2018 01G 3114

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3, as amended

AND IN THE MATTER OF the Receivership of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc.

Estate No. 51-126100
Court No. 21491

APPLICATION FOR VESTING ORDER

MEMORANDUM OF AUTHORITIES ON BEHALF OF THE RECEIVER

Darren D. O'Keefe
COX & PALMER
Solicitors for the Applicant
Whose address for service is:
Suite 1100, Scotia Centre
235 Water Street
St. John's, NL A1C 5L3

TO: **The Supreme Court of Newfoundland and Labrador Trial Division (General)**
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

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Estate No. 51-126100
Court No. 21491

SUMMARY OF CURRENT DOCUMENT	
Court File No:	**2018 01G 3114**
Date of filing of Document:	03 August 2018
Name of Filing Party or Person:	BDO Canada Ltd., the Court Appointed Receiver of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc.
Application to which Document being filed relates:	Interlocutory Application for a Vesting Order
Statement of purpose in filing:	Authorities in support of the application
Court Sub-File Number, if any:	N/A

2018 01G 3114

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3, as amended

AND IN THE MATTER OF the Receivership of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc.

Estate No. 51-126100
Court No. 21491

MEMORANDUM OF AUTHORITIES

AUTHORITY	TAB
1. Order in Re: the Receivership of PTL Holdings Limited, et al. May 11th, 2018	**TAB 1**
2. In Receivership of *Shape Foods Inc.* (2009) MBQB 171	**TAB 2**
3. Holden & Morawetz, 2018 Annotated Bankruptcy and Insolvency Act, 2018 Thomson Reuters, p. 1108-1113	**TAB 3**
4. *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.* (2007), 2007 CarswellNfld 83, 29 C.B.R. (5th) 270 (NLCA)	**TAB 4**
5. *Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, s 29.05.	**TAB 5**
6. *Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, s 6.06	**TAB 6**

DATED at St. John's, Newfoundland and Labrador, this 3 day of August, 2018.

for **DARREN D. O'KEEFE**
COX & PALMER
Solicitors for the Applicant
Whose address for service is:
Suite 1100, Scotia Centre
235 Water Street
St. John's, NL A1C 1B6

TAB 1

2018 01G 3114

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF	an application by Canadian Imperial Bank of Commerce for an order appointing BDO Canada Limited as Court-Appointed Receiver of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc.
AND IN THE MATTER OF	the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended

Estate No.

Court No.

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

AND:

PTL HOLDINGS LIMITED

FIRST RESPONDENT

AND:

PTL SERVICES (EQUIPMENT) LIMITED

SECOND RESPONDENT

AND:

CSL SERVICES (INDUSTRIAL) LIMITED

THIRD RESPONDENT

AND:

9263357 CANADA INC.

FOURTH RESPONDENT

RECEIVERSHIP ORDER

BEFORE THE HONOURABLE JUSTICE

UPON APPLICATION by the Applicant for an order, under subsection 243(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**") to appoint BDO Canada Limited as receiver (the "**Receiver**") without security, of all of the assets, undertakings and property of the Respondents.

#1858850

Filed May 11/15 mh

AND UPON HEARING Carl Holm, Q.C., counsel for the Applicant, and other counsel appearing;

AND UPON READING the Application, and the Affidavits of Supriya Sarin, Phil Clarke, Carl Holm, Q.C. and Marc Dunning, filed herein:

THIS COURT HEREBY ORDERS AS FOLLOWS:

Service

1. The time for service of the notice of application and the supporting materials is hereby abridged and validated so that the Application is properly returnable today and further service thereof is hereby dispensed with.

Appointment

2. Pursuant to subsection 243(1) of the BIA, and Rule 25(1) of the *Rules of the Supreme Court, 1986* the Receiver is hereby appointed receiver, without security, of all of the assets, undertakings, and property of the PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc. (the "**Respondents**"), acquired for, or used in relation to a business carried on by the Respondents, including any bank accounts/trust accounts in the name of any one of the Respondents or in the name of the Receiver on behalf of any one of the Respondents, and including all proceeds thereof (the "**Property**").

Receiver's Powers

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without limiting the generality of the foregoing, the Receiver is hereby empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession and control of the Property and any proceeds or receipts arising from the Property but, while the Receiver is in possession of any of the Property, the Receiver must preserve and protect it;

(b) to change locks and security codes, relocate the Property to safeguard it, engage independent security personnel, take physical inventories, and place insurance coverage;

(c) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(d) to purchase or lease such machinery, equipment, inventories, supplies, premises, or other assets to continue the business of the Respondents, or any part or parts thereof;

(e) to receive and collect all monies and accounts now owed or hereafter owing to any one of the Respondents and to exercise all remedies of the Respondents in collecting such monies, including, without limitation, to enforce any security held by the Respondents;

(f) to settle, extend, or compromise any indebtedness owing to any one of the Respondents;

(g) to execute, assign, issue, and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Respondents, for any purpose pursuant to this Order;

(h) to undertake environmental or workers' health and safety assessments of the Property and operations of the Respondents;

(i) to initiate, prosecute, and continue the prosecution of any proceedings and to defend proceedings now pending or hereafter instituted with respect to the Property or the Receiver, and to settle or compromise any such proceedings, which authority extends to appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to manage, operate, and carry on the business of the Respondent, including the powers to enter into any agreement, incur, and pay any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Respondent;

(k) to make payment of any and all costs, expenses, and other amounts that the Receiver determines, in its sole discretion, are necessary or advisable to preserve, protect, or maintain the Property, including, without limitation taxes, municipal taxes, insurance premiums, repair and maintenance costs, costs or charges related to security, management fees, and any costs and disbursements incurred by any manager appointed by the Receiver;

(l) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(m) to sell, convey, transfer, lease, or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000.00, provided that the aggregate consideration for all such transactions does not exceed $500,000.00, except that the Receiver is hereby authorized to run an auction sale of any Property that is equipment so that title to equipment can be given at the auction without the need for Court approval of the auction process and passing of title; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause, except that the Receiver is hereby authorized to run an auction sale of any Property that is equipment so that title to equipment can be given at the auction without the need for Court approval of the auction process and passing of title;

and in each such case notice under section 60 of the *Personal Property Security Act* shall not be required.

(n) to sell the right, title, interest, property, and demand of the Respondents in and to the Property at the time the Respondents are granted a security interest or at any time since, free of all claims including the claims of subsequent encumbrancers;

(o) to report to, meet with, and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(p) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property;

(q) to apply for any permits, licences, approvals, or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Respondents;

(r) to enter into agreements with any trustee in bankruptcy appointed in respect of the Respondents including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by any one of the Respondents;

(s) to exercise any shareholder, partnership, joint venture, or other rights which the Respondents may have; and

(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps it shall be authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Respondents, and without interference from any other Person.

Duty to Provide Access and Co-Operation to the Receiver

4. The Respondents, all of their current and former directors, officers, employees, agents, accountants, legal counsel, and shareholders, and all other persons acting on their instruction or behalf, and all other individuals, firms, corporations, governmental bodies, or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records, and information of any kind related to the business or affairs of the Respondents, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall, subject to their right to seek a variation of this Order, provide to the Receiver or permit the Receiver to make, retain, and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software, and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall, subject to their right to seek a variation of this Order, forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper, making copies of computer disks, or such other manner of retrieving and copying the information as the Receiver in its discretion

deems expedient, and shall not alter, erase, or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

No Proceedings Against the Receiver

7. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Respondents or the Property

8. No Proceeding against or in respect of the Respondents or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Respondents or the Property are hereby stayed and suspended pending further order of this Court.

No Exercise of Rights or Remedies

9. All rights and remedies of any individual, firm, corporation, governmental body or agency or any other entities against the Respondents, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Respondents to carry on any business which the Respondents are not lawfully entitled to carry on, (ii) exempt the Receiver or the Respondents from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration

of a claim for lien and the related filing of an action to preserve the right of a lien holder, provided that the Applicant shall not be required to file a defence to same as the further prosecution of any such claim is stayed except with the written consent of the Applicant or the Receiver, or leave of this Court.

Personal Property Lessors

10. All rights and remedies of any Person pursuant to any arrangement or agreement to which any of the Respondents are a party for the lease or other rental of personal property of any nature or kind are hereby restrained except with consent of the Receiver in writing or leave of this Court. The Receiver is authorized to return any Property which is subject to a lease from a third party to such Person on such terms and conditions as the Receiver, acting reasonably, considers appropriate and upon the Receiver being satisfied as to the registered interest of such Person in the applicable Property. The return of any item by the Receiver to a Person is without prejudice to the rights or claims of any other Person to the property returned or an interest therein.

No Interference with the Receiver

11. Subject to paragraph 16 of this Order related to the Respondents' employees, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate, or cease to perform any right, renewal right, contract, agreement, licence, or permit in favour of or held by any of the Respondents, without written consent of the Receiver or leave of this Court.

Continuation of Services

12. All Persons having oral or written agreements with any of the Respondents or statutory or regulatory mandates for the supply of goods or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other services to the Respondents are hereby restrained until further order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Receiver, and the Receiver shall be entitled to the continued use of the

Respondents' current telephone numbers, facsimile numbers, internet addresses, and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Respondents or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

13. The Receiver, in its sole discretion, may, but shall not be obligated to, establish accounts or payment on delivery arrangements with suppliers in its name on behalf of the Respondents for the supply of goods or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other services to the Respondents, or any of them, if the Receiver determines that the opening of such accounts is appropriate.

14. No creditor of the Respondents shall be under any obligation as a result this Order to advance or re-advance any monies or otherwise extend any credit to the Respondents.

Receiver to Hold Funds

15. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts opened by the Receiver or to be opened by the Receiver (the **"Post Receivership Accounts"**) and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

Employees

16. All employees of the Respondents shall remain the employees of the Respondents until such time as the Receiver, on the Respondents' behalf, may terminate the employment of

such employees or they resign in accordance with their employment contract. The Receiver shall not be liable as a result of this Order for any employee-related liabilities, including any successor employer liabilities as provided for in subsection 14.06(1.2) of the BIA, wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under subsections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, such amounts as may be determined by a court or tribunal of competent jurisdiction.

