

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF THE RECEIVERSHIP OF SAGE GOLD INC.

AND

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF
THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS
AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O.
1990, C. C.43, AS AMENDED.**

FACTUM OF THE RECEIVER
(returnable December 18, 2020)

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TABLE OF CONTENTS

	PAGE
PART I - INTRODUCTION	1
PART II - THE FACTS.....	2
A. Background to the Receivership.....	2
B. The Efforts of the Receiver and its Legal Counsel.....	5
C. Fees and Disbursements of the Receiver and its Counsel.....	7
PART III - ISSUES AND THE LAW	7
A. The Sixth Report and Professional Fees Should be Approved.....	8
B. The Distribution to the Receiver and its Counsel Should be Approved..	12
C. Deloitte Should be Discharged from its Duties as Receiver	12
PART IV - ORDER REQUESTED.....	13
SCHEDULE “A”	
LIST OF AUTHORITIES	14
SCHEDULE “B”	
RELEVANT STATUTES	15

PART I - INTRODUCTION¹

1. Deloitte Restructuring Inc. (“**Deloitte**”), in its capacity as Receiver of all of the assets, undertakings and properties (the “**Receiver**”) of Sage Gold Inc. (“**Sage**”), brings this motion for an Order discharging it as Receiver, approving its fees and those of its counsel, McMillan LLP (“**McMillan**”), approving a final distribution of the estate’s assets and related relief.

2. Due to various challenges in this Receivership, including limited interest among bidders in Sage’s assets and the withdrawal of funding for this proceeding in December 2018 by Sage’s principal secured creditor, there have been limited recoveries to the estate and there remain significant unfunded professional fees owing to the Receiver and its counsel. There will not be sufficient funds in the estate to satisfy the outstanding amounts owing to the Receiver and its counsel or for any distribution to Sage’s secured creditor or other creditors.

3. The Receiver and its counsel have assumed a substantial risk by providing their services without secured funding in order to achieve an orderly transfer of Sage’s mining assets for the benefit of its stakeholders, including workers and the affected government ministries. It is just and proper in the circumstances to distribute the limited funds in the estate to the Receiver in respect of its unpaid professional fees and those of its counsel.

¹ Capitalized terms not otherwise defined have the meanings ascribed to them in the Sixth Report of the Receiver to the Court dated December 11, 2020 [Sixth Report].

PART II - THE FACTS

A. Background to the Receivership

4. On July 13, 2018, Sage's senior secured creditor, CRH Funding II Pte. Ltd. (the "**Secured Creditor**"), made an application for the appointment of Deloitte as Receiver. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted that day, Deloitte was appointed as interim receiver, without security, of the assets, undertakings, and properties of Sage acquired for or used in relation to the business carried on by Sage (the "**Property**"), pursuant to s. 47 of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c.B-3, as amended (the "**BIA**") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended.

5. On July 30, 2018, pursuant to a further order of the Court (the "**Receivership Order**"), Deloitte was discharged as interim receiver and appointed Receiver, without security, of the Property pursuant to s. 243(1) of the *BIA*.

6. This receivership proceeding was funded directly by the Secured Creditor from the time that it was commenced until December 2018, as further described below and in the Receiver's previous reports.²

7. On August 29, 2018, Justice Hailey granted an order approving a sale and investor solicitation procedure (the "**SISP**") for the marketing and sale of the Property, including

² See the Supplement to the Second Report dated December 20, 2018 and the Second Supplement to the Second Report, dated January 8, 2019.

Sage's principal assets, being the Clavos mining property (the "**Clavos Property**") and the Onaman mineral exploration property (the "**Onaman Property**").

8. At the conclusion of the SISP, the Receiver received no bids for the Onaman Property. It identified a single compliant and binding offer in respect of the Clavos Property, being a credit bid by the Secured Creditor (the "**Credit Bid**"). The Receiver advised the Court in its Second Report dated December 12, 2018 that it sought approval of Clavos transaction.³

9. On December 14, 2018, the Secured Creditor advised the Receiver and McMillan that it intended to revoke the Credit Bid, abandon its interest in the Property, and cease funding of this receivership proceeding.⁴ Without sufficient funding to maintain the Clavos Property, the Receiver was required to abandon the mine at the Clavos Property. The Receiver sought and obtained urgent Court approval to abandon the mine on short notice and subsequently issued a notice of abandonment effective January 8, 2019.⁵

10. The Receiver and McMillan, with the consent of certain provincial government ministries, voluntarily continued their expedited sale efforts to facilitate a sale of the Clavos mine for the benefit of Sage's stakeholders, and to reduce environmental risks flowing from the abandonment of the mine.⁶ These efforts were carried out without secured funding for the professional fees of the receiver and its counsel.⁷

³ Second Report of the Receiver to the Court dated December 12, 2018 [Second Report].

