QBG 1337 of 2020 - JCS

Bank of Montreal v Tyler Smith et al

James P. Kroczynski	for Richardson Pioneer Limited
David G. Gerecke, Q.C., Wuraola (Wura) Dasylva, Jacey Safnuk	for Bank of Montreal
Jeffrey M. Lee, Q,C., Paul D. Olfert	for Deloitte Restructuring, Receiver of Tyler Smith, Pamela Smith, Smith Northern Ranching and 101197829 Saskatchewan Ltd.
Peter V. Abrametz	for Tyler and Pamela Smith
Janine L. Lavoie-Harding, David Ukrainetz	for Farm Credit Corporation
Nicole C. Krupski	for John Deere Financial Inc.
Donald J. Klaassen	for Department of Justice (Canada)

FIAT - May 31, 2021 - MESCHISHNICK J.

---

[1] A number of matters came before me for review and consideration at the hearing on May 11, 2021. They arose out of the proposal to order a distribution to the Bank of Montreal [BMO] and a discharge of the Receiver. That application engaged a number of issues:

a. What amount from the proceeds of the sale of certain lands, as defined below, should be distributed to Farm Credit Corporation [FCC];

b. Was Richardson Pioneer Limited [Richardson] entitled to a marshalling of personal property ie proceeds of the sale of grain before a distribution could be made to BMO which in turn raised the question of whether Richardson had a perfected security interest in the grain;

c. Should the Receiver be discharged when:

   i. There remained to be realized a payment on the sale of grain to Richardson of approximately $500,000 which depended on the Receiver successfully defending an appeal of a judgment of this court; and

ii. When it had not been determined with any certainty if there was any realizable non-exempt equity in the equipment owned or leased by the parties in receivership [collectively "Debtors"].

Payment to FCC

[2] This issue arises because of my determination that the net equity in the land owned by Pamela and Tyler Smith [Smith's] was an asset within the definition of Property in the Receivership Order made by this court December 1, 2020. Entitlement to that equity would of course require consideration of the claims of secured creditors to that equity.

[3] It is convenient to define certain terms:

a. "PA Lands" refers to three quarter sections of land sold by the Smith's in December of 2020;

b. "Duck Lake Lands" refers to four quarters sections of land sold by the Smith's in March of 2021 for $700,000.

c. "2007 Mortgage" refers to a mortgage granted by the Smith's to FCC in December of 2007 having a principle amount of $150,500 which was registered against the Duck Lake Lands, the SE-20-45-03-W3 [SE 20] and the SW-20-45-03-W3 [SW 20];

d. "2011 Mortgage" refers to a mortgage granted by the Smith's to FCC in 2011 having a principle amount of $400,000 which was registered against SW 20;

e. "2016 Mortgage" refers to a mortgage granted by the Smith's to FCC in 2016 having a principle amount of $360,000 which was registered against the PA Lands;

f. "2018 Mortgage" refers to a mortgage granted by the Smith's to FCC in April of 2018 having a principle sum of $350,000 which was registered against both the PA Lands and the Duck Lake Lands.

[4] Net proceeds of the sale of the PA Lands in the amount of $618,512.41 were paid to FCC to totally discharge the 2016 Mortgage and to discharge the 2018 Mortgage from those lands. The 2018 Mortgage remained registered against the Duck Lake Lands.

[5] The matter of the disposition of the proceeds of the sale of the Duck Lake Lands came before me prior to the completion of that sale. FCC took the position that it was entitled to collect all of those sale proceeds (all amounts include principal, interest and fees):

a. The amount of the unpaid advance made in conjunction with the granting of the 2007 Mortgage FCC said that amount at March 18, 2021 was $175,050.33;

b. The amount of the unpaid advance made in conjunction with the granting of the 2011 Mortgage FCC said that amount at March 18, 2021 was $292,665.48; and

c. The remaining amount owing under an agreement with the Smith's [Repayment Agreement] where FCC agreed to forbear enforcement of its creditor rights if certain payments were made on stipulated dates and on the condition that the 2018 Mortgage was granted to secure those payments. FCC said the amount owing at March 18, 2021 was $128,968.62.

