2024 Hfx No. 531915

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: THE RECEIVERSHIP OF TCAS HOLDINGS LIMITED, SUSTAINABLE FISH FARMING (CANADA) LIMITED, SUSTAINABLE BLUE INC. and TCAS IP INC.

Between:

4595756 Nova Scotia Limited

Applicant

and

TCAS Holdings Limited, Sustainable Fish Farming (Canada) Limited, Sustainable Blue Inc. and TCAS IP Inc.

Respondents

BOOK OF AUTHORITIES SUBMITTED ON BEHALF OF THE RECEIVER
MOTION – SEPTEMBER 20, 2024 – 9:30 A.M.

Gavin MacDonald
Josh McElman, K.C.
Cox & Palmer
Nova Centre, South Tower
1500-1625 Grafton Street
Halifax, NS B3J 3E5

Counsel for the Receiver

INDEX

TAB	DESCRIPTION
1.	*Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105
2.	*CWB Maxium Financial Inc. v. FGC Health LP et al.*, (13 August 2024) Calgary 2401/08064 (ABKB)
3.	*Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 297
4.	*Belyea v. Federal Business Development Bank*, [1983] NBJ No. 41, 44 NBR (2d) 248 (NBCA)

1

Original
2017 NSSC 105
Nova Scotia Supreme Court

Royal Bank of Canada v. 2M Farms Ltd.

2017 CarswellNS 272, 2017 NSSC 105, 278 A.C.W.S. (3d) 474, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151

Royal Bank of Canada (Applicant) v. 2M Farms Ltd. (Respondent)

Moir J.

Heard: February 23; March 2, 2017
Judgment: March 3, 2017
Docket: Hfx. 425907

Counsel: Gavin D.F. MacDonald, Meryn Steves, for Applicant
Tim Peacock, for Intervenor, National Building Group Inc.
Marc Comeau, for Dana Robinson Fisheries Limited

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities

Headnote

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

Applicant receiver B Ltd. sought approval of sale of five-acre lot — Receivership and power of sale were to enforce security for bank debts — Plaintiff encumbrancer N Inc. had builder's lien that was registered after banks' security — In letter dated June 17, 2016, B Ltd.'s counsel advised N Inc.'s counsel of $350,000 agreement purchase and sale and provided copy — About one month later, counsel had to advise that agreement was terminated under due diligence conditions — Inadvertent failure occurred on November 24, 2016 — Agreement of purchase and sale now sought to be approved had been concluded — On that day, receivers' counsel prepared letter to be sent by email to N Inc.'s counsel to advise of $210,000 sale — Copies were sent to B Ltd., but through inadvertence nothing was sent to main addressee — B Ltd. brought motion for approval of sale by receiver — Motion granted — Sale was approved — After approval hearing started, N Inc. produced offer of $230,000 and evidence that another offer for $236,500 could be coming — General obligation under s. 247(b) of Bankruptcy and Insolvency Act is touchstone for approval of sale by receiver when receiver has been appointed under Act, alone or in combination with provincial law — Commercial reasonableness is touchstone for approval and includes fairness, efficacy, integrity, and sufficiency of sale process — Interests of parties have to be borne in mind — Approving sale by receiver is not opportunity to reopen marketing effort — Failure to send email on November 24, 2016 caused no unfairness to N Inc. — On November 24, 2016, there was nothing left for N Inc. to do because receiver was subject to binding agreement of sale subject to approval process that could not be turned into new opportunity for making offers — N Inc. knew receiver had concluded that earlier list prices were too high because in June, 2016 N Inc. was told of $350,000 sale — List prices were public — Lowest list price and actual sale price exceeded debt owed to N Inc. — Reductions in list price would be of practical concern to other parties, but not to N Inc. — Sale process was fairly conducted in interest of various parties Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 247(b).

Table of Authorities

Cases considered by *Moir J.*:

Bank of Montreal v. Maitland Seafoods Ltd. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20, 120 A.P.R. 20, 1983 CarswellNS 43 (N.S. T.D.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — considered

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

Statutes considered:

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

Generally — referred to

s. 242(1)(c) — considered

s. 247(b) — considered

Builders' Lien Act, R.S.N.S. 1989, c. 277

s. 8(3) — considered

Conveyancing Act, 1881 (44 & 45 Vict.), c. 41

Generally — referred to

s. 25(2) — considered

Real Property Act, R.S.N.S. 1989, c. 385

s. 15 — considered

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009

R. 35.12 — considered

R. 42.09 — referred to

Authorities considered:

McGhee, Q.C., John, *Snell's Equity, 33rd ed.*, (London: Sweet & Maxwell, 2015)

p. 947 — considered

Words and phrases considered:

commercial reasonableness

Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

motion to approve a sale by the receiver

A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort.

MOTION for approval of sale by receiver.

***Moir J.* (orally):**

Introduction

1 BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: "foreclose out the encumbrances on title to the property." The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

2 The other encumbrancer is National Building Group Inc. It has a builder's lien that was registered after the banks' security. The priority between the banks' security and the builder's lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the Builder's Lien Act.

3 The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

4 In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

Approval of Sale

5 The receiver submits that *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

6 The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

7 As stated by Justice Wood at paragraph 14 of *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.): "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the Bankruptcy and Insolvency Act, a receiver must deal with the receivership property in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

8 As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

9 BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

10 The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

11 To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

12 The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015	$600,000
January, 2016	$550,000
March, 2016	$500,000
June, 2016	$425,000
July, 2016	$350,000
October, 2016	$315,000.

13 The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

14 Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

15 In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

16 National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

17 National Building Group also argues "the reasonableness of the purchase price... is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property." It proposed that we determine the priorities before considering sale approval or "delay the proposed sale for 30 days to allow for an accounting", and an opportunity for National Building Group "to explore its' options".

18 The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot "delay the proposed sale". Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

19 This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver's failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

20 The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

21 The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

22 The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed about the property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

23 In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

24 Communications between the receiver and National Building Group were through lawyers.

25 In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

26 On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

27 Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

28 There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

29 By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

30 An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building Groups' counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

31 After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

32 A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 57 N.S.R. (2d) 20 (N.S. T.D.).

33 The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed

interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

34 National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

35 National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

36 I find that the sale process was fairly conducted in the interest of the various parties.

Proposed Terms for Foreclosure

37 The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

38 However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

39 Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

Foreclosure-Based Versus Vesting Order-Based Receiverships

40 Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

41 Counsel then argues that s. 15 the Real Property Act incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

42 This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited* 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

43 Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

44 Justice Wood's decision in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel*.

45 Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

46 The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

47 I respectfully adopt Justice Wood's reasons in *Crown Jewel Resort Ranch Inc.* . In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the Bankruptcy and Insolvency Act. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

48 I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

The Need to Join Interested Parties

49 We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

50 I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in this province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

51 *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

52 There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

53 The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

Dispute about Priorities

54 When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

55 Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

Conclusion

56 I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Motion granted.

End of Document

2

Court of King's Bench of Alberta

Date:
Docket: 2401 08064
Registry: Calgary

Between:

CWB Maxium Financial Inc.

