

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

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

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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

Respondents.

**SUPPLEMENTARY MOTION BRIEF OF
THE RECEIVER
(PETER J. NYGARD PERSONAL LEGAL FEES DISTRIBUTION
ORDER)**

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I. LIST OF DOCUMENTS

1. The First Report of the Receiver dated April 20, 2020;
2. The Supplementary First Report of the Receiver dated April 27, 2020;
3. The Second Report of the Receiver dated May 27, 2020;
4. The Supplementary Second Report of the Receiver dated May 31, 2020;
5. The Third Report of the Receiver dated June 22, 2020;
6. The Fourth Report of the Receiver dated June 27, 2020;
7. The Supplementary Third Report of the Receiver dated June 29, 2020;
8. The Fifth Report of the Receiver dated July 6, 2020;
9. The Sixth Report of the Receiver dated August 3, 2020;
10. The Seventh Report of the Receiver dated September 10, 2020;
11. The Supplementary Seventh Report of the Receiver dated September 14, 2020;
12. The Eighth Report of the Receiver dated September 28, 2020;
13. The Supplementary Eighth Report of the Receiver dated October 12, 2020;
14. The Ninth Report of the Receiver dated November 2, 2020; and
15. The Supplementary Ninth Report of the Receiver dated November 10, 2020;
16. The Second Supplementary Ninth Report of the Receiver dated December 30, 2020;

17. The Tenth Report of the Receiver dated January 21, 2021;
18. The Eleventh Report of the Receiver dated February 24, 2021;
19. Twelfth Report of the Receiver dated June 4, 2021;
20. The Supplementary Twelfth Report of the Receiver dated September 14, 2021;
21. The Second Supplementary Twelfth Report of the Receiver dated November 30, 2021;
22. Notice of Motion of the Receiver dated June 4, 2021 with attached draft form of Net Receivership Proceeds Order;
23. Notice of Motion of the Receiver (NPL Proceeds Preservation Agreement) dated May 5, 2021;
24. Notice of Motion of the Receiver (Second NPL Preservation of Sale Proceeds Agreement) dated July 26, 2021;
25. Notice of Motion of the Receiver (Third NPL Preservation of Sale Proceeds Agreement) dated December 16, 2021;
26. Notice of Motion of the Respondents dated December 10, 2021; and
27. Affidavit of Brian H. Greenspan affirmed December 9, 2021.

II. LIST OF AUTHORITIES

Tab

1. Section 113(2)(e), 117 and 119 of *The Corporations Act*, C.C.S.M c. C255.

III. POINTS TO BE ARGUED

Introduction

1. The Receiver files this brief in accordance with the direction of the Honourable Mr. Justice Edmond on December 22, 2021 in connection with the Notice of Motion of the Respondents dated December 10, 2021 seeking an Order authorizing a distribution in the amount of \$1,150,000.00 from the Net Receivership Proceeds to NPL for payment of certain legal fees incurred, or to be incurred, by Peter J. Nygard personally in connection with the defense of certain criminal charges laid against Mr. Nygard by the Toronto Police Service and the request for Mr. Nyagrd's extradition to the United States for various charges relating to sex trafficking.

2. The Receiver repeats and relies on its Motion Brief dated June 21, 2021 and the Supplementary Motion Brief of the Receiver dated November 30, 2021 and the submissions of counsel for the Receiver made on December 20 and 22, 2021. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion Brief of the Receiver (Net Receivership Proceeds Order) dated June 21, 2021 and in the Second Supplementary Twelfth Report of the Receiver dated November 30, 2021.

3. The Receiver expressly reserves the right to file further responsive materials should it become necessary and appropriate.

4. The Receiver submits that the Order sought by the Respondents is contrary to *The Corporations Act*, C.C.S.M. c. C255 (the "**Act**"). NPL is an entity incorporated pursuant to the provisions of the Act.

Indemnification of Directors / Officers – Legal Costs, Charges and Expenses

5. The Act contains certain provisions dealing with the indemnification by a corporation (governed by the Act) of directors or officers (and former directors and officers) of a corporation.
6. Section 119 of the Act establishes a statutory framework setting out specific circumstances in which indemnification by the corporation may be permissible.
7. The main indemnification provision is set out in section 119(1) of the Act:

119(1) Indemnification

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

(a) he acted honestly and in good faith with a view to the best interests of the corporation; and

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

The Corporations Act, C.C.S.M. c. C255 (the "Act") at s 119(1) [Tab 1]

8. Pursuant to section 113(2)(e) of the Act, directors who approve "a payment of an indemnity contrary to section 119 ... are jointly and liable to restore to the

corporation any amounts so distributed or paid and not otherwise recovered by the corporation”.

