File No. CI 20-01-26627

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.

MOTION BRIEF OF THE RECEIVER
(DILLARD'S SETTLEMENT APPROVAL ORDER)

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I. LIST OF DOCUMENTS

1. The First Report of the Receiver, dated April 20, 2020;

2. The Second Report of the Receiver, dated May 27, 2020;

3. The Third Report of the Receiver, dated June 22, 2020;

4. The Fourth Report of the Receiver, dated June 27, 2020; and

5. Notice of Motion of the Receiver, filed June 26, 2020, with attached draft form of Dillard's Settlement Approval Order.

II. LIST OF AUTHORITIES

Tab

1. *Shape Foods Inc., Re*, 2009 MBCA 171

2. *Bakemates International Inc., Re,* [2003] O.J. No. 3191

3. *Ravelston Corp., Re*, [2005] O.J. No. 5351

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties of the Respondents, Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd. ("**NEL**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**") pursuant to an Order (the "**Receivership Order**") of this Honourable Court. The Receivership Order was subsequently amended by a General Order made on April 29, 2020, which limited the scope of the Receivership Order in relation to the property, assets and undertakings of the Debtors NEL and NPL.

2. The Receiver has now filed the Fourth Report of the Receiver, dated June 27, 2020 (the "**Fourth Report**"). The purpose of the Fourth Report is to provide this Honourable Court with information concerning the Settlement Agreement and Release of Claims (the "**Settlement Agreement**") entered into between the Receiver, on behalf of the Debtors, and Dillard's Inc. ("**Dillard's**"), providing for the settlement and resolution of a complex series of claims and disputes between the parties and the implementation of certain transactions (the "**Transactions**").. In connection with that, the Fourth Report also provides the evidentiary basis for an order (the "**Dillard's Settlement Approval Order**"):

(a) abridging the time for service of the Notice of Motion of the Receiver and the materials filed in support thereof, such that the motion is properly returnable on the stated hearing date, and dispending with further service thereof;

(b) approving the applicable Transactions contemplated by the Settlement Agreement, including the mutual settlement and release of claims;

(c) sealing the Confidential Appendices to the Fourth Report, consisting of: (i) the un-redacted report of the Consultant (as defined in the Order made herein on April 29, 2020 (the "**Sale Approval Order**")) dealing with Settlement Agreement (the "**Consultant Report**"); (ii) the un-redacted copy of the Settlement Agreement; and, (iii) the transaction comparison summary comparing the realizations that would be generated from the Dillard's Agreement and the Transactions contemplated therein to potential recoveries should the Transactions not be completed, as well as a previous settlement offer presented by Dillard's to the Debtors prior to the Receiver's appointment of which the Receiver was made aware;

(d) approving the Fourth Report, and the conduct, and activities of the Receiver described therein.

3. This Brief is being filed on behalf of the Receiver so as to outline the legal basis for the requested Dillard's Settlement Approval Order.

Dillard's Settlement Approval

4. The Transactions contemplated by the Settlement Agreement involve the following:

(a) the sale of certain Inventory (as defined in the Settlement Agreement) by the Receiver to Dillard's;

(b) the sale of a Trademark (as defined in the Settlement Agreement) by the Receiver to Dillard's (together with the Inventory, the "**Subject Assets**");

(c) the payment of certain amounts by Dillard's to the Receiver in respect of accounts receivable alleged to be owing by Dillard's;

(d) the establishment of a certain escrow fund with respect to a piece of litigation; and

(e) the full and final settlement, mutual release and conclusion of all claims back and forth as between Dillard's and the Receiver (on behalf of the Debtors) which arise out of, or are in any way connected with any transactions, events, occurrences, acts or omissions alleged to have occurred as a result of the past business relationship or dealings between Dillard's and any one or more of the Debtors, including any agents or employees thereof.

5. The Settlement Agreement and the Transactions contemplated therein are expressly subject to and conditional upon obtaining the approval of this Honourable Court as to the Settlement Agreement by on or before June 30, 2020. Approval by this date is critical, as Dillard's will purchase Inventory only if (and to the extent that) it is available for pick up not later than July 3, 2020. Dillard's is not agreeable to dealing with the matters

described in paragraph 4 above on a piecemeal basis. As such, if the Inventory is not available this week, the significant benefits to the Debtors' stakeholders from the totality of the Settlement Agreement will be lost. Accordingly, this matter is urgent.

6. At the request of the Receiver and the Applicant, the Consultant (as defined in the Sale Approval Order) performed the Wholesale Services, IP Services and Receivables Services (all as defined in the Consulting Agreement, as defined in the Sale Approval Order) in relation to Dillard's. The Settlement Agreement was thus negotiated and concluded with the assistance of the Consultant pursuant to the Consulting Agreement.

7. In addition to the sale of the Subject Assets and the collection of accounts receivable, the Settlement Agreement also involves the mutual release and settlement of claims as between Dillard's and the Debtors. Under paragraph 6(j) of the Receivership Order, the Receiver is authorized to "settle, extend or compromise any indebtedness owing to or by the Debtors."

8. The Receiver submits that in accordance with paragraphs 3 and 4 of the Sale Approval Order, the sale of the Subject Assets to Dillard's and the agreement for the collection of accounts receivable from Dillard's have previously been authorized and approved, given that those aspects of the Settlement Agreement were concluded with the assistance of the Consultant, as contemplated under Consulting Agreement. In addition, the Receiver submits that by virtue of paragraph 4 of the Sale Approval Order, upon implementation of the Transactions, Dillard's will acquire the Subject Assets free and clear of any Encumbrances (as such term in defined in the Sale Approval Order).

9. While the sale of the Subject Assets and the collection of the accounts receivable from Dillard's have been approved by virtue of the provisions of the Sale Approval Order, the Settlement Agreement also includes the full and final settlement, mutual release and resolution of all claims back and from as between Dillard's and the Receiver arising out of the previous business relationship between the Debtors and Dillard's. It provides certainty and finality for the Debtors' estates with respect to a significant business relationship of the Debtors and will result in significant amounts realized for the estate. While the Receiver is authorized pursuant to the Receivership Order to settle claims involving the Debtors, Dillard's has required that the Settlement Agreement and the Transactions contemplated thereunder, including the said settlement and release, be court-approved, and same is accordingly a condition of the Settlement Agreement. Accordingly, the Receiver is respectfully requesting the approval of this Honourable Court in relation to the Settlement Agreement given the amounts at issue, and because Dillard's has requested such approval as a condition of the Settlement Agreement.

10. The Receiver submits that the factors that ought to be considered by a Court in the assessment of the settlement of disputed legal claims are essentially the same as those which are relevant in assessing a proposed sale of assets (which is also occurring pursuant to the Settlement Agreement). Those factors were set out by Menzies J. in *Shape Foods Inc. (Receiver of, Re*, (citing *Crown Trust Co. v. Rosenberg*, (1986) 60 O.R. (2d) 87 (Ont. H.C.J.)):

(a) The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) The court should consider the interests of the parties.

(c) The court should consider the efficacy and integrity of the process by which the offers are obtained.

(d) The court should consider whether there has been any unfairness in the working out of the process.

Shape Foods Inc. (Receiver of), Re, 2009 MBQB 171 at para 20 [*Shape Foods*] [Tab 1]

11. Menzies J. went on in *Shape Foods*, (citing *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)), to summarize two principles that ought to be applied when a court is reviewing a receiver's conduct in relation to the sale of property. First, the court should place a great deal of confidence in the actions taken and the opinions formed by the receiver. Unless the contrary is shown, the court should assume that the receiver (its court-appointed officer) is acting properly. Second, the court should be reluctant to second-guess, with the benefit of hindsight, the business decisions of the receiver.