[6] At the time of the sale of the Duck Lake Lands FCC said, then, that the total owing on all loans advanced to the Debtors was $597,414.65.

[7] Proceeds from the sale of the Duck Lake Lands were partially distributed with the consent of the parties. A payment of $305,209.97 was made to FCC. The Smith's lawyer holds $337,754.82 of those sale proceeds. It is entitlement to these funds that is in issue.

[8] The consent order authorizing the partial payment to FCC along with the payment of other closing costs and a retainer to the Debtor's lawyer was made to facilitate and not jeopardize the closing of the sale of the Duck Lake Lands. The sale had a specified closing date and the vendors needed to be able to ensure the delivery of clear title which meant that in order to accept the sale proceeds they had to be sure they could discharge of the 2018 Mortgage. It was not the intention of that order to open FCC to an argument that the discharge would prevent it from continuing to claim that the 2018 Mortgage registered against the Duck Lake Lands secured all outstanding loans to the Debtors.

[9] FCC argues it is entitled to collect the amounts set out in paragraph 6 out of the proceeds of the sale of the Duck Lake Lands. In support of its arguments it relies on the terms of the mortgages and certain provisions of *The Land Titles Act*, 2000, SS 2000, c L-5.1.

[10] It is common ground that each of mortgages in issue contain a prescribed interest rate and the following terms:

> **1. DEFINITIONS**
>
> ...
>
> **"Loan Agreement"** means any Promissory Note, Loan Approval and Acceptance, Loan or Credit Agreement, Guarantee, Covenant, Indemnity or any similar agreement evidencing a Loan between You and Us to be secured by this Mortgage. It includes any Guarantee signed by You guaranteeing the repayment of a Loan made by Us to a third party, which contingent indebtedness under the Guarantee is secured by this Mortgage.
>
> **"Loan Amount"** means the outstanding balance of any Loan or Guarantee after demand or of any draw under any Loan. This balance could include unpaid principal, defaulted payments, interest on defaulted payments, Other Charges and interest on Other Charges.
>
> **"Loan"** means all loans made by Us to You from time to time and secured by this Mortgage, including the Loan made at the time this Mortgage is signed, and all loans which We have made to others which You have guaranteed or covenanted to pay to Us or for which You have otherwise indemnified Us, and which are secured by this Mortgage. Loans may be agreed to in Loan Agreements. The Specific Mortgage Terms attached set out the maximum Principal Amount of the Loan and the maximum interest rate We will charge You on the Loan.
>
> ...
>
> **2. WHAT THIS MORTAGE DOES**
>
> By signing the Specific Mortgage Terms attached You acknowledge that You are indebted to Us or may become indebted to Us and agree to repay the Principal Sum or the Loan Amount outstanding with interest. You also mortgage all of Your estate and interest in the Property to Us, as additional and collateral security for the repayment of all the Loan Amounts up to the Principal Sum, plus interest and Other Charges. You also represent to Us that Your Loan and all related Loan Agreements have been entered into for primarily business purposes. [Emphasis Added]

[11] The provisions of the *Land Titles Act* relied on by FCC are:

> Priority
> 27(1) Transfers or interests that are registered with respect to or affecting the same title or interest have priority, the one over the other,

according to the time assigned to them at the land titles registry, and not according to:

(a) the date of execution of the instrument;

(b) the date of execution of the application;

(c) the time of submission of the application to the land titles registry; or

(d) the order in which they appear on title

(2) The registration of an interest based on a mortgage for a specific principal sum has priority in accordance with subsection (1) for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that the advances and obligations are made or incurred after the registration of any other interest.

(3) The registration of an interest based on a mortgage that provides for readvances of credit up to a specific principal sum has priority in accordance with subsection (1) for all advances, readvances and obligations secured pursuant to the terms of the mortgage notwithstanding that:

(a) the advances, readvances and obligations are made or incurred after the registration of any other interest; and

(b) at any time during the term of the mortgage there may not be any outstanding advances, readvances or obligations to be secured.