17. Pursuant to paragraph 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**") as permitted at law. Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. A prospective purchaser or bidder requesting the disclosure of personal information shall execute such documents to confirm the agreement of such Person to maintain the confidentiality of such information on terms acceptable to the Receiver. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Respondents, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

Limitation on Environmental Liabilities

18. Nothing herein contained shall require or obligate the Receiver to occupy or to take control, care, charge, occupation, possession, or management (separately or collectively, "**Possession**") of any of the Property that might, or any part thereof, which may be environmentally contaminated, might be a pollutant or a contaminant, or might cause or

contribute to a spill, discharge, release, or deposit of a substance contrary to any federal, provincial, or other legislation, statute, regulation or, rule of law or equity respecting the protection, conservation, enhancement, remediation, or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, *Canadian Environmental Protection Act*, 1999, the *Newfoundland and Labrador Environmental Protection Act, or* the *Newfoundland and Labrador Water Resources Act* (collectively, the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.

Limitation on Liability

19. BDO Canada Limited and, without limitation, a director, officer, or employee of the Receiver, shall incur no liability or obligation as a result of its appointment as the Receiver or the carrying out the provisions of this Order, or in the case of any party acting as a director, officer, or employee of the Receiver so long as acting in such capacity, save and except for any negligence, breach of contract, or actionable misconduct on the part of such party, or in respect of the Receiver's obligations under subsections 81.4(5) and 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

Receiver's Accounts

20. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge to a maximum of $100,000.00 (the "**Administrative Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and the Administrative Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. The Receiver and its legal counsel shall pass its accounts from time to time before a judge of this Court or a referee appointed by a judge.

22. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees, expenses and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Receiver's Indemnity Charge

23. The Receiver shall be entitled to and is hereby granted a charge (the "**Receiver's Indemnity Charge**") upon all of the Property as security for all of the obligations incurred by the Receiver including obligations arising from or incident to the performance of its duties and functions under this Order, under the *Bankruptcy and Insolvency Act*, or otherwise, saving only liability arising from negligence or actionable misconduct of the Receiver.

24. The Receiver's Indemnity Charge shall form a second charge on the Property in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA and subordinate in priority to the Administrative Charge.

Allocation of Costs

25. The Receiver shall file with the Court for its approval a report setting out the costs, fees, expenses, and liabilities of the Receiver giving rise to the Administrative Charge, the Receiver's Indemnity Charge, and the Receiver's Borrowings Charge, as defined below, and, unless the Court orders otherwise, all such costs, fees, expenses, and liabilities shall be paid as agreed by the senior secured creditors, in the following manner:

    (a) Firstly, applying the costs incurred in the receivership proceedings specifically attributable to an individual asset or group of assets against the realizations from such asset or group of assets;

(b) Secondly, applying the costs *pro rata* against all of the assets based on the net realization from such asset or group of assets; and

(c) Thirdly, applying non-specific costs incurred in the receivership proceedings *pro rata* against the assets based on the net realization from such asset or group of assets.

Funding of the Receivership

26. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000.00, or such greater amount as this Court may by further order authorize, at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of making payments, including interim payments, required or permitted to be made by this Order, including, without limitation, payments of amounts secured by the Administrative Charge and the Receiver's Indemnity Charge. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Indemnity Charge, the Administrative Charge and the charges as set out in subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

27. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court on seven days' notice to the Receiver and the Applicant.

28. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

29. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or

any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

General

30. The Receiver may from time to time make a motion for advice and directions in the discharge of its powers and duties hereunder.

31. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Respondents and, notwithstanding the stay of proceedings in respect of the Respondents and the Respondents' assets imposed by this order, the Receiver is authorized to make an assignment in bankruptcy in respect of the Respondents in accordance with the *Bankruptcy and Insolvency Act*.

32. The aid and recognition of any court, tribunal, or regulatory or administrative body having jurisdiction outside Newfoundland and Labrador is hereby requested to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, and regulatory or administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

33. The Receiver is hereby authorized and empowered to apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

34. The Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Respondents' estates with such priority and at such time as this Court may determine.

35. Any interested party may make a motion to vary or amend this Order upon such notice required by the *Rules of the Supreme Court, 1986* or on such notice as this Court may order.

36. Any Person affected by this Order which did not receive notice in advance of the hearing may make a motion to vary or amend this Order within five days of such Person being served with a copy of this Order.

37. In addition to the reports to be filed by the Receiver under legislation, the Receiver shall file a report of its activities with the Court when the Receiver determines that a report should be made, when the Court orders the filing of a report on the motion of an interested party or on the Court's own motion, and at the conclusion of the receivership.

38. The Receiver shall not be discharged without notice to such secured creditors and other parties as the Court directs.

DATED AT St. John's, Newfoundland and Labrador this 11th day of May, 2018.

Schedule "A"

Receiver Certificate

Certificate No.

Amount $

This is to certify that BDO Canada Limited, the receiver (the "**Receiver**") of the assets, undertakings, and property of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc. (the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by order of the Supreme Court of Newfoundland and Labrador (the "**Court**") dated the day of , 2018 (the "**Order**") made in an action having court file number , has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $, being part of the total principal sum of $, which the Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [*monthly/semi-annually/annually/other*] not in advance on the day of each month after the date hereof at a rate per annum equal to the rate of per cent above the prime commercial lending rate of from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any

person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

Dated the day of , 2018.

BDO Canada Limited, solely in its capacity as Receiver of PTL Holdings Limited, PTL Services (Equipment) Limited, CSL Services (Industrial) Limited and 9263357 Canada Inc., and not in its personal capacity

Per: _____

Name:

Title:

TAB 2

Date: 20090622
Docket: CI 09-02-02233
Indexed as: Shape Foods Inc.
Cited as: 2009 MBQB 171
(Brandon Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: THE RECEIVERSHIP OF SHAPE FOODS INC.

AND IN THE MATTER OF: THE RECEIVERSHIP OF 0767623 B. C. LTD.

BETWEEN:

DELOITTE & TOUCHE INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF SHAPE FOODS INC. AND 0767623 B. C. LTD.

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 and Richard Brugger

J. Hirsch
For 5842264 Manitoba Ltd. (watching brief)

R. Paterson
For City of Brandon (watching brief)

JUDGMENT DELIVERED:
June 22, 2009

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 Corporation*** [2000] O. J. No. 467, 47 O. R. (3d) 234 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.).
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> 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.
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> 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. (4th) 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.
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> [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.
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> 2) The court should consider the interests of the parties.
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> 3) The court should consider the efficacy and integrity of the process by which offers are obtained.
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> 4) The court should consider whether there has been unfairness in the working out of the process.

[21] In ***Royal Bank v. Soundair***, (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.
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> 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 ***Re: Selkirk*** (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. e-mailed 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.

_____ J.

TAB 3

243 was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought. The general goals of bankruptcy or receivership cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence, is inconsistent with the requisite restrained approach to paramountcy. The Court set aside the conclusion that Part II of *TSFSA* is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 CarswellSask 680, 2015 CarswellSask 681, [2015] 3 S.C.R. 419, 31 C.B.R. (6th) 1, 2015 SCC 53 (S.C.C.).

The Newfoundland and Labrador Court of Appeal dismissed an appeal of an order appointing a receiver under s. 243 of the *BIA*. The appellants sought to set aside the order on the basis that the receiver was in a conflict of interest resulting from its previous acceptance of a mandate from one of the banks to assist the appellants in financial restructuring efforts that had been unsuccessful. The Court held that the standard of review on a question of law is that of correctness; and the standard of review for findings of fact is one of "palpable and overriding error." In this case, the engagement letter, signed by the three appellant companies, acknowledged the mandate of the accountancy firm and expressly stated that the appellants understood that the firm was "not precluded from accepting any other mandate in respect of the company, including but not limited to appointments under statute or by court order". Justice Harrington noted that the engagement letter precluded the appellants from seeking to revoke the mandate given to the receiver. The firm could not be found to be in a conflict of interest position given the clear mandate set forth in the engagement letter. Justice Harrington also held that it was not necessary for the court to revisit the receivership management plan that had been agreed on by the parties and ordered by the court: *Wabush Hotel Limited v. Business Development Bank of Canada*, 2017 CarswellNfld 221, 48 C.B.R. (6th) 181, 2017 NLCA 35 (N.L. C.A.).

The British Columbia Supreme Court granted a receivership order pursuant to the British Columbia *Securities Act* (*BCSA*) and imposed a constructive trust in favour of the investors: *British Columbia (Securities Commission) v. Bossteam E-Commerce Inc.*, 2017 CarswellBC 1231, 2017 BCSC 787 (B.C. S.C.). For a discussion of this judgment, see F§5(8) "Trust Property — Constructive Trusts".

The Nova Scotia Supreme Court dismissed a bank's motion to appoint an interlocutory receiver. While Moir J. accepted the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, it is prominent in trials or hearings for a final order. The interlocutory receivership in Nova Scotia is a temporary remedy. The approach the Nova Scotia *Rules* adopted leaves the final receivership order to default, summary judgment, trial of an action, or hearing of an application, embracing a policy against prejudgment that underlines the reasoning in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)*, [1987] 1 S.C.R. 110, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34: "Is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all the circumstances of the case. This will necessarily be context-specific" (*Google*, at para. 25). Justice Moir found that granting the interlocutory receivership sought by the bank would not be just and equitable in all the circumstances, including the short time between this application and the date for the

final hearing: *Bank of Montreal v. Linden Leas I* (6th) 170, 2017 NSSC 223 (N.S. S.C.).

