with the Receiver that "NPL and NEL both participate as 'co-sureties' on the same proportionate basis as the other Guarantors of the Credit Facility; that is, 1/5 th of the total of the guarantee obligations, as described in the Twelfth Report." (At para. 59)

113 NPL submits that it has more than satisfied the NPL Guarantee as a result of the sale of the NPL properties. Since I have accepted the allocations made by the Receiver as fair and equitable, the evidence does not satisfy me that the assumptions made by the respondents are correct. As previously stated, I do not accept that the entire amount of $28.579 million was paid to the Lenders pursuant to the Credit Facility. Each of the five Canadian Debtors are Guarantors respecting amounts owed by the US Debtors or Borrowers under the Credit Agreement. Applying the principles outlined above, each Guarantor's obligation to contribute to the Lenders is limited to one-fifth (20%) of the total amount paid to the Lenders by the Guarantors, subject to a further qualification that the contributions by NEL and NPL cannot exceed the recourse limit (in this case $20 million US, plus costs and expenses, including enforcement under the Credit Agreement).

114 Since I have accepted the Receiver's allocations and specifically the repayments to the Lenders have been allocated equally to NIP and NPL, I agree that neither NIP nor NPL can seek contribution from the other under the Act. On the other hand, NPL and NIP could seek one-fifth contribution from each of the other Guarantors to the extent of those respective overpayments. As well, NPL and NIP are entitled to indemnity from each of the Borrowers.

115 I accept the evidence of the Receiver that the Borrowers and Co-Guarantors are insolvent and as a result there is no subrogated rights or right of contribution or indemnity to enforce.

116 In the motion brief of the respondents filed October 29, 2021, they submit that the application of the legal principles of subrogation between the Co-Guarantors should be applied as follows:

> 49. The application of these principles to the facts before this Court is straightforward. Firstly, NPL has a secured claim for indemnity against the Borrowers in the amount of CDN $28,579,000. Secondly, it has secured claims against the Unlimited Guarantors (897, 887 and NIP). The maximum liability of the three Unlimited Guarantors is CDN $66,466,000 each, and for the limited guarantor (NPL) it is CDN $24,698,000 (US $20,000,000 at the October 28, 2021 Bank of Canada exchange rate). The total of the maximum liabilities of these four companies is $224,096,000. The ratio of NPL's maximum liability to the maximum liability of the Unlimited Guarantors is 11 percent ($24,698,000 divided by $224,096,000). Accordingly, the amount for which NPL is responsible is $7,311,260 (11 percent of $66,466,000). Since the amount actually paid by NPL was $28,579,000, NPL overpaid by $21,267,740 ($28,579,000 less -27-$7,311,260). In the result, the three Unlimited Guarantors each owe NPL a contribution of $7,089,246.
>
> 50. Since NPL's subrogated claims against the Borrowers and the Unlimited Guarantors are secured, any (unsecured) inter-company debts owed by NPL (or NPL's owner) to the other respondents are irrelevant to an assessment of NPL's rights. This is to say that no matter the state of unsecured inter-respondent debt involving NPL and NEL, the Receiver cannot prevent NPL from executing on its security: in subrogation, set-off is

not available, because the claims to be set-off are not in the same right. At the least, any cash currently in the receivership should be paid to NPL.

117 As pointed out by the Receiver, the assumptions made by the respondents are incorrect and the analysis is flawed. The entire amount of proceeds received from the sale of NPL's properties was not paid to the Lenders to satisfy the Borrowers' obligations. Further, even if the respondents are correct and all of the NPL sale proceeds were paid to the Lenders and applied against the Credit Facility, the analysis does not take into account the fact that the guarantee is in the amount of $20 million US plus costs and expenses. Further, the analysis must factor NEL in as a Co-Guarantor. In any event, I am not satisfied the outcome for NPL following a potential claims' process would establish that the remaining Net Receivership Proceeds should be paid to NPL.

118 The respondents rely upon the *Ladacor* decision respecting that the process to equalize contributions between co-guarantors. It is important to note that the court approved the assignment of 236, Ladacor and Nomads into bankruptcy finding:

> **139** I acknowledge that the Receiver's work in allocating assets and employees between Ladacor and Nomads may not have resulted in a perfect allocation. That is not because the Receiver's work was deficient or flawed. Rather, it was because of the corporate mess that existed at the time of the Receivership Order. The Receiver had to try to make sense of an undocumented and ill-conceived "takeover" of Nomads by Ladacor. The proposed method of allocation by Mr. Klisowsky is unworkable, especially as it is founded on the incorrect assumption that Nomads could assign its obligations to Ladacor in a manner that would be binding on its creditors.
>
> **140** The reality is that any reallocation of assets would be moot. Putting more assets and liabilities into Ladacor would result in Nomads making a smaller contribution to paying off the BMO debt. That would simply increase the amount of 236's secured claim for contribution from Nomads. While it might leave fewer unsecured creditors for Nomads to have to deal with, the above analysis indicates that Nomads' unsecured creditors are unlikely to make any recovery at all.
>
> **141** As such, my conclusion is that no creditor is prejudiced by the allocations that were made by the Receiver between Nomads and Ladacor.
>
> **142** The Receiver has, in my view, correctly applied the applicable principles of subrogation and contribution, such that it is appropriate to allocate all of the remaining cash of Ladacor and Nomads to 236.

5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order

> **143** What is left with the three debtor corporations is a paucity of assets and a mountain of claims against them. Only the Liberty Mutual claim involves all three corporations. Total claims (counting Liberty Mutual only once) exceed $7,000,000. None of the claims have been proven. There may be defences to some or many of the claims, and some of the claims may be excessive in amount.
>
> **144** Getting to the bottom of all of this will be time consuming and very expensive. Litigation with Hythe has already commenced. Its result is uncertain. Success on that litigation would appear to be the only real chance of any collection for Nomads' unsecured creditors. The only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy. While there are possible ways of dealing with claims in a receivership, no one other than Mr. Klisowsky is recommending that the receivership continue. The Receiver's recommendation is to use the bankruptcy process to deal with the few remaining assets and myriad of claims.

119 Accepting for the moment, some of the assumptions advanced by the respondents are correct, I agree with the Receiver's findings and outcome addressed at para. 61 of the Second Supplementary Twelfth Report as follows:

> 61. In the result, assuming (as was done in the Twelfth Report) that the total of the guarantee payment required to fully repay the Credit Facility was $28.4 million and that Net Receivership Proceeds in the amount of approximately $9.9 million are available for distribution, and further assuming (for the purpose of this analysis only) that all of $9.9 million in distributable Net Receivership Proceeds are NPL Asset Sale Proceeds, then the Net Receivership Proceeds in the hands of NPL would be subject to at least the following claims:
>
> (a) all of the guarantee payment was made by NIP, such that NIP has a subrogated claim (i.e. a claim pursuant to the provisions of The Mercantile Law Amendment Act (Manitoba)) as against NPL in an amount equal to 1/5th of $28.4 million, which is $5.68 million;
>
> (b) intercorporate obligations of NPL are not impacted by use of NPL Asset Sale Proceeds to repay Receiver's Borrowings, such that based on the Debtors' records (i) NIP has an intercompany claim for approximately $2.5 million and (ii) NIP has an intercompany claim against NEL (which is NPL's parent corporation) in the amount of approximately $18.1 million and a subrogated claim as against NEL (i.e. a claim pursuant to the provisions of The Mercantile Law Amendment Act (Manitoba)) in an amount equal to 1/5th of $28.4 million, which is $5.68 million, both of which are enforceable in due course against the assets of NPL;
>
> (c) NPL has an accrued tax liability to Canada Revenue Agency in the estimated amount of $3 million; and
>
> (d) NPL may have other third-party creditor obligations.
>
> 62. The claims against NPL or to which the Net Receivership Proceeds would be, in due course, subject, are substantially in excess of the Net Receivership Proceeds and it is apparent that, on the basis of "what actually happened", there is no "equity" in NPL or NEL that would enable Mr. Nygard to benefit from the Net Receivership Proceeds.