(4) Subsections (2) and (3) do not affect any right acquired pursuant to *The Builders' Lien Act* or *The Personal Property Security Act, 1993*.
...

[12] FCC has also drawn to my attention some important mortgage law principles citing *Farm Credit Corp. v Nelson* (1993), 6 WWR 518, (Sask QB) where Justice Baynton said:

20 In considering the authorities cited by counsel, it is essential to keep in mind that mortgages are now creatures of statute. Substantive mortgage law is no longer found primarily in the common law, but in the provisions of the legislation that has been enacted in each separate jurisdiction. This is true not only for the current mortgage law in England, but as well for the current mortgage law in Canada. As property and civil rights in Canada are a provincial matter, each province has enacted its own substantive law respecting mortgages,

> and each has its own land titles and registration system. Because of this legislative diversity, a court decision in one jurisdiction is not necessarily an authority respecting a mortgage issue in another jurisdiction.
>
> 21 Even the basic legal principles of common law mortgages apply to a lesser extent to some jurisdictions than to others. The concepts and principles respecting land and mortgages that had been developed over centuries through the common law in England, had a significant impact on the statutes that were subsequently enacted in the 19th century to govern land registration and mortgage transactions. Many of these common law concepts and principles inherent in the early English legislation were incorporated in varying degrees into the legislation of several Canadian provinces. For example, both Ontario and British Columbia "imported" into their legislation the concept (albeit a notional one) that a mortgage involved the conveyance of the land and a redemption involved the reconveyance of the land.

[13] Justice Baynton also reviewed the issue of the proper approach to the interpretation of mortgage provisions in this province:

> 43 A statutory mortgage under the Torrens system should be viewed not as a common law mortgage in statutory clothing, but as a new statutory instrument created by the legislation. Victor DiCastri, *Thom's Canadian Torrens System* (2nd ed.), at p. 491 puts it this way in referring to the Manitoba case of *Smith v. National Trust Co.* (1912), 1 W.W.R. 1122:
>
> > The rights and powers of a mortgagee under the Torrens system were reviewed In detail by the Supreme Court of Canada in *Smith v. National Trust Co.* .. The majority opinion viewed the statutory mortgage not as a common-law mortgage in statutory clothing but as a new statutory instrument created by and primarily interpreted by *The Real Property Act*; in approaching the question of whether or not any particular right or power is enforceable or exercisable under such a statutory mortgage *the rule of interpretation is not first to consider the same right or power under a common-law mortgage*, and then to see if it is effected or forbidden by the Act as suggested in the dissenting judgment of Anglin, J. [at p. 665], *but rather to look at the Act to see whether the right or power is given* either by express words or by implication, *paying particular attention to the "essential difference" between the common law and statutory mortgage*. If the statute does not expressly or by implication give the right or power then it does not exist. [emphasis added; footnotes omitted.]
>
> Duff J. (as he then was) at p. 641 [45 S.C.R. 618] sums it up in this fashion:

> ... it is a question to be determined upon an examination of the statute as a whole, how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.
>
> 44 The comment of McGuire, C.J. in *Colonial Investment & Loan Co. v. King* (1902), 5 Terr. L.R. 371 at 379-80, is germane as well to this issue:
>
> > But under our Land Titles Act the mortgage does not operate as a transfer of title, but only as security. The mortgagor remains the owner of the legal estate. The mortgagee merely has a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself. Upon getting a final order vesting the title in him he can obtain from the registrar of land titles a certificate which gives him an absolute title freed from all claim by the mortgagor. Under these circumstances *one must be careful when endeavouring to apply to mortgages here the rules and principles laid down, say in England or Ontario, as governing the rights of parties to a mortgage there.* [emphasis added]
>
> 45 Because all registered mortgages under Saskatchewan law are legal mortgages, they ...must be interpreted keeping in mind this fundamental legal distinction between Saskatchewan mortgages and common law mortgages or statutory mortgages in jurisdictions that have incorporated these common law concepts in their legislation.