Shape Foods, supra, at para 21 [Tab 1]

12. In *Bakemates International Inc., Re,* [2003] O.J. No. 3191 (aff'd [2004] O.J. No. 2463), the Court applied the principles set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) in approving a settlement agreement between a court-appointed receiver and an insurer in relation to certain business interruption and property loss claims of the debtor companies, noting as follows:

> Counsel for the Receiver and for the Laurentian Bank submit that the motion before this court to approve the Settlement entered into by the Receiver is analogous to a motion to approve a sales of assets by a court-appointed receiver and

that the principles annunciated in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1 (Ont. C.A.) and *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) should be applied to the case at bar and that the only issues the court need consider are the propriety of the Receiver's conduct and whether the transaction entered into by the Receiver is a provident transaction. They further submit that, in determining these issues, the court should place considerable reliance upon the Receiver's experience and business judgment…

…

I am of the view that the characterization of this proceeding by counsel for the Receiver and for Laurentian Bank is correct…

…

The court should accept that a court-appointed receiver has acted properly unless there is strong evidence to the contrary. In *Royal Bank v. Soundair Corp*., *supra*, Galligan J.A. stated:

> "When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver".

Similarly, in *Skyepharma PLC, supra*, Farley J. stated at paragraph 7:

> "Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

> There is no evidence before this court that the Receiver in the case at bar acted otherwise than reasonably and prudently in negotiating the Settlement Agreement with the Insurer.

Bakemates International Inc., Re, [2003] O.J. No. 3191 at paras 13-19 [Tab 2]

13. On the specific issue of the business decisions of a receiver relating to legal disputes involving a debtor entity, the following comments of Doherty J.A. in *Ravelston Corp., Re*, [2005] O.J. No. 531 (C.A.), are also instructive:

> While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and process in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

Ravelston Corp., Re, [2005] O.J. No. 5351 (C.A.), at para 40 [Tab 3]

14. As set out in the Fourth Report, and in the Consultant's Report attached thereto:

(a) The Consultant believes the settlement with respect to the accounts receivable owing by Dillard's is reasonable, as it represents the full value of

the Receiver's reconciliation of the amount owing by Dillard's, subject only to adjustments relating to actual or potential exposure relating to trademark infringement cases;

(b) The accounts receivable settlement also involves a waiver by Dillard's of its right to claim a further reduction based on potential shortfalls below a guaranteed margin amount historically provided to Dillard's by the Debtors;

(c) Other potential purchasers of the Inventory and Trademark contacted by the Consultant have expressed reluctance to pursue any transaction because of the continued association of the Inventory and Trademark with the "Nygard" brand. In addition, in the case of "Investments" labelled inventory, it is a Dillard's owned brand that would require removal of the labels by other purchasers prior to sale.

(d) The Settlement Agreement facilitates the sale by the Receiver of remaining in-stock inventory bearing the "Allison Daley" brand;

(e) As a result of the COVID-19 pandemic, the supply chain has recently been flooded with inventory and buyers are steering towards higher-end brands currently available at significantly discounted pricing. In addition, retailers that are beginning to make purchases with a view to post-COVID-19 are being extremely selective and have shown no interest in the Inventory and Trademark.

(f) Should the Transactions under the Settlement Agreement fail to materialize, the Consultant believes it would continue to encounter resistance in its

attempts to monetize the Inventory and Trademark, and it anticipates that the Inventory recovery could significantly decline from the amount contemplated under the Settlement Agreement. The realization could also be further reduced due to delays, as retailers continue to discount seasonal merchandise and additional excess inventory enters the supply chain due to COVID-19.

(g) With respect to the Trademark specifically, the Consultant believes that the sale price under the Settlement Agreement is significantly greater than what could be realized from any other party based on its experience and in view of, *inter alia*: (i) the "domain name" associated with the Trademark is registered to Dillard's, and any interested purchaser would either have to forego online sales or negotiate / litigate to obtain control of the domain name from Dillard's; and (ii) the Trademark brand has been sold exclusively through Dillard's an any interested party would likely want to secure the Dillard's relationship.

15. As noted in the Fourth Report, the Applicant, as the primary secured creditor of the Debtors, also supports the Settlement Agreement and the Transactions contemplated therein

16. As set out in the Fourth Report, the Receiver accepted the terms of the Settlement Agreement and the Transactions contemplated therein only after the Receiver had received sufficient information and worked with Dillard's and the Debtors to understand the nature of the business relationship, reconcile Dillard's accounts receivable, confirm inventory levels and assess all potential claims and counterclaims.

17. The Receiver obtained assistance during the negotiation of the Settlement Agreement from the Consultant, who has extensive experience providing advice in monetizing distressed assets in the fashion industry, in order to ensure fairness and reasonableness in negotiations and in outcome.

18. In the view of the Consultant and the Receiver, the Transactions contemplated by the Settlement Agreement will result in the highest potential recovery for the Receiver under the circumstances. Any further delay in realizing upon the Inventory and Trademark could adversely impact the values reflected under the Settlement Agreement.

19. The Settlement Agreement represents the settlement and resolution of a complex series of issues between the Debtors and Dillard's. It is a "package deal" and any of the individual resolutions or compromises set out in the agreement are not available on a stand-alone basis. It provides certainty and finality for the Debtors' estates and represents an important milestone in these proceedings. Further, it provides a significant realization from a group of interrelated assets that could in reality only be monetized in the manner set out in the Settlement Agreement.

20. The Receiver submits that based on the information in the Fourth Report and the Consultant's Report, it is apparent the Receiver and Consultant considered the information available to them in determining to enter into the Settlement Agreement. The Receiver further submits the Settlement Agreement is commercially fair and reasonable, and there is no basis upon which it can be asserted that the Receiver and Consultant have acted improvidently.

21. Accordingly, the Receiver submits that this Honourable Court should grant the Dillard's Settlement Approval Order in the form attached as Schedule "A" to the Receiver's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of June, 2020.

THOMPSON DORFMAN SWEATMAN LLP

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

2009 MBQB 171
Manitoba Court of Queen's Bench

Shape Foods Inc. (Receiver of), Re

2009 CarswellMan 312, 2009 MBQB 171, [2009] M.J. No. 240,
178 A.C.W.S. (3d) 570, 241 Man. R. (2d) 235, 54 C.B.R. (5th) 224

In the Matter of The Receivership of Shape Foods Inc.

And In the Matter of The Receivership of 0767623 B.C. Ltd.

Deloitte & Touche Inc. in its capacity as receiver and manager of Shape Foods Inc. and 0767623 B.C. Ltd.

Menzies J.

Judgment: June 22, 2009
Docket: Brandon Centre CI 09-02-02233

Counsel: D. Swayze for Deloitte & Touche
B. Filyk for Vanguard Credit Union
W. Leslie for 884498 Alberta Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks, Richard Brugger
J. Hirsch for 5842264 Manitoba Ltd. (watching brief)
R. Paterson for City of Brandon (watching brief)

Subject: Corporate and Commercial; Insolvency; Property; Intellectual Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Debtors and creditors
XIV Miscellaneous
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Receiver manager made reasonable efforts to achieve best deal and its recommendation should not be rejected — Fact that one potential bidder did not meet requirements or deadline did not mean sale was improvident — Process of sale was fair and receiver manager was able to obtain higher price than tender — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.
Debtors and creditors --- Miscellaneous issues
Standing to oppose sale by receiver manager — Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Unsuccessful purchasers did not have standing to oppose application — Prospective purchasers did not have rights in property — Minority shareholders did not have standing to oppose sale — Sale to another entity would not effect shareholder's capacity as unsecured creditors — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.
Table of Authorities
Cases considered by *Menzies J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

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

Selkirk, Re (1987), 1987 CarswellOnt 177, 64 C.B.R. (N.S.) 140 (Ont. S.C.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

Corporations Act, R.S.M. 1987, c. C225

s. 94 — referred to

APPLICATION by receiver manager for approval of sale of property.

***Menzies J.*:**

1 Shape Foods Inc. ('Shape') operated a food processing business in the City of Brandon. 0767623 B.C. Ltd. ('B.C.') was a related corporation which held ownership to the intellectual property (patents and trademarks) associated with Shape's food processing business. Both corporations executed a security agreement in favor of Vanguard Credit Union ('Vanguard') as security for a loan. The security agreement provided that in the event of default on the loan, Vanguard had the right to appoint a receiver-manager to realize on its security.

