CLERK'S STAMP

COURT FILE NUMBER	2001-14421
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	THE TORONTO-DOMINION BANK
DEFENDANTS	THE GENERATION CORPORATION, ELLIS FABRICATIONS INC., GENERATION CONSTRUCTION CORP., GENERATION STEEL INC., GROUNDWORKS SAFETY SYSTEMS INC., JAMES FOLEY, AND DANIELLE FOLEY
DOCUMENT	BENCH BRIEF OF JAMES FOLEY
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Ken Lenz, Q.C./Keely Cameron Telephone No.: 403-298-3317/3324 Fax No.: 403-265-7219 Client File No.: 91105.1

Commercial List Chambers Application
Scheduled for the 13th day of January, 2021
before The Honourable Justice Neufeld

TABLE OF CONTENTS

I. INTRODUCTION

1. This Brief of Argument is submitted on behalf of James Foley in support of his application for the discharge of KPMG Inc. (the "**Receiver**") as the receiver with respect to The Generation Corporation, Ellis Fabrications Inc., Generation Construction Corp., Generation Steel Inc., and Groundworks Safety Systems Inc. (collectively, the "**Companies**").

II. STATEMENT OF FACTS

2. The key facts are set out in the Affidavits of James Foley filed in this matter and for convenience are summarized below. Capitalized terms that are not otherwise defined herein shall bear the meanings given in Mr. Foley's Affidavits.

3. The Companies manufacture and fabricate attachments for heavy industrial equipment and also manufacture trench safety boxes utilizing revolutionary patented technology. This disruptive technology has assisted the Companies in continuing to increase revenues notwithstanding unprecedented challenges facing customers in Western Canada.

4. TD Bank advanced funds to The Generation Corporation and Ellis Fabrications (the "**Borrowers**") pursuant to (i) a loan agreement dated December 24, 2018; (ii) a Loan agreement dated December 27, 2018; and (iii) a TD Bank Business Credit Card Agreement dated January 24, 2019 (collectively the "**Loan Agreements**").

5. On December 3, 2020, upon application by TD Bank, a receivership order was granted. Following which the Receiver ceased the Companies operations and proceeded to terminate approximately 60 employees.

6. Shortly thereafter, Mr. Foley was able to secure refinancing from 1814966 Alberta Ltd. ("**181**") which also acquired the TD Bank Loan Documents and security and is prepared to forbear from enforcement.

7. The Companies are seeking to restart operations as soon as possible to rehire employees before they find alternate employment and to resume operations in compliance with contractual obligations and ensure that customers are not lost to their competitors.

III. ISSUE

8. The issue before this Honourable Court is whether the Receiver should be Discharged.

IV. DISCUSSION

9. TD Bank successfully obtained the appointment of the Receiver on the basis that it was owed money under the Loan Agreements and the Borrowers had failed to obtain refinancing which would result in the repayment of the Outstanding Indebtedness.

10. The Loan Agreements have been assigned to 181 who is prepared to forbear from further enforcement and finance the Companies going forward.[1]

11. While the appointment of the Receiver was not solely for the benefit of TD Bank, but all of the creditors, the other creditors will benefit from the discharge of the Receiver through agreements that have been reached or payments in the usual course following resumption of operations.[2]

12. In the circumstances, it is no longer just and convenient for the Receiver to be appointed as it is preventing the Corporate Debtors from resuming operations for the benefit of all stakeholders, including but not limited to the approximately 60 employees terminated as a result of the receivership.[3]

13. Houlden & Morawetz in their text, the 2020-2021 Annotated Bankruptcy and Insolvency Act noted that:

> 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.[4]

14. In addition to the above, the courts have held a receiver may seek to be discharged once it has completed the "[…] substance of its mandate."[5] The authority to discharge a receiver is not explicitly set out in the *Bankruptcy and Insolvency Act.* Courts have held that the discharge

---

[1] Affidavit of James Foley, sworn January 6, 2021 ("**Foley Affidavit #2**") at para. 11
[2] Foley Affidavit #2 at paras. 14-15
[3] Foley Affidavit #2 at para. 12, 16
[4] Houlden, Morawetz & Sarra, The 2020-2021 Annotated Bankruptcy and Insolvency Act at p. 1192 **[TAB 1]**
[5] *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc*, [2009] OJ No 4265, (2009) 181 ACWS (3d) 471 (ONSCJ) at paras. 8 and 9 **[TAB 2]**

of a receiver is further appropriate where a court is satisfied with the receiver's reports, where no party is opposed to the requested discharge, where the requested fees and disbursements appear to be reasonable in the circumstances and the receiver has substantially completed its duties.[6]

15. Given the financial rehabilitation of the Companies afforded by the refinancing and payment by Mr. Foley, we submit that the receiver's mandate has been completed and the receiver should be discharged.