[14] FCC argues that there is no ambiguity in the terms of the mortgages. Those terms provide that all "Loans" made from "time to time" are secured by the mortgages. It says that the right to take mortgage security for all loans made from time to time is expressly or by implication found in s. 27(3) of the *Land Titles Act* when it recognizes that a mortgage can not only secure "... advances, readvances and obligations secured pursuant to the terms of the mortgage ..." but will also have priority for those amounts notwithstanding that they may be made after the registration of another interest or that at some point in time after the registration of the mortgage there may not have been any amount outstanding.

[15] The Receiver largely supports FCC's position. It says that the mortgage provisions confirm that the mortgages are collateral in nature and secure all loans made by FCC. The Receiver, though, says that there is a cap to the amount that the mortgages secure and the cap is the "stated amount" contained in the mortgages at the time discharge is sought. That is, since the stated amounts of the 2011 Mortgage and the 2018 Mortgage totalled $500,500 that is the cap amount that was secured by those mortgages at the time of discharge. It agrees with FCC that the amount that could be collected depended on the amounts outstanding at the time discharge was requested and that the cap amount was not reduced by prior payments which in this case included a

substantial payment against the 2018 Mortgage from the proceeds of the sale of the PA Lands.

[16] In other words, the Receiver is of the opinion that the maximum amount that FCC could collect at the time of the sale of the Duck Lake Lands was $500,500 plus interest and fees.

[17] Richardson opposes the repayment of the amount advanced in conjunction with the granting of the 2011 Mortgage from the sale proceeds of the Duck Lake Lands. It does not dispute that the mortgages are collateral in nature and in its written submissions dated May 12, 2021 acknowledges that at least the 2011 Mortgage secures all debts owed to FCC. But it points out that the 2011 Mortgage did not take the Duck Lake Lands as security for the indebtedness. In addition, it argues that the cap amount of the 2007 Mortgage and the 2018 Mortgage must be reduced by the payments previously made on the 2018 Mortgage from the sale proceeds of the PA Lands.

[18] There is also an inequity in all of this says Richardson. Using funds from the sale of the Duck Lake Lands which would otherwise be available to creditors like Richardson to retire the amount secured by the 2011 Mortgage will clear the title the SW 20 which it appears is an exempt homestead. If the amount secured by the 2011 Mortgage remains unpaid FCC is not prejudiced as it remains fully secured for that amount by virtue of the 2011 Mortgage. The Smith's end up with clear title to a valuable asset at the expense of their creditors.

Analysis: FCC's Entitlement to Sale Proceeds

[19] I agree with FCC's position as modified and limited as suggested by the Receiver.

[20] The relevant provisions of the 2007 Mortgage and the 2018 Mortgage clearly show that the mortgages are collateral in nature in relation to the debts that they secure. The debt advanced in conjunction with the granting of the 2011 Mortgage is clearly a "Loan" as defined in those mortgage terms. There is no provision in the rules regarding statutory mortgages as set out in the *Land Titles Act* preventing a mortgage from securing all loans made to a borrower. Indeed, s. 27(3), when it says that the registration of a mortgage with a specified principle sum has priority for "all obligations secured pursuant to the terms of the mortgage …", implies that a mortgage can secure a variety of obligations which would include debts not directly associated with or advanced at the time the mortgage is granted.

[21] In addition, s. 27(3)(b) infers that the cap amount secured by the 2007 Mortgage and the 2018 Mortgage do not get reduced by repayment of some or all of the debt secured by the mortgages as that subsection provides that the priority of the mortgage

for advances continues, to the "specified principle sum", even if at some point while the mortgage remains registered there is no debt owing.