2 On October 23, 2008, Vanguard appointed Deloitte & Touche ('the Receiver') as receiver-manager of Shape Foods Inc.

3 Subsequently on December 10, 2008, Vanguard, appointed Deloitte & Touche receiver-manager of 0767623 B.C. Ltd.

4 On April 14, 2009, the Receiver accepted an offer to purchase the assets of Shape and B.C. in the amount of $5.1 million from 5842664 Manitoba Ltd. ('the purchaser'). A formal agreement was executed on May 6, 2009 which required the Receiver to provide a vesting order of the property in the name of the purchaser on or before June 5, 2009.

5 The Receiver-manager brought an application is for a vesting order to complete the transaction with the purchaser and for a declaration that the sale of the corporate assets is not reviewable by the remaining creditors of Shape or B.C. or by any subsequent trustee in bankruptcy.

The Standing of Parties on the Application

6 The application by the Receiver-manager is opposed by 884498 Manitoba Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks and Richard Brugger. The Receiver-manager argues these parties do not enjoy standing before the court as they are not interested parties in the outcome of the application.

7 Before deciding the issue of standing, I allowed Todd Hicks on behalf of 884498 Manitoba Ltd. and Nick Mashin on behalf of Canrex Biofuels Ltd. to file affidavits as to their attempts to purchase the assets of Shape and B.C. My decision was based on the premise the evidence was relevant to the issue of the integrity of the Receiver-manager's actions taken to sell the security.

8 The Receiver-manager brought the application for the vesting order shortly before the closing date of June 5, 2009. A decision as to whether or not the vesting order would issue was required in a timely fashion or the sale agreement would be in jeopardy. With some misgivings, I reserved my decision on the issue of standing and heard the arguments of the opposing parties to allow the ultimate application to proceed. While this is not the best procedure in which to consider an application, the process did allow me to render a decision on the issue of the vesting order within the time constraints of the purchase agreement.

Interested Parties

9 884498 Manitoba Ltd. and Canrex Biofuels Ltd. attempted unsuccessfully to purchase the assets of Shape and B.C. from the Receiver-manager. Barry Comis, Ben Comis, Todd Hicks and Richard Brugger are shareholders of 884498 Manitoba Ltd.

10 I have concluded an unsuccessful purchaser does not have standing to challenge a proposed sale. In coming to this conclusion I rely upon the reasons of O'Connor J. A. of the Ontario Court of Appeal in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, 47 O.R. (3d) 234 (Ont. C.A.) beginning at para 25:

> There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold...The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H. C. J.).
>
> Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of the process: *Crown Trust v. Rosenberg*, supra; Royal *Bank of Canada v. Soundair Corp.* (1991), 4 O. R. (3d) 1, 83 D. L. R. (4 th) 76 (C. A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.
>
> [para. 29] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest in not sufficient.

11 As prospective purchasers, none of the opposing parties have a legal right or interest in the assets arising out of the circumstances of the sale process. Although I have considered their evidence in assessing the integrity of the sale process, they are not interested parties merely due to their status of unsuccessful purchasers.

12 Barry Comis and Ben Comis claim standing as interested parties by virtue of being shareholders of Shape. Richard Brugger and Todd Hicks claim standing as shareholders of Falcon Creek Holdings Inc., a corporation which is a shareholder in Shape. The extent of their holdings in Shape were not disclosed except to the extent of an admission by their counsel that they are minority shareholders in Shape. They were not appearing on behalf of Shape, but simply in their capacity as minority shareholders.

13 Ben Comis also claims status as an interested party by virtue of being a creditor of Shape in the amount of $6,300.00.

14 I am not satisfied that the status of shareholder, in and of itself, or the status of creditor gives one the status of an interested party. In my opinion, more is required. In this case the assets of Shape and B. C. are secured by three secured creditors. Vanguard is the first secured creditor. As of May 19, 2009, Vanguard was owed $4,711,865.50 with daily interest accruing at the rate of $822.26. The Manitoba Development Corporation ('MDC') is the second secured creditor. The debt owed to MDC as of May 1, 2009 was $4,145,541.82 with interest accruing at the daily rate of $868.14. In addition, MDC had guaranteed repayment of Vanguard's debt. The third debtor is RAB Special Situation (Master) Fund Ltd. with a debt in the approximate amount of $2,000,000.00.

15 The completion of the agreement between the Receiver and the successful purchaser will result in Vanguard being paid in full and MDC receiving only partial payment. In addition, MDC will be relieved of any obligation under its guarantee of the Vanguard debt.

16 The two prospective offers not accepted by the Receiver will result in Vanguard being paid in full, and MDC receiving an increased partial payment on its debt. The acceptance or the rejection of the Receiver-manager's recommended sale in favor of one of the unsuccessful purchasers will not affect the position of Ben Comis, Barry Comis, Todd Hicks or Richard Brugger in their capacity as minority shareholders or Ben Comis in his capacity as an unsecured creditor.

17 As receiverships often affect numerous parties, I am of the opinion that a party requesting to appear to oppose a proposed sale by a receiver-manager must minimally show an interest to the extent that any alleged failure of the receiver-manager to act in a commercially reasonable manner may affect their interests in a material fashion.

18 I am not satisfied that 884498 Manitoba Lyd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks or Richard Brugger have proven they are interested parties to this application.

The Duty of the Receiver

19 S. 94 of *The Corporations Act* (Manitoba) provides that a receiver or receiver-manager of a corporation appointed under an instrument shall act honestly and in good faith; and deal with any property of the corporation in his possession or control in a commercially reasonable manner.

20 On considering a proposed sale of a debtor's property by a receiver-manager, there are four criteria for the court to consider. (See: *Crown Trust Co. v. Rosenberg*, supra; Bennett on Receiverships, (2nd Ed.) (1999) Carswell at p. 251 et seq.)

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

21 In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), the Ontario Court of Appeal outlined two principles for a court to consider in reviewing a sale of property. The first principle is that a court should place a great deal of confidence in the actions taken and the opinions formed by the receiver-manager. Unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager. I will now consider the relevant criteria in this transaction.

Did the Receiver Make a Sufficient Effort to Get the Best Price and Did It Act Providently?

22 In this instance the Receiver-manager was appointed to take control of the assets of Shape in October 2008. The Receiver-manager advertised the sale of the assets of Shape and B. C, by way of tender with the advertisements being published in the Brandon Sun, the Winnipeg Free Press and the Globe and Mail on November 26, 2008. Tenders closed on December 17, 2008 with the highest bid being in the amount of $750,000.00.

23 Following the attempt to sell by tender, a sales and information package was distributed to potential purchasers and interested parties on April 16, 2009. By March 31, 2009, the Receiver-manager had received five additional proposals with the highest being $4.5 million.

24 The Receiver-manager advised the interested parties to reconsider their bids and that no bid under $5 million would be considered. The Receiver-manager maintains that all parties were advised that bids would require either a deposit or a letter from a financial institution confirming financing.

25 Two bids were received which complied with the conditions as set out by the Receiver-manager. The highest bid was received from the purchaser and was accepted.

26 The evidence establishes the Receiver-manager put considerable effort into obtaining the best price for the assets of Shape and B. C.

27 The real issue to be determined is whether the Receiver-manager acted improvidently. I am guided by the comments of Anderson J. in the decision of *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O. R.]:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it 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. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made on the motion for approval.

28 I repeat that a court should be reluctant to reject the recommendation of the Receiver-manager based upon information which comes to light after the decision was made. Evidence as to the value of competing bids was placed before me on this application. This evidence is relevant only to the extent it allows me to evaluate the reasonableness of the price obtained by the Receiver-manager. (See: *Crown Trust Co. v. Rosenberg*, supra)

29 Evidence of the value of competing bids was considered by McRae J. in *Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at 142:

> Only in a case where there seems to be some unfairness, in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

30 The evidence alleging improvident behavior on behalf of the Receiver-manager comes from two sources. One such source is the affidavit of Nick Mashin, the President of Canrex Biofuels Ltd, who submitted a proposal of $6.25 million for the assets of Shape and B.C. In brief, the evidence of Mashin was that although he forwarded the proposal to the Receiver-manager on March 13, 2009, he was not prepared to provide either a deposit or a letter of commitment for financing by the date on which the Receiver-manager accepted the purchaser's offer. These allegations do not amount to evidence of improvident behavior by the Receiver-manager.