The Saskatchewan Court of Queen's Bench consi appointment of a receiver under the *BIA* and the *I* a stay of proceedings under the *CCAA*. The Court early 2015, the creditor had accommodated finan and under various forbearance agreements, had ag various undertakings of the debtor. The creditc breached those undertakings. The creditor gave pursuant to s. 244(1) of the *BIA* and demanded pa it. The debtor failed to pay. Justice Scherman held establishing each of the requirements of appropri that an applicant under s. 243 of the *BIA* bears the be just and convenient to appoint a receiver in th on the evidence, that there had been elements of creditor. In this case, the debtor had provided ina payable and made a significant payment to anoth the forbearing creditor. Scherman J. concluded th order pursuant to the *CCAA* application; it was pointed. Justice Scherman indicated that the cou appointing a receiver may have upon employees, ness associates. However, he was satisfied on th significant relief from the contractual terms ove effectively provided the debtor with much of the *CCAA*: *Affinity Credit Union 2013 v. Vortex I* C.B.R. (6th) 220, 2017 SKQB 228 (Sask. Q.B.).

L§4 — Effect of Bankruptcy on the Manager

Section 13.4 deals with a licensed insolvency tru By s. 13.4, a licensed insolvency trustee canno property of the bankrupt unless it obtains an i under which it will be acting as receiver and mar me has notified the Superintendent and the credit (a) that it is acting as receiver and manager; (b) t manager; and (c) the legal opinion that the trustee security. Section 243 grants authority to the cour ing jurisdiction under the *BIA*, to appoint a receiv eliminating the need to apply to the courts in mu receiver.

There are cases that have held that, if a court-ap ment in bankruptcy on behalf of the company cases: see *Prairie Palace Motel Ltd. v. Carlson* in *C.I.B.C. v. King Truck Engineering Can. Lt* Court of Appeal refused to follow the *Prairie P*

L§5 — Effect of Appointment of a Re

When a receiver and manager is appointed, the c directors remains in office. The receiver is only

final hearing: *Bank of Montreal v. Linden Leas Limited*, 2017 CarswellNS 607, 51 C.B.R. (6th) 270, 2017 NSSC 223 (N.S. S.C.).

The Saskatchewan Court of Queen's Bench considered competing applications, one for the appointment of a receiver under the *BIA* and the *PPSA*, and the other for an initial order and a stay of proceedings under the *CCAA*. The Court granted the receivership application. Since early 2015, the creditor had accommodated financial difficulties being faced by the debtor, and under various forbearance agreements, had agreed to interest only payments in return for various undertakings of the debtor. The creditor took the position that the debtor had breached those undertakings. The creditor gave notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded payment in full of the indebtedness owed to it. The debtor failed to pay. Justice Scherman held that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith, and due diligence; and that an applicant under s. 243 of the *BIA* bears the burden of satisfying the court that it would be just and convenient to appoint a receiver in the circumstances. Justice Scherman found, on the evidence, that there had been elements of bad faith in the debtor's dealings with the creditor. In this case, the debtor had provided inaccurate information relating to its accounts payable and made a significant payment to another creditor in breach of its agreement with the forbearing creditor. Scherman J. concluded that it was not appropriate to make an initial order pursuant to the *CCAA* application; it was just and convenient that a receiver be appointed. Justice Scherman indicated that the court was fully alive to the consequences that appointing a receiver may have upon employees, unsecured creditors, shareholders, and business associates. However, he was satisfied on the evidence that the creditor had provided significant relief from the contractual terms over a two-year period, and thus had already effectively provided the debtor with much of the remedial opportunity contemplated by the *CCAA*: *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 CarswellSask 399, 50 C.B.R. (6th) 220, 2017 SKQB 228 (Sask. Q.B.).

L§4—Effect of Bankruptcy on the Appointment of Receiver and Manager

Section 13.4 deals with a licensed insolvency trustee acting on behalf of a secured creditor. By s. 13.4, a licensed insolvency trustee cannot also act as receiver and manager of the property of the bankrupt unless it obtains an independent legal opinion that the security under which it will be acting as receiver and manager is valid and enforceable, and the trustee has notified the Superintendent and the creditors of the bankrupt estate or the inspectors: (a) that it is acting as receiver and manager; (b) the basis of its remuneration as receiver and manager; and (c) the legal opinion that the trustee has received concerning the validity of the security. Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA*, to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver.

There are cases that have held that, if a court-appointed receiver-manager makes an assignment in bankruptcy on behalf of the company, its authority to act as receiver-manager ceases: see *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.). In *C.I.B.C. v. King Truck Engineering Can. Ltd.* (1987), 63 C.B.R. (N.S.) 1, the Ontario Court of Appeal refused to follow the *Prairie Palace* case.

L§5—Effect of Appointment of a Receiver

When a receiver and manager is appointed, the company continues to exist and the board of directors remains in office. The receiver is only given exclusive control over the assets that

are the subject-matter of the receivership order: *T.D. Bank v. Fortin*, 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111 (B.C. S.C.); *Moss Steamship Co. Ltd. v. Whinney*, [1912] A.C. 254; *Del Zotto v. International Chemalloy Corp.* (1976), 22 C.B.R. (N.S.) 268, 14 O.R. (2d) 71, 2 C.P.C. 198 (H.C.). However, in *Bull v. Klaptchuk* (2004), 2004 CarswellSask 413, 2 C.B.R. (5th) 92 (Sask. Q.B.), the court held that the appointment of a receiver-manager without a court order constituted a change in management that relieved the directors of the debtor corporation of joint and several liability for unpaid wages imposed by s. 63 of the *Labour Standards Act* of Saskatchewan. The change was effective as of the date of appointment.

Trading contracts are not terminated when the court appoints a receiver-manager. The receiver can continue such contracts or repudiate them. If the receiver continues a trading contract and then repudiates it, the customer will be entitled to damages, and the damages can be set off against any moneys due to the receiver-manager: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160.

An interim receiver appointed under s. 47(1) does not constitute a person who represents the creditors of a debtor company, including an assignee for the benefit of creditors and a trustee, for the purposes of s. 20(1)(b) of the *Personal Property Security Act* (Ontario). The court held that a trustee that also acted as the interim receiver of a debtor company does not become a representative of the creditors of the debtor company until it is appointed as trustee, and that a security interest that is unperfected at the time of such appointment will be ineffective as against the trustee: *Re 1231640 Ontario Inc.* (2006), 2006 CarswellOnt 4406, 23 C.B.R. (5th) 92 (Ont. S.C.J.).

The debtor filed a notice of intention after an interim receiver had been appointed but prior to the appointment of the receiver. The court granted an extension of time to file the proposal, but recognized that the receivership had priority; consequently, the court limited the role of the debtor and the proposal trustee such that they could not interfere with the receivership proceedings. Controlling the litigation to set aside the interim receivership and receivership order was distinct from controlling the administration of the receivership itself. The receivership order remained in effect and it authorized the receiver to take possession and control of the property, to manage, operate and carry on the business, and to market and sell the property of the debtor. From an operational standpoint, the powers of the directors had been displaced, and there was no basis on which the debtor and proposal trustee should have been exercising any powers that were in conflict with the powers conferred by court order on the receiver: *Re Inyx Canada Inc.* (2007), 2007 CarswellOnt 6244, 36 C.B.R. (5th) 154 (Ont. S.C.J.).

The court has that that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. French Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

The court's appointment of a receiver does not necessarily dictate the financial end of the debtor; some receiverships are terminated on presentation of an acceptable plan of refinancing or after a sale of some of the assets. The receiver was to determine value and appropriately market the subject properties; and during this time, the debtors were entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification

that they could not usurp the role of the r
Ontario Ltd. (2010), 2010 CarswellOnt 29

The Nova Scotia Supreme Court denied th
holder to lift the stay in a receivership. The
of the debtor's assets would come from a sa
enforcement proceedings would negatively
stay contained in a receivership order ought
the circumstances and the relative prejudice
guidance may be drawn from s. 69.4 of the
be objective prejudice as opposed to a subj
interests of the general body of creditors, tc
act for the benefit of the general body of cr
disadvantages to each against the general goc
The court could not conclude that the possi
the benefit to the creditors of an en bloc sal
swellNS 564, 84 C.B.R. (5th) 57 (N.S.S.C.)

The Ontario Superior Court of Justice decla
security agreement covered a cause of action
the defendant. The court noted it was the r
would make the determination as to wheth
Central 1 Credit Union v. UM Financial Inc
1893 (Ont. S.C.J. [Commercial List]).

The delivery of a notice of abandonment und
use of a contractual right as against the debt
eedings under a receivership order, and as it
as required by the receivership order, it was
2012 CarswellAlta 1500, 2012 ABQB 539 (

The Ontario Superior Court of Justice direc
appointed prior to the trustee in bankruptcy, t
the claims of secured creditors and report to
proceeds arising from the sale of the debtor's
process. The receiver had been successful in
the sale producing sufficient funds to pay out t
a surplus of $600,000. The receivership order
control over all of the assets, undertakings and
were in the hands of the receiver impressed w
there was no estate to pass to the trustee. Just
the receiver did not step into the shoes of the
existence along with all of its residual rights. T
included the right to challenge the work of th
ports and to otherwise be heard in the curre
trustee. Justice MacLeod concluded that becau
because the bankruptcy had been initiated with
be authorized to complete its work. The trustee
taken by the receiver and to take a position
prevail: *Royal Bank of Canada v. Casselman*
C.B.R. (6th) 365, 2017 ONSC 4107 (Ont. S.C

that they could not usurp the role of the receiver: *Romspen Investment Corp. v. 1514904 Ontario Ltd.* (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.).