[22] I conclude that the 2007 Mortgage and the 2018 Mortgage secures the payment of the loan made to the Smith's by FCC that is also secured by the 2011 Mortgage. But the amount to be paid to FCC is limited to the "specified principle sum[s]" of those mortgages of $500,500 plus interest and costs which totalled, at the time the discharge of those two mortgages was sought, $556,762.41. Deducting from that amount the interim payment of $305,209.97 that was already made to FCC from the sale proceeds of the Duck Lake Lands FCC is entitled to be paid from the funds held in trust by the Smith's lawyer the further sum of $251,212.27. The balance of the funds held by the Smith's lawyer not required to pay the closing costs and the retainer to the Smith's lawyer previously ordered shall be remitted to the Receiver. In the most recent version of the draft order (Amending Receivership Order) that amount was said to be $86,542.55.

[23] The inequity in these circumstances raised by Richardson could have been resolved in its favour if the doctrine of marshalling would have been applied. But, it does not as that doctrine would only apply to force FCC to look to its security under the 2011 Mortgage if there were other registered interests on the Duck Lake Lands, *St. Gregor Credit Union Ltd. v Zimmer*, 2004 SKQB 75 at para 17 and 45(b).

[24] In addition, the inequity referred to by Richardson does not arise from the payout of the loan, made when the 2011 Mortgage was granted, from the proceeds of the sale of the Duck Lake Lands. The inequity, if it is one, arises for the exemption available to the Smith's. The decision to protect some assets from execution is a policy choice. Fairness is not relevant. It is the purpose and intention of the legislation creating exemptions that governs, *Farm Credit Canada v Gustafson*, 2021 SKCA 38 at paras 75-80.

[25] If it were not for the exemption the claims of creditor's like Richardson could still be satisfied by enforcement of those claims against the SW 20.

Marshalling of Realization on Personal Property

[26] The Receiver reports that as of May 5, 2021 it realized from the sale of market grains $1,055,606 and that does not include the possible realization of approximately another approximate $500,000 if it is successful in defending Richardson's appeal of the decision of Justice Scherman who allowed the Receiver to disclaim contracts calling for the sale of canola at a price lower than the market price [Disclaimer Decision].

[27] The Receiver has vetted BMO security and finds it to be valid and, subject to secured claims against serial numbered goods, enforceable as a first charge against present and after acquired personal property including grain.

[28] Richardson alleges that it has a valid security interest in grain which secures a debt of $794,086.41 as of December 31, 2020. There are some outstanding questions as to the perfection and scope of this secured claim. For the purposes of analysis, it will be assumed that Richardson has a valid and enforceable security interest in the grain sold by the Receiver subordinate only to BMO's security.

[29] Richardson says that the marshalling doctrine should require BMO to look to other assets where it has a first charge to satisfy its claim leaving the grain available to Richardson. If that is the case Richardson says that a distribution should not be made to BMO until it is known what other realization proceeds are available to BMO.

Analysis: The Marshalling Issue

[30] Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, 2d ed (Toronto : Irwin Law, 2012) [Cuming Walsh & Wood] at p. 676 report "... Although some courts initially took the view that the doctrine [of marshalling] is in conflict with the priority structure of the PPSA, more recently courts have indicated a willingness to apply the doctrine to PPSA security interests." The authors cite *National Bank of Canada v Malkin Metals Ltd.*, [1994] 4 WWR 707 (Sask CA) and *Surrey Metro Savings Credit Union v Chestnut Hill Homes Inc.*, (1997), 30 BCLR (3d) 92 [*Surrey*] as two of the cases supporting the application of marshalling to PPSA security interests.

[31] Assuming then, as well, that marshalling could apply in these circumstances the restrictions on the application of the doctrine come into play.

[32] Cumming Walsh & Wood also at p. 676 say that "... courts will marshal the securities to ensure that the maximum recovery is obtained without prejudicing the rights of the senior secured party".

[33] *Surrey*, citing and relying at para. 58 on Bruce Macdougall, *Marshalling and the Personal Property Security Act: Doing onto Others*, 28 UBC Law Review at p. 98 holds that the party who seeks marshalling has the onus of proving that the "... senior creditor will not be endangered or delayed and that the senior creditor will not have to litigate more because of the marshalling.".