31 The other source is the affidavit of Todd Hicks. According to Hicks, 884498 Alberta Ltd. submitted a proposal in the amount of $6.51 million on April 9, 2009. On April 14, 2009, Hicks was advised that a 7% deposit *and* a letter of commitment for financing would need to be provided to the Receiver-manager by 1:00 p.m. that day. Hicks forwarded the letter confirming financing to their Manitoba lawyer but instructed him not to forward it on to the Receiver-manager until he received further instructions.

32 At 3:04 p.m. on April 14, 2009, the lawyer for 884498Alberta Ltd. emailed the Receiver advising that his client was aware the confirmation of financing letter must be provided and that the 7% deposit was being raised. This was two hours after the deadline as advised by the Receiver. On April 15, 2009, the Receiver advised 884498 Alberta Ltd. that another offer had been accepted.

33 Hicks provides much evidence as to conversations he had with respect to the purchase of the property. However, Hicks knew of the April 14, 2009 at 1:00 p.m. deadline and did not meet it. There is no evidence of a request for an extension of time to raise the deposit. The letter of commitment for financing was available but not forwarded until after the deadline.

34 Business negotiations take many interesting and varied approaches. 884498 Alberta Ltd. decided not to forward the available letter of commitment for financing which is their right to do. However, as of April 14, 2009 at 1:00 p.m., the Receiver did not have a deposit or a letter of commitment of financing to back up the offer of $6.5 million. The Receiver-manager, with the information it had, made his decision. He accepted the purchaser's proposal. I am not persuaded the Receiver-manager acted improvidently.

The Interests of the Parties

35 No one appeared on behalf of Shape and B. C. on this application.

36 There are three major creditors holding security against the assets the Receiver-manager proposes to sell. The first secured creditor in priority is Vanguard who as of May 19, 2009 was owed $4,711,865.50 with interest continuing to accrue at the per diem rate of $882.26.

37 The second secured creditor in priority is MDC. As of May 1, 2009, MDC was owed $4,145,541.82 with interest accruing at the rate of $868.14 daily. In addition to its own loan to Sharpe and B.C., MDC has guaranteed the loan held by Vanguard.

38 The third secured creditor in priority is RAB Special Situations (Master) Fund Ltd. whose loan is in the approximate amount of $2,000,000.00. This creditor took no part in these proceedings.

39 Vanguard supports the Receiver-manager's proposal in favor of the purchaser. Vanguard will be paid in full by the Receiver-manager's proposal.

40 MDC also supports the Receiver-manager's proposal. With the closing of the transaction with the purchaser, Vanguard will be paid off and MDC will be released of any liability under their guarantee. It is anticipated that there will also be some monies available to reduce the amount of indebtedness on the MDC loan. RAB will get nothing.

41 MDC does not support the position of 884498 Manitoba Ltd. Although 884498 Manitoba Ltd.'s bid exceeds the purchaser's offer by $1.5 million, the bid is subject to the completion of a due diligence review. It is not a guaranteed transaction. MDC supports the Receiver-manager's proposal as it is to close imminently.

42 Neither scenario will result in MDC being paid in full. RAB will not receive any payment on account of their debt no matter which proposal is accepted.

43 It is in the interests of the interested parties that approval to the Receiver-manager's proposal be given.

Consideration of the Efficacy and Integrity of the Process

44 It is important that the potential purchasers in a receivership situation have confidence that if they act in good faith, undertake bona fide negotiations with a receiver-manager and enter into an agreement for purchase of the assets that a court will not lightly interfere with the negotiated agreement. Potential purchasers must have some degree of confidence in the efficacy and integrity of the process. The comments of Saunders J. in *Re: Selkirk*, supra, at p. 246 [C. B. R.] are of assistance:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J. A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N. S.* (1981), 38 C. B. R. (N. S.) 1, 45 N. S. R. (2d) 303, 86 A. P. R. 303 (C. A.), where he said at p.11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and

> purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

45 Hicks and Mashin attack the process used by the Receiver-manager in their affidavits. They claim they were unable to obtain information in a timely manner and their bids were made subject to conditions that the ultimate purchaser did not have to comply with, notably the provision of a deposit. I do know that the purchaser did ultimately provide a deposit but I do not know when and under what circumstances. Although their allegations raise some concern, I am unable to adjudicate if the procedures required of Mashin or Hicks were substantially different than the procedure for the purchaser based solely on the affidavit evidence before the court.

46 It is true that there were strict timelines under which parties were expected to comply with conditions of the receiver's process, but that does not affect the integrity of the process.

47 As far as efficacy of the process, the Receiver-manager began with a tendering process which resulted in an offer of $750,000.00 and was able to negotiate a proposal from the purchaser in the amount of $5,100,000.00. The efforts of the receiver-manager obtained positive results for the debtor and creditors. As was stated earlier in the *Skyepharma* decision, supra, the integrity of the process should be analyzed from the perspective of those for whose benefit it has been conducted. In that regard, the proposal accepted by the Receiver-manager was considerably higher that the initial tenders at the beginning of the process.

Consideration of Unfairness in the Process

48 The Receiver-manager undertook to sell the assets with a tendering process which was unsuccessful. The Receiver moved on to a second bidding process which once again was unsuccessful. Finally the Receiver followed up with who he considered to be serious buyers and accepted a proposal from the purchaser. All parties were provided with notice of what constituted an acceptable tender by the Receiver and all potential bidders were aware of the time guidelines. The only unfairness alleged is that the conditions of a tender were not the same for all parties. As I have already said I am unable on the evidence before me to conclude whether this allegation has been made out or not. However, other that that one allegation, the process undertaken was a fair process to all concerned.

Decision

49 The court should accept the recommendation of the Receiver except in circumstances where the necessity of rejection of the Receiver-manager's recommendation is clear (See *Crown Trust and Rosenberg*, supra.).

50 Receiver-manager has made a considered effort to obtain the best price and has not acted improvidently. In light of the position of MDC, I have no hesitation in finding that the approval of the proposed sale to the purchaser would be in the best interests of the interested parties.

51 I am unsure if there has been any unfairness in the working of the process with respect to the conditions imposed on the final purchase bids on the property. The evidence is somewhat contradictory and I am unable to resolve the credibility issues on the basis of affidavits alone. However, a decision was required as of the date of the hearing or the sale agreement with the purchaser would have been breached.

52 Due consideration must be given to preserving the efficacy and integrity of the sale process undertaken by the Receiver-manager.

53 After consideration of all the criteria set out in the case law, I have concluded the proposed sale should be approved as requested by the Receiver-manager. To not do so would put any potential sale of the assets at jeopardy and place the parties back into a situation of uncertainty.

54 The vesting orders as requested by the Receiver will be granted.

55 Because I was unable to resolve the issue of unfairness with any degree of certainty, I am not prepared to grant the declaratory relief as requested by the Receiver and that portion of the application is dismissed.

Order accordingly.

2003 CarswellOnt 3075
Ontario Superior Court of Justice

Bakemates International Inc., Re

2003 CarswellOnt 3075, [2003] O.J. No. 3191, [2003] O.T.C. 744, 125 A.C.W.S. (3d) 1006

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

Ground J.

Heard: May 28, 2003
Judgment: August 6, 2003
Docket: 31-377993, 31-377994, 31-377995, 31-377996, 31-377997

Counsel: Kenneth W. Crofootfor for KPMG Inc.
Igor Ellyn, Q.C. for Barbara and Mario Parravano
Aubrey Kauffman for Laurentian Bank
Benjamin Frydenberg for Business Development Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Table of Authorities

Cases considered by *Ground J.*:

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.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — considered

***Ground J.*:**

[1] The motion before this court is the latest step in protracted, bitter and generally unproductive litigation between KPMG Inc. as Receiver and Manager (the "Receiver") of Bakemates International Inc., Confectionately Yours Bakeries Inc., Confectionately Yours, Inc., Sweet-Ease Inc., and Marmac Holdings Inc. (collectively the "Companies") and Mario and Barbara Parravano (the "Parravanos"), the controlling shareholders of the companies.