The Nova Scotia Supreme Court denied the motion of a purchase money security interest holder to lift the stay in a receivership. The receiver had concluded that the best realization of the debtor's assets would come from a sale of the assets en bloc and it was concerned that enforcement proceedings would negatively impact an en bloc sale. In deciding whether a stay contained in a receivership order ought to be lifted, the court will consider the totality of the circumstances and the relative prejudice to both sides; and while not strictly applicable, guidance may be drawn from s. 69.4 of the *BIA* where material prejudice has been found to be objective prejudice as opposed to a subjective one. The receiver's duty is to act in the interests of the general body of creditors, to consider the interests of all creditors, and then act for the benefit of the general body of creditors. The court must weigh the benefits and disadvantages to each against the general good and consider the totality of the circumstances. The court could not conclude that the possible prejudice of the security holder outweighed the benefit to the creditors of an en bloc sale: *Re Scanwood Canada Ltd.* (2011), 2011 CarswellNS 254, 84 C.B.R. (5th) 57 (N.S.S.C.).

The Ontario Superior Court of Justice declared that the collateral charged under a general security agreement covered a cause of action where the applicant secured creditor lender was the defendant. The court noted it was the receiver and the court, and not the lender, who would make the determination as to whether the action would continue or not continue: *Central 1 Credit Union v. UM Financial Inc.* (2012), 2012 CarswellOnt 4068, 2012 ONSC 1993 (Ont. S.C.J. [Commercial List]).

The delivery of a notice of abandonment under an operating procedure constituted the exercise of a contractual right as against the debtor, a step that was contrary to the stay of proceedings under a receivership order, and as it was done without consent or leave of the court as required by the receivership order, it was of no effect: *Baytex Energy Ltd. v. MNP Ltd.*, 2012 CarswellAlta 1500, 2012 ABQB 539 (Alta. Q.B.).

The Ontario Superior Court of Justice directed the court-appointed receiver, having been appointed prior to the trustee in bankruptcy, to evaluate the priority, quantum and quality of the claims of secured creditors and report to the court with a proposed distribution of the proceeds arising from the sale of the debtor's assets. The trustee had sought to take over the process. The receiver had been successful in effecting a sale of all the assets of the debtor, the sale producing sufficient funds to pay out the secured claim in its entirety and to generate a surplus of $600,000. The receivership order was comprehensive in nature; the receiver had control over all of the assets, undertakings and properties of the debtor. As the surplus funds were in the hands of the receiver impressed with a trust and until the court orders otherwise, there was no estate to pass to the trustee. Justice MacLeod noted that unlike a bankruptcy, the receiver did not step into the shoes of the debtor, and the debtor continued its corporate existence along with all of its residual rights. Those residual rights may be minimal, but they included the right to challenge the work of the receiver, to oppose confirmation of any reports and to otherwise be heard in the current litigation. Those rights now vested in the trustee. Justice MacLeod concluded that because the receivership was put in place first and because the bankruptcy had been initiated without approval by the court, the receiver should be authorized to complete its work. The trustee would have the right to be informed of steps taken by the receiver and to take a position when the report was submitted for court approval: *Royal Bank of Canada v. Casselman PHBC Ltd.*, 2017 CarswellOnt 10241, 50 C.B.R. (6th) 268, 2017 ONSC 4107 (Ont. S.C.J.).

L§6 — Relationship of Receiver and Directors

The appointment of a receiver-manager does not take away from the directors their power to act for the corporation where their actions do not prejudice or conflict with the preservation and realization of assets by the receiver-manager: *First Investors Corp. v. Prince Royal Inn Ltd.* (1988), 1988 CarswellAlta 294, 69 C.B.R. (N.S.) 50 (Alta. C.A.). On appointment of the receiver-manager, the directors' authority to deal with assets has ceased; however, the directors have authority to make decisions regarding legal services, except in respect of litigation relating to protection and preservation of assets, which is a power of the receiver-manager: *Lang Michener v. American Bullion Minerals Ltd.* (2006), 2006 CarswellBC 753, 21 C.B.R. (5th) 118 (B.C. S.C.).

In considering the issue of whether directors of a company can continue to control litigation, the court held that the following principles, among others, apply: the power that the receiver-manager is authorized to exercise, as set out in the court order or under an instrument, may not be exercised by the directors, however, they can exercise any residual power, a privately appointed receiver-manager has a fiduciary duty to the security holder that appointed it and may have a conflict of interest in potential litigation such that directors should make the decisions; although a court-appointed receiver-manager owes a fiduciary duty to all parties, including the debtor, it may have the same conflict of interest in respect of the creditor that sought its appointment; and the directors' residual power is subject to the restriction that it should not risk dissipation of the assets of the debtor company: *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.* (2007), 2007 CarswellNfld 83, 29 C.B.R. (5th) 270 (Nfld. C.A.).

The Newfoundland and Labrador Court of Appeal held that: prior to receivership, the directors of a company exercise the powers of the company and direct the management of its business and affairs and on the appointment of a receiver-manager by the court or under an instrument, the powers of the directors that the receiver-manager is authorized to exercise may not be exercised by the directors until it is discharged. The powers of the receiver-manager are stated in the court order of appointment or as authorized by the security instrument, and powers that the receiver-manager is not authorized to exercise remain vested in the directors. A privately appointed receiver-manager has a fiduciary duty to the security holder that appointed it, and it is in a conflict of interest position in respect of potential litigation by the debtor against the security holder and as a result, the receiver-manager is not authorized to be involved in such litigation and control of such litigation is one of the residual powers remaining in the directors. Athough a court-appointed receiver-manager owes a fiduciary duty to all parties, including the debtor, its position respecting litigation against the secured creditor, at whose behest it was appointed, is the same as that of the privately appointed receiver. The receiver-manager lacks authorization respecting litigation against the secured creditor is based on broad legal principles respecting potential conflicts in receiverships. The directors' residual power is subject to the restriction that the litigation should not threaten the interests of the secured creditor, and directors who wish to direct litigation would generally be required to post security for costs, and the director's power over litigation involving the secured creditor is not restricted to that challenging the security document under which the receiver-manager was appointed, and the concern over conflict of interest remains whether the challenged litigation involving the secured creditor arises from the security document or other contracts or alleged tortious conduct. *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.* (2007), 2007 CarswellNfld 83, 29 C.B.R. (5th) 270 (Nfld. C.A.).

The Ontario Court of Appeal held that a corporation was entitled to retain counsel without prior approval of the receiver or the court in respect of receivership litigation. However, it is up to the court to decide whether a board is to be reimbursed for legal expenses in taking a particular course of action. On exercising its discretion, the court may, in addition to the

factors under Rule 57 of the Rules of Civil Pr
position advanced by counsel for the board ha
the interests of the corporation; whether the p
advanced by the board rather than by the recei
board detracted from the orderly administratio
ure and each case will turn on its own particul
other purposes such as strategic planning and
consultation with the receiver and/or the ap
Kawartha Native Housing Society Inc. (2010),
C.B.R. (5th) 22 (Ont. C.A.).

In supplementary reasons, the Ontario Court c
board of directors of entities that were in recei
corporations were public sector organizations
Aboriginal community, and that one would no
indemnity hourly rates. Whether one applied t
or partial indemnity scale to the number of do
duced an unreasonable result. Blair J.A. orde
counsel for the appeal and that the board was
reasonable legal fees and expenses of counsel
tions' assets, after assessment: *Peterborough (*
(2011), 2011 CarswellOnt 1119, 74 C.B.R. (

The Ontario Superior Court of Justice decline
shareholder to deliver an amended statement c
off. The corporate plaintiff was in receivership
the jurisdiction to grant leave to an interested
declined to pursue, it will only be done on te
against the costs of any such proceeding, citin
Ltd. (2007), 2007 CarswellNfld 83, 29 C.B.I
view that in the circumstances of this case,
favour of a litigant who had not honoured pre
mentally flawed action, which the plaintiff is
Label Inc. (2011), 2011 CarswellOnt 3735,

The British Columbia Supreme Court held t
the joint retainer between a lawyer and two
sion of the funds in the lawyer's trust accou
noted that the other party to the joint accou
agreement and was not named in the receive
not extinguish one party's interest in a joint t
tive. There was also no evidence before the c
of Canada v. Norland Forest Products Ltd.,
2016 BCSC 1456 (B.C. S.C.).

L§7 — Improper Appointment of R

If an improper appointment is made of a r
Ebsyn Lister Ltd. v. Dunlop Canada Ltd., [
N.R. 181, 115 D.L.R. (3d) 1, 18 B.L.R. 1, 6
(1979), 31 C.B.R. (N.S.) 264 (F.C. T.D.).

BIA

...ers under Rule 57 of the Rules of Civil Procedure, consider the following: whether the position advanced by counsel for the board had any merit; whether the board was acting in the interests of the corporation; whether the position advanced by the board was properly advanced by the board rather than by the receiver; and whether the position advanced by the board detracted from the orderly administration of the receivership. This list is not exhaustive and each case will turn on its own particular facts. However, the retaining of counsel for other purposes such as strategic planning and corporate restructuring should be preceded by consultation with the receiver and/or the approval of the court: *Peterborough (City) v. Kawartha Native Housing Society Inc.* (2010), 2010 CarswellOnt 7995, 104 O.R. (3d) 38, 71 C.B.R. (5th) 22 (Ont. C.A.).

In supplementary reasons, the Ontario Court of Appeal assessed the costs of counsel to the board of directors of entities that were in receivership. The court observed that the appellant corporations were public sector organizations that operate affordable rental housing for the Aboriginal community, and that one would not expect public sector organizations to pay full indemnity hourly rates. Whether one applied the hourly rates on either a full indemnity scale or partial indemnity scale to the number of docketed hours for the re-argued motion, it produced an unreasonable result. Blair J.A. ordered that the appellants were entitled to retain counsel for the appeal and that the board was entitled to retain counsel on their behalf. The reasonable legal fees and expenses of counsel so retained were to be paid out of the corporations' assets, after assessment: *Peterborough (City) v. Kawartha Native Housing Society Inc.* (2011), 2011 CarswellOnt 1119, 74 C.B.R. (5th) 183 (Ont. C.A.).