Ibid, s. 119(1) [Tab 1]

9. The conditions set out in s.119(1) and the consequent liability of a director for payment of an indemnity contrary to s. 119 reflects the basic duty of a director and officer set out in s. 117 of the Act, including:

117(1) Duty of care of directors and officers

Every director and officer of a corporation in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

117(2) Duty to comply

Every director and officer of a corporation shall comply with this Act and the regulations, the articles and by-laws, and any unanimous shareholder agreement.

117(3) No exculpation

Subject to subsection 140(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach thereof.

[emphasis added]

The Act, *supra*, s. 117 [Tab 1]

10. The Receiver submits that pursuant to the Act, NPL is not permitted to indemnify Mr. Nygard in connection with any legal costs, expenses or charges incurred, however reasonable, as a result of the Criminal Charges (as hereinafter defined).

11. The Receiver understands that certain criminal charges have been laid against Mr. Nygard by the Toronto Police Service including six charges of sexual assault

and three charges of unlawful confinement (the “**Criminal Charges**”). All of the allegations in connection with the Criminal Charges occurred between 1987 and 2006 (the “**Material Time**”) and are alleged to have taken place at the Toronto Property which was owned by NPL and served as “... the Toronto headquarters of Mr. Nygard’s business operations”.

Affidavit of Brian H. Greenspan affirmed December 9, 2021 at paras 1-3 (the “**Greenspan Affidavit**”)

12. Mr. Nygard retained Brian H. Greenspan to represent him in respect of the Criminal Charges as well as a request for Mr. Nygard’s extradition to the United States in connection with various charges laid in the Southern District of New York relating to sex trafficking.

Ibid, at para 1

13. The Receiver acknowledges that Mr. Nygard has publically denied all allegations against him and has not been found guilty of any of the Criminal Charges. Mr. Nygard is presumed to be innocent until proven guilty.

14. Pursuant to s. 119 of the Act, NPL (by Gregory Fenske and Steve Mager, the current directors of NPL) may only make payment of an indemnity in respect of Mr. Nygard’s personal legal fees incurred in connection with the Criminal Charges if:

- (a) Mr. Nygard was a director and/or officer of NPL at the Material Time;
- (b) Mr. Nygard is subject to the Criminal Charges by virtue of his tenure as a director and/or officer of NPL at the Material Time;
- (c) Mr. Nygard reasonably incurred legal costs, charges or expenses as a result of the Criminal Charges;

- (d) Mr. Nygard acted honestly and in good faith with a view to the corporation's best interests in connection with the alleged conduct giving rise to the Criminal Charges; and
- (e) Mr. Nygard had reasonable grounds for believing the alleged conduct was lawful.

15. It is unclear whether NPL had an interest in the Toronto Property at the Material Time. It appears that title of the Toronto Property was not held in the name of Nygard Properties Ltd. until 2008 after Nygard International Ltd. was amalgamated into Nygard Properties Ltd. It is further unclear whether Mr. Nygard was an officer and/or director of NPL (or the former Tan Jay International Ltd. and/or the former Nygard International Ltd.) for all or part of the Material Time.

Affidavit of Peter J. Nygard affirmed November 12, 2020 at paras 3-4 and Exhibit "F"

16. The Receiver submits that the uncertainty as to whether Mr. Nygard was a director and/or officer during the Material Time precludes any indemnity payment under the Act.

17. In any event, it cannot be reasonably said that the Criminal Charges were laid against Mr. Nygard by virtue of Mr. Nygard acting in a capacity as a director and/or officer of NPL.

18. Due to the nature of the Criminal Charges, that being sexual assault and unlawful confinement, it cannot be said that any alleged conduct in connection with the Criminal Charges could have been undertaken honestly and in good faith with a view to

the best interests of NPL, or that Mr. Nygard had a reasonable belief that the alleged conduct was legal (which conduct is denied by Mr. Nygard).

19. Additionally, pursuant to s. 117(3) of the Act, neither a provision in a contract between Mr. Nygard and NPL, nor any provision in the articles, the by-laws or a resolution of NPL can relieve Mr. Fenske and Mr. Mager from the duty to act in accordance with the Act, including s. 119, or from liability for a breach of s.119 as provided for in s.113(2)(e) of the Act.

20. The Receiver notes that the Respondents have alleged that NPL would enjoy the benefit of and has an interest in the criminal defence of Mr. Nygard in connection with the Criminal Charges and that "... the entitlement to cross-examination of the complainants in the criminal proceedings will benefit NPL and NIP in the defence of the civil action".