2 The motion before the court today is brought by KPMG Inc. for an order:

(a) approving the conduct and activities of the Receiver as outlined in the Receiver's Seventh Report dated

December 19, 2003 (the "Receiver's Seventh Report");

(b) approving the Settlement agreement (the "Settlement") between the Receiver and the Companies' insurer, St. Paul Fire and Marine Insurance Company (the "Insurer"), in respect of certain business interruption loss and property loss insurance claims (collectively, the "Insurance Claims");

(c) sealing the contents of Appendices 6 and 7 of the Receiver's Seventh Report and all of the Receiver's Eighth Report until the approval of the Settlement has been finally determined; and

(d) authorizing a distribution of $1,063,745.79, plus per diem interest from November 15, 2002 up to the date of distribution, to Laurentian Bank of Canada ("Laurentian") in the event the Settlement of the Insurance Claims is approved by the court and the companion summary judgment motion brought by the Insurer is successful.

Background

[3] The Settlement for which the Receiver seeks approval quantifies the business interruption claim for Settlement purposes at $1,928.157.00 and quantifies the property loss claim at $407,870. Interim payments were made by the Insurer in the amount of $250,000 for the business interruption claim and $287,000 for the property loss claim. As a result, the total Settlement, after allowing $50,000 for professional fee coverage and deducting the $500.00 deductible, is $1,848,527.00.

[4] The Receiver had continued the retainer by the Companies of an insurance loss claims accountant, Donald Trench Inc. ("Trench") who valued the unpaid Insurance Claims at $2,246,668.00 or $4,405,132.00 depending upon whether a fifteen-month indemnity period or twenty-four indemnity period was used. The Settlement resulted after a prolonged period of negotiations with the Insurer having regard to various other issues and risks affecting the claims of the Companies.

[5] The Parravanos assert that the Settlement is improvident and rely upon a report prepared by Muccilli Consulting Ltd. (the "Muccilli Report") which provides a range of business interruption losses between $3,742,388 and $15,229,259. The Receiver's Eighth Report contains an exhaustive review of the differences between the Trench Report and the Muccilli Report.

[6] The Companies' assets in the hands of the Receiver included the Insurance Claims comprising a business interruption claim and a property loss claim resulting from an October 1999 recall of a product due to an insect infestation (the "Infestation") of products shipped to Costco US by Sweet-Ease Inc. ("Sweet-Ease"). Prior to the Infestation, Sweet-Ease had been selling the product which became infested (cereal snack bars) to Costco's US Western Region for six months from April, 1999. The Infestation resulted in a recall of Sweet-Ease products from the Western Region and a cessation of further sales to that Region. Prior to the Infestation, it had been believed by Sweet-Ease that its sales to the Western Region would continue to grow significantly. At the time of the Infestation, Sweet-Ease had been close to finalizing arrangements to sell its cereal snack bars to Costco US Eastern Region but the discussions to finalize these sales ended as a result of the Infestation. After the Infestation, Sweet-Ease and its US sales agent attempted to restart its sales to Costco US with limited success. While some sales were made to the Western Region in the Summer of 2000, these sales were short lived and no sales ever materialized to the Eastern Region. Notwithstanding the problems with selling the cereal snack bars to Costco US, Sweet-Ease, both before and during the receivership, continued to sell significant and increased quantities of product to Costco Canada.

[7] In preparing its report, Trench recognized that the duration of the claim was a very real and contentious issue. The maximum claim period under the insurance policy is 24 months. Trench assessed the loss using 15-month and 24-month indemnity periods and recognized that factors affecting the period were the insolvency of the Companies, the affect of the Infestation on the insolvency, the sale of the operating assets on December 29, 2000 and the fact that sales had resumed to Costco US in the summer of 2000 although in limited quantities.

[8] The Trench Report assumed that if the Infestation had not occurred, sales to the Western Region of Costco would have continued and sales to the Eastern Region of Costco would have commenced in December 1999. Trench relied upon the pre-Infestation average monthly sales data per store in the Western Region to project the likely sales after the Infestation in both the Western and Eastern Regions. The pre-Infestation

average sales were adjusted annually to reflect the 44% growth rate of sales between 1999 and 2001 of this product to Costco Canada (i.e., Canadian sales growth rate applied to U.S. Sales). Also included in the business interruption claim are claims for $16,000.00 for additional labour by Sweet-Ease and lost profit margins of infested finished goods of $117,000. The Trench Report was provided by the Receiver to the solicitors for the Insurer and after a period of consultation and negotiation the Settlement resulted. The Settlement of the business interruption claim provides for an additional payment of $1,678,157.35. The Settlement is based upon a 15-month indemnity period and projected annual sales growth rate of 10 per cent and also includes $50,000 for professional fee coverage.

[9] In addition, the property loss claim filed in the sum of $598,000 was settled for an additional payment of $120,870.00 after allowing for payments of $287,000 already made. One of the primary areas of discussion with respect to the property loss claim was the claim for work-in-process inventory by the Companies relating to a substantial inventory of processed cereal bar material that was not used when the product was produced. The Insurer took the position that this material had been ordered destroyed by the health authorities for reasons unrelated to the Infestation in that it had been infested by insects other than the Indian meal moths, which were the cause of the Infestation, and by various rodents. In addition, the Insurer took the position that some of this inventory was rancid and possibly more than a year old. Similar positions were taken with respect to a claim of $80,830 respecting ingredients inventory. Trench produced a property loss report commenting on the position of the insurer and determining that contrary positions could be argued with respect to their assertions. This resulted in the Settlement of the property loss claim on a compromise basis to allow 50% of these items.

[10] The Settlement also provided that the Receiver retained the right to cancel the Settlement in the event that an interested party bought the claim for an amount equivalent to the amount of the proposed Settlement. This provided the Parravanos or any creditor with the right to proceed with the insurance claims at their own costs if they were of the view that the claims were worth more than the amount of the Settlement.

[11] The Parravanos have presented the Muccilli Report which challengers the methodology used by Trench and a number of the assumptions made by Trench in the preparation of the Trench Report. The Eighth Report of the Receiver, done in conjunction with Trench, set forth its analysis of the Muccilli Report.

[12] The motion records filed on this motion, the reports of KPMG, the Parravanos' affidavits, the Trench Report and the Muccilli Report and the facta and submissions of counsel to this court deal with a myriad of issues relevant to the approval of the Settlement by this court. The issues involve the process followed by the Receiver in arriving at the Settlement, the methodology used by Trench and Muccilli in preparing their Reports, the assumptions made by them and the risk factors taken into account or not taken into account by each of them. The risk factors and the assumptions included whether the Infestation was the cause of the insolvency of the companies or whether the insolvency resulted from other financial problems within the companies, the appropriate indemnity period to apply to the calculation of the loss, the causes of the insolvency of the Companies, the calculation of lost sales and profits as a result of the Infestation, the anticipated and growth rate of sales of the Companies, the anticipated sales and profits from prospective contracts with Kellogg's and with Effem Foods, the property loss claim for work in process inventory and infested inventory, the appropriate gross margin percentage to be applied, the appropriate per store sales figures to be used for anticipated future sales to Costco and numerous other issues.

Disposition

[13] Counsel for the Receiver and for the Laurentian Bank submit that the motion before this court to approve the Settlement entered into by the Receiver is analogous to a motion to approve a sales of assets by a court-appointed receiver and that the principles annunciated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) and *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) should be applied to the case at bar and that the only issues the court need consider are the propriety of the Receiver's conduct and whether the transaction entered into by the Receiver is a provident transaction. They further submit that, in determining these issues, the court should place considerable reliance upon the Receiver's experience and business judgment. It is their position that the major factors to be considered by the court in determining whether the Receiver has acted reasonably and providently in entering into the Settlement are the appropriate indemnity period for the claims, whether the Infestation was the cause of

the insolvencies of the Companies and whether Infestation was also the cause of lost potential sales to Kellogg's and Effem Foods. These factors, they submit, account for substantially all of the difference between the valuation of the claims in the Trench Report and the Muccilli Report and can be determined by a consideration of the two Reports and by the submissions of counsel in their facta and before this court. The court should also, they submit, note that the Parravanos have had ample opportunity to purchase the Insurance Claims and have failed to do so, that there is no opposition by any other creditor to the proposed Settlement and that Business Development Bank, which will not be fully taken out by the amount of the Settlement and is a major secured creditor, supports the Settlement.