The Ontario Superior Court of Justice declined to grant leave to an individual director and shareholder to deliver an amended statement of claim naming a corporate entity as the plaintiff. The corporate plaintiff was in receivership. Justice Strathy stated that while the court has the jurisdiction to grant leave to an interested party to pursue an action that the receiver has declined to pursue, it will only be done on terms that the person indemnify the corporation against the costs of any such proceeding, citing *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.* (2007), 2007 CarswellNfld 83, 29 C.B.R. (5th) 270 (N.L.C.A.). Strathy J. was of the view that in the circumstances of this case, the court should not exercise its discretion in favour of a litigant who had not honoured previous court orders, nor should it repair a fundamentally flawed action, which the plaintiff is financially incapable of pursuing: *Lukezic v. A1 Label Inc.* (2011), 2011 CarswellOnt 3735, 79 C.B.R. (5th) 164 (Ont. S.C.J.).

The British Columbia Supreme Court held that the appointment of a receiver did not sever the joint retainer between a lawyer and two clients, and the receiver could not take possession of the funds in the lawyer's trust account of the party in receivership. Maisonville J. noted that the other party to the joint account was not a debtor under the general security agreement and was not named in the receivership order. The appointment of a receiver cannot extinguish one party's interest in a joint trust account, the joint retainer remained operative. There was also no evidence before the court to establish unjust enrichment: *Royal Bank of Canada v. Norland Forest Products Ltd.*, 2016 CarswellBC 2204, 40 C.B.R. (6th) 154, 2016 BCSC 1456 (B.C. S.C.).

L§7 — Improper Appointment of Receiver

If an improper appointment is made of a receiver, the court can award damages: *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 42 N.R. 181, 135 D.L.R. (3d) 1, 18 B.L.R. 1, 65 C.P.R. (2d) 1; *Coopers & Lybrand Ltd. v. R.* (1979), 31 C.B.R. (N.S.) 264 (F.C. T.D.).

TAB 4

Date: 20070122
Docket: 05/85
Citation: 2007 NLCA 7

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

MAPLE LEAF FOODS INC. APPELLANT

AND:

MARKLAND SEAFOODS LTD. RESPONDENT

Coram: Cameron, Rowe and Mercer, JJ.A.
Court Appealed From: Supreme Court of Newfoundland and Labrador, 200401T1350

Appeal Heard: October 12, 2006
Judgment Rendered: January 22, 2007

Reasons for Judgment by Mercer J.A.
Concurred in by Cameron and Rowe, JJ.A.

Counsel for the Appellant: Philip Buckingham
Counsel for the Respondent: Wayne White

Mercer, J.A.:

[1] This appeal considers whether the directors of a company in receivership may continue to control litigation against the secured creditor that placed the company into receivership, or whether control of such litigation rests with the privately appointed receiver-manager.

Background

[2] The respondent (Markland) is incorporated under the **Corporations Act**, RSNL 1990, c. C-36. Its business had been the farming of steelhead trout from its facilities at Conne River, Bay d'Espoir.

[3] Beginning in the spring of 2001 Markland obtained the feed for its fish farms from the appellant (Maple Leaf) pursuant to a credit arrangement. That arrangement was evidenced by three documents of May 2, 2001 namely a Promissory Note, a Feed Supply and Credit Agreement, and a General Security Agreement registered under the **Personal Property Security Act**, SNL 1998, c. P-7.1 (the PPSA). On March 20, 2003 Markland and Maple Leaf renewed their arrangement with the execution of a further Promissory Note, Feed Supply and Credit Agreement, and a General Security Agreement likewise registered under the PPSA. That renewal extended the credit arrangement to March 20, 2004.

[4] Subsequently Markland alleged that the feed supplied by Maple Leaf was of poor quality and caused the fish to regurgitate with resultant high mortality rates and poor growth. In affidavit evidence Markland stated that in November/December 2003 it sent samples of the feed to laboratories in Europe for testing and, by early January 2004, it refused to make any further direct payments to Maple Leaf on the credit account. According to Maple Leaf as of January 29, 2004 Markland was in default on its payment obligations and was then indebted to Maple Leaf in the amount of $2,584,732.17.

[5] On February 2, 2004 Markland received the results of the laboratory testing. It considered those results to support its previous contention that the feed supplied by Maple Leaf was of poor quality and unfit for its intended purpose. On February 12, 2004 Markland commenced the legal action out of which this appeal arises (the action). The action, based in contract and tort, alleged that Maple Leaf breached its obligations by its provision of feed that was unfit for Markland's fish-farming operation. Markland claimed special damages exceeding six million dollars and general damages. The

statement of claim filed by Markland did not challenge the validity of the General Security Agreement between the parties.

[6] On March 8, 2004 Maple Leaf appointed Ernst & Young Inc. Receiver and Manager (Receiver-Manager) under the General Security Agreement. On March 12, 2004 the Receiver-Manager instructed the solicitor acting for Markland in the action to cease his representation and to return to the Receiver-Manager the Markland files in his possession. The solicitor did not comply with that instruction then or when it was subsequently reiterated. The directors of Markland continued to retain and instruct that solicitor to proceed with the action on behalf of Markland.

[7] Following the sale of Markland's operating assets there remained, according to the Receiver-Manager, an outstanding deficiency in the debt owed Maple Leaf in the amount of $2,140,434.75 as of August 31, 2004. Sums totaling $1,180,000 were also owed to various unsecured creditors by Markland.

[8] In February 2005 Maple Leaf brought an interlocutory application pursuant to rule 14.24 of the **Rules of the Supreme Court, 1986** (the Rules) seeking to have the action struck due to the lack of capacity of the Markland directors to carry the matter forward in the absence of the consent of the Receiver-Manager. Maple Leaf also filed a concurrent application that Markland post security for costs pursuant to Rule 21 of the Rules.

[9] In support of the application to strike Maple Leaf filed an affidavit from a vice-president of the Receiver-Manager which stated, among other things, that Markland was insolvent, that its operations had ceased as of the date of the receivership, and that Markland had no assets available. The affidavit advised that the Receiver-Manager was not prepared to pursue the action against Maple Leaf and that Markland could not meet any order for costs arising from the action. The affidavit further stated:

> THAT as Receiver I have reviewed Markland's documents in order for the Receiver to be able to assess the Receiver's rights and any further opportunities for any justifiable and practical recoveries with respect to any accounts receivable or causes of action of Markland and to complete its administration of the Receivership. That I have found no justifiable basis for the claim that is the basis of this action and at no time has the Receiver consented to the issuance or the prosecution of this matter.
>
> para. 15 of Affidavit of Richard Cullen

[10] In response to the above, Markland filed an affidavit from one of its directors which cited the laboratory test results, and related documentation, in support of the assertion that Markland had a *bona fide* claim against Maple Leaf arising out of the supply of fish feed. The affidavit further suggested that the Receiver-Manager was in a conflict of interest in respect of decisions concerning the action as it was "appointed and acting primarily for the secured creditor ... which is the Defendant in this litigation" - Affidavit of Clyde Collier dated May 5, 2005 at para. 35.

[11] The two applications brought by Maple Leaf were heard together. In his decision of June 30, 2005 the chambers judge dismissed the Rule 14 application to strike but ordered that Markland post $100,000 within ninety days under the Rule 21 application as security for costs. The chambers judge dismissed the Rule 14 application as he considered the law to be unclear whether the Markland directors could continue the action against Maple Leaf contrary to the instructions of the Receiver-Manager. In so doing he queried whether it was relevant that the action had been commenced prior to the appointment of the Receiver-Manager.

[12] Maple Leaf appeals the disposition of the Rule 14 application to strike.

Issue

[13] The sole issue for determination is whether the directors of Markland are entitled to control litigation against Maple Leaf following the appointment of the Receiver-Manager by Maple Leaf, and contrary to the instructions of the Receiver-Manager.

Applicable Statutory Provisions

[14] The following statutory provisions were considered:

> **Corporations Act**
>
> **161.** Where a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
>
> **162.** A receiver or receiver-manager appointed by a court shall act in accordance with the directions of the court.

163. A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and a direction of a court made under section 165.

164. A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honesty and in good faith; and

(b) deal with property of the corporation in his or her possession or control in a commercially reasonable manner.

165. Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by an interested person, a court may make an order it thinks appropriate including

.....

(e) an order giving directions on a matter relating to the duties of the receiver or receiver-manager.

166. A receiver or receiver-manager shall

.....

(b) take into his or her custody and control the property of the corporation in accordance with the court order or instrument under which the receiver or receiver-manager is appointed;

.....

Personal Property Security Act

65.(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or another Act, may provide for the receiver's rights and duties.

(2) A receiver shall

(a) take custody and control of the collateral in accordance with the security agreement or order under which the receiver was appointed, but unless appointed a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor;

.....

66.(1) .....

(2) All rights and obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised and discharged in good faith and in a commercially reasonable manner.

.....

General Security Agreement

[15] Maple Leaf's appointment of the Receiver-Manager was made pursuant to the General Security Agreement of March 20, 2003. The collateral charged under the General Security Agreement and the rights and duties of a receiver appointed thereunder are stated in the following Articles of that agreement:

1.1 *Definitions.* In this Agreement, unless something in the subject matter or context is inconsistent therewith:

.....

(c) "Collateral" means, subject to Section 2.4, any and all of the undertaking, property and assets of the Borrower which are now or at any time hereafter owned by the Borrower or in which the Borrower now has or at any time hereafter acquires any interest of any nature whatsoever, including without in any way limiting the generality of the foregoing:

.....

(iii) all present and future debts, accounts, claims, demands and amounts now or at any time hereafter due or accruing due or owing to or owned by the Borrower whether or not earned by performance, including without limitation its book debts, accounts receivable and claims under policies of insurance, all contracts, security interests and other rights and benefits in respect thereof, and all books, records, documents, papers and electronically recorded data, recording, evidencing, securing or otherwise relating to such debts, accounts, claims, demands and amounts or any part or parts thereof (herein collectively called the "Accounts"),

(iv) all present and future intangible personal property of the Borrower, including all contract rights, goodwill, patents,

trade marks, trade names, business styles, copyrights and other industrial property, and all other choses in action of the Borrower of every kind, whether due at the present time or hereafter to become due or owing,

.....