Applicant

- and -

FGC Health LP By And Through Its General Partner FGC Health Ltd, FGC Health Ltd, FGC Health (Alberta) Inc, FGC (Martindale #1) Ltd, FGC (Martindale #2) Ltd, FGC (Martindale #3) Ltd, FGC Hope Medicare Ltd, FGC Whitehorn Ltd, Hilary's Agencies Limited, FGC Village Lane Ltd, FGC Market Mall/Alberta Compounding Ltd, FGC Health-Hub Ltd, FGC Lorimer Ltd, FGC Health (Manitoba) Ltd, Healthhub Medical Clinic Ltd, FGC Lifeguard Homecare Ltd, Lifeguard Homecare Inc, FGC Home Healthcare Ontario Inc, 14336542 Canada Inc, Comforts Of Home-Care Inc, Milestone Health Services Corporation, 10077072 Manitoba Ltd, DHS Holdings Ltd, Pharmacy Access Solutions Inc, Shapring Ventures Ltd, FGC Rite Choice Pharmacy Ltd, FGC Family Care Medical Pharmacy Ltd, 10168910 Manitoba Ltd, FGC Medicine Guru Pharmacy Ltd, FGC Aldergrove Community Pharmacy Ida Ltd, Sandip Bhangoo, Hamza Musaphir, and Dalbir Bains

Respondents

Endorsement
of
Associate Chief Justice
D. Blair Nixon

I. Introduction

[1] The Applicant is CWB Maximum Financial Inc ("**CWB**"). There are many other creditors, and competing security interests.

[2] There are a multitude of debtors in underlying this application (collectively, the "**Debtors**"). They are listed in Schedule "A" to the "Bench Brief of the Applicant in Support of an Application for Approval of a Stalking Horse Agreement and Run-Off Sale and Investment Solicitation Process".

[3] As at May 30, 2024, CWB was owed more than $45 million by the Debtors. Interest, legal bills, and other costs continuing to accrue.

II. Overview, Facts and Findings

[4] Since February 2024, the Debtors have been engaged in a strategic process to monetize their assets with the support of CWB (the "**Out of Court Sale Process**"). The Out of Court Sale Process consisted of marketing the Debtors' pharmacy, medical clinic, and medical technology businesses, but did not include their home care businesses.

[5] Following a breakdown in the relationship between CWB and the Debtors, CWB gave notice of its application to appoint a receiver (the "**Receiver**") over the Debtors and their property (the property of the Debtors is collectively, the "**Property**"). The intention underlying the receivership application was to bring control and consistency to the Out of Court Sale Process, allowing a receiver to continue that process to its conclusion (the "**Receivership Application**").

[6] On June 13, 2024, this Court adjourned the Receivership Application, but appointed PricewaterhouseCoopers Inc LIT as the "soft monitor" of the Debtors during the adjournment period (the "**Soft Monitor**"). The Receivership Application has since been adjourned to provide time for the Out of Court Sale Process to advance.

[7] Notwithstanding the accommodations by CWB to allow the Out of Court Sale Process to advance, on July 25, 2023 the Debtors gave notice that they terminated the engagement of the Sale Advisor. As part of the overall context, the integrity of the Out of Court Sale Process had been questioned by the Soft Monitor because two bidders used the same legal counsel in that process.

[8] CWB asserts that the proposed Run-off SISP is the best available option to ensure that the Debtors' assets are sold in a fair and transparent manner, and to maximize the value of the Debtors' assets for the benefit of CWB and the other stakeholders. The Run-off SISP is

structured as an abbreviated extension of the Out of Court Sale Process. The parties who participated in that process will be eligible to continue to participate in the proposed Run-off SISP.

[9] CWB is of the view that the Runoff SISP will further minimize costs by engaging the same Sale Advisor from the Out of Court Sale Process and by continuing to use their established virtual data room ("**VDR**"). CWB is also of the view that the use of the stalking horse bid process will bring stability to the Run-off SISP by setting a floor price and creating certainty of a transaction.

[10] Several of the Debtors pledged unlimited guarantees to CWB, either individually or jointly and severally (the "**Guarantors**"). The Guarantors each executed General Security Agreements in favour of CWB pursuant to which each of those Debtors pledged all their respective present and after acquired property to CWB to secure the primary obligations of the borrowers under the loan agreements and the obligations of the Guarantors (collectively, the "**Security**").

[11] Based on my review of the evidence, there have been multiple Events of Default by the Debtors in this case. This fact was conceded to by the Debtors in the forbearance documents.

III. Issues

[12] The issues I will be addressing are as follows. I have framed them as questions.

a. Should this Court exercise its discretion to appoint a Receiver over the Debtors and their Property?

b. Should this Court exercise its discretion and approve the Retention Bonus Plan?

c. Should this Court approve the Receiver's engagement as the Sale Advisor?

d. Should this Court approve the proposed Run-off SISP?

e. Should this Court approve the Receiver's obligation to pay the Break Fee and Expense Reimbursement?

f. Should this Court grant the sealing order over:

i. the Confidential Wyett Affidavit sworn June 10, 2024, the Confidential Brodie Affidavit sworn July 12, 2024, and the Confidential Second Brodie Affidavit (collectively, the "**Confidential Affidavits**");

ii. the Confidential Supplement to the Fifth Report of the Soft Monitor, dated July 24, 2024; and the Confidential Supplement to the Seventh Report of the Soft Monitor, dated August 7, 2024 (collectively, the "**Confidential Supplements**"); and

iii. Mr. Bains seeks restricted court access orders for: (i) the confidential Affidavit of Dalbir Bains, sworn on August 9, 2024; and (ii) the confidential exhibits to the Second Affidavit of Dalbir Bains, sworn on July 10, 2024 (collectively, the "**Confidential Bains Materials**").