120 In my view, the findings made by Graesser J. in *Ladacor*, are apt in this case. I agree that the Receiver's allocations of assets and costs and expenses between the respondents may not have resulted in perfect allocations. I disagree with the respondents that the Receiver chose to apply arbitrary allocations and "simply move numbers around to build a case against NPL's right of subrogation". I accept the explanations provided by the Receiver in the relevant reports, including the Second Supplementary Twelfth Report as reasonable and agree that the respondents' submissions are simply not correct for the reasons set out in the Receiver's reports.

121 The Receiver's allocations are not unfair or arbitrary. The Receiver was dealing with a complicated receivership respecting a number of corporations and in my view, made allocations that were fair and equitable based on the timing of numerous receipts and disbursements made in the circumstances. Getting to the bottom of the various claims would be time-consuming and very expensive and in my view, the most effective and efficient way to deal with the claims going forward is through a bankruptcy proceeding.

122 I am satisfied based on the evidence of the Receiver that even if some of the Net Receivership Proceeds should be allocated to NPL, those funds are subject to claims of NPL's creditors which, in all probability, exceed the proceeds available to satisfy those claims. If that finding is incorrect, I am satisfied the competing claims to the Net Receivership Proceeds are best left to be resolved and determined during a bankruptcy proceeding.

d) Should one or more or all of the respondents be assigned into bankruptcy, and if so, should the Receiver be appointed as the Trustee in Bankruptcy?

123 Section 49(1) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (the "*BIA*") permits a Receiver, with leave of the court, to make an assignment in bankruptcy of an insolvent person's property for the general benefit of the insolvent person's creditors. The assignments "shall be offered to the official receiver in the locality of the debtor". (See s. 49(3))

124 In light of my findings and decisions made in the past (see Order of March 13, 2020) and the evidence in the Twelfth Report, I am satisfied that the assignments in bankruptcy should be filed in Winnipeg and heard in this court as the locality of the Debtors is the principal place where the Debtors carried on business. The Debtors' head office and management was located in Canada and substantially all of the Debtors' books and records were located at the head office in Winnipeg at the Inkster property.

125 The respondents do not contest the request that seven of the nine respondents are insolvent and may be assigned into bankruptcy. The respondents submit that NEL and NPL are not insolvent and NPL in particular has a claim to the Net Receivership Proceeds presently held by the Receiver.

126 In light of my findings and the opinion of the Receiver in the Twelfth Report, I accept that NPL and NEL are insolvent on a consolidated basis. Further, I accept the opinion of the Receiver that NPL may be insolvent on a separate corporation analysis depending on the outcome of a rigorous allocation of receivership expenses and the extent of NPL's direct liabilities.

127 Other than legal arguments advanced on behalf of NPL and NEL, there is no expert evidence that has been filed that proves NPL and NEL are solvent.

128 At the time I granted the Inkster Approval and Vesting Order, I considered the first AGI Report, the Supplementary First AGI Report and the affidavit of Greg Fenske affirmed November 5, 2020. On the basis of my review of the evidence filed, I concluded: "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." No further expert evidence has been filed to alter my previous finding.

129 The Receiver submits that on a consolidated basis, each of the Debtors are jointly liable for the Common Liabilities, which is estimated to be in the amount of approximately $77 million. The Common Assets are identified in the Twelfth Report and clearly are not sufficient to satisfy the Common Liabilities.

130 The Receiver seeks alternative orders regarding bankruptcy. In my view, the preferred approach is to grant leave to the Receiver to file assignments in bankruptcy respecting all of the respondents, other than NPL and NEL, and to authorize the Receiver to file applications for bankruptcy orders in this court in relation to NPL and NEL, on a basis that reflects the Common Assets and the Common Liabilities and the substantive consolidation of the estates of the Debtors.

131 I grant an order lifting the stay of proceedings ordered in the Receivership Order to permit bankruptcy applications to be made and direct that, for the purpose of such assignments and applications, the locality of the Debtors shall be Winnipeg, Manitoba. Finally, given the Receiver's intimate knowledge of the assets and liabilities of the Debtors, the most cost effective and expeditious way to proceed is to order that the Receiver be appointed as Trustee in bankruptcy.

Issues relating to the respondents' motion

a) Should the court grant an order to release the balance of the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement to pay legal fees and disbursements and expert costs incurred by the respondents in connection with the Receivership Proceedings or a bankruptcy proceeding?

132 I previously granted orders approving payments from the Preserved Proceeds established pursuant to the NPL Proceeds Preservation Agreement to satisfy legal fees and disbursements incurred by the lawyers representing the respondents in the Receivership Proceedings. The Receiver did not object to reasonable fees and disbursements being paid to the respondents for the purpose of satisfying professional statements of account generated as a result of the Receivership Proceedings. At the hearing on December 22, 2021, the Receiver did not oppose payment of statements of account for professional services that had been issued to the respondents in connection with the Receivership proceedings.

133 The general legal principle governing payment of a debtor's legal costs is that the court has discretion to authorize an advance by the Receiver out of a debtor's assets to pay legal costs required to defend an application providing the defence is not frivolous or vexatious. (See Lloyd W. Houlden, Geoffrey B. Morowetz and Janis P. Sarra's Annotated Bankruptcy and Insolvency Act, 4th ed (Canada: Carswell, 2009) at para. 3.62; King Petroleum Ltd. (Re)197318 C.B.R. (N.S.) 270, [1973] O.J. No. 1324 (Ont. S.C.) (Ont. Sup. Ct.) and Royal Bank v. West-Can Resources Finance Corp.[1990] 77 Alta. L.R. (2d) 43 19903 C.B.R. (3d) 55(Alta. Q.B.))

134 In my view, the submissions advanced by the respondents have not been frivolous or vexatious. The issues have been complex and the respondents deserve to be represented to advance their best legal position. I agree with the respondents that putting forth a defence would be hollow without an ability to retain and pay experienced legal counsel in insolvency matters to represent their interests.

135 The breakdown of the $1,150,000 requested by the respondents is described as follows:

a. Criminal Lawyers

- $350,000 to Mr. Brian Greenspan;
- $50,000 to Mr. Jeff Hartman;
- $50,000 to Mr. Richard Wolson;
- $50,000 to Mr. Jay Prober

Total- $500,000

b. Insolvency Lawyers

- $250,000 to Fred Tayar & Associates;
- $350,000 to Levene Levene Tadman;
- $50,000 to Albert Gelman Inc. (AGI)

Total - $650,000

136 Counsel for the respondents submit that after distributing $150,000 that was authorized in court on December 22, 2021, the outstanding indebtedness to Levene Levene Tadman is approximately $50,000 and the outstanding indebtedness to Fred Tayar & Associates is approximately $31,000. Respondents' counsel state that the balance of the Preserved Proceeds remaining in trust pursuant to the NPL Proceeds Preservation Agreement is $200,000.