⁴ Sixth Report, para 7.

⁵ Sixth Report, paras 10-16.

⁶ Sixth Report, paras 17-20.

⁷ *Ibid.*.

11. Despite the absence of funding and the absence of alternative binding offers within the SISP, the Receiver successfully negotiated purchase and sale agreements for the Clavos Property and the Onaman Property.⁸

12. On January 29, 2019, Justice Dietrich granted an order, among other things, approving (a) the sale of the Onaman Property pursuant to an asset purchase agreement (the “**Onaman APA**”), and (b) the sale of the Clavos Property pursuant to an asset purchase agreement (the “**Original Clavos APA**”), and vesting the respective properties. The transaction contemplated in the Onaman APA closed on April 7, 2019. However, the Purchaser under the Original Clavos APA failed to close the transaction contemplated therein.⁹

13. Following further negotiations with a newly constituted purchaser, the Receiver entered into a new asset purchase agreement the (“**New Clavos APA**”) on substantially similar commercial terms to the Original Clavos APA.¹⁰ On December 19, 2019, Justice Conway granted an order (the “**New Clavos Approval and Vesting Order**”), among other things, approving the transaction contemplated by the New Clavos APA.¹¹

14. However, due to intervening events, the New Clavos APA subsequently required further amendments, including in respect of a deferral of certain portions of the purchase price. The Receiver agreed to the partial payment deferral to ensure that the purchaser under the New Clavos APA would have sufficient capital to post a financial assurance in

⁸ *Ibid.*

⁹ Sixth Report of the Receiver to the Court dated December 10, 2020, at paras 20 and 21 [Sixth Report].

¹⁰ *Ibid.* at para 21.

¹¹ *Ibid.* at para 22.

connection with the Clavos mine that is satisfactory to the Ministry of Energy, Northern Development and Mines post closing.¹²

15. On October 5, 2020, Justice Hainey granted an order, among other things, amending and restating the New Clavos Approval and Vesting Order to reflect the agreed upon amendments to the New Clavos APA, provide a continuing charge (the “**Deferred Payments Charge**”) in favour of the Receiver for certain deferred payments of part of the purchase price (the “**Deferred Payments**”) and make minor changes to the Order’s schedules.¹³

B. The Efforts of the Receiver and its Legal Counsel

16. This receivership proceeding has involved many challenges and required significant efforts by the Receiver and its legal counsel despite the limited recoveries to Sage’s estate from the sale of its assets.

17. During the course of this receivership proceeding, the Receiver and its counsel have, among other things:

- (a) Prepared and obtained the Court’s approval for a the SISP;
- (b) Administered the SISP in accordance with its terms, including taking steps to seek Court approval for the winning Credit Bid by the Secured Creditor;

¹² Affidavit of Phil Reynolds at para 38.

¹³ Amended and Restated Approval and Vesting Order of Justice Hainey dated October 5, 2020 [Amended and Restated Approval and Vesting Order] at para 6.

- (c) Addressed the Secured Creditor's abandonment of the Credit Bid and withdrawal of funding for this receivership;
- (d) In consultation with affected government ministries, sought and obtained urgent permission from this Court to abandon the Clavos mine;
- (e) Negotiated and consummated alternative asset sales for the benefit of Sage's stakeholders and estate following the failure of the SISP, and obtained Court approval for such transactions;
- (f) Negotiated a second alternative sale transaction for the Clavos Property following failure of an approved transaction to close;
- (g) Carried out protracted negotiations with the purchaser of the Clavos Property to amend the commercial terms of the Court approved sale transaction in order to accommodate difficulties related to the status of the Clavos mine and certain regulatory requirements;
- (h) Obtained Court approval for a set of amendments to the sale agreement and related vesting order for Clavos Property, and closed such transaction;
- (i) Addressed various issues related to a provincial offenses prosecution against Sage proceeding in Timmins in relation to regulatory offences by Sage alleged to have occurred prior to the appointment of the Receiver; and
- (j) Carried out extensive communications with Sage's various stakeholders throughout the many stages of this proceeding.