IV. Law and Analysis

[13] Over the past two months, CWB has adjourned its Receivership Application to allow the Out of Court Sale Process to operate. Unfortunately, the integrity of that prior process has been questioned and the Debtors terminated the engagement of the Sale Advisor.

[14] In an effort to preserve the time, effort, and money that went into conducting the Out of Court Sale Process, CWB brought this Application for approval of the Run-off SISP to be conducted under the supervision of the proposed Receiver and the re-engagement of the Sale Advisor.

A. Should this Court exercise its discretion to appoint a Receiver over the Debtors and their Property?

[15] The test to appoint a receiver and manager is whether it is just or convenient to do so in light of the circumstances: ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24; *Judicature Act*, RSA 2000, c J-2, s. 13(2); ***Servus Credit Union v Proform Management Inc***, 2020 ABQB 316 at para 65.

[16] A receivership order is a significant enforcement tool and it "should not be lightly granted": ***Higgerty*** at para 25; ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17.

[17] When considering the issue of whether a receiver should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[18] A wide array of factors should be taken into consideration when considering the appointment of a receiver and manager: ***Higgerty*** at para 26. A non-exhaustive list of the factors to consider prior to any such appointment are set out in ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27 as follows:

a. whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b. the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i. the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

j. the consideration of whether a court appointment is necessary to enable the receiver to perform its' duties more efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties;

p. the goal of facilitating the duties of the receiver.

[19] In the present circumstances, this Court has the authority to appoint a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("***BIA***"), section 13(2) of the *Judicature Act*, and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.23 ("***PPSA***"). Section 243(1) of the *BIA* expressly states that a secured creditor such as CWB may bring an application to appoint a receiver over the property of an insolvent person and the courts will grant such an application when it is "just or convenient to do so".

[20] Under the explicit terms of the Security, CWB has the right to appoint a receiver over the Property if an Event of Default (defined therein) occurs. In the present case, there have been multiple Events of Default such that the ability to enforce the Security appears to have merit, including through the appointment of a receiver.

[21] As a procedural prerequisite to the appointment of a receiver, the *BIA* requires the delivery of a Notice under section 244 to the insolvent person at least ten days prior to the appointment. As a secured creditor of the Debtors, CWB delivered such Notices on or about November 22, 2023, and November 29, 2023. As a result, I find this notice prerequisite has been satisfied.

[22] As I mentioned above, the appointment of a receiver is a discretionary remedy that should not be lightly granted by the courts. When faced with an application to appoint a receiver, the Court "must carefully balance the rights of both the applicant and the respondent". In its capacity as the Applicant, CWB has the burden of establishing that it is just or convenient to grant the proposed receivership order after the conclusion of the balancing exercise.

[23] CWB asks this Court to exercise its discretion to appoint a receiver over the Debtors and their Property. For the following ten reasons, I find that the appointment of a receiver has merit in this case.

[24] First, the Debtors assert that a receiver would erode value. I disagree because the duty of a receiver is to take steps to preserve value. That said, I acknowledge that Mr. Bains has

threatened the destruction of the value of the businesses. This includes his assertions that he instructed PricewaterhouseCoopers Corporate Finance Inc ("**PWC CFI**") to terminate the Sales Process. Mr. Bains has also threatened that if CWB did not support him (including by indemnifying him for guarantees he pledged to other creditors), he would leave the businesses, taking all the pharmacy managers with him. While such actions present a real risk to the realization potential of CWB and the other creditors, this Court is not guided by threats and inappropriate conduct of one or more of the Debtors and Guarantors. Such conduct may be addressed in a different forum if an injured party wishes to pursue the matter. That is an issue for another day. That said, this type of conduct bolsters the need for the appointment of a receiver in this case.

[25] Second, in my experience, an organized sale of the assets by a receiver is: (i) a cost-effective means to realize on the assets; and (ii) typically maximizes recovery for creditors. Indeed, maximizing recovery is a primary duty of a receiver and manager: ***Westcoast Savings Credit Union v Wachal***, 1988 CanLII 3222 (BCCA) at para 10.

[26] Third, the proposed receiver in this case is PWC. That entity is a Licensed Insolvency Trustee, and it has consented to act as the receiver. Based on my review of the circumstances in this case and my knowledge of PWC, I am satisfied that it can take on the receivership responsibility.

[27] Fourth, CWB is no longer prepared to support the Debtors through additional funding or payment holidays outside of a receivership proceeding. That is an important practical issue. Based on the Debtors' cash flows, they will be unable to continue operating if that financial support is no longer available. This cash flow concern was highlighted in the hearing where the Eighth Report of the Soft Monitor was reviewed, and it reported that there was increased uncertainty associated with the cash flow. I also note that if the Debtor businesses shut down or the regulatory status of the Debtors is affected, there is a clear risk to all stakeholders, including suppliers, customers, and employees. Further, there also would be a significant risk of harm to the outcome of the Sales Process. Given this context, I am of the view that irreparable harm to CWB and other creditors is inevitable if a receiver is not appointed.

[28] Fifth, based on the non-binding letters of interest received to date in the Sales Process and the sizeable creditor list, I find the Debtors have little if any equity remaining in the underlying businesses. This context favours the appointment of a Receiver.

[29] Sixth, the essence of the businesses is such that the Debtors are required to purchase inventory to sell medications to patients. The fact that the Debtors no longer have a source of funding to make such purchases outside of a receivership further supports the appointment of a receiver.

[30] Seventh, the draft receiver order would place all creditors and stakeholders of the Debtors on a level and transparent playing field under the administration of this Court. In my view, this would better ensure the consistent and appropriate treatment of all stakeholders.

[31] Eighth, with all due respect to their assertions to the contrary, the Debtors have demonstrated an inability to responsibly manage their businesses. This is evidenced by the continued events of default and the breaches of the forbearance agreements by the Debtors. I do not accept the assertions by the Debtors that these events of default and the breaches occurred

because of a misunderstanding. Common sense suggests otherwise. In my view, the appointment of a receiver will better ensure all necessary steps are taken to deal with operational issues.

[32] Ninth, the recent actions of the Debtors and the related threats, under the stewardship of Mr. Bains, is placing the success of the operations and the Sales Process at risk. In my view, this jeopardizes creditor realizations. This further reinforces the need for the appointment of a receiver to preserve and protect the value of the businesses and Property.