137 In my view, there is no reason to depart from the general principle that the respondents are entitled to representation in the receivership and bankruptcy proceedings. Accordingly, subject to providing statements of account to the Receiver or Trustee in bankruptcy for approval on the basis the costs claimed are reasonable,

the Preserved Proceeds may be used to satisfy legal fees and disbursements and professional fees incurred in connection with the receivership and bankruptcy proceedings.

b) Should the court grant an order to release a portion of the Net Receivership Proceeds to fund legal fees and disbursements that have been incurred or will be incurred in connection with the Receivership Proceedings or a bankruptcy proceeding?

138 The same governing legal principle as noted above applies in connection with the second issue. In my view, providing statements of account for legal fees and disbursements are submitted to the Receiver or Trustee in bankruptcy for approval and are reasonable, the fees and disbursements may be paid from the Net Receivership Proceeds. The respondents are entitled to mount a defence and advance legal positions challenging the Receiver and if they elect to do so, the respondents may proceed with an appeal of this decision. If the legal fees and disbursements exceed the remaining balance of the Preserved Proceeds, a portion of the Net Receivership Proceeds may be set aside to cover reasonable fees and disbursements incurred by the respondents.

c) Can a portion of the Net Receivership Proceeds or the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement be used to fund legal fees and disbursements incurred to defend Mr. Nygard in connection with the criminal charges laid against him in Toronto, Ontario?

139 In support of their position that a portion of the Preserved Proceeds and/or the Net Receivership Proceeds may be used to defend the criminal charges against Mr. Nygard, the respondents filed the Greenspan affidavit. Mr. Greenspan describes the charges and his representation of Mr. Nygard as follows:

> 1. I am the lawyer representing Peter Nygard in respect of nine charges that have been brought against him in the City of Toronto. I further act as counsel with respect to the request for Mr. Nygard's extradition to the United States for various charges relating to sex trafficking.
>
> 2. There are six complainants in relation to the Toronto allegations. Three complainants allege both sexual assault and unlawful confinement relating to those occurrences. Three further complainants allege only sexual assault. All of the allegations occurred between 1987 and 2006.
>
> 3. What is common to all the allegations is that the unlawful confinements and/or sexual assaults are alleged to have taken place at 1 Niagara Street, Toronto, the Toronto headquarters of Mr. Nygard's business operations.

140 The Receiver submits that the order sought by the respondents is contrary to *The* Corporations Act C.C.S.M. c. C225 and legal authority. Section 19 of The Corporations Act sets out specific circumstances in which an officer or director of corporation (current or former) may be indemnified. It provides:

> **Indemnification**
>
> 119(1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if
>
> (a) he acted honestly and in good faith with a view to the best interests of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

141 Section 113(2)(e) of The Corporations Act also provides that directors who approve "a payment of an indemnity contrary to section 119 ... are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation."

142 The duty of care of directors and officers is outlined in s. 117 of The Corporations Act and includes a duty to act honestly and in good faith and with a view to the best interests of the corporation; and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

143 The Receiver submits that in accordance with the provisions of *The* Corporations Act, NPL is not permitted to indemnify Mr. Nygard in connection with any legal costs, expenses or charges incurred, however reasonable, to defend criminal charges.

144 The Receiver acknowledges that Mr. Nygard has publically denied all allegations against him and has not been found guilty of any of the criminal charges. There is no question that Mr. Nygard is presumed innocent unless the Crown proves beyond a reasonable doubt that he is guilty of the charges.

145 The Receiver submits that the present officers and directors of NPL may only make payment of an indemnity in respect of Mr. Nygard's personal legal fees incurred to defend him in connection with the criminal charges if:

a) Mr. Nygard was a director and/or officer of NPL at the material time;

b) Mr. Nygard is subject to the criminal charges by virtue of his tenure as a director and/or officer of NPL at the material time;

c) Mr. Nygard reasonably incurred legal costs, charges or expenses as a result of the criminal charges;

d) Mr. Nygard acted honestly and in good faith with a view to the corporations best interests in connection with the alleged conduct or giving rise to the criminal charges; and

e) Mr. Nygard had reasonable grounds for believing the alleged conduct was lawful.

146 NPL submits that because Mr. Nygard is the ultimate owner of NPL, it is in NPL's best interests that Mr. Nygard be acquitted of the criminal charges. If Mr. Nygard is convicted, NPL's assets would likely be used to pay a judgment obtained by anyone who is successful in the prosecution of a civil claim after a successful criminal prosecution against Mr. Nygard. Further, NPL may be added to the civil proceedings and the work done in defence of Mr. Nygard will benefit NPL and NIP. (See Greenspan affidavit at para. 5)

147 As to the application of ss. 113, 117 and 119 of The Corporations Act, NPL submits those sections describe instances when a corporation can pay the legal costs of an officer, director or employee. Mr. Nygard is not currently an officer, director or employee of NPL, so it is not on this basis that NPL submits monies should be paid on his behalf. NPL submits Mr. Nygard was an officer of NPL and his conduct was in accordance with the company's scope for his work. NPL submits it is unaware of any conduct that was not within the scope of his employment or criminal and there is no evidence before this court to the contrary. The Receiver has the onus of establishing that Mr. Nygard did not act honestly and in good faith and it has not met the onus.

148 In the event s. 119 of The Corporations Act is applicable, the respondents referred the court to the leading Manitoba case on the indemnification provisions (Manitoba (Securities Commission) v. Crocus Investments Fund 2007 MBCA 36, 214 Man.R. (2d) 44 (“Crocus”)). In *Crocus*, the Manitoba Court of Appeal applied the test set out by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29

(QL). The respondents referred the court to the three conditions that must exist "in order to receive indemnification for the costs of defending in litigation" at para. 36:

> (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation;
>
> (2) the costs must have been reasonably incurred; and
>
> (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

149 The respondents submit these conditions have been met and there is a presumption that the officer acted honestly and in good faith.

150 Applying the principles noted above I am not satisfied the conditions to indemnify Mr. Nygard for legal costs incurred to defend criminal charges have been met. I fail to see how it is possibly in the best interests of NPL to successfully defend criminal charges of sexual assault and other related offences against a former officer or director or person controlling or directing the corporation. The evidence has not clearly established Mr. Nygard's actual position with NPL and whether he was an officer or director of NPL at the material time. I accept that he was, at the material times when the sexual offences are alleged to have occurred, a person who directed the operations of the Nygard Group of Companies, including NPL or one of its predecessor corporations. In any event, the criminal charges in no way arise as a result of Mr. Nygard performing any duties reasonably expected of an officer, director, directing mind or employee of NPL. The cases relied upon by the respondents deal with officers or directors who were made a party to litigation because they were officers or directors and were performing duties honestly and in good faith.