[34] The Receiver reports in the Supplement to the Fourth Court Report that:

a. As of May 5, 2021, it had total receipts of $2,586,083;

b. As of May 5, 2021, it had total disbursements of $669,668 which did not include Receiver's fees and disbursements after May 3, 2021 and the fees and disbursements of its counsel after April 30, 2021;

c. As of May 5, 2021, the Receiver had $1,917,415 available for distribution, but that amount did not include the $86,542.55 it will receive as a result of this decision;

d. That at April 23, 2021 the amount needed pay out to BMO was $1,972,563.

[35] According to these numbers, when the receipts are totalled and the disbursements and proposed distribution to BMO paying out its claims in full is deducted, there remains just over $30,000 to secure the Receiver's Charge.

[36] This analysis demonstrates that if some of the grain sale proceeds are marshalled to Richardson the Receiver must rely on other assets if BMO is not to be prejudiced.

[37] The Receiver reports that the only remaining assets capable of generating further proceeds are:

a. From equipment some of which will be subject to perfected security interests other than BMO's. I notice in BMO's Notice of Intention to Take Possession of equipment served under s. 48 of *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*] now filed with the Debtor's application for a hearing in QB 112 of 2021 in the Judicial Centre of Prince Albert that BMO claims the right to take possession of about 284 pieces of farm equipment. I also see that the Receiver in a variety of correspondence sent to creditors other than BMO who it permitted to initiate their own proceedings to begin the process of seizing the Debtor's farm equipment under the *SFSA,* that the Receiver identified that some of those secured claims may be unperfected and of those that were not there was approximately $215,000 in equity after the payment of those secured claims. I am also aware that overall, the Debtor's estimated the value of their owed equipment to be 2.3 Million dollars and the value of leased equipment to be .9 Million dollars all of which will be subject to an exemption claim by the Smith's; and

b. The outstanding canola proceeds to be paid by Richardson if it is unsuccessful in its appeal of the Disclaimer Decision.

[38] It would appear that BMO stands at risk of not being paid in full if BMO or the Receiver whose fees and costs are secured by the Receiver's Charge in priority to BMO, are required to monitor the realization of the equipment by those with perfected security interests to determine if there is any equity available to the Receiver. The same cost problem arises when BMO or the Receiver are required to review the Debtor's exemption claim and, if necessary, contest it.

[39] BMO will be subjected to a similar risk for the legal fees of its counsel and the Receiver's counsel to perfect and argue Richardson's appeal of the Disclaimer Decision.

[40] As alluded to earlier, BMO has taken, with the consent of the Receiver, proceedings to realize on the Debtor's equipment by serving notices under s. 48 of the *SFSA*. The Debtor's have applied for a hearing before this court under s. 50 of the *SFSA* and one has been scheduled for June 9, 2021 at 2:00 p.m. in the Judicial Centre of Prince Albert on court file QB 112 of 2021. No material as of yet has been filed by the Debtor's in support of their application but it is expected that a claim to exemptions will be one, if not the only, issue.

[41] As requested by the parties, I have been able to adjust my schedule to hear that matter if, in light these reasons, it proceeds.

[42] The obvious point to be made is that BMO is having to litigate to realize on equipment. If assets are marshalled in Richardson's favour BMO and the Receiver will also have to monitor and perhaps challenge other security interests claiming priority to BMO. They will also have to participate in the resolution of the Debtor's exemption claim.

[43] But it would appear equally obvious that if BMO is paid out there may well be additional equity in the Debtor's equipment subject to the exemption claim.

[44] Similarly, BMO and the Receiver will have to litigate Richardson's appeal of the Disclaimer Decision to secure additional funds to cover any amount to be marshalled to Richardson.

[45] The Richardson appeal of the Disclaimer Decision has another element to it that mitigates against equitable relief. If Richardson is successful in the appeal, no asset will be available to replace that which would be marshalled to Richardson. Because of the costs associated with the appeal, BMO is clearly at risk of not getting paid in full.