16. The continuation of the receivership would only result in unnecessary fees and prejudice the Companies, through delaying their ability to resume operations for the benefit of all stakeholders, risking loss of customers to competitors and former employees finding alternate employment.

17. Finally, it should be noted that the Receiver is not opposed to its discharge in the circumstances.[7]

V. RELIEF SOUGHT

18. Mr. Foley respectfully requests an Order discharging the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 11th day of January, 2021.

Estimated Time for Argument: 20 minutes

BENNETT JONES LLP

Per: Ken Lenz

Ken Lenz, Q.C. and Keely Cameron
Counsel for James Foley

[6] *West Face Capital Inc v Chieftain Metals Inc*, 2020 ONSC 5161 at paragraph 11 **[TAB 3]**
[7] Foley Affidavit #2 at para. 17

VI. TABLE OF AUTHORITIES

TAB

1. Houlden, Morawetz & Sarra, The 2020-2021 Annotated Bankruptcy and Insolvency Act

2. *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc*, [2009] OJ No 4265

3. *West Face Capital Inc v Chieftain Metals Inc*, 2020 ONSC 5161

TAB 1

CARSWELL

THE 2020-2021 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

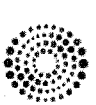
Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED



THOMSON REUTERS®

42731235

A cataloguing record for this publication is available from Library and Archives Canada.

ISSN 1197-8503

ISBN 978-0-7798-9350-8 (2020-2021 Edition)

Printed in the United States by Thomson Reuters.

THOMSON REUTERS®

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

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. Freure 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 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 564, 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 1893 (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) 265, 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, 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 (N.L. 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

TAB 2

COURT FILE NO.: 07-CL-6913
DATE: 2009-09-25

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: Ed Mirvish Enterprises Limited and 1 King West Inc. v. Stinson Hospitality Inc., Dominion Club of Canada Corporation and Harry Stinson

BEFORE: Pepall, J.

COUNSEL: L. Joseph Latham and Lauren Butti for the Receiver
Jeff Carhart for Ed Mirvish Enterprises Limited and I King West Inc.
M. Michael Title for Segura Investments Ltd.
Harry Stinson on his own behalf
Robert Verdun on his own behalf

Endorsement

Relief Requested

[1] Ira Smith Trustee & Receiver Inc. ("ISI"), the court appointed receiver and manager of Stinson Hospitality Inc., Dominion Club of Canada Corporation, The Suites at 1 King West ("the Suites") and 2076564 Ontario Inc. (the "Receiver"), requests an order: approving its 13th Report and its fees and activities that are detailed in that Report; approving a final distribution of proceeds to secured creditors in the amount of $907,137.91 and to unsecured creditors of Suites in the amount of $122,854; approving an assignment of the Receiver's rights under certain cost awards against Robert Verdun to Segura Investments Ltd.; and discharging the Receiver and releasing the Receiver and its counsel. The motion is supported by all those appearing except Mr. Verdun and Mr. Stinson. They are unopposed to all the relief requested except for the scope of the requested release.

Backround Facts

[2] The Receiver was appointed receiver and manager of the debtors on August 24, 2007. The receivership was complex and involved numerous stakeholders with differing

interests including many individual condominium owners. Ultimately the subject property was sold and interim distributions were made to secured creditors. The Receiver reported regularly on its activities and proposed fees to the Court and on notice to interested parties. Twelve Receiver Reports have been approved as have the requested fees. Indeed, no one ever opposed the fees requested by the Receiver and its counsel.