151 Mr. Nygard is seeking indemnification and priority respecting funds held for the benefit of all of the creditors of the respondents and he has not established that the criminal charges have anything to do with acting as an officer or director of the Debtors. Nor does the evidence satisfy me that he acted honestly and in good faith with a view to promoting the best interests of NPL. I agree that the criminal charges are unproven allegations and Mr. Nygard is innocent unless he is proven guilty beyond a reasonable doubt. However, the allegations simply cannot relate to performing any duties of an officer or director or former officer or director who owes duties to act honestly and in good faith and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

152 The fact that the criminal charges relate to incidents alleged to have occurred at one or more of the properties owned by NPL does not assist the respondents' argument. The location of alleged criminal conduct is not part of the test to seek entitlement to indemnification.

153 The respondents' reference to the civil action is a reference to the Jane Doe proceeding, a class action law suit commenced in the US and referenced in the Receivership Order. NPL is not named as a defendant in the Jane Doe proceeding and I disagree with the submission that NPL's assets will likely be used to satisfy any judgment obtained in that case. Even if I accept that NPL is entitled to the Net Receivership Proceeds, which I do not, the submission advanced is speculative. In light of my ruling in this case, the Net Receivership Proceeds, which includes NPL's assets, will be used to satisfy Common Liabilities of the respondents' creditors in the bankruptcy proceedings. Mr. Nygard has no prior claim or entitlement to any of NPL's assets, including the Preserved Proceeds or the Net Receivership Proceeds.

154 To conclude on the indemnification issues, the respondents' motion to authorize or permit payment of reasonable legal fees and disbursements and professional costs in the receivership or bankruptcy proceedings is granted. The respondents' motion to authorize or permit payment of reasonable legal fees and disbursements from

the Preserved Proceeds or the Net Receivership Proceeds to defend the criminal charges against Mr. Nygard is dismissed.

Costs

155 The Receiver and its counsel submit that the respondents have made serious allegations regarding the Receiver's conduct and submit that in the circumstances, the Receiver should be awarded costs on a substantial indemnity basis or in an amount in excess of the Court of Queen's Bench tariff against the respondents.

156 The Receiver outlines statements made by the respondents under the heading "Misleading/Inaccurate statements and allegations of impropriety" at paras. 98 - 102 of the Second Supplementary Twelfth Report.

157 The Receiver relies on *Kaptor Financial Inc. v. SF Partnership LLP*, 2016 ONSC 6607, [2016] O.J. No. 5612 (QL), as authority for the proposition that the court may award costs on a substantial indemnity basis against a party who had previously been involved in the control of certain debtors where the conduct of a party is reprehensible, scandalous or outrageous. As pointed out by the respondents, the *Kaptor Financial Inc* case involved "... unsubstantiated allegations ... completely unrelated to the relief sought ...", including statements that the relevant trustee in bankruptcy had participated in an improper conspiracy, had deliberately omitted material facts from its reports, and had disregarded generally accepted accounting principles. (See para.6)

158 Reviewing the specific allegations, I have no hesitation finding that the Receiver has carried out its duties as an officer of the court in a responsible manner and the improper conduct alleged by the respondents has not been established.

159 That said, I am not satisfied that the conduct of the respondents is reprehensible, scandalous or outrageous or that the allegations made are the same or similar to the allegations made in the *Kaptor Financial Inc.* case justifying an enhanced award of costs above the costs granted pursuant to the Receivership Order. I would describe the approach taken by the respondents as aggressive and the conduct bordering on inappropriate, but not conduct justifying a further cost award in the circumstances.

160 In accordance with the Receivership Order, all reasonable professional costs of the Receiver and Receiver's counsel have been fully indemnified pursuant to accounts submitted and approved by the court. Those costs have been paid during the course of the receivership from the proceeds of the sale of the Property and will continue to be paid subject to approval of the court. In my view, an additional award of costs against the respondents in favour of the Receiver is not appropriate or required in the circumstances.

Summary of Orders/Declaratory Relief

161 I grant the following orders and/or declaratory relief:

a) Each of the Debtors is declared to be jointly liable for the Common Liabilities of each of the other Debtors, and the Debtors are hereby joint Debtors respecting Common Liabilities;

b) The Common Assets of each of the Debtors are declared to be treated as Common Assets subject to the Common Liabilities;

c) The assets and liabilities of the Debtors are declared to be substantively consolidated for the purpose of addressing the claims of creditors of each of the Debtors;

d) The allocations made by the Receiver respecting receivership costs and the proceeds of sale of the Property are approved;

e) The Receiver is authorized to file assignments in bankruptcy on behalf of the Debtors, other than NPL and NEL;

f) The Receiver is authorized to file applications for bankruptcy orders in this court in relation to the Debtors, NPL and NEL, on a basis that reflects the Common Assets and the Common Liabilities and the substantive consolidation of the estates of the Debtors;

g) The stay of proceedings granted in the Receivership Order is hereby lifted to permit bankruptcy applications to be made and the court directs that, for the purpose of such assignments and applications, the locality of the Debtors shall be Winnipeg, Manitoba;

h) The Receiver is hereby appointed as Trustee in bankruptcy (the "Trustee");

i) The Receiver/Trustee is authorized to apply for an order for procedural and substantive consolidation of the estates of each of the Debtors in bankruptcy for all purposes in the administration of the said estates under the *BIA*;

j) Upon completion of its duties as the Receiver and making the necessary filings in bankruptcy on behalf of the Debtors, the Receiver is hereby directed to pay or transfer the Net Receivership Proceeds to the Trustee for the purposes of administering the consolidated estates in bankruptcy of the Debtors;

k) The Twelfth Report, the Supplementary Twelfth Report and the Second Supplementary Twelfth Report and the conduct and activities of the Receiver, including the NPL Proceeds Preservation Agreement are approved;

l) The accounts of the Receiver and its legal counsel are approved as reasonable and consistent with the standard charges for the services performed;

m) The respondents' motion to authorize or permit payment of the respondents' reasonable legal fees and disbursements and professional costs incurred and to be incurred in the Receivership Proceedings and to be incurred in the bankruptcy proceeding from the Preserved Proceeds and, if necessary, the Net Receivership Proceeds is granted;

n) The respondents' motion to authorize or permit payment of reasonable legal fees and disbursements from the Preserved Proceeds or the Net Receivership Proceeds to defend the criminal charges against Mr. Nygard is dismissed; and

o) The Receiver's request for an additional award of costs against the respondents is dismissed.

Receiver's motion granted; debtors' motion granted in part.

Schedule"A" — (excerpt from Receiver's Twelfth report)

Net Receivership Proceeds

103. Based on the assumptions and considerations, and subject to the limitations of the analysis, described above, the Separate Corporate Analysis yields the following results:

(a) the Net Receivership Proceeds of NIP are estimated to total approximately $1.4 million and Net Receivership Proceeds of NPL are estimated to total approximately $8.5 million;

(b) there are no Net Receivership Proceeds in NI, as the totality of the proceeds realized from the sale of its assets was allocated to expenses, priority claims, court-ordered charges and repayment of Lender Debt; and

(c) an unequal allocation of the repayment of Lender Debt by which all remaining NIP asset realization proceeds are applied to repayment of Lender Debt would increase the Net Receivership Proceeds of NPL to approximately $9.9 million (i.e. all remaining Net Receivership Proceeds would be attributable to NPL), however, any resulting increase in equity in NPL would still be ultimately subject to the intercompany obligations of NEL to NIP (and would accrue to NIP).