The Greenspan Affidavit, *supra* at para 5(c)

21. The Receiver notes as follows with respect to the Respondent's position as set out in paragraph 20 above:

- (a) NPL is not named in the Jane Doe Proceeding (as defined in the Receivership Order), or any other civil action pertaining to the alleged conduct of Mr. Nygard;
- (b) any benefit NPL may derive from the defence of Mr. Nygard in connection with the Criminal Charges is entirely speculative;
- (c) NIP is a named party in the Jane Doe Proceedings; and

- (d) the Respondents are proposing that \$1,150,000.00 be paid out of proceeds allegedly belonging to NPL (which is denied by the Receiver) for the benefit of NIP, notwithstanding that if NPL is entitled to retain the Net Receivership Proceeds for itself, NPL would have no way of recovering from NIP any amounts paid to Mr. Nygard for the benefit of NIP.

22. Based on the foregoing, the Receiver submits that the Notice of Motion of the Respondents dated December 10, 2021 should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of December, 2021.

THOMPSON DORFMAN SWEATMAN LLP

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

Manitoba Statutes
The Corporations Act
Part IX — Directors and Officers (ss. 97-120)

R.S.M. 1987, c. C225, s. 113

s 113.

Currency

113.

113(1) Liability of directors

Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

113(2) Further liability of directors

Directors of a corporation who vote for or consent to a resolution authorizing

- (a) a purchase, redemption or other acquisition of shares contrary to section 32, 33 or 34;
- (b) a commission, contrary to section 39;
- (c) a payment of a dividend contrary to section 40;
- (d) [Repealed 2006, c. 10, s. 14(1)(a).]
- (e) a payment of an indemnity contrary to section 119;
- (f) a payment to a shareholder contrary to section 184 or 234; or
- (g) any investment or financial assistance contrary to the provisions of Part XXIV;

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

113(3) Contribution

A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act upon which the judgment was founded.

113(4) Recovery

A director liable under subsection (2) is entitled to apply to a court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 119, 184 or 234 or the provisions of Part XXIV.

113(5) Order of court

In connection with an application under subsection (4) a court may, if it is satisfied that it is equitable to do so,

(a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 119, 184 or 234 or the provisions of Part XXIV;

(b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; and

(c) make any further order it thinks fit.

113(6)No liability

A director is not liable under subsection (1) if he proves that he did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

113(7)Limitation

An action to enforce a liability imposed by this section may not be commenced after two years from the date of the resolution authorizing the action complained of.

Amendment History

2006, c. 10, s. 14

Currency

Manitoba Current to S.M. 2021, c. 62 and Man. Reg. 99/2021 (October 19, 2021)

Manitoba Statutes
The Corporations Act
Part IX — Directors and Officers (ss. 97-120)

R.S.M. 1987, c. C225, s. 117

S 117.

Currency

117.

117(1)Duty of care of directors and officers

Every director and officer of a corporation in exercising his powers and discharging his duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

117(2)Duty to comply

Every director and officer of a corporation shall comply with this Act and the regulations, the articles and by-laws, and any unanimous shareholder agreement.

117(3)No exculpation

Subject to subsection 140(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach thereof.

117(4)Interpretation

This section is in addition to and not in derogation of, any enactment or rule of law relating to the duty or liability of directors or officers of a corporation.

Amendment History

1988-89, c. 11, s. 5(6)

Currency

Manitoba Current to S.M. 2021, c. 62 and Man. Reg. 99/2021 (October 19, 2021)

Manitoba Statutes
The Corporations Act
Part IX — Directors and Officers (ss. 97-120)

R.S.M. 1987, c. C225, s. 119

S 119.

Currency

119.

119(1)Indemnification

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

- (a) he acted honestly and in good faith with a view to the best interests of the corporation; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

119(2)Indemnification in derivative actions

A corporation may with the approval of a court indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him in connection with the action if he fulfils the conditions set out in clauses (1)(a) and (b).

119(3)Indemnity as of right

Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

- (a) was substantially successful on the merits in his defence of the action or proceeding; and
- (b) fulfils the conditions set out in clauses (1)(a) and (b).

119(4)Directors' and officers' insurance

A corporation may purchase and maintain insurance for the benefit of any person referred to in subsection (1) against any liability incurred by him

- (a) in his capacity as a director or officer of the corporation, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the corporation; or

(b) in his capacity as a director or officer of another body corporate where he acts or acted in that capacity at the corporation's request, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the body corporate.

119(5)Application to court

A corporation or a person referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

119(6)Notice to director

An applicant under subsection (5) shall give the Director notice of the application, and the Director is entitled to appear and be heard in person or by counsel.

119(7)Other notice

Upon an application under subsection (5), the court may order notice to be given to any interested person and that person is entitled to appear and be heard in person or by counsel.

Currency

Manitoba Current to S.M. 2021, c. 62 and Man. Reg. 99/2021 (October 19, 2021)