[14] Counsel for the Parravanos submits that this court requires *viva voce* evidence in order to make a determination as to which expert's opinion should be accepted before determining whether the Settlement should be approved. He further submits that the conduct of the Receiver should not be approved in that the Receiver failed to proceed with the Insurance Claims expeditiously, that the Parravanos were not consulted sufficiently about the Insurance Claims or kept informed about the exchange of offers, that the interests of Mario Parravano as a secured creditor were not taken into account by the Receiver, that the Trench Report was kept from the Parravanos for nine months after it was prepared and that the Parravanos were given no opportunity to have any input into the Trench Report. Counsel for the Parravanos concedes, however, that a trial of issues has the risk of the court making findings which would be prejudicial to the position of the Receiver in any subsequent litigation with the Insurer if the Settlement is not approved.

[15] I am of the view that the characterization of this proceeding by counsel for the Receiver and for Laurentian Bank is correct. This is not a summary judgment motion where the court is being asked to dismiss a claim or a defence on the basis that there is no genuine issue for trial. Obviously, there are a great number of issues between the two experts' Reports but, having considered the Reports and the submissions made by counsel, I am satisfied that it was reasonable for the Receiver to conclude that the 15-month indemnity period was appropriate in the circumstances, that the Infestation was not the cause of the insolvency of the Companies, that the Infestation did not cause the loss of potential sales to Kellogg's and Effrem Foods and that the annual growth rate of sales of 10% was a reasonable rate to accept for the purposes of concluding a Settlement.

[16] In *Royal Bank v. Soundair Corp.*, *supra*, Galligan J.A. stated at page 17:

> "As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver".

[17] The failure of the Receiver to keep the Parravanos informed and to consult with them is certainly understandable in the circumstances of this case. The position of the Parravanos *vis- a- vis* the Receiver has been throughout the tortuous history of this matter one of accusations, antagonism and endless pointless litigation. The other criticisms of the conduct of the Receiver raised by counsel for the Parravanos are, in my view, minor at best and amount to nothing more than saying that another Receiver might have done things differently. I am satisfied that any such alleged shortcomings on the part of the Receiver do not impact on the reasonableness of the Settlement Agreement arrived at between the Receiver and the Insurer.

[18] The court should accept that a court-appointed receiver has acted properly unless there is strong evidence to the contrary. In *Royal Bank v. Soundair Corp.*, *supra*, Galligan J.A. stated:

> "When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver".

[19] Similarly, *Skyepharma PLC, supra*, Farley J. stated at paragraph 7:

> "Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

[20] There is no evidence before this court that the Receiver in the case at bar acted otherwise than reasonably and prudently in negotiating the Settlement Agreement with the Insurer.

[21] Accordingly, an order will issue:

(a) sealing the contents of Appendices 6 and 7 of the Receiver's Seventh Report and all of the Receiver's Eighth Report until such time as this motion and the companion summary judgment motion by the Insurer are finally determined;

(b) approving the conduct and activities of the Receiver as outlined in the Seventh Report of the Receiver dated December 19, 2002 (the "Receiver's Seventh Report");

(c) approving the Settlement Agreement between the Receiver and the Companies' Insurer, St. Paul Fire and Marine Insurance Company, in respect of the business interruption and property loss Insurance Claims of the Companies; and

(d) authorizing distribution of $1,063,744.79 plus per diem interest from November 15, 2002 up to the date of distribution, to Laurentian Bank of Canada in the event that the companion summary judgment motion by the Insurer is successful.

[22] Counsel may make brief written submissions to me on the costs of this proceeding, on or before August 31, 2003.

End of Document

Most Negative Treatment: Check subsequent history and related treatments.

2005 CarswellOnt 9058
Ontario Court of Appeal

Ravelston Corp., Re

2005 CarswellOnt 9058, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

In the Matter of a Plan of Compromise or Arrangement of
Ravelston Corporation Limited and Ravelston Management Inc.

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as Amended, and the Courts of Justice Act, R.S.O. 1990, c. C.43, as Amended

Doherty, S. Borins, H.S. LaForme JJ.A.

Heard: October 18, 2005
Judgment: November 10, 2005
Docket: CA M33075, CA M33076, CA M33049, CA C44249

Proceedings: refusing leave to appeal *Ravelston Corp., Re* (2005), 2005 CarswellOnt 4907 (Ont. S.C.J. [Commercial List])

Counsel: Alan H. Mark, Edward Greenspan for Conrad Black
Robert Staley for Hollinger International Inc.
Derek Bell for Hollinger Inc.
Alex MacFarlane for R.S.M. Richter Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.A Future rights
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights

Application by receiver of company RCL applied for order authorizing and directing it to voluntarily accept service, on behalf of RCL, of summons to indictment returned on August 18, 2005, by federal grand jury in Chicago was granted — B, another stakeholder, vigorously opposed attornment — Trial judge found receiver indicated that it had completed thorough analysis of issues arising from U.S. criminal proceedings as they related to RCL, receivership of RCL and stakeholders of RCL —

Trial judge found two major stakeholders, H International Inc. and H Inc., advised that their view was that it was appropriate for receiver to have RCL attorn to U.S. criminal proceedings — Trial judge found receiver reached conclusion that it was appropriate to so attorn and to enter not guilty plea — Trial judge found appointment of receiver in April 2005 was on basis that old guard, B, and his colleague, R, were out as to control of RCL, and receiver, as new guard, was completely in control — Trial judge found receiver must zealously safeguard interests of legitimate stakeholders, including U.S. Department of Justice and those for whom it was responsible for protecting — B appealed — Receiver brought application to quash appeal — Application granted; appeal quashed and leave to appeal refused — No leave to appeal as of right existed, as no future rights were at issue as contemplated by s. 193 of Bankruptcy and Insolvency Act — No future rights of U.S. Attorney affected — Merely advancing claim does not create future right — No realistic possibility of success on appeal — Receiver has broad discretion to direct actions of business subject to its authority.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Application by receiver of company RCL applied for order authorizing and directing it to voluntarily accept service, on behalf of RCL, of summons to indictment returned on August 18, 2005, by federal grand jury in Chicago was granted — B, another stakeholder, vigorously opposed attornment — Trial judge found receiver indicated that it had completed thorough analysis of issues arising from U.S. criminal proceedings as they related to RCL, receivership of RCL and stakeholders of RCL — Trial judge found two major stakeholders, H International Inc. and H Inc., advised that their view was that it was appropriate for receiver to have RCL attorn to U.S. criminal proceedings — Trial judge found receiver reached conclusion that it was appropriate to so attorn and to enter not guilty plea — Trial judge found appointment of receiver in April 2005 was on basis that old guard, B, and his colleague, R, were out as to control of RCL, and receiver, as new guard, was completely in control — Trial judge found receiver must zealously safeguard interests of legitimate stakeholders, including U.S. Department of Justice and those for whom it was responsible for protecting — B appealed — Receiver brought application to quash appeal — Application granted; appeal quashed and leave to appeal refused — No leave to appeal as of right existed, as no future rights were at issue as contemplated by s. 193 of Bankruptcy and Insolvency Act — No future rights of U.S. Attorney affected — Merely advancing claim does not create future right — No realistic possibility of success on appeal — Receiver has broad discretion to direct actions of business subject to its authority.

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s. 163(a) — considered

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Generally — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(b) — referred to

s. 193(c) — referred to

s. 193(d) — referred to

s. 193(e) — considered

s. 195 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

APPLICATION by receiver to quash appeal of shareholder from judgment reported at *Ravelston Corp., Re* (2005), 2005 CarswellOnt 4907 (Ont. S.C.J. [Commercial List]), granting receiver's application for authorization of direction to accept service of indictment.