104. The Receiver considers the allocations forming the basis of the Separate Corporation Analysis, for the purposes aforesaid, to be fair and equitable, and otherwise consistent with the basis on which the Receiver is to exercise its discretion and the principles on which such allocations are to be made. Below is a chart summarizing the Separate Corporation Analysis:

Nygard Group Separate Corporation Analysis (in 000s) **Operating Entity**	***NIP***	**Inc.**	**NPL**	**Corporate OH**	**TOTAL**
1. Compute Net Receipts And Disbursements by Entity					
Cash on Hand-March 18, 2020	73				73
Receipts					
Accounts Receivable, Real Estate And other Collections	7071	11,825	28,579	7	47,483
Sales Receipts	43,846	6	-	-	43,852
Total Receipts	**50,917**	**11,831**	**28,579**	**7**	**91,334**
Disbursements					
Payroll	(8,118)	(980)	-	(4,647)	(13,745)
Rent	(6,175)	-	-	-	(6,175)
Utilities/Operating Expenses/Other	(2,966)	(256)	(223)	-	(3,446)
Insurance	(312)	(387)	(104)	-	(803)
Postage/Courier/Logistics Providers	(1,128)	(6)	-	-	(1,135)
Asset Protection Services	(89)	(209)	(30)	-	(327)
Chargebacks/Returns/Bank Fees	(502)	(12)	-	(0)	(514)
Consultant Fees	(2,620)	(260)	-	-	(2,880)
Professional Fees	-	-	-	(6,438)	(6,438)
Receivers' Sales Taxes	(0)	-	-	(201)	(201)
Debtors' Sales Taxes	(3,971)	-	-	-	(3,971)
Payment of Landlord Charge	(1,293)	-	(1,293)	-	(2,586)
Total Disbursements	**(27,175)**	**(2,110)**	**(1,650)**	**(11,286)**	**(42,221)**
Excess of Receipts over Disbursements	**23,815**	**9,721**	**26,929**	**(11,279)**	**49,187**
2. Remaining Receivership Expenses				(2,000)	(2,000)
Remaining Cash Outflows (estimate only)					
Excess of Receipts over Disbursements after Remaining Receivership	**23,815**	**9,721**	**26,929**	**(13,279)**	**47,187**
3. Allocation of Corporate Overhead (Note 1)	(7,403)	(1,720)	(4,155)	13,279	-
Corporate Overhead Allocation					
Excess of Receipts over Disbursements after Allocation of Corporate	**16,412**	**8,001**	**22,774**	**-**	**47,187**
4. Payments that Rank in Priority to Secured Claims					
Vacation Pay	(720)				(720)
Excess of Receipts over Disbursements after Priority Payments	**15,692**	**8,001**	**22,774**	-	**46,467**
5. Repayment of Debt by Borrowers					
Nygard Inc. Debt Repayment as Borrower	-	(8,001)	-	-	(8,001)
Excess of Receipts over Disbursements after Repayment of Debt by	**15,692**	-	**22,774**	-	**38,466**

6. Payment of Remaining Debt by Guarantors (Note 2)					
Receiver's Borrowings	-	-	-	30,082	30,082
Distribution to Lenders	(14,192)		(14,192)	(30,082)	(58,465)
Excess of Receipts over Disbursements after Repayment of Debt by	**1,500**	-	**8,582**	-	**10,083**
7. Payments of Landlord's Charge (Note 3)					
Landlord Charge Payment	(100)		(100)		(200)
Cash Available for Unsecured Creditors (Note 4)	**1,400**		**8,482**		**9,883**

Allocation of Corporate

Overhead (in 000's)

	NIP	**NI**	**NPL**	**Total**
Gross Proceeds	50,917	11,831	28,579	91,328
Proration of Gross Proceeds	56%	13%	31%	100%
Corporate Overhead	13,279	13,279	13,279	
Allocation of Corporate Overhead	7,403.40	1,720.26	4,155.42	13,279

Debt Repayment Summary (in 000's)	
Total Amount Distributed to lender	66,466
Repayment of Receiver's Borrowings	(30,082)
Repayment of Lender Debt	36,384
Repayment of Lender Debt by Borrower (NI)	(8,001)
Balance of Lender Debt	28,383
Equal Contribution by NIP/ NPL	14,192

Note 3: Disputed Landlord Claims

The Disputed Landlord Claims have not been adjudicated by the Receiver. Based on the Debtors' books and records, the aggregate amount owing in respect Unpaid Rent for the 14 leases in which landlords filed Notices of Dispute totals approximately $120,000. The amount included in the above chart ($200,000) is an estimate of the amounts remaining to be paid, pursuant to the Landlords' Charge, based on the Receiver's preliminary assessment of the Disputed Landlord Claims. The actual amount paid in respect of the Disputed Landlord Claims may, however, differ (and the difference may be material) from the Receiver's preliminary assessment.

Note 4: Cash Available for Unsecured Creditors

On a separate corporations basis, and subject to the qualifications set out above as to the limitations of the allocation process described herein, the Separate Corporation Analysis results in approximately $1.4 million being available to NIP creditors, and approximately $8.5 million being available to NPL and its creditors, prior to applying the analysis set out below.

Allocation of Corporate Overhead

(000's) **NIP NI NPL Total**

Gross Proceeds 50,917 11,831 28,579 91,328

Proration of Gross Proceeds 56% 13% 31% 100%

Corporate Overhead 13,279 13,279 13,279

Allocation of Corporate Overhead 7,403.40 1,720.26 4,155.42 13,279

Debt Repayment Summary*000's*)

Total Amount Distributed to Lender 66,466

Repayment of Receiver's Borrowings (30,082)

Repayment of Lender Debt 36,384

Repayment of Lender Debt by Borrower (NI) (8,001)

Balance of Lender Debt 28,383

Equal Contribution by NIP/ NPL 14,192

Implications of Intercompany Balances

105. Ultimately, at issue is the extent to which "direct" (as opposed to consolidated) creditors and stakeholders of NIP, NI and NPL (each of the Debtors that had assets) have access to Net Receivership Proceeds and other amounts against which they can attempt to recover debts outstanding to them.

106. Intercompany balances represent either liabilities or assets, affecting the scope of the debts outstanding and the prospects for recovery. Accordingly, to fairly estimate the extent to which the unconsolidated creditors and stakeholders of each of NIP, NI and NPL are to benefit, it is necessary to include, on a separate corporation analysis basis, an assessment of the relevant intercompany balances.

107. In this case, determination of the relevant intercompany balances depends on reliance upon Nygard Group financial records and statements for historical intercompany balances as at the Appointment Date, and the accounting treatment to be applied to advances made by the Lenders and repayments by NIP, NI and NPL, under the Credit Agreement.

Relevant Historical Intercompany Balances

108. As a caution, the Receiver has previously questioned the reliability of the Debtors' books and records as part of the Ninth Reports, and the accounting treatment applied by Nygard Group staff to intercompany transactions.