18. As set out in the Sixth Report, the recoveries to the estate through the sale of Sage's assets are not sufficient to cover the professional fees of the Receiver and its counsel.

C. Fees and Disbursements of the Receiver and its Counsel

19. Pursuant to paragraphs 18 to 20 of the Receivership Order, the fees and disbursements of the Receiver and its legal counsel are authorized to be paid on a periodic basis. The Receiver seeks approval of the Court for its fees and disbursements and those of McMillan for the period from June 28, 2018 until its discharge, which are estimated to total \$1,950,347.01.¹⁴

20. The fees charged were at or below the Receiver's and McMillan's respective standard billing rates. The disbursements of the Receiver and McMillan were charged in amounts that were less than or equal to their respective standard charges.¹⁵

PART III - ISSUES AND THE LAW

21. The relief sought by the Receiver in this motion raises the following issues of law:

- (a) Should the Sixth Report and the fees of the Receiver and McMillan be approved?
- (b) Should the distribution of the estate's funds to the Receiver and McMillan be approved?

¹⁴ Sixth Report at paras 30-33; Affidavit of Wael Rostom at paras 12, 16, 21, 28, 31, 36 and 40. The Receiver's fees total \$744,405.00 plus disbursements of \$137.74 and HST in the amount of \$95,601.84. The Receiver anticipates an additional \$35,000 in fees from now until it is discharged and ongoing storage costs of \$30,000. McMillan's fees during this period total \$890,790.50 plus disbursements of \$16,882.58 and HST of \$117,529.35. McMillan anticipates an additional \$20,000 in fees from now until the Receiver is discharged.

¹⁵ Affidavit of Phil Reynolds at para 43; Affidavit of Wael Rostom at para 43.

(c) Should Deloitte be discharged from its duties as Receiver and a release be granted?

A. The Sixth Report and Professional Fees Should be Approved

The Sixth Report

22. The activities of the Receiver, as set out in detail in the Sixth Report, were all necessary and undertaken in good faith in furtherance of the Receiver's duties and powers pursuant to the Receivership Order and the BIA. The Receiver submits that such activities should be approved by this Court.

Professional Fees

23. The accounts of the Receiver and McMillan meet the technical requirements established by prior case law:¹⁶

(a) the accounts disclose in detail the name of each person who rendered services, the date on which the services were rendered, the time expended each day, the rate charged, and the total charges for each of the categories of services rendered can be easily discerned;

(b) notwithstanding the redaction of some entries for the preservation of solicitor-client privilege, the accounts are in a form that can be easily understood by those affected by the receivership or by the judicial officer required to assess the accounts; and,

¹⁶ *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (C.A.) [*Confectionately Yours*] at paras 37-38.

- (c) the Receiver's and McMillan's accounts are verified by affidavits.

24. A Receiver is entitled to be paid its fees and disbursements, along with those of its counsel, where the amount charged is fair and reasonable in the circumstances. As set out in *Belyea v. Federal Business Development Bank*, courts will consider the following factors in making this determination: ¹⁷

- (a) the nature, extent and value of the assets handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees and the time spent;
- (d) the Receiver's knowledge, expertise and skill;
- (e) the diligence and thoroughness displayed;
- (f) the responsibilities assumed;
- (g) the results of the receiver's efforts; and
- (h) the cost of comparable services when performed in a prudent and economical manner.

¹⁷ *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (C.A.) at para 9 [*Belyea*]; *Confectionately Yours* at 42.

25. Any assessment of whether the Receiver's account is fair and reasonable must focus on the circumstances as they existed at the time the fees and disbursements were incurred, and not with the benefit of hindsight.¹⁸

26. The Receiver recognizes that this is an unusual case as the total professional fees and disbursements are greater than the proceeds of the sale of the Property. However, as the Court held in *MacPherson (Trustee of) v. Ritz Management Inc.*, a Receiver's fees are "not to be linked in some indeterminate way to the size of the fund".¹⁹ Rather, a Court-appointed receiver "is duty bound to do whatever is reasonably necessary to perform the task assigned to it."²⁰ The Court further observed in *MacPherson* that the "Receiver had done its work properly and none of the four additional [Court] appearances were in any sense its fault, nor could they have been reasonably anticipated if one were budgeting the receivership." It concluded: "Bearing these principles in mind and noting that the work claimed for was all performed, the hourly rate is not challenged, the unhappy result is not the Receiver's doing and the serious difficulties under which the Receiver laboured, I am of the view that the Receiver has earned the fee it has submitted".²¹

27. The Court's observations in *MacPherson* apply equally in this case. The Receiver and its counsel worked diligently to market and sell assets that did not attract significant interest as well as attending to the Receiver's many other duties. The fees they incurred were in respect of professional services that were necessary to carry out the Receiver's

¹⁸ *BT-PR Realty Holdings Inc. v Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct. (Commercial List)) [*BT-PR Realty Holdings*] at para 22.