[33] Tenth, the peril to the ongoing Sales Process and the necessity for preservation of value, coupled with the fact that the Debtors have no ability to continue operating the businesses without the continued financial support of CWB and the fact that the Debtors are suggesting steps that jeopardize the Sales Process, cause the balance of convenience to weigh heavily in favour of the appointment of a receiver in this case. This is especially so because CWB has been keeping the Debtors afloat in various forms for almost a year. The fact that other creditors have initiated enforcement processes (albeit they have suspended such initiatives pending the results of the CWB application) further supports the balance of convenience favouring a receivership appointment.

[34] Based on my review of the evidence and analysis of the law, I find that there is merit to a preliminary conclusion that it is just or convenient for the Court to grant a receivership order. This preliminary determination is subject to the proviso that there are no other viable alternatives, which is addressed below.

[35] The jurisprudence also directs that an applicant who is seeking a receiver order needs to demonstrate that alternate remedies have been explored, short of a receivership: ***Higgerty*** at para 29; and ***Alberta Health Services v Networc Health Inc***, 2010 ABQB 373 at para 18. Based on my review of the evidence, CWB did explore alternative remedies. This is evidenced by the accommodations and the several forbearance agreements that CWB entered into with the Debtors during the last year.

[36] Having regard to the factors set out in ***Paragon***, I find the present circumstances weigh heavily in favour of the finding that it is just or convenient to appoint a receiver over the Debtors and their Property. I make this comment notwithstanding that the relief sought is of an extraordinary nature.

[37] While the relief sought is extraordinary, I find the circumstances before the Court in this case are also extraordinary. The deteriorating financial circumstances and the conduct of Mr. Bains is such that CWB has lost all faith in management's continued control and operation of the businesses, including the prescribing pharmacies.

[38] CWB has been collaborating with the Debtors for almost one year, providing financial and other supports to ensure a continuation of the businesses with existing management at the helm. Regrettably, the Debtors have consistently failed to meet contractual obligations. In the circumstances, I recognize that CWB's financial support to the Debtors is not automatic or absolute.

[39] Based on my review of the evidence in this case, I find that a sufficient number of the ***Paragon*** factors have been met such that it is just or convenient to appoint a receiver. This finding is supported by the fact that, in my view, no other remedy will adequately protect CWB or the interests of the other secured creditors of the Debtors.

[40] While I considered the issue, I find no prohibition against PWC acting as the receiver based on its previous role in relation to the Sales Process. Indeed, in the circumstances PWC is the logical choice to act as the receiver given its familiarity with the Sales Process and the complexities of the Debtors' businesses.

[41] Based on my review of the evidence and interpretation of the law, I find that it is just or convenient to appoint a Receiver over the Debtors and their Property. As a result, this Court will exercise its discretion to appoint a receiver over the Debtors and their Property, and that Receiver will be PWC.

B. Should this Court exercise its discretion and approve the Retention Bonus Plan?

[42] The Applicant seeks the approval of this Court of the proposed Retention Bonus Plan pursuant to the Receivership Order. CWB asserts that the proposed Retention Bonus Plan is necessary to maintain key personnel of the Debtors who hold critical roles in regard to the ongoing operations of the pharmacy businesses.

[43] The proposed Retention Bonus Plan is similar in both purpose and structure to a key employee retention plan ("**KERP**") A KERP is commonly used in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("***CCAA***") and in proposal proceedings under the *BIA*.

[44] Chief Justice Morawetz has noted that the courts have approved KERPs in receivership proceedings under the *BIA* in recognition of the "utility and importance of KERPs in restructuring proceedings": ***Ontario Securities Commission v Bridging Finance Inc***, 2021 ONSC 4347 at para 13. The purpose of a KERP is to incentivize key employees, who may otherwise leave the debtor company, to remain with the businesses and assist during its restructuring proceedings.

[45] This Court has the authority to approve the Retention Bonus Plan under its discretionary powers pursuant to subsection 243(1)(c) of the *BIA*. Those discretionary powers provide that this Court may take any action that the court considers advisable when determining the scope of the powers of a receiver upon appointment: see section 243(1)(c) of the *BIA*.

[46] As noted by the Alberta Court of Appeal, section 243(1)(c) of the *BIA* creates "a plenary and open-ended jurisdiction in the court": ***DGDP-BC Holdings Ltd v Third Eye Capital Corporation***, 2021 ABCA 226 at para 17. That Court stated that the broad language of section 243(1)(c) of the *BIA* gives "supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise": ***DGDP*** at para 20.

[47] The principle behind a KERP is not to deprive creditors of recovery. Instead, it is to improve creditor recovery by maintaining the ongoing business by retaining key employees. In essence, a KERP can be seen as an investment in the ongoing business enterprise. If the investment is successful, there will be much more to distribute to creditors": ***Just Energy Group Inc et al***, 2021 ONSC 7630 at para 19-20.

[48] Fundamentally, the Retention Bonus Plan is intended to maintain key employees who are critical to the ongoing operations of the pharmacy businesses. Absent an incentive to remain, the Debtors are at significant risk of losing critical employees.

[49] The Retention Bonus Plan is proposed, supported, and would be financed by CWB as a senior secured creditor of the Debtors. There is no separate charge proposed for the Retention

Bonus Plan. Rather, it would be funded through the Receiver's borrowings charge and at the Receiver's discretion.

[50] Based on my review of matters, the proposed Retention Bonus Plan: (i) contains the appropriate arm's length safeguards; (ii) is necessary; and (iii) is of a reasonable design. As a result, I exercise my discretion and approve the Retention Bonus Plan. I make this determination because of the extraordinary circumstances of this particular case, including the fact that the Debtors' principal has threatened to entice pharmacists to abandon the Debtors at this critical juncture. Given these collective circumstances, I find that it is appropriate for me to draw upon my plenary and open-ended jurisdiction provided by section 243(1)(c) of the *BIA* to mitigate this potential harm: ***DGDP*** at para 17.

C. Should this Court approve the Receiver's engagement as the Sale Advisor?

[51] Canadian courts commonly approve the engagement of professionals necessary to advance insolvency and restructuring proceedings: ***Walter Energy Canada Holdings, Inc (Re)***, 2016 BCSC 107 at para 27. The factors considered when determining whether to approve the engagement of financial advisors include: (i) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable; (ii) whether the financial advisor has industry experience and/or familiarity with the businesses of the debtor; and (iii) whether the success fee is necessary to incentivize the financial advisor: ***Danier Leather Inc (Re)***, 2016 ONSC 1044 at para 47.

[52] Concerning the first factor as to whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration is fair and reasonable, I note that the fees payable under the draft engagement letter are reflective of the fees payable under the prior engagement agreement as between the Debtors and PwC CFI, subject only to the removal of the work fee which has already been incurred. That being the case, I infer that that the quantum and nature of the remuneration is fair and reasonable. As a result, this factor is met.