109. Among others, at paragraph 111 of its Ninth Report, the Receiver commented: In the Receiver's view, taking into consideration its concerns regarding the reliability of the Debtor's books and records, and the accounting treatment applied by Nygard staff to certain material intercompany transactions, it would be difficult for an independent financial advisor to provide unqualified advice and guidance regarding the Debtors' financial circumstances (either collectively or individually) or endeavour to "separate out" the financial relationships among the complex web of related entities that comprise the Nygard Group and the broader Nygard Organization. and at paragraph 117 of its Ninth Report, the Receiver commented: On a general note, it has been described to the Receiver that, because the Nygard Group (and other non-Debtor entities) operated from the perspective of the accounting team as whole rather than individually, the entry of intercompany transactions was, at times, made at the direction of certain employees or executives without regard to the provision of normal accounting rules or

usual backup for such entries. This calls into question the intercompany balances generally. In the Receiver's view, if the Nygard Group entities are to be treated separately for creditor purposes, rather than on a consolidated basis, even a complex accounting review may not be sufficient to properly and fairly sort out intercompany balances.

110. In its Ninth Report at paragraphs 113 and 114, the Receiver described the incorrect accounting treatment applied by the Nygard Group staff to the Credit Agreement advances and, consequently, to the proceeds generated from the sales of the Notre Dame Property and the Toronto Property. The Receiver's opinion regarding the incorrect accounting treatment applied to these transactions by the Nygard Group was endorsed by the Manitoba Court. In his reasons issued November 19, 2020, Mr. Justice Edmond found that: 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 NPL property sales as repayment of NIP's debt to the Lenders and result in NIP owing approximately $17 million to NPL. 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. (at page T6, lines 27-33 and 38-41 and page T7, lines 1-4)

111. These were material transactions — the Credit Agreement may have been the most material recent Nygard Group financial transaction, both from a business and accounting perspective, and the fact that advances under the Credit Agreement and repayments were improperly accounted for supports the Receiver's concerns as to the reliability generally of the Debtors' books and records. It is also concerning that the accounting treatment applied to these matters appears to reflect a bias to simply recording obligations as obligations of NIP rather than a dedication to accounting rigour.

112. Having stated such a caution, as at the Appointment Date, the Debtors' books and records disclose the following intercompany balances relevant to the Separate Corporation Analysis:

(a) NPL was indebted to NIP in the amount of approximately $2.5 million;

(b) NEL (100% owner of NPL) was indebted to NIP in the amount of approximately $18.1 million; and

(c) NPL was indebted to 887 (one of the partners of NIP) in the amount of approximately $200,000.

These amounts generally accord with disclosure made by the Debtors in the Perfection Certificate dated December 30, 2019 provided to the Lenders in connection with the Credit Agreement, and are the basis on which AGI prepared its First Pre-Filing Report dated November 5, 2020 on behalf of NPL. Accordingly, for purposes (as among NIP, NEL and NPL) relevant to the Separate Corporation Analysis, the intercompany balances described in (a), (b) and (c) in this paragraph are used and referenced as the historical intercompany balances.

Accounting Treatment of Credit Agreement Transactions

113. NPL previously argued that:

(a) repayments of Lender Debt from the proceeds of realization of NPL assets should be treated as payments made pursuant to NPL's guarantee, resulting in rights of subrogation in favour of NPL;

(b) advances made by the Lenders under the Credit Agreement were advances to NIP as a "Borrower"; and

(c) alternatively, if Credit Agreement advances were made to the US Debtors as Borrowers and were thereafter advanced by them to NIP, repayments of Lender Debt from proceeds realized from NIP assets should be treated as repayment of intercompany obligations to the US Debtors and not as payments made pursuant to NIP's guarantee, such that rights of subrogation did not arise in favour of NIP.

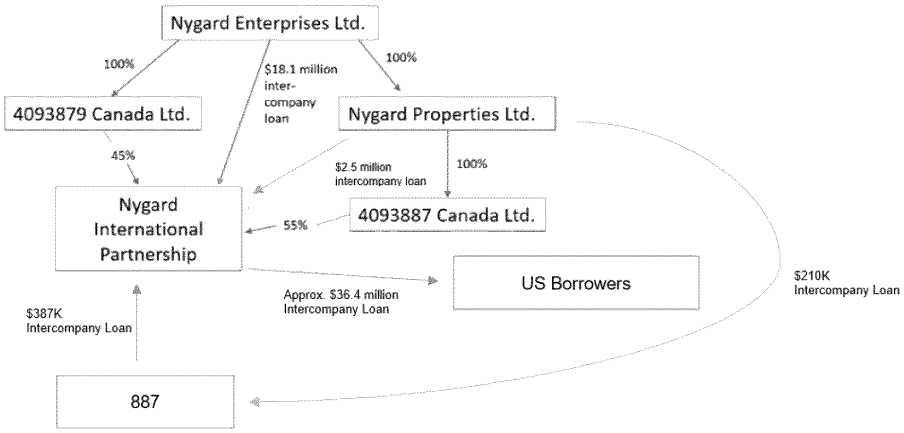
114. The Manitoba Court did not accept NPL's arguments described in subparagraphs 113 (b) and (c) above. In his reasons issued November 19, 2020, Mr. Justice Edmond held that: NPL is a limited recourse guarantor pursuant to the Credit Agreement. NIP, the entity that carried on the fashion clothing business 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. (at page T6, lines 8-13)

115. Accordingly, repayments of Lender Debt from proceeds realized from NPL assets do not affect the historical intercompany debts of NPL to NIP and of NEL to NIP, as alleged in past by NPL, and do not create subrogated rights in favour of NPL as against NIP and its assets. Instead, the correct accounting treatment of Credit Agreement transactions appears to be as follows:

> (a) the Borrowers caused the Lenders to initially advance funds under the Credit Agreement variously to Bank of Montreal, a title insurance provider, various professional firms and NIP, and thereafter on a revolving basis to NIP, to the repay a Bank of Montreal credit facility, pay the costs of the Credit Agreement transaction and fund ongoing expenses. For the purposes of this Separate Corporation Analysis, the Receiver has treated the flow of funds directed by the Borrowers as creating intercompany debts of NIP to the Borrowers collectively in the amount of the Lender Debt (approximately $36 million);
>
> (b) NIP and NPL, as guarantors, made equal payments to the Lenders to repay the balance of the Credit Facility, in the amounts of approximately $14.2 million;
>
> (c) both NIP and NPL are equally subrogated to the rights of the Lenders, as against the Borrowers, in the full amounts of their guarantee payments (calculated by the Receiver to be approximately $14.2 million each) and are equally subrogated to the rights of the Lender, as against Debtor co-guarantors 4093887 Canada Ltd., 4093879 Canada Ltd. and NEL for equal contributions (in the amounts of approximately $2.85 million each) to repayment of the Lender Debt attributable to guarantors, resulting in subrogated claims (but not intercompany transactions) accordingly.

116. Based on the equal allocation of the repayment of the remaining Lender Debt to both NIP and NPL, neither NIP nor NPL has subrogated rights as against one another. In addition, the subrogated rights and claims of NIP and NPL as against the Borrowers (i.e. the US Debtors) and other co-guarantors, are illusory, as none of the Borrowers or co-guarantors has assets. Accordingly, while much has been argued in respect of subrogation and rights of guarantors arising under *The* Mercantile Law Amendment Act (Manitoba), there is no practical significance to such rights in this case.