(x) all other books, accounts, invoices, letters, papers, documents and other records in any form evidencing or relating to the undertaking, property and assets of the Borrower which are subject to the Security Interest,

.....

(l) "Receiver" means a receiver, receiver and manager or any similar person appointed in accordance with Subsection 4.1(n);

.....

4.1 *Enforcement of Security.* Upon the occurrence of any Event of Default, the Security Interest hereby granted shall immediately become enforceable and the Lender may, forthwith or at any time thereafter and without notice to the Borrower, except as provided by applicable law or this agreement, take one or more of the following actions:

.....

(n) appoint, by an instrument in writing delivered to the Borrower, a Receiver of the Collateral, and remove any Receiver so appointed and appoint another or others in its stead, or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver, it being understood and agreed that:

(i) the Lender may appoint any person, firm or corporation as Receiver,

(ii) such appointment may be made at any time, either before or after the Lender has taken possession of the Collateral,

(iii) the Lender may from time to time fix the reasonable remuneration of the Receiver and direct the payment thereof out of the Collateral or any proceeds derived from a sale or other disposition or dealing thereof or therewith, and

(iv) the Receiver shall be deemed to be the agent of the Borrower for all purposes and, for greater certainty, the

> Lender shall not be in any way responsible for any actions, whether willful, negligent or otherwise, of any Receiver or for any tax liabilities arising from the use, sale or other disposition of the Collateral by the Receiver (unless all rights of ownership in the Collateral have been transferred to and vested in the Lender prior to the use, sale or other disposition thereof by the Receiver), and the Borrower hereby agrees to indemnify and save harmless the Lender from and against any and all claims, demands, actions, costs, damages, expenses or payments which the Lender may hereafter suffer, incur or be required to pay as a result of, in whole or in part, any action taken by the Receiver or any failure of the Receiver to do any act or thing;
>
> .....
>
> (p) exercise all of the rights under all contracts, notes, debentures or other instruments in writing comprising the Collateral as fully and effectually as if the Lender was the absolute owner thereof;
>
> (q) commence legal proceedings for and on behalf of and in the name of either the Lender or the Borrower or both and at the expense of the Borrower in order to enforce the rights of the Borrower under any contracts, agreements, indentures or other instruments in writing which may form part of the Collateral; and
>
> (r) take any other action, suit, remedy or proceeding authorized or permitted by this Agreement, the Credit Agreement, the *Act* or by law or equity.
>
> .....
>
> 4.4 *Lender to Mean Receiver*. For the purposes of Sections 4.1, 4.2 and 4.3, a reference to "Lender" shall, where the context permits, include any Receiver appointed in accordance with Subsection 4.1(n).
>
> .....

Analysis

[16] Maple Leaf contends that the General Security Agreement reflected the clear contractual intention of the parties that:

> ... in exchange for advancing feed to the Respondent, feed ultimately of a value of in excess of 2 millions of dollars, the Appellant was to have the right to security for same as set out in the agreement of the parties. That security included

> the agreement of the Respondent that upon default a Receiver-Manager could be appointed, and that upon such appointment, that Receiver-Manager would have the right to take control of the entire collateral of the Respondent corporation, including outstanding legal actions, without interference by the Respondent or directors purporting to act on its behalf. …
>
> Appellant's Factum, para. 18

Maple Leaf cites a leading text for the proposition that a privately appointed receiver is *prima facie* entitled to possession of all the debtor's assets to the extent charged under the security instrument – **Bennett on Receiverships**, 2nd ed. (Toronto: Carswell, 1999) (**Bennett**) at p. 186. Maple Leaf submits that by virtue of the General Security Agreement, the above noted statutory provisions, and the referenced law respecting private receiverships the Markland directors had neither capacity nor status to continue with the action following the appointment of the Receiver-Manager. It argues that the continuance of the action clearly constitutes an abuse of process.

[17] In response Markland emphasizes the difference between duties of a court appointed receiver and a privately appointed receiver. It cites **Bennett** which states that the former has a fiduciary duty to all interested parties, including the debtor and its shareholders. Though the court appointment is initiated by the security holder the receiver, as a court officer, is neither an agent of the security holder nor of the debtor. In contrast the duties of a privately appointed receiver are primarily owed to the security holder who made the appointment. Such receiver does not have a fiduciary duty to the debtor. **Bennett** further observes that the common law and statutes now impose upon receivers, however appointed, the duty to act honestly and in good faith and to deal with receivership assets in a commercially reasonable manner. **Bennett**, pp. 24-28.

[18] The authorities reviewed below analyze the factors to be considered when a receiver-manager and the directors of a debtor company contest the control of litigation. In so doing they acknowledge the importance of enabling the effective enforcement of security obligations while avoiding a formalistic approach to the interpretation of commercial contracts and applicable legislation.

[19] The legal position in the absence of legislation was addressed in **Newhart Developments Ltd v. Co-operative Commercial Bank Ltd**, [1978] 2 All E.R. 896 (C.A.), in which there was a private appointment of a receiver by a debenture holder. Subsequently the debtor company, without

the consent of the receiver, sued the debenture holder alleging breach of the financing agreement for which the debenture was security. The debenture holder sought to have the writ set aside on the ground of irregularity as it was issued without the consent or knowledge of the receiver. The Court of Appeal upheld the right of the directors to bring the action on behalf of the debtor company, Shaw L.J. stating:

> But the provision in the debenture trust deed giving [the receiver the power to institute proceedings] is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.
>
> .....
>
> If there is an asset which appears to be of value, although the directors cannot deal with it in the sense of disposing of it, they are under a duty to exploit it so as to bring it to a realisation which may be fruitful for all concerned.
>
> .....
>
> I see no principle of law or expediency which precludes the directors of a company, as a duly constituted board ... from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders.
>
> pp. 900-901

[20] He further noted that the receiver may be faced with a conflict of interest:

> In this particular case it does so happen that the receiver finds himself in a very curious and unenviable position because the action is directed against the very people who appointed him as receiver for the debenture holders. One can quite understand that a receiver so appointed, and let me say at once that the receiver appointed in this case is a member of a very distinguished firm of accountants, would find himself faced with a very great conflict of interest.
>
> p. 901

[21] **Newhart** did not involve a statutory provision affecting the power of the directors upon the appointment of a receiver or receiver-manager. In

Canada such provisions are prevalent and their effect has been considered in numerous cases. In **Toronto Dominion Bank v. Fortin et al**. [1978] 2 W.W.R. 761 (B.C.S.C.) a receiver-manager was appointed by the court in a debenture holder's action. The companies in receivership filed a defence in that action alleging, *inter alia*, that the receiver-manager, upon the direction of the debenture holder, had so misconducted himself as to impair the ability of the companies to redeem the assets charged. The debenture holder submitted that the directors lacked the power to instruct counsel to defend the action, arguing that the appointment of the receiver-manager had stripped the directors of their power to deal with all the affairs of the company. The Court referred to provisions of the **Companies Act**, S.B.C. 1973, c. 18 including:

> 108. Where a receiver-manager is appointed, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking for which he is appointed until he is discharged.
>
> 109. Every receiver-manager appointed by the Court is an officer of the Court and not of the corporation and he shall act in accordance with the directions of the Court.
>
> .....

[22] Anderson J. reasoned that:

> It seems to me, in the absence of authority, that the proper approach is to ascertain just what happens in fact when a receiver-manager is appointed:
>
> > The receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced.
> >
> > The company continues to exist and the board of directors remains in office.
>
> From the above it will be seen that, while the receiver is given exclusive powers over the assets and affairs of the company, including the right to bring and defend actions relating to the assets and affairs of the company, he is not given the power to interpret or in any manner concern himself with the contract made between the debenture holder and the company. It is for the court to interpret the contract between the parties and to determine, upon the whole of the evidence, including the conduct of the receiver, the rights and liabilities of the parties.
>
> If counsel for the plaintiff were correct, as soon as a receiver was appointed the board of directors would be precluded from filing a defence to the action and only

> the receiver would have the right to file a defence. In my view such matters are not the concern of the receiver, whose sole task is to preserve and get in the assets of the company for the protection of the debenture holder, the shareholders, and other creditors and the company. He is not entitled to engage in adversary proceedings as between the debenture holder and the company. Such an entitlement would place the receiver in an uncomfortable and untenable position, and would preclude the company from its right to be represented by counsel of its own choosing on all matters in dispute in respect of the contract itself.
>
> pp. 764-765
>
> .....
>
> I also hold that when the receiver took over "the undertaking of the Companies" he did not take over the contract made between the plaintiff and the companies. The contract retained a separate existence from "the undertaking" of the companies and the board of directors continued to have the power to instruct counsel in respect of the contract.
>
> p. 766

[23] **Newhart** was not cited in **Fortin**. Nevertheless Anderson J. reached the same conclusion as the English Court of Appeal, though in the context of a court appointment of the receiver-manager and statutory provisions suspending directors' powers during receivership.

[24] A different result was reached in **Federal Business Development Bank v. Shearwater Marine Limited** (1979), 102 D.L.R. (3d) 257 (B.C.C.A.). In **Shearwater** there had been a court appointment of a receiver-manager in a debenture holder's action. The debtor company filed a counterclaim against the debenture holder. The Court, without reference to **Fortin**, cited ss. 108 and 109 of the **Companies Act** – see para. 21 above, and stated:

> In the face of that legislation the question arises: What powers were left to anybody, other than the receiver-manager, to bring any action? And, of course, this counterclaim is the equivalent of bringing a new action. In my opinion, no powers were reserved to the directors, or to anybody else, to instruct counsel to bring that counterclaim.
>
> p. 259

The Court, citing **Del Zotto et al. v. International Chemalloy Corp.** (1976), 14 O.R. (2d) 72 (H.C.J.), held that a counterclaim could only be pursued with prior leave of the Court and, as prior leave had not been

obtained, the counterclaim was struck. The disposition in **Shearwater** appears, however, to differ from that in the majority of recent Canadian cases.