[53] Concerning the second factor as to whether the proposed financial advisor has industry experience and familiarity with the businesses of the Debtors, I note that Respondent Debtors engaged PWC CFI as their sale advisor to conduct and oversee the Out of Court Sale Process in February 2024. The proposed Sale Advisor therefore has extensive knowledge not only of the Debtors' Property and businesses being marketed for sale, but also the conduct of the Out of Court Sale Process. In circumstances such as these, the continued engagement of PWC CFI as the Sale Advisor is the "natural choice" because it has previously been marketing the assets of the Debtors: see ***Walter Energy*** at para 32. As a result, PWC CFI is familiar with the subject assets, and that knowledge that will no doubt be of great assistance in respect of the Run-off SISP. As a result, this factor is met.

[54] Concerning the third factor as to whether the success fee is necessary to incentivize the financial advisor, I note the proposed amount is the greater of $1,500,000 and 3%. That fee amount is within the normal range of consideration payable in these situations. In the circumstances, I am satisfied that the success fee is necessary to incentivize the financial advisor. As a result, this factor is met.

[55] In my view there has been no credible challenge raised by the Debtors with respect to PWC CFI's qualifications and competency to continue to assist in a sale process respecting the Debtors and their businesses. The challenge rather, is that the Debtors have disagreed with the

professional advice PWC CFI has been giving to them. Contrary to the views of the Debtors, PWC CFI was simply doing its job.

[56] As a practical matter, it would neither be efficient nor cost effective to engage another sale advisor at this stage. I make this comment because it is evident that CWB is not prepared to fund the operations of the Debtors while another sale advisor learns about the various businesses, assets, creditor interests, operational issues, as well as the comments and interests potential bidders have expressed to date. All this information is within the knowledge and experience of PWC CFI.

[57] I also note that pursuant to the original engagements as between the Debtors and PWC CFI, certain work and other fees are payable to PWC CFI regardless of whether their efforts yield a transaction. Thus, to engage a new party would result not only in delays (and costs associated with such delays) but greater expenses to cover the fees of the new advisor as well as those payable under the prior engagement with PWC CFI.

[58] Based on my review of the evidence and analysis of the law, I find that this Court should approve the Receiver's engagement as the Sale Advisor.

D. Should this Court approve the proposed Run-off SISP?

[59] The proposed Run-off SISP contemplates a single-phase sale process, whereby the proposed Sale Advisor will contact participants from the Out of Court Sale Process and invite them to submit their final bids by 12 pm (MST) on or about August 29, 2024. In the event Superior Offers are received, the Receiver will select the best bid as the Successful Bid to generate the greatest value with the least amount of closing risk for stakeholders in the process.

[60] The Stalking Horse Agreement defines a Superior Offer as a viable third party offer of an amount equal to at least $55 million broken down as follows: (i) $50 million to match the Purchase Price of the Stalking Horse Bid; (ii) $1.5 million to pay the Bid Protections; (iii) $1.1 million to repay the Court-Ordered Charges, being the Administration Charge and the Receiver's Borrowing Charge; and (iv) $2.4 million as the "Minimum Bid Increment". During the hearing, CWB offered to reduce the threshold, but I gather that offer was not accepted.

[61] The Run-off SISP contemplates extending the Out of Court Sale Process over approximately three weeks. Given the Out of Court Sale Process identified a large group of interested participants, CWB asserts that it is neither necessary nor economic to engage in a longer marketing process. The Receiver and Sale Advisor will not be marketing the process generally, but rather only parties previously qualified as bidders in the Out of Court Sale Process will be contacted.

[62] The *BIA* provides this Court with the authority to approve the Run-off SISP. In particular, the *BIA* provides that, on application of a secured creditor, the Court may appoint a receiver to "take any other action that the court considers advisable": section 243(1)(c) of the *BIA*. Further, the proposed Receivership Order allows the Receiver to market the Debtors' Property, solicit offers, and negotiate the terms of a sale for the same.

[63] Stalking horse sale processes are frequently used in insolvency proceedings to increase the likelihood that the sale process being conducted obtains the best price for the debtor company's assets or business: ***Danier Leather*** at para 20; and ***CCM Master Qualified Fund v blutip Power Technologies***, 2012 ONSC 1750 at para 7 The use of a stalking horse process aims to maximize both value and fairness by setting a floor price: ***Danier Leather*** at para 20.

[64] There are a number of factors to consider in assessing the use of a stalking horse sale process. They include: (i) whether a sale transaction is warranted at that time; (ii) whether the sale would benefit the whole "economic community"; (iii) whether any of the debtor's creditors have a bona fide reason to object to a sale of the business; and (iv) whether there is a better viable option: ***Nortel Networks Corporation, Re***, 2009 CanLII 39492 (ONSC) at para 49. Additional factors relevant to the approval of a sale process using a stalking horse bid are: (i) the fairness, transparency, and integrity of the proposed process; (ii) the commercial efficacy of the proposed process, taking into consideration the specific circumstances facing the receiver; and (iii) whether the sale process will optimize the chances of securing the best possible price for the assets: ***CCM*** at para 6. Recently, the British Columbia Supreme Court restated the factors to include the following questions: (i) how did the stalking horse agreement arise; (ii) what are the stability benefits; and (iii) does the timing support approval: ***Freshlocal Solutions Inc (Re)***, 2022 BCSC 1616 at paras 24-32.

[65] After considering matters, I am of the preliminary view that the best opportunity for value maximization for the Debtors' creditors is through the conduct of the proposed Run-off SISP with the stalking horse process. Taking into consideration the above-mentioned factors, I make this determination for the following seven reasons.

[66] First, CWB agreed to delay the appointment of the Receiver to protect the Out of Court Sale Process and to permit the Debtors to continue running that process while under the supervision of the Soft Monitor. It is evident that CWB is no longer prepared to allow the Debtors to remain in control of a sale process given the events which have transpired.

[67] Second, the Out of Court Sale Process lasted for approximately five and a half months and was effectively concluded by virtue of the Debtors' termination of the Sale Advisor. While it is not perfect, the Run-off SISP does not pose any risk to the outcome of the previous process. In my view, the results of the prior process also can be used to inform the Run-off SISP.