117. Illustrated below is a snapshot of the corporate structure and intercompany obligations among the Canadian Debtors after applying the correct accounting treatment to the funds advanced pursuant to the Credit Facility, including booking an intercompany payable as between NIP and one or more of the US Debtors in respect of the funds advanced pursuant to the Credit Agreement:



Graphic 1

The Mercantile Law Amendment Act (Manitoba)

118. In considering the matter of subrogation, the Receiver notes that the Credit Agreement is governed by the law of the State of New York, and the security agreements provided by the Canadian Debtors to the Lenders are generally governed by the law of the Province of Ontario. NPL has argued that, nevertheless, it is *The* Mercantile Law Amendment Act (Manitoba) that governs subrogation issues. For the purposes of this Separate Corporation Analysis, and given that, in the Chapter 15 Proceedings, the US Court has determined that Manitoba is the center of main interest, the Receiver has reached its conclusions on matters of subrogation with reference to *The* Mercantile Law Amendment Act (Manitoba).

119. Based on advice from TDS, the Receiver understands that, under *The* Mercantile Law Amendment Act (Manitoba), on payment of a principal obligor's debt to a lender, a surety (or guarantor) becomes subrogated to the rights of the creditor as against the principal obligor ("borrower") and any co-sureties. A guarantor that has paid all or part of a borrower's debt, can recover the full amount of its payment from the borrower, however, where the right to contribution from other co-surety arises, it is limited to contribution by the cosurety to that proportion of the total debt for which the co-surety is "justly liable".

120. With respect to being "justly liable", the general principle is that co-sureties are to contribute equally towards the satisfaction of a guaranteed debt unless there is an agreement between the co-sureties that would supersede such principle. In practice, where a co-surety pays more than its proportionate share of the guaranteed debt, the co-surety is entitled to contribution from the other co-sureties to equalize the amounts paid among the co-sureties. The Receiver further understands that, in circumstances where there are multiple co-sureties, each co-surety's obligation to "contribute" towards the equalization of a cosurety's disproportionate payment of a guaranteed debt should not exceed its fractional (i.e. number of co-sureties) obligation thereunder.

121. Pursuant to the Credit Agreement, each of the five (5) Canadian Debtors are guarantors (NEL and NPL are limited recourse guarantors) of amounts due by the Borrowers to the Lenders. As such, each guarantor's obligation to "contribute" towards the equalization of a co-guarantor's disproportionate payment of the Lenders claim, should not exceed twenty percent (20%) of the total amount paid by guarantors, and the contributions by NEL and NPL cannot exceed their recourse limit (i.e. USD 20 million plus costs). For example, if, as in this case, the total amount paid by NIP and NPL as Guarantors toward the repayment of the Credit Facility totaled approximately $14.2 million each, the maximum claim for "contribution", by each of NIP and NPL, against each non-paying guarantor would be 1/5th of that amount, or approximately $2.85 million.

122. Since the Receiver has fairly allocated the guarantee repayments equally to NIP and NPL, in amounts in excess of their respective "just liability" to other sureties, neither NIP nor NPL can seek contribution from the

other under *The* Mercantile Amendment Act (Manitoba). Since none of the remaining borrowers or co-sureties have assets, there are, as a practical matter, no subrogated rights to enforce.

123. The Receiver has noted in past that the Credit Agreement provides that each guarantor guarantees Credit Agreement Obligations "as a primary obligor and not merely as a surety." On the basis of the equal allocation of repayment of the balance of the Lender Debt to NIP and NPL, the designation of NIP and NPL as "primary obligors" does not affect the outcome of the analysis, as both NIP and NPL would have equal rights of recovery against each other if both were treated as primary obligors.

Claims against NPL

124. Based on the assumptions and considerations, and subject to the limitations of the analysis described above, and on the evidence adduced by NPL earlier in these Receivership Proceedings as to its assets, it appears that the only remaining assets of NPL are the Net Receivership Proceeds of NPL totaling approximately $8.5 million and the Preserved Proceeds (estimated at $0.6 million) referred to in paragraph 81 of this Twelfth Report, totaling approximately $9.1 million.

125. As noted above, in general, NPL has argued that it has no third party creditors, however, it is apparent that a significant tax liability has accrued to NPL in respect of the sales of its properties in the course of these proceedings, and other tax liabilities may accrue in relation to dispositions of the NPL Falcon Lake Property and the Fieldstone Property. The Receiver presently estimates those tax liabilities (other than in relation to the dispositions of the NPL Falcon Lake Property and the Fieldstone Property) to be in the range of approximately $5 million. NPL may also have other third party creditor obligations.

126. In addition, as discussed above, on the basis of the Debtors' financial information, NPL is indebted to NIP in the amount of approximately $2.5 million, and NEL, which is NPL's parent corporation, is indebted to NIP in the amount of approximately $18.1 million.

127. In the result, after repayment of any known NPL "direct" liabilities, any funds remaining in NPL (whether accruing from the sale of Property or arising from other NPL assets) would ultimately be subject to NIP recovering same by means of enforcing the $18.1 million intercompany debt owing by NEL to NIP.

128. Below is a chart summarizing claims in relation to NPL, NI, NIP and others, indicating that the outcome is that all remaining assets of NPL are either subject to claims of direct creditors of NPL, or subject to the enforcement of NIP's intercompany claim against NEL:

Note 1:

Treatment of Remaining Cash Available for Unsecured Creditors (in 000's)	**NIP**	**Inc.**	**NPL**	**Corporate OH**	**NEL**	**337**	**Total**
Cash Available for Unsecured Creditors in Receiver's Account	1,400	-	8,482	-	-	-	9,883
Preserved Proceeds	-	-	640	-	-	-	640
Recoveries from other NPL Assets	-	-	TBD	-	-	-	-
Total Cash Available for Unsecured Creditors	**1,400**	**-**	**9,122**	**-**	**-**	**-**	**10,523**
1. Settlement of NPL Liabilities (Note 1)							
NPL Tax Liability (estimate only)	-	-	(4,978)	-	-	-	(4,978)
Settlement of NPL debt owing to NIP	2,462	-	(2,462)	-	-	-	-
Settlement of NPL debt owing to 887	-	-	(210)	-	-	210	-

Settlement of 887 debt owing to NIP	210	-	-	-	-	(210)	-
Other NPL Debts	-	-	TBD	-	-	-	-
Excess of Receipts over Disbursements after Settlement of NPL	**4,072**	**-**	**1,472**	**-**	**-**	**-**	**5,545**
2. Distribution to NEL by NPL (Note 2)							
NPL Dividend to NEL	-	-	(1,472)	-	1,475	-	-
Partial Settlement NEL debt owing to NIP	1,472	-	-	-	(1,472)	-	-
Cash Available to NIP	**5,544**	**-**	**-**	**-**	**-**	**-**	**5,544**

Note 1: Settlement of NPL Debts

As noted, based on the Receiver's preliminary assessment, NPL has a tax liability resulting from its real property sales estimated at approximately $5 million. The Receiver is in the process of assembling and reviewing the information necessary to complete of the Debtors' outstanding tax filings. As per the Debtors' books and records, NPL owes NIP approximately $2.5 million. Intercompany loans are also recorded as between NPL and 887 in the amount of approximately $210,000 and 887 and NIP in the amount of approximately $387,000. Consequently, upon repayment of NPL's debt to 887, these monies would ultimately accrue to NIP.