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

I

1 The receiver, R.S.M. Richter Inc. ("Richter") seeks an order quashing an appeal brought by Lord Conrad Black ("Black") as of right from the order of Farley J. Black resists the motion to quash and, by way of alternative, seeks leave to appeal the order of Farley J. Black's application for leave to appeal need be considered only if Richter successfully quashes Black's appeal.

2 I would hold that Black does not have a right of appeal and would quash his appeal. I would refuse leave to appeal.

II

3 In April 2005, Ravelston Corporation Limited ("RCL") was placed into receivership in proceedings taken under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Richter was appointed receiver/monitor with wide powers to manage the affairs of the company. In making

the order, Farley J. indicated that Black and others had resigned as officers and directors of RCL and that the objective of the proceedings was to place RCL (and associated entities) under the control of a court appointed officer:

> The draft orders are to be adjusted to make it absolutely clear that the old guard (Black and Radler — and any other officer and director including Messrs. White and Boultbee) are "out" — out in the sense of not being able to, directly or indirectly, pull any of the strings and that Richters as an officer of the court, responsible to the court and the stakeholders of the applicants, is "in" — in in the sense of being able to pull all the strings and thereby direct the fortunes, business and affairs of the applicants.

4 Richter has filed a series of reports with the Superior Court summarizing its activities since April 2005. Various stakeholders have raised issues before Farley J. and he has made several orders in the course of his ongoing supervision of the insolvency proceedings.

5 On August 18, 2005, a federal grand jury in Chicago, Illinois indicted RCL and others on fraud charges. RCL has no assets or place of business in the United States. It is currently engaged in civil litigation in Illinois. In its Ninth Report filed on September 16, 2005, Richter outlined the issues raised by the criminal proceedings against RCL in federal court in the United States and advised Farley J. that it needed more time to formulate recommendations as to what steps, if any, RCL should take in response to the indictment.

6 On September 28, 2005, Richter filed its Tenth Report with Farley J. That report contains a detailed examination of the legal, practical and "special" considerations that Richter had evaluated in formulating RCL's proposed response to the criminal charges in the United States federal court. Richter concluded that it should accept service of the summons in the criminal proceedings on RCL's behalf, voluntarily appear in those proceedings and plead not guilty to the charges. Richter set out several reasons for its recommendation. It then moved before Farley J. for an order allowing it to accept service of the summons, appear in the U.S. federal court, and enter a not guilty plea on behalf of RCL. Richter was supported on the motion by various stakeholders, including Hollinger International Inc. and Hollinger Inc. Black, whose control over RCL had been terminated by the receivership, but who remained a shareholder and creditor, opposed the receiver's motion. His was the only opposition.

7 On the motion, counsel for Black argued that under the terms of the relevant American "long arm" statute, RCL could not be served with a criminal summons because RCL had no place of business in the United States. Counsel further contended that absent proper service of the summons on RCL, the U.S. federal court had no jurisdiction to proceed against RCL. Counsel urged Farley J. to find that it could not be in the best interests of any of the RCL stakeholders for RCL to attorn to the federal court's jurisdiction, thereby opening itself to potential additional criminal charges and massive penalties, when under the applicable American statute, the American criminal court could not exercise jurisdiction over RCL absent attornment.

8 The Tenth Report prepared by Richter was the only material before Farley J. on the motion. As I understand the submissions before Farley J., no objection was taken to the facts outlined in the report or the relevance of the various factors identified by Richter in reaching its conclusion as to the appropriate response by RCL to the American indictment.

9 Farley J. made the order sought by Richter. In doing so, he said:

> The Receiver has had the opportunity of a thorough analysis, assisted by its Canadian counsel, but importantly by its U.S. counsel, and it has concluded that on balance it would be appropriate to attorn and plead not guilty; and further that that would be the right and proper thing to do and that it would likely be to the advantage of the estate. I see no reason to quarrel with or second guess that considered analysis ...

10 Black appealed the order of Farley J. He relied on s. 193(a) of the *BIA*, which provides a right of appeal from an order "if the point at issue involves future rights". Alternatively, if s. 193(a) was inapplicable, Black applied for leave to appeal under s. 193(e) of the *BIA*.

11 Pursuant to s. 195 of the *BIA*, the filing of the Notice of Appeal stayed the order under appeal. If Black is found not to have a right of appeal, but is granted leave to appeal, the granting of leave also stays the order. RCL has not yet attorned to the jurisdiction of the U.S. federal criminal court.

III

The motion to quash

12 Richter, supported by Hollinger Inc. and Hollinger International Inc., argues that the order of Farley J. does not involve future rights and therefore does not provide an automatic right of appeal pursuant to s. 193 (a). If Richter's submission is correct, the appeal must be quashed for want of jurisdiction.

13 In addition to a right of appeal where the issue "involves future rights" under s. 193(a), ss. 193(b), (c) and (d) provide a right of appeal in a variety of other circumstances. Black does not rely on any of these provisions and I need not set them out here. There does not appear to be any unifying principle underlying the situations in which an appeal lies as of right via s. 193 of the *BIA*.

14 The specific rights of appeal granted under s. 193 of the *BIA* are combined with s. 193(e), which provides for appeals where leave is granted by a judge of the Court of Appeal. Leave may be granted from any order made under the *BIA* on any ground.

15 By combining limited specific rights of appeal with a broad power to appeal with leave, s. 193 of the *BIA* both allows access to the appeal court on meritorious appeals and limits the availability of multiple appeals in ongoing insolvency proceedings where those appeals would inevitably delay and fracture the proceedings.

16 The *BIA* does not provide any definition of the phrase "future rights". As with any exercise in statutory interpretation, the words must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act: *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

17 Earlier cases such as *Amalgamated Rare Earth Mines Ltd. (No. 2), Re* (1958), 37 C.B.R. 228 (Ont. C.A.) that would give the phrase "future rights" a "wide and liberal interpretation" are inconsistent with the contemporary approach to statutory interpretation. These cases also take the interpretation of "future rights" from earlier insolvency cases. Those earlier cases were, however, interpreting insolvency legislation that did not grant any right of appeal from orders made in insolvency proceedings, but only provided for appeal with leave from specific orders, including orders "involving future rights". It was within the context of statutory provisions that provided only a limited right of appeal with leave that the courts gave a wide and generous reading to the phrase "future rights". Any other reading could have closed the appeal court door on many meritorious appeals. Under the scheme of appeals set out in the present *BIA*, there is no need to give the phrase "future rights" a broad meaning to ensure that meritorious appeals can be heard. [1]

18 The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal: *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at 242; *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.), at 84. Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights: *Simonelli v. Mackin* (2003), 320 A.R. 330 (Alta. C.A. [In Chambers]) at paras. 9-11 (C.A., Wittmann J.A. in chambers); *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) at paras. 11-12 (Ont. C.A., Armstrong J.A. in chambers); *Devcor Investment Corp., Re* (2001), 277 A.R. 93 (Alta. C.A.) at para. 7 (C.A., Picard J.A. in chambers).

19 A definition of the phrase "future rights" appears in the judgment of McGillivray C.J.A. in *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), at 100-101:

> A right in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future. For the adjective "future" to have any meaning, it cannot refer to that which presently exists. ...
>
> To give "future" the meaning that includes that which a litigant may obtain by success in litigation in the future is to say that a right of appeal exists in all cases. Any claim advanced is, in that sense, a future right to a judgment which does not yet exist. It would seem to me for para, (a) of s. 163 [now 193] to have any meaning that it must refer to rights which could not at the present time be asserted but which will come into existence at a future time
>
> [emphasis added].

Elias has been repeatedly cited with approval in various appellate courts: see e.g. *TFP Investments Inc. (Trustee of) v. Singhal* (1991), 44 O.A.C. 234 (Ont. C.A.), at 236 (Catzman J.A. in chambers).

20 Black does not argue that the order of Farley J. involves the future rights of RCL. That order directs RCL to attorn to the jurisdiction of the American court and to plead not guilty to the outstanding indictment. RCL clearly had the right to appear in answer to the criminal allegations and enter a plea after the grand jury had returned the indictment against RCL. The order of Farley J. does not affect RCL's future rights, but rather tells RCL how it should exercise its present rights.