[68] Third, CWB advised the Debtors and the Soft Monitor of its intention to engage in discussions with the Stalking Horse Bidder prior to initiating such conversations to avoid any surprise to the Debtors and to obtain the Soft Monitor's consent to do so. Notwithstanding this advance notice, the Debtors waited until the date of this hearing (August 9, 2024) to table an affidavit challenging the Run-off SISP. I will address Mr. Bains August 9 affidavit below.

[69] Fourth, the Run-off SISP is an extension of the Out of Court Sale Process. That earlier process was broadly marketed. Further, the Property and businesses of the Debtors was marketed over a period of approximately five and a half months.

[70] Fifth, the use of the Stalking Horse Bid creates certainty of a transaction in the Run-off SISP while also providing an opportunity to ameliorate the value derived in that process for the benefit of CWB and the Debtors' other stakeholders.

[71] Sixth, the Receiver will conduct and oversee the Run-off SISP, together with the Sale Advisor, to preserve its integrity and cure any potential issues that may have arisen from the Out of Court Sale Process.

[72] Seven, several stakeholders addressed the Court at the hearing on August 9, 2024. Except for the Debtors, all the stakeholders supported the Run-off SISP. While that support is not determinative, it is instructive to the Court.

[73] In coming to the preliminary determination that the best opportunity for value maximization for the Debtors' creditors is through the conduct of the proposed Run-off SISP, I did consider the Affidavit sworn by Mr. Bains on August 9, 2024. As mentioned above, the was the day of the hearing. While some of the statements in the Bains August 2024 Affidavit suggest that Run-off SISP has issues, I give the alleged evidence in that document very little weight. I make this determination because I construe much of the contents of that document to be in the nature of opinion, speculation, and argument. An affidavit is only to include facts. In contrast, I construe the Bains August 2024 Affidavit to be argument masquerading as an affidavit.

[74] In the present case, the amount of the Minimum Bid Increment is reasonable given the increased costs and risk incurred by CWB in pursuing the Run-off SISP using the Stalking Horse Bid to ensure that the highest and best value for the Debtors' assets is received rather than directly proceeding to finalizing the transaction contemplated in the Stalking Horse Agreement. I make this determination because as I construe matters, the Minimum Bid Increment takes into account the risk and costs associated with: (i) incurring further professional fees over a longer period of time, (ii) CWB foregoing additional interest payments over the period, (iii) CWB providing additional working capital support in the receivership that would not otherwise be required, (iv) pricing in the risk that a prospective purchaser will not obtain financing, thus requiring a renegotiation with the Stalking Horse Bidder, and (v) recognizing that the Run-off Process lengthens the period of time in which the Debtors are operating without stable, long term management and vision, thus creating more risk and uncertainty for the businesses. While the proposed Minimum Bid Increment is not immaterial, I find it is reasonable when I consider all the circumstances of this particular case.

[75] In my consideration of the Run-off SISP, I have also contemplated the liquidity constraints facing the Debtors. As noted by the Soft Monitor as the Eighth Report issued on August 9, 2024, there continue to be major concerns with cash flow. The evidence is that the Debtors have been deferring current obligations in an effort to manage their constrained cash position, including deferring payment of rent, employee payroll, and GST remittances. Further, the Debtors have failed to provide the Soft Monitor with advance notice of disbursements and for not providing weekly lists of all intercompany transfers to the Soft Monitor.

[76] Based on my review of the evidence and analysis of the law, I find that the proposed structure of the Run-off SISP is reasonable, fair, transparent, and appropriate in the circumstances. As a result, this Court should approve the proposed Run-off SISP.

[77] As a practical matter, I also approve the entitlement of the Receiver to continue to use the VDR established in the Out of Court Sale Process for the purposes of conducting the Run-off SISP. I make this determination because the continued use of the VDR will eliminate the costs associated with having to establish a new VDR. Further, the qualified bidders are already familiar with the pre-existing VDR. In my view, the approval of the continued use of the existing VDR is therefore reasonable and appropriate in the present circumstances.

E. Should this Court approve the Receiver's obligation to pay the Break Fee and Expense Reimbursement?

[78] Break fees reflect the costs incurred by a stalking horse bidder in putting together a bid. They also function as a premium for bringing stability to the sale process: ***Danier Leather*** at para 41.

[79] Expense reimbursements are a common feature of stalking horse bids, recognizing the "up front" costs incurred by a stalking horse bidder in agreeing to participate as such and putting together its initial stalking horse bid, where there is a risk that it might not be the successful bidder at the end of the day: ***Freshlocal*** at paras 30, 32(e), 67. Courts have previously approved bid protections averaging in the range of between 1% to 5% of the overall transaction value contemplated by the stalking horse bid: ***Danier Leather*** at para 42.

[80] CWB seeks approval of each of the: (i) Break Fee, in the amount of $1.4 million, and (ii) Expense Reimbursement, in the amount of $100,000. These fees are contemplated by the Stalking Horse Agreement. Each of the Bid Protections would only be payable to the Stalking Horse Bidder in the event a more favourable offer is received through the Run-off SISP and selected as the Successful Bid.

[81] The requested Bid Protections being sought here are well within the range of reasonable fees previously approved by the Courts as part of stalking horse agreements. Based on the numbers provided to the Court, I calculate them to be approximately 3% of the overall Purchase Price considered in the Stalking Horse Agreement.

[82] I also note that the Receiver (as appointed herein) is supportive of the proposed Bid Protections being payable in the event the Stalking Horse Bidder is not selected as the Successful Bidder.

[83] In my view, the Bid Protections properly recognize the benefits being conveyed to CWB and the other creditors in this case. The Stalking Horse Bid will set the floor price for the sale process as the Stalking Horse Bidder ultimately may be outbid in the Run-off SISP. The Stalking Horse Bid process also brings stability to the Run-off SISP in light of the issues that arose in the Out of Court Sale Process and creates certainty for stakeholders that there will be a transaction at the end of the Run-off SISP.

[84] Based on my review of the evidence and analysis of the law, I find it appropriate and reasonable for me to approve the Bid Protections pursuant to the terms of the Stalking Horse Agreement. As a result, the Receiver is authorized to pay the Break Fee and Expense Reimbursement in the event such obligations are incurred.

F. Should this Court grant the sealing order over the Confidential Affidavits, the Confidential Supplements and the Confidential Bains Materials?

[85] This Court can order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record: *Alberta Rules of Court*, Part 6, Division 4. The relevant test is: (i) whether court openness poses a serious risk to an important public interest; (ii) whether the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects: see ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41 at para 53; ***Sherman Estate v Donovan***, 2021 SCC 25 at paras 37-38.