[25] **Fortin** and in particular the passage on p. 766 quoted above was applied by the Saskatchewan Court of Appeal in **Bank of Nova Scotia v. Saskatoon Salvage Company (1954) Limited** (1983), 51 C.B.R. (N.S.) 167. **Saskatoon Salvage** also involved the court appointment of a receiver-manager following a debenture holder's application and consideration of the **Business Corporations Act**, R.S.S. 1978, c. B-10, s. 91 which reads:

> 91. If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

[26] The powers of a receiver-manager and directors of a debtor company were again considered by the Saskatchewan courts in **Clarkson Company Limited v. Credit Foncier Franco Canadien** (1984), 55 C.B.R. (N.S.) 206 (Sask. Q.B.), affirmed (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.) and in **Golden West Restaurants Ltd. v. C.I.B.C.**, [1989] 5 W.W.R. 471 (Sask. Q.B.), affirmed [1990] 3 W.W.R. 287 (Sask. C.A). In the latter case the debtor company commenced legal action against the debenture holder and receiver-manager. Gerein J. referred to s. 91 of the **Business Corporations Act** – see para. 25 above – and observed that it made no distinction between a court or instrument appointment of a receiver-manager. The debenture holder and receiver-manager contended that s. 91 and the court order vested all authority for the entirety of the debtor's affairs in the receiver-manager and divested its directors completely of their powers. Gerein J. rejected the contention, stating:

> In my opinion, the section itself contains a qualification. The powers of the directors are restricted only to the extent that a receiver-manager is "authorized" to exercise those powers. Thus, if certain powers are not conferred upon a receiver-manager, then those powers remain in the directors.
>
> In the instant case, neither the debenture agreement nor the court order prohibit the debtor corporation from seeking relief by way of action from the creditor or the receiver-manager on the basis of unlawful conduct or mismanagement. Section 91 of itself has meaning only by reference to the court order or the debenture. It does not operate in a vacuum or on its own so as to remove or restrict powers of directors when it has not been done by a court or instrument.

> In the instant case, the receiver-manager is empowered to initiate and defend suits and actions. However, that power is only in respect to suits and actions relative to the property and assets of the debtor corporation. Section 91 cannot be read as granting to a receiver-manager a form of immunity for unlawful conduct. Nor can it be said that the court order or debenture does this.
>
> p. 475

[27] **First Investors Corp. v. Prince Royal Inn Ltd.,** [1988] 5 W.W.R. 375 (Alta. C.A.) followed **Newhart** and **Fortin** in holding that the appointment of a receiver-manager did not divest the directors of a debtor company of their power to instruct counsel to act for the company where their actions did not prejudice the position of the debenture holder. That position was reiterated in **ABC Colour and Sound Ltd. v. Royal Bank of Canada** (1990), 80 C.B.R. (N.S.) 141 (Alta. C.A.). In **First Investors** the Court cited with approval a decision of the New Zealand Court of Appeal – **Paramount Acceptance Co. Ltd. v. Souster,** [1981] 2 N.Z.L.R. 38. In that case a receiver sought to strike out an action brought by the directors of a company in receivership against the receiver and the debenture holder. Davison C.J. stated:

> Now the appellant was in receivership and where as here a receiver and manager is appointed over the whole of the undertaking, the directors will for most practical purposes become functus officio. *Moss Steamship Co Ltd v Whinney*, [1912] AC 254, 263, per Lord Atkinson:
>
> > "This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."
>
> But the directors still retain residual powers, and if the receiver does not wish to cause the company to bring an action then the directors may do so without his consent so long as the company is indemnified against any liability for costs. *Newhart Developments Ltd v Co-op Commercial Bank Ltd* [1978] QB 814, 819; [1978] 2 All ER 896, 900.
>
> pp. 42-43

[28] In **Royal Bank v. Tower Aircraft Hardware Inc.** (1991), 3 C.B.R. (3d) 60 (Alta. Q.B.), a receiver-manager was appointed by the court upon application of a debenture holder. The debtor company filed a defence and counterclaim against the debenture holder. The court had to address whether the counterclaim should be funded from the assets of the debtor corporation. Forsyth J. observed:

> 20 ... The receiver-manager takes the position that under these circumstances, notwithstanding his duty to all creditors as well as to the bank which retained him as a result of being a court-appointed receiver, he should not become involved in litigation between the creditor at whose behest the receiver was appointed and the shareholders and officers of the debtor corporation, who wish to bring action against the appointing creditor. The receiver cites as authority for that proposition a decision of Van Camp J. of the Supreme Court of Ontario in *Del Zotto v. International Chemalloy Corp.* (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268 (H.C.). Similarly, in the decision of *Toronto-Dominion Bank v. Fortin*, 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111, at p. 172 [C.B.R.], Anderson J. of the British Columbia Supreme Court stated [page 765 of Fortin].
>
> 21 I am in accord that in the circumstances of this case, the receiver should not become involved as a party in the action involving the claim by the plaintiff and the defendants by counterclaim.
>
> 22 Turning now to the issue whether the counterclaim should be funded from the sale and assets of the undertaking of the corporate defendants, I would note that the directors of those corporations, notwithstanding the status of the companies, retain the legal authority to pursue such action against the plaintiff on behalf of the corporate defendants.

[29] Following consideration of **Newhart** and **First Investors** he concluded that the counterclaim should not be funded from the receivership as it did not dispute the debenture holder's right to enforce its security.

[30] **North Atlantic Sea Farms v. Maple Leaf Foods**, 2005 NLTD 36, 245 Nfld. & P.E.I.R. 291 (cited as **Maple Leaf Foods Inc. v. North Atlantic Sea Farms Corp.**), involved the same litigant, Maple Leaf, and the same form of General Security Agreement as in this action. In that case the debtor company, following the private appointment of a receiver by Maple Leaf pursuant to the General Security Agreement, commenced legal action against Maple Leaf alleging a breach of that agreement and other security documents. Maple Leaf, as in this case, brought an application under Rule 14.24 to strike out the statement of claim, contending that the debtor company lacked the capacity to bring the action. Faour J., having referenced

ss. 161 and 164 of the **Corporations Act**, s. 66 of the PPSA and the General Security Agreement, stated:

> [12] ... Those provisions charge the receiver, once appointed, with all of the powers of the directors, subject to the provisions of the security document, and prohibit the directors from undertaking any action for which power is given the receiver under the security document.
>
> [13] I agree that the power to sue or defend against being sued is reserved to the receiver. The respondents had entered into an agreement which had very specific terms which would be invoked once a receiver was appointed. The result is that if the security document reserves the powers to the receiver, then the directors may not exercise those powers: **FBDB v. Shearwater Marine** ...
>
> [14] It brings us to the core question of whether the power to commence an action on the security document itself was included in the broad scope of the security document. ...

[31] Following a review of various authorities including **Golden West, Fortin, Clarkson** and **Del Zotto** he concluded:

> [19] In my view, an action based on the contract between the parties is of a different character, *vis a vis* the security document, than actions or other proceedings which arise from the undertaking of the enterprise. An attempt to prevent the respondent from seeking an interpretation from the court, in the absence of very specific language in the security document, would be unreasonable. It would provide absolutely no mechanism to address the case of a lender which acted with impunity. And to give such a power to a receiver appointed under a security document would give rise to an unreasonable result. How could a receiver, who by its appointment must act to protect the interest of the lender, be put into a position adversarial to that lender, should there be a disagreement over the actions of the lender under the document.
>
> [20] I am satisfied that the security agreement between the parties did not purport to transfer the right to commence an action on the agreement itself to the receiver. In any event, the court must have the power to adjudicate disagreements on such agreements. If the borrower is to be taken to have contracted out of its right to litigate the contract itself, then the wording would have to be very explicit, and in my view, would have to be interpreted quite strictly against the party seeking to prevent such an action.

[32] Accordingly the debtor corporation was permitted to pursue its claim against **Maple Leaf**. He granted the alternate application for security for costs, citing **Newhart** and other authorities for the proposition that:

> [36] ... Debenture-holders should be protected from the negative consequences of litigation on the security document itself. Where, as in this case, the costs of any action are likely to diminish the value of the security, the courts will attempt to ensure the litigation does not proceed on the backs of the debenture holders: ...Generally it would be considered as a condition for allowing the action to continue that the directors, or the guiding minds of the respondent, put up security. [The last sentence of this paragraph was omitted in error from the report in the Nfld. & P.E.I.R.].

[33] More recently **Lang Michener v. Amercian Bullion Minerals Ltd.** (2006), 267 D.L.R. (4th) 553 (B.C.S.C.) discussed the residual powers of the directors of a corporation in receivership. In that case Tysoe J. stated that **Newhart** articulated the common law position which had been overridden by statute. The statutory provision cited was the current version of that discussed in **Fortin** – see para. 21 – above. He continued:

> [39] In my view, the intent of s. 98 is to take away from the directors such of their powers as are given to a receiver-manager ... .
>
> [40] A determination of the powers remaining in the directors must logically involve a consideration of the powers given to the receiver. If a power residing in the directors prior to the appointment of a receiver-manager is not given to the receiver manager, the Legislature could not have intended that neither would be able to exercise the power. This is why the powers remaining in the directors are commonly referred to as residual powers.
>
> [41] On a literal interpretation of s. 98, the powers of the directors to deal with the assets of the corporation over which the receiver-manager is appointed cease until the receiver-manager is discharged. However, directors have powers that do not involve dealings with the assets, and those powers remain with the directors despite the appointment of a receiver-manager.