21 Counsel for Black also does not argue that his future rights are affected by the order.

22 Counsel does argue that the future rights of the American prosecutor (the U.S. Attorney) who Farley J. has held to be a stakeholder in the insolvency proceedings, are affected by the order. Counsel contends that the U.S. Attorney presently has no right to proceed against RCL in the U.S. criminal proceedings, but that an order directing RCL to attorn would give the U.S. Attorney the right to proceed against RCL in the future.

23 The order of Farley J. may impact on the right of the U.S. Attorney to proceed against RCL, but it does not involve any future right of the U.S. Attorney. The U.S. Attorney's rights against RCL, including its right to proceed if RCL attorns to the jurisdiction, existed when Farley J. made his order. His order may remove an impediment to the U.S. Attorney's proceeding against RCL, but that does not make the U.S. Attorney's right to proceed a future right. I would analogize this to a situation where a litigant needs leave to pursue a civil proceeding in the insolvency context. An order granting leave does not create the right to sue which existed all along, but merely removes an impediment to the exercise of that right: see *Simonelli*, *supra*, at paras. 9-11.

24 As I have rejected the submission that the order of Farley J. involves the future rights of the U.S. Attorney, I need not decide whether Black can rely on the future rights of another stakeholder to gain a right of appeal. I leave that question for another day.

25 The order of Farley J. does not involve future rights. The appeal must be quashed.

IV

The leave to appeal application

26 Having concluded that Black has no right of appeal, I turn to his application for leave to appeal. In seeking leave, Black argues that Farley J.'s exercise of his discretion directing RCL to attorn to the jurisdiction of the American court was based on a misinterpretation of the relevant American statute. He contends that the proper interpretation of that statute raises a significant legal question upon which leave to appeal should be granted under s. 193(e) of the *BIA*.

27 As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the *BIA*. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: see e.g. *Baker, Re* (1995), 22 O.R. (3d) 376

(Ont. C.A. [In Chambers]), at 381 (C.A., Osborne J.A. in chambers); *Fiber Connections Inc. v. SVCM Capital Ltd.*, *supra*, at para. 19; *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]) (C.A., Feldman J.A. in chambers).

28 The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.

29 A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

30 In *Canadian Airlines Corp., Re* (2000), 261 A.R. 120 (Alta. C.A. [In Chambers]) at para. 35, Wittmann J.A. (in chambers) was faced with an application for leave under the *CCAA*. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is *prima facie* meritorious". He described the necessary merits inquiry in this way:

> ... There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

31 I think the same level of merits inquiry is warranted on an application for leave to appeal under the *BIA*. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.

32 The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has *prima facie* merit. I do not reach those other considerations on this motion.

33 Black's proposed appeal focuses on two aspects of the reasons of Farley J. He submits that Farley J. erred in holding that the applicable U.S. federal legislation contemplated service of a summons in a criminal matter on RCL even though RCL had no assets or a place of business in the United States. Black also contends that at most, Farley J. should have directed Richter to enter an appearance in the federal court in the United States solely for the purpose of contesting the jurisdiction of that court. An appearance limited to the jurisdictional issue would have permitted RCL to determine whether in fact the American court had jurisdiction without attorning to that jurisdiction.

34 The federal prosecutor's right to effect service of a summons on RCL in Canada was canvassed in Richter's Tenth Report:

> The Receiver has been unable to determine the existence of any U.S. judicial decision that confirms the effectiveness of service of a summons outside the United States. Given the language of the Federal Rules of Criminal Procedure 4(c) (Fed. R. Crim. P. 4(c)), the uncertainty of the language of the MLAT [Mutual Legal Assistance in Criminal Matters Treaty], the absence of any apparent practice of serving an originating process for criminal prosecution under the MLAT, and the lack of any U.S. caselaw to support effective service *ex juris* of an originating criminal process, it appears to the Receiver that the U.S. Attorney's Office would have significant difficulty effecting service, in Canada, on the Receiver or RCL
>
> [emphasis added]. ...

35 Richter did not put forward a definitive interpretation of the relevant U.S. legislation. Nor did it rest its advice that RCL should attorn to the U.S. federal jurisdiction on its interpretation of any American legislation. Richter referred to the possibility of service under the legislation, and to several other possible ways that a U.S. federal court might find that it had jurisdiction over RCL. Richter concluded that the question of the court's criminal jurisdiction over RCL raised several difficult legal issues

that would have to be litigated to be resolved. Richter believed that the litigation would be lengthy and expensive and the outcome uncertain.

36 Richter did not limit its analysis to the possible bases upon which the U.S. prosecutor might successfully assert that the U.S. federal court had jurisdiction over RCL. Richter considered practical factors including the benefits that might inure to RCL through cooperation with the U.S. authorities. Richter also addressed what it called "special circumstances" that arose because of Richter's status as a court appointed receiver. When referring to these "special considerations", Richter observed:

> A receiver has a further duty to consider and respect the interests of comity between this Honourable Court and the U.S. Court, and the public's interest in the administration of justice generally.

37 Black argues that Farley J. misconstrued the American legislation that provides for the service of a summons on a corporation in a criminal matter. Black contends that on a plain reading of the statute and its accompanying commentary, it is crystal clear that since RCL had no place of business in the United States, it could not be served with a summons requiring it to appear in a criminal proceeding in federal court in the United States. Black maintains that Farley J. found that RCL could be served under the relevant statute and that this led him to accept Richter's recommendation that RCL should attorn to the American jurisdiction.

38 Farley J. did not decide whether RCL could be served with a summons under the relevant American legislation. He referred to counsel for Black's interpretation of the legislation and identified what he considered to be weaknesses in the argument advanced by counsel. He did not ultimately accept or reject counsel's contention.

39 It was unnecessary for Farley J. to come to any conclusion as to the proper meaning of the American legislation. He based the exercise of his discretion on the absence of any reason to "quarrel with or second guess" Richter's analysis. That analysis included, but was not limited to, Richter's assessment of the U.S. Attorney's ability to effectively summons RCL in answer to the charges. Farley J. did not make the order he did because he was satisfied that RCL could be properly summonsed under the American legislation, but because he was satisfied that Richter had done its job as the court appointed receiver and there was no reason for the court to interfere with Richter's judgment as to RCL's best course of conduct.

40 Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

41 The second argument made by Black that Farley J. should have at least limited RCL's appearance to a challenge of the American federal court's jurisdiction fails for the same reason as his first argument. Richter was aware of this option. The determination that RCL should attorn and plead not guilty reflected its considered opinion that RCL had much to lose should it engage in and ultimately lose a jurisdictional fight with the U.S. Attorney. Richter also properly took into account its court appointed status in deciding against a jurisdictional battle with the U.S. Attorney. Finally, Richter weighed the views expressed by other stakeholders, particularly Hollinger Inc. and Hollinger International, the principal stakeholders. All stakeholders save Black wanted RCL to attorn to the American jurisdiction.

42 I see no viable argument that Farley J. erred in principle in the exercise of his discretion. There is no realistic possibility that Black could succeed on appeal were leave to appeal granted. I would refuse leave to appeal.

V

Conclusion

43 I would quash the appeal brought by Black and refuse leave to appeal.

44 The successful parties, Richter, Hollinger Inc., and Hollinger International, are entitled to their costs on a partial indemnity basis. As the two motions were closely related, one order of costs is appropriate. Counsel for the successful parties will have five days from the release of these reasons to provide written submissions of no more than five pages. Black will have five days from receipt of those submissions to respond with written submissions of no more than five pages.

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

I agree

***H.S. LaForme J.A.*:**

I agree

Application granted.

Footnotes

1 The earlier insolvency legislation which provided for leave to appeal from orders involving future rights was in issue in *Clarke v. Union Fire Insurance Co.* (1886), 13 O.A.R. 268 (Ont. C.A.), at 294 -95; *J. McCarthy & Sons Co., Re* (1916), 32 D.L.R. 441 (Ont. C.A.), at 442 -43. Those cases were in turn cited with approval in cases such as *Amalgamated Rare Earth Mines Ltd. (No. 2), Re*, *supra*, without reference to the important difference in the rights of appeal created by the relevant legislation.