[86] The Supreme Court of Canada explicitly recognized that preserving confidential information constituted an "important public interest", provided the above elements were established: ***Sierra Club*** at paras 55, 60-61; ***Sherman Estate*** at para 41. The courts have commonly granted sealing orders in the context of receiverships, including where the disclosure of confidential information could have adversely impacted a future sale process: see ***Ontario***

Securities Commission v Bridging Finance Inc, 2021 ONSC 4347 at paras 23-24; and see also the Order of Justice Hollins, granted February 22, 2024, *ATB Financial v McLoud Technologies Services Inc et al*, Court of King's Bench of Alberta Court File No. 2401-02224 at para 2.

[87] The confidential information that is sought to be sealed in respect of the hearing on August 9 and August 13 are as follows.

a. CWB seeks restricted court access orders for: (i) the Confidential Wyett Affidavit; (ii) the Confidential Brodie Affidavit; and (iii) the Confidential Second Brodie Affidavit (collectively the "**Confidential Affidavits**").

b. The Soft Monitor seeks restricted court access orders for: (i) the Confidential Supplement to the Fifth Report of the Soft Monitor, dated July 24, 2024; and (ii) the Confidential Supplement to the Seventh Report of the Soft Monitor, dated August 7, 2024 (collectively the "**Confidential Supplements**").

c. Mr. Bains seeks restricted court access orders for: (i) the confidential Affidavit of Dalbir Bains, sworn on August 9, 2024; and (ii) the confidential exhibits to the Second Affidavit of Dalbir Bains, sworn on July 10, 2024 (collectively, the "**Confidential Bains Materials**").

[88] Based on my review of the Confidential Affidavits, the Confidential Supplements and Confidential Bains Materials, I am satisfied that these documents contain information that could adversely impact the outcome of a sale process respecting the Debtors. I make this determination because in this case: (i) court openness poses a serious risk to an important public interest; (ii) the sealing orders sought are necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefit of the orders outweigh the negative effects in these circumstances. In my view, sealing the Confidential Affidavits, the Confidential Supplements and Confidential Bains Materials is the least restrictive method available to prevent the dissemination of the underlying confidential information. The salutary effects of the sealing orders, which are to protect the general commercial interest of maintaining confidentiality, commercially sensitive information, and personal information, far outweigh the deleterious effects of restricting the accessibility of court proceedings.

[89] Based on my review of the evidence and analysis of the law (but subject to the proviso below), I find that this Court should grant the sealing order over the Confidential Affidavits, the Confidential Supplements and Confidential Bains Materials. As a result, I direct that restricted court access orders be issued for the Confidential Affidavits, the Confidential Supplements and Confidential Bains Materials. The only proviso to this directive is that the relevant parties must confirm to the Court that they have given the appropriate notice to the media.

V. Conclusions

[90] As I construe the evidence before me, the Run-off SISP is structured as an abbreviated extension of the Out of Court Sale Process. It is intended to cure irregularities associated with the prior process while minimizing costs by re-engaging the Sale Advisor and utilizing the existing VDR.

[91] In my view, the use of the revised bid approach will bring stability to the process and certainty of a transaction desired by CWB and other stakeholders, while presenting an

opportunity to improve value for stakeholders. In summary, notwithstanding the Bains August 2024 Affidavit (to which I give little weight), the proposed Run-off SISP provides the best opportunity to maximize value for all the Debtors' stakeholders.

[92] Based on the evidence and my analysis of the law, my answers to the issues raised are as follows.

a. Should this Court exercise its discretion to appoint a Receiver over the Debtors and their Property? Yes.

b. Should this Court exercise its discretion and approve the Retention Bonus Plan? Yes.

c. Should this Court approve the Receiver's engagement as the Sale Advisor? Yes.

d. Should this Court approve the proposed Run-off SISP? Yes.

e. Should this Court approve the Receiver's obligation to pay the Break Fee and Expense Reimbursement? Yes.

f. Should this Court grant the sealing order over the Confidential Affidavits, the Confidential Supplements and Confidential Bains Materials? Yes.

Heard on the 09th day of August 2024.
Dated at the City of Calgary, Alberta this 13th day of August 2024.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

Robyn Gurofsky and Jessica Cameron
for CWB Maximum Financial

Patrick D. Fitzpatrick
for Pharmacy Brands Canada Inc

Ian Duncan
for Katherine Peters, creditor for Comforts of Home-Care Inc

Kelsey J. Meyer and Adam Williams
for PWC, Soft Monitor

Afshan Naveed

for RBC, second creditors, two pharmacies in BC

Shaun T. MacIsaac
for William Trent Kitsch

Garrett Finegan and Ravinth Latour
for FGC Health Ltd

Daniel Segal
for Justice Canada Department of Justice Canada

Asim Iqbal
for 1000968249 Ontario Inc (Stalking Horse Bidder)

James Reid and Patrick Corney
for Care Lending Group

Ripple Kaila
for GG & HH Inc

Heather Brodie
for ReI Group Inc (observer)

James O'Brien
for FGC Health LP (observer)

Ted Hopkinson
for CWB (observer)

3

Original
2019 NSSC 297
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 713, 2019 NSSC 297, 11 P.P.S.A.C. (4th) 121, 311 A.C.W.S. (3d) 21, 73 C.B.R. (6th) 104

Royal Bank of Canada (Plaintiff) v. Eastern Infrastructure Inc. and Allcrete Restoration Limited (Defendant)

Peter P. Rosinski J.

Heard: September 19, 2019
Judgment: October 10, 2019
Docket: 483616

Counsel: Gavin MacDonald, for Royal Bank of Canada
Stephen Kingston, for Receiver

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Plaintiff creditor obtained order appointing receiver over property of defendant debtors pursuant to s. 243 of Bankruptcy and Insolvency Act — Receiver brought motion for approval and vesting order that would allow it to sell defendants' encumbered assets at auction — Motion granted — While previous decisions had suggested there was no jurisdiction to grant such orders in absence of expressly enabling legislation, more recent decisions, focusing on remedial nature of and liberal interpretation to be applied to Act, had found s. 243(1)(c) did, in fact, allow for such orders in appropriate circumstances — Considerations similar to those relevant to determining whether to approve sale by receiver, including sufficiency of effort to obtain best price, interests of all parties, efficacy and integrity of process by which offers were obtained and fairness, applied — As matter of law and in circumstances of this case, it was appropriate to grant approval and vesting order sought .
Table of Authorities
Cases considered by *Peter P. Rosinski J.*:
Bank of Montreal v. Sportsclick Inc. (2009), 2009 NSSC 354, 2009 CarswellNS 649 (N.S. S.C.) — considered
Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — referred to
Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — considered
Royal Bank of Canada v. 2M Farms Ltd. (2017), 2017 NSSC 105, 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151 (N.S. S.C.) — referred to
Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383,

(sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — considered

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 243(1)(c) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

MOTION by receiver for approval and vesting order permitting sale of debtors' assets at auction.