¹⁹ *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 at para 20; *Genelcan Realty Ltd. v Wiseman*, [1987] C.L.D. 1002 at paras 37-38.

²⁰ *MacPherson* at para 24.

²¹ *MacPherson* at para 28.

duties to the estate and to the Court. The Receiver could not have predicted at the outset of this proceeding the minimal interest in Sage's assets, the withdrawal of the Credit Bid and funding for the receivership, the need to abandon a working mine, or the significant difficulties it faced in closing a sale of the Clavos Property, all of which contributed to professional fees generated in this case.

28. It is also notable that the Receiver and its counsel will incur a substantial shortfall in payment of their professional fees, even if they receive distribution of all of the estate's funds. The unfunded professional services of the Receiver and its counsel from January 2019 until now have benefitted Sage's stakeholders and permitted an orderly transfer of ownership and responsibility for the Clavos mine. Having achieved this positive result, the Receiver should not be further deprived of its earned compensation beyond the existing shortfall.

29. The Receiver has acted in good faith and in the interest of Sage's creditors and other stakeholders. Over the course of the Receivership proceedings, the Receiver has exercised the reasonable care, supervision and control that an ordinary person would have given to Sage if it were his or her own company.²²

30. The fees and disbursements of the Receiver and McMillan reflect the firms' standard billing rates (or below) and were validly incurred in accordance with the provisions of the Receivership Order.²³

²² *BT-PR Reality Holdings* at para 22.

²³ Order of Justice Dunphy dated July 30, 2018 [Receivership Order], para 18.

B. The Distribution to the Receiver and its Counsel Should be Approved

31. The fees and disbursements of the Receiver and McMillan incurred during the receivership outstanding. The proceeds realized from the sale of the Property are insufficient to fully satisfy these outstanding fees and disbursements.²⁴

32. Any valid royalty interests that may attach to the Clavos Property continue to attach to the property and have not been vested from title or otherwise impaired in this proceeding. Accordingly, the interests of any royalty holders do not need to be addressed by the Receiver or the Court at the distribution stage.

33. Paragraph 18 of the Receivership Order provides that the Receiver and counsel to the Receiver shall have a priority charge over the Property in respect of the fees and disbursements incurred by the Receiver and its counsel.²⁵ This charge ranks in priority ahead of the Secured Creditor's security interest in the proceeds of the sale of Sage's assets. There are no other charges or security interests ranking ahead of the Receiver's.

C. Deloitte Should be Discharged from its Duties as Receiver

34. Upon completing the distribution of funds, including the Deferred Payments and outstanding HST refunds which the Receiver anticipates receiving in January 2021, the Receiver will have substantially completed its limited mandate. Accordingly, the Receiver recommends that it be discharged upon completion of the distribution.

²⁴ Sixth Report at para 27.

²⁵ Receivership Order at para 18.

35. Deloitte also seeks a release from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Deloitte while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on Deloitte's part.

36. The release is a standard term in the Commercial List model discharge order. As Justice Pattillo held in *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, "in the absence of any evidence of improper or negligent conduct, the release should issue".²⁶ Accordingly, Deloitte respectfully requests that the release be granted.

PART IV - ORDER REQUESTED

37. For the reasons set out above, the Receiver respectfully requests that the Court grant the relief sought on this motion.

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



Wael Rostom / Stephen Brown-Okruhlik
McMillan LLP

Counsel for the Receiver

²⁶ *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 ONSC 6376 (Commercial List) at para 47.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (C.A.).
2. *Belyea v. Federal Business Development Bank*, [1983] NBJ No 41 (C.A.).
3. *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct. (Commercial List)).
4. *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506.
5. *Genelcan Realty Ltd. v. Wiseman*, [1987] C.L.D. 1002.
6. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 ONSC 6376.

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.101.

101(1) Injunctions and receivers

In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

2. *Bankruptcy and Insolvency Act*, s. 243.

243(1) Court may appoint receiver

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.

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Court File No. CV-18-601307-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER
(RETURNABLE DECEMBER 18, 2020)**

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