The Debtors have previously presented information to the Manitoba Court that, except for Canada Revenue Agency (the **"CRA"**), NPL has no arm's length creditors. In the Receiver's view (and as described later in this Twelfth Report), NPL historically incurred limited direct obligations, as most (if not all) of its operating expenses were paid by NIP. After the Appointment Date, with NIP no longer able to pay NPL's expenses, NPL has been incurring obligations directly. The Receiver's purpose in entering into the NPL Proceeds Preservation Agreement was to preserve funds for payment of NPL creditor claims, including the claim of NIP, based on the Receiver's view of the intercompany accounts, and more generally for creditors of the "consolidated" Debtors, should a court order that the Debtors be consolidated for creditor payment or bankruptcy purposes (as discussed later in this Twelfth Report).

Note 2. Distribution to NEL by NPL On the basis of the assumptions and considerations described above in this Twelfth Report, following repayment of the items in Note 1, the remaining funds in NPL would effectively be available to its shareholder, NEL and subject to enforcement by NIP of the debt owing to it by NEL (and certain other minor creditors of NEL).

Based on the above analysis, NPL is estimated to have approximately $1.5 million remaining after payment of known direct liabilities described in Note 1. Application of these monies to the intercompany amounts owing from NEL to NIP ($18.1 million) would reduce the obligation owing as between NEL and NIP to approximately $16.6 million. The additional amounts represented by the Preserved Proceeds would contribute to reduction of NEL's intercompany obligation to NIP, but would be insufficient to fully satisfy that obligation.

129. On a separate corporation basis, NPL may have other obligations to creditors arising from the conduct of the Nygard Group business. For example, vendors regularly performed work or supplied goods for the benefit of NPL and its properties, but contracted directly with NIP in respect of such services. Such vendors, if unpaid, may have claims against NPL in relation to the provision of these goods and services. Further, as more fully described later in this Twelfth Report, the Receiver understands that NIP "employed" various individuals that effectively worked (both full-time and part-time) for NPL to manage and maintain its real property assets, including the Falcon Lake Cottage, the Notre Dame Property, the Broadway Property, the Inkster Property and the Toronto Property. NPL

may be jointly responsible for outstanding obligations to such employees, on a "common employer" basis. Further, as noted above, on a more comprehensive allocation review, NPL may be determined to be responsible for a greater proportion of the expenses and disbursements of the Receiver.

130. In consideration of the above, the Receiver is not purporting, by this Separate Corporate Analysis to determine the solvency or insolvency of NPL.

End of Document

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164 O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

IN THE MATTER OF THE PROPOSALS OFCONFECTIONATELY YOURS, INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC., CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

Table of Authorities

Cases considered by *Borins J.A.*:

Anvil Range Mining Corp., Re, 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Atkinson Estate, Re (1951), [1952] O.R. 685, [1952] 3 D.L.R. 609 (Ont. C.A.) — considered

Atkinson Estate, Re, *(*sub nom. *National Trust Co. v. Public Trustee)* [1953] 2 S.C.R. 41, [1953] 3 D.L.R. 497, 1953 CarswellOnt 136 (S.C.C.) — referred to

Avery v. Avery, [1954] O.W.N. 364, 1954 CarswellOnt 200 (Ont. H.C.) — referred to
Bank of Montreal v. Nican Trading Co., 43 B.C.L.R. (2d) 315, 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397 (B.C. C.A.) — referred to
Belyea v. Federal Business Development Bank, 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed
BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered
Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to
Chartrand v. De la Ronde, 1999 CarswellMan 248, 9 C.B.R. (4th) 20, [1999] 9 W.W.R. 631, 139 Man. R. (2d) 36 (Man. Q.B.) — considered
Cohen v. Kealey & Blaney, 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 376 (Ont. C.A.) — referred to
Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — considered
Ferguson v. Imax Systems Corp., 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) — referred to
Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd., 46 C.B.R. (N.S.) 117, 1983 CarswellNS 44 (N.S. T.D.) — referred to
Hermanns v. Ingle, 68 C.B.R. (N.S.) 15, 1988 CarswellOnt 138 (Ont. Assess. O.) — referred to
Hoskinson, Re, 22 C.B.R. (N.S.) 127, 1976 CarswellOnt 53 (Ont. S.C.) — referred to
Ibar Developments Ltd. v. Mount Citadel Ltd., 26 C.B.R. (N.S.) 17, 1978 CarswellOnt 150 (Ont. H.C.) — referred to
In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch), 45 O.A.C. 241 at 247, 1991 CarswellOnt 830 (Ont. Div. Ct.) — referred to
MacPherson (Trustee of) v. Ritz Management Inc., 1992 CarswellOnt 3213 (Ont. Gen. Div.) — referred to
Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp., 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered
Murano v. Bank of Montreal, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — considered
Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc., 40 C.P.C. (2d) 280, 1989 CarswellOnt 464 (Ont. H.C.) — referred to
Prairie Palace Motel Ltd. v. Carlson, 35 C.B.R. (N.S.) 312, 1980 CarswellSask 25 (Sask. Q.B.) — considered
R. v. S. (R.D.), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed
Silver v. Kalen, 52 C.B.R. (N.S.) 320, 1984 CarswellOnt 165 (Ont. H.C.) — referred to
Toronto Dominion Bank v. Park Foods Ltd., 13 C.P.C. (2d) 302, 62 C.B.R. (N.S.) 68, 77 N.S.R. (2d) 202, 191 A.P.R. 202, 1986 CarswellNS 49 (N.S. T.D.) — referred to
Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd., 19 C.B.R. (N.S.) 252, 1974 CarswellOnt 73 (Ont. S.C.) — referred to
West Toronto Stereo Centre Ltd., Re, 19 C.B.R. (N.S.) 306, 1975 CarswellOnt 73 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3
s. 21(2) — referred to
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 39(2) — referred to
Trustee Act, R.S.O. 1990, c. T.23

s. 61(1) — referred to

s. 61(3) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.02(1) — considered

R. 57.01(3) — referred to

R. 74.17(1)(i) [en. O. Reg. 484/94] — considered

R. 74.18(1)(a) [en. O. Reg. 484/94] — considered

R. 74.18(9) [en. O. Reg. 484/94] — considered

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

***Borins J.A.*:**

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately $24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

> **THIS COURT ORDERS** that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately $6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the

companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from $175 to $550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of $1,080,874.93, inclusive of GST.
- legal fees of Goodmans of $209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of $92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of $2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

(1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;

(2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and

(3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted

to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

> Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

> As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to

be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

> Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.
>
> [There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

> (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.
>
> (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
>
> (3) The receivership was difficult and "rather unique".
>
> (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
>
> (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.
>
> (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.
>
> (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he empahsized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

> While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

> [An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

> I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.

• the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.

• in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".

• Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.

• the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the

presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

> . . . the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). [1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit." [2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v.*

Ontario (Director, Laboratory Services Branch), [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, *e.g.*, *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, *e.g.*, *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bktcy.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

> In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, *e.g.*, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

> Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

> In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but,

rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, *e.g.*, *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party

to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded form any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

(3) The remuneration claimed by the receiver and its solicitor

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

***Catzman J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.