***Peter P. Rosinski J.*:**

Introduction

1 The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

2 Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case [1] .

The authority for vesting orders pursuant to s. 243(1)(c) BIA

3 Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.) and *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105 (N.S. S.C.)), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744 (Ont. C.A.), in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

4 As Justice Blair stated for the court in *Regal*:

> [23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of the parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

. . .

[31] **In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] **The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of *Sarnia Band v. Canada* (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.
>
> (Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real

> or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.
>
> [34] I reach this conclusion for the following reasons.
>
> . . .
>
> [45] Vesting orders properly registered on title, then — like other conveyances — are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

5 Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.) per Pepall JA:

> **(e) Section 243 of the BIA**
>
> **43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.
>
> ***The Wording and Purpose of s. 243***
>
> **44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so.** As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.
>
> **45** Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:
>
> > 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

. . .

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring

jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. **As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain."

6 Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel*.

7 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* [2015 CarswellSask 680 (S.C.C.)] was released one year after Justice Wood made his comments in *Crown Jewel*. Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

8 Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montreal v. Sportsclick Inc.*, 2009 NSSC 354 (N.S. S.C.) at paras 32-33, which the court will eventually apply to all such sales:

Law

32 In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:

> 1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

33 Certain principles have been enunciated by the courts in consideration of these points:

> The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
>
> the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para. 40;
>
> the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg*, *supra*, at page 124, Anderson J. said:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

> a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co.*, *supra*.

Conclusion

9 As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Motion granted.

Appendix"A"

Supreme Court of Nova Scotia in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

APPROVAL AND VESTING ORDER (AUCTION)

Before the Honourable Justice *Peter P. Rosinski* Chambers:

UPON HEARING Stephen Kingston on behalf of Ernst & Young Inc. (the "Receiver") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "*Debtor*");

AND UPON appearing that appropriate Notice of this Motion has been provided to all interested parties;

AND UPON having read the First Report of the Receiver dated September 11, 2019 (the "*Receiver's First Report*") and all other materials filed in connection with this Motion;

AND UPON the Receiver having negotiated an Auction Agreement (the "*Auction Agreement*") with Mirterra Industrial Appraisers & Auctioneers (the "*Auctioneer*") as more particularly described in the Receiver's First Report;

AND UPON the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "*Alberta Assets*"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

NOW UPON MOTION:

IT IS ORDERED THAT:

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "*Transactions*") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "*Purchased Assets*").

3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "*Purchaser*") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "*Purchaser Bill of Sale*"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Claims*") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.

4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. Notwithstanding:

(a) the pendency of these proceedings;

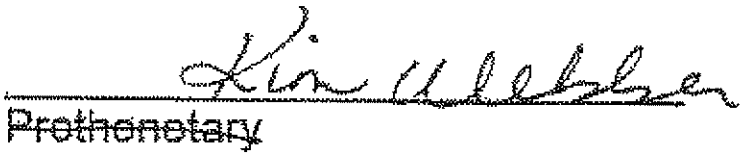
(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this *19* day of September, 2019



Graphic 1

Footnotes

1 Attached hereto as Appendix "A" is the order granted.

End of Document

4

1983 CarswellNB 27
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248, 18 A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK

Hughes C.J.N.B., Ryan and Stratton JJ.A

Judgment: January 18, 1983
Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Appointment — Application for appointment — Person entitled to make application — General

Receivers --- Remuneration of receiver — Remuneration

Secured creditors — Receiver appointed by document — Remuneration — Factors to be considered.

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. The considerations applicable in determining the reasonable remuneration to be paid to a receiver should 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 costs of comparable services when performed in a prudent and economical manner. Whether an account for services is fair and reasonable is a matter of some difficulty. In many cases, attempts have been made to establish this fact by calling as witnesses persons who engage in the same profession or calling to testify that the charges made are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, the courts will impose an underlying or implied limit or maximum on the professional fees it will allow, based on what is reasonable in relation to the dollar amount involved in the particular case. Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case.

Table of Authorities

Cases considered:

Considered by majority:

Amalg. Syndicates, Re, [1901] 2 Ch. 181, 17 T.L.R. 486 — *referred to*

Campbell v. Arndt (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) — *referred to*

Cowie (J.W.) Enrg. Ltd. v. Allen (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) — *referred to*

Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd. (1938), 13 M.P.R. 237 (N.S.C.A.) — *referred to*

Hall v. Slipp (1894), 1 N.B. Eq. 37 — *referred to*

Ibar Devs. Ltd. v. Mount Citadel Ltd. (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) — *referred to*

Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd., [1951] O.W.N. 47 (H.C.) — *referred to*

Considered in dissent:

Lister (Ronald Elwyn) Ltd. v. Dunlop Can. Ltd., [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 — *referred to*

Statutes considered:

Evidence Act, R.S.N.B. 1973, c. E-11, s. 49.

Authorities considered:

75 C.J.S. 1067.

Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29.

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

***Stratton J.A.* (*Hughes C.J.N.B.* concurring):**

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for $40,000, and the reasonableness of the receiver's account of $11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 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.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) , it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237 . In making their award, the court said at p. 240:

> As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.) . In that case, Marriott, Master, said at p. 48:

> In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In Kerr on Receivers, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426 , Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) , Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 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.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J.W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) .

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486 . They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

> ... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.
>
> ... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.
>
> ... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for $30,075 and that the total receipts from all sources were $36,566. The receiver charged a fee for its services of $11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately $5,000.00, say in the range of $4,000.00 to $6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be $6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to $4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of $750.

***Ryan J.A.* (dissenting):**

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of $10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of $40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163 -64, 100 A.P.R. 162 :

> In the summer of 1978 the plaintiff lent $40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.
>
> Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay $40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately $34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.
>
> By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.
>
> Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for $30,000.00. In addition the plaintiff realized $4,925.24 apart from the receiver's efforts. A balance of $7,749,03 remained owing on the $34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of $8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

> a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and
>
> b) Was the receiver's fee of $11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of $40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, which provides that:

> A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Directions given.