[46] If Richardson is unsuccessful, it will be paying approximately $500,000 to the Receiver to cover the shortfall to BMO created by the marshalling of assets in Richardson's favour. There is no net gain to Richardson, but BMO and the Receiver would have had to litigate. BMO would be delayed in getting paid.

[47] Applying the principles that BMO ought not to be prejudiced in its efforts to be paid and to have to continue litigation to do so, Richardson has not met the onus of establishing that BMO will not be prejudiced if assets are marshalled in Richardson's favour. Its argument that a distribution should not be made to BMO would be dismissed.

[48] However, I notice that Cumming Walsh & Wood also suggest at pp. 676-677 that there is uncertainty as to how the doctrine of marshalling operates saying that "the more conventional view is that marshalling operates by subrogation" and that "... the caselaw in Canada has generally not recognized marshalling by compulsion". This issue was not explored by the parties in argument and, in turn, the consequences it would have in this proceeding if BMO was paid out and Richardson was to stand in BMO's shoes.

[49] This issue further complicates the continuation of this receivership as the only way to ensure that BMO is not prejudiced by marshalling seems to be paying it in full which leaves the Receiver in the precarious position of having to continue to perform its duties and obligations without the guarantee that there are sufficient assets to secure the Receiver's Charge.

Distribution and Discharge

[50] I see no reason why a distribution should not be made to BMO paying it out in full and I am prepared to make that order. But, the proposal to do that was only one component of the application. The other component was a discharge of the Receiver. It does not appear, in the circumstances, that the distribution to BMO should be made unless the Receiver is also discharged as it may put the Receiver in a position where there are insufficient assets to secure the Receiver's Charge. If I am wrong in this analysis and the Receiver is prepared to make the distribution without a discharge it can advise me so and provide me with a draft order to that effect.

[51] I am not prepared to discharge the Receiver at this time. That order should not be made unless to all creditors and other stakeholders are aware that there remains potential realization from equipment and from successfully defending the Disclaimer Decision, and that the Receiver intends to abandon that realization and be discharged unless an interested party comes forward to underwrite the continuing costs of the Receiver. It may be that a creditor, a group of creditors or for that matter the debtors may be ready, willing and able to do so.

[52] Richardson can consider doing so as well if it wishes to pursue equity in the equipment. Interestingly, this would require Richardson to secure the costs of the Receiver to defend the Disclaimer Decision and, perhaps, to challenge Richardson's claim that it has a secured claim in grain and, then, whether its claim to marshalling through subrogation will be permitted.

[53] Because of the time pressure associated with perfecting the appeal of the Disclaimer Decision I will leave it to the Receiver to pursue one of two courses of action. It can:

a. Survey the stakeholders to see if anyone or more of them are prepared to secure the ongoing costs of this receivership. If it is satisfied it has done so with proper disclosure of the distribution (or proposed distribution, as the case may be) to BMO and the remaining potential realization, and no one is prepared to secure the costs, the Receiver shall so advise and provide me with a draft order for its discharge. In conducting this survey of the stakeholders, the Receiver shall also make it clear that it will seek a discharge (providing the terms of a draft discharge order) if no stakeholder comes forward to underwrite the Receiver's ongoing costs; or

b. If it finds it will be more time and cost efficient, it can apply by Notice of Applicant accompanied by proof of service of the Notice of Applicant and the information set out in paragraph 51(a). If the Receiver pursues this option, the time for service of the Notice of Application and supporting material is abridged such that service with two clear days notice shall be good and sufficient service.

[54] I can advise that if the Receiver pursues the second option that I am available to hear the application on Friday, June 4, 2021 at any time on that day. If that day is not available to the Receiver or if it cannot serve material with two clear days notice the application may be made returnable Tuesday June 8, 2021 at 9:00 a.m or such other time and date as may be arranged with the Local Registrar

J.
G.A. MESCHISHNICK