[3] The Receiver had particular problems with one of the condominium owners, Mr. Verdun. He was insulting and abusive of the Receiver and its counsel, distributed inflammatory correspondence and lodged complaints with the Superintendent of Bankruptcy, the Institute of Chartered Accountants of Ontario, and with the Law Society. All professional complaints have either been dismissed by the governing body or no action is being taken by the governing body with respect to the subject complaint. After having had numerous opportunities to take issue with the secured parties' security, very late in the proceedings, he chose to challenge it but then abandoned his motion. At that time the Receiver requested costs on a full indemnity basis. While I had considerable sympathy for the Receiver, for the reasons set forth in my endorsement, I awarded costs on a partial indemnity scale against Mr. Verdun. Rouleau J.A. also made a costs order against Mr. Verdun in favour of the Receiver.

[4] Pursuant to a Court order, the Receiver conducted a call for creditor claims against the debtors and for claims against the Receiver and its counsel. Notices of determination dismissing the claims were sent to claimants but no appeals were initiated.

[5] Administration of the estate has largely been completed. With the exception of the costs owing by Mr. Verdun, all of the undertaking, property and assets of the debtors have been collected and sold by the Receiver. The only task remaining is for the Receiver to issue the final approved distributions and respond to Mr. Verdun's leave to appeal costs motion. It therefore recommends that it be authorized to make those final distributions and assign its interest in its two cost awards to Segura Investments Ltd. and then be discharged. In view of the litigious nature of the proceedings and the claims filed

as part of the claims process, the Receiver requests the following provisions in the discharge order:

10. THIS COURT ORDERS that notwithstanding its discharge, the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of ISI in its capacity as Receiver.

11. THIS COURT ORDERS AND DECLARES that, effective upon the filing with this Court of the Certificate of the Receiver referred to in paragraph 9 above, ISI, in its capacity as both Monitor and Receiver, and all of its directors, officers, employees and agents, and Goodmans LLP and all partners and employees thereof (collectively the "Receiver Parties"), are hereby released and discharged from any and all liability that the Receiver Parties now have or can, may or shall have hereafter by reason of, or in any way arising out of, or in connection with the Receiver Parties' conduct, involvement or duties with respect to the Debtors or in any way in connection with these proceedings. Without limiting the generality of the foregoing, the Receiver Parties are hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in these proceedings.

Positions of Parties

[6] As mentioned, no one except Mr. Verdun and Mr. Stinson takes issue with the proposed order. They are unopposed to the order requested but submit that the release should exclude gross negligence and willful misconduct on the part of the Receiver Parties as they are defined in the proposed order.

Discussion

[7] The issue raised by this motion often arises on a motion to discharge a receiver.

[8] A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once

it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.

[9] Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act*[1] provides that the discharge of a trustee discharges him from all liability in respect of any act done or default made by him in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.

[10] The Commercial List Users' Committee had occasion to examine this issue when preparing a standard template or model discharge order. That order includes a provision comparable to paragraph 10 before me that continues the protections provided in the initial receivership order and an optional paragraph that contains a general release comparable although not identical to that contained in paragraph 11 before me.

[11] Dealing firstly with the substance of paragraph 10 of the proposed discharge order, the model order appointing a receiver provides that the receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the order, save and except for any gross negligence or willful misconduct on its part. In addition, the order states that nothing in it derogates from the protections afforded the

[1] R.S.C. 1985, c.B-3.

receiver by section 14.6 of the BIA or any other applicable legislation. Furthermore, no proceeding shall be commenced or continued against the receiver except with the written consent of the receiver or with leave of the Court. Similarly, subject to certain exceptions, all rights and remedies against the receiver are stayed and suspended except with the written consent of the receiver or leave of the Court.

[12] In the explanatory notes accompanying the model receivership order, the subcommittee observes that it is unaware of any case law guidance on the question of why a receiver who has been found to have committed deliberate misconduct or to have been grossly negligent ought to be protected from an award of damages that reasonably flow from its misconduct.

[13] Turning to the substance of paragraph 11 of the proposed discharge order that includes a general release, the explanatory notes that accompany the model discharge order state: "The model order subcommittee was divided as to whether a general release might be appropriate. On the one hand, the receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the receiver likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity, as the Court's officer, so the Court may find that it is appropriate to insulate