[34] Tysoe J. considered that **Fortin** at p. 765 correctly stated the basis for resolving whether the receiver-manager has exclusive control of litigation. He concluded:

> [43] ... In other words, although a receiver-manager is generally given the power to prosecute and defend actions, it is in a conflict of interest position when the litigation is between the security holder and the company in respect of which the receiver-manager has been appointed. As a result of the conflict of interest, the receiver-manager does not have the ability to be involved in the litigation, and the power to either defend an action instituted by the security holder or to make a claim or counterclaim against the security holder on behalf of the company remains vested in the directors.

[35] Consideration of these authorities and the applicable statutory provisions leads me to conclude that the proper approach to the resolution of this appeal is as stated in the following paragraphs.

[36] Prior to receivership the directors of a company exercise the powers of the company and direct the management of the business and affairs of the corporation. **Corporations Act**, s. 167.

[37] Upon the appointment of a receiver-manager by the court or under an instrument, the powers of the directors that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged: **Corporations Act**, s. 161. Section 161 is to the same effect as the statutory provision in **Fortin, Saskatoon Salvage** and **Lang Michener**. Upon a receivership the directors retain residual powers. Through they are displaced in respect of powers exercisable by the receiver-manager, they remain in office and can exercise limited functions. **Fortin**, p. 764.

[38] The powers of the receiver-manager are stated in the court order of appointment or in the private appointment as authorized by the security instrument (see para. 41 below). Powers which the receiver-manager is not authorized to exercise remain vested in the directors. **Golden West** at p. 475; **Lang Michener** at para. 40.

[39] A privately appointed receiver-manager has a fiduciary duty to the security holder which appointed it. Accordingly it is in a conflict of interest position in respect of potential litigation by the debtor company against that security holder. As a result of that conflict of interest the receiver-manager is not authorized to be involved in such litigation. Control of such litigation is one of the residual powers remaining in the directors. **Newhart**, p. 901; **Lang Michener**, para. 43; **Maple Leaf Foods**, para. 19.

[40] Though a court appointed receiver-manager owes a fiduciary duty to all parties, including the debtor company, its position respecting litigation against the secured creditor, at whose behest it was appointed, is the same as that of the privately appointed receiver. **Fortin**, p. 765; **Royal Bank**, paras. 20-21.

[41] The foregoing conclusion that the receiver-manager lacks authorization respecting litigation against the secured creditor is based upon broad legal principles respecting potential conflicts in receiverships. It is also clearly supported by the proper interpretation of standard debentures, and other security documents, as to whether the debenture or security document is part of the undertaking of the debtor company. **Fortin**, p. 766.

Saskatoon Salvage, p. 171. In view of the broad principles involved it cannot be assumed, in my opinion, that a re-drafting of security documents can easily eliminate the residual power of directors over litigation against the secured creditor which initiated a receivership. There are public policy concerns which argue strongly against a debtor's access to the courts being eliminated. See **Fortin**, p. 765 and **Maple Leaf Foods**, para. 20. The legal position could doubtless be altered by legislation or by the specific terms in the court appointment of a receiver-manager though it is difficult to readily conceive that receiverships generally or in a specific situation should require the elimination of the directors' residual power over such litigation.

[42] The directors' residual power is subject to the restriction that the litigation should not threaten the interests of the secured creditor – **Newhart**; **First Investors**. The "interests of the secured creditor" in this context refers to the risk of dissipation of the assets of the debtor company. Accordingly the directors who wish to direct litigation will generally be required to post security for costs – see, for example, **ABC Colour & Sound** at p. 144; **Maple Leaf Foods** at para. 36.

[43] In this appeal Maple Leaf emphasized that Markland was not disputing the validity of the General Security Agreement under which the Receiver-Manager was appointed. It argued that the principles articulated in **Fortin** and subsequent cases were therefore inapplicable. I reject that submission. The authorities establish that the directors' power over litigation involving the secured creditor is not restricted to that challenging the security document under which the receiver-manager is appointed – see **Newhart**; **First Investors**. The concern over conflict of interest remains whether the challenged litigation involving the secured creditor arises from the security document or other contracts or alleged tortious conduct.

[44] As stated above s. 161 of the **Corporations Act** leaves the directors of Markland, upon the receivership, with those powers not conferred upon the Receiver-Manager. The Receiver-Manager by operation of law lacks the authority to conduct litigation against Maple Leaf, the secured creditor which appointed it. The directors are therefore entitled to continue to direct the litigation.

[45] Accordingly the appeal is dismissed. The respondent shall have its costs on a party and party basis.

K.J. Mercer, J.A.

I concur: _____
M.A. Cameron, J.A.

I concur: _____
M. Rowe, J.A.

TAB 5

RULE 29
APPLICATIONS

Analysis

Applications

29.01. (1) Unless the Court otherwise orders, an application in a proceeding commenced by an originating application *(inter partes)* or an originating application *(ex parte)* or an interlocutory application in a proceeding, shall be heard by

(a) the Court when sitting during the trial or pursuant to an order; or in any other case

Court Sub-File Number, if any:

1986 c42 Sch D rule 29.02; 139/04 s3; 93/05 s2; 97/17 s1

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Place of hearing of application

29.03. (1)Unless the Court otherwise orders, the place of hearing of an application shall be at the judicial centre where the proceeding was commenced.

(2) Where an application is filed and issued under this rule, the Registrar shall

(a) set a return date at which a judge may set a date for the hearing of the application; or

(b) where the application is made *ex parte* or is for an extension or abridgement of a period of time, schedule a date for the hearing of the application.

97/17 s1; 9/18 s7

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Ex parte applications

29.04. (1) An application may be made *ex parte* where

(a) under a statute or rule, notice is not required;

(b) the application is made before any party is served;

(c) the applicant is the only party;

(d) the application is made during the course of a trial or hearing; or

(e) the Court is satisfied that the delay caused by giving notice would or might entail serious mischief, or that notice is not necessary.

(2) [Rep by 97/17 s3]

1986 c42 Sch D rule 29.04; 97/17 s3

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Service of application

29.05. (1) An application and any supporting affidavit shall be served,

(a) where the application is *inter partes* , by serving the application and affidavit as provided by Rule 6 and rule 29.05(2); and

(b) where the application is *ex parte* , by filing the application and affidavit with the Court before the hearing.

(2) Where an application is to be served upon an opposing party or person, the application and any supporting affidavit shall be served

(a) when the application originates a proceeding, at least ten clear days before the return date;

(b) when the application originates a proceeding and is to be served on a party outside the jurisdiction, at least thirty clear days before the return date, unless otherwise ordered by the Court;

(c) when the application is made in an existing proceeding, at least two clear days before the return date; and

(d) when the application is only for an extension or abridgement of a period of time, on the day preceding the hearing of the application.

(3) The Court may, on the return date, do any one or more of the following

(a) set a time for the hearing of the application;

(b) amend a timeline set out in this rule;

(c) order that an application and any attached affidavit be served upon any party or person in such manner and at such time as it may direct, and may adjourn any hearing to permit the service;

(d) dispense with the service of an application and any attached affidavit on a party or person;

(e) adjourn, continue, discontinue or dismiss an application when any person, who ought to have been served, has not been served; or

(f) make any other order required to organize the application.

(4) The parties to an application may, before the return date, jointly request that a date be set for the hearing of the application by sending a written request to the Court, setting out

(a) an estimate of the time required for the hearing;

(b) dates the parties are available;

(c) the expected number of witnesses; and

(d) proposed filing dates for affidavits, memoranda, and any other supporting document required.

(5) The Registrar may, in consultation with a judge

(a) set a date for the hearing on the basis of the written request and notify the parties in writing that they need not appear on the return date; or

(b) refuse the written request and notify the parties that they must appear on the return date set.

1986 c42 Sch D rule 29.05; 36/14 s39; 97/17 s 4

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Service of other affidavits

29.06. (1) Subject to rule 29.06(3), an opposing party shall, before a hearing, serve on any applicant a copy of any affidavit to be used by the opposing party on an application,

(a) when the application originates a proceeding, at least two clear days; and

TAB 6

RULE 6
ORIGINATING AND OTHER DOCUMENTS: SERVICE

Analysis

General provisions

6.01. (1) An originating document shall be served personally on each defendant as provided in rule 6.02 or by an alternative to personal service as provided in rule 6.03, except on an *ex parte* application or where a rule otherwise provides.

(2) Documents that are not originating documents do not have to be served personally or by an alternative to personal service unless expressly required by a statute or rule or a Court order.

(7) An application for an order for substituted service shall be supported by an affidavit stating why it is impractical to serve the document by personal service or an alternative to personal service, and proposing a substitute method of service which, in the opinion of the deponent will, or is likely to, be effective.

(8) An application for an order dispensing with service shall be supported by an affidavit setting out:

(a) evidence which enables the court to draw the inference that the person is likely to be aware that process has been or is about to be issued against him or her and is evading service; or

(b) other evidence which satisfies the court that the interests of the plaintiff in proceeding with the matter without notice to the person outweigh the potential prejudice to the person of not knowing that proceedings have been taken against him or her.

9/03 s2

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Where notice not received

6.05. On an application to set aside the consequences of not filing a defence or appearing on an application, an application for an extension of time or an adjournment, a person may show, even though he or she was served with a document in accordance with Rule 6, that the document

(a) did not come to the person's notice; or

(b) did come to the person's notice at a time later than when it was served.

9/03 s2

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Validating service

6.06. Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the Court is satisfied that

(a) the document came to the notice of the person to be served; or

(b) the document would have come to the notice of the person to be served, except for the person's own attempts to evade service.

9/03 s2

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Service of an originating document out of the province

6.07. (1) A document by which a proceeding is commenced may be served outside of the province where,

(a) the whole subject matter is land situated within the province (with or without rents or profits) or the perpetuation of testimony relating to lands so situated;

(b) any act, deed, will, contract, obligation or liability affecting land situated within the province is sought to be construed, rectified, set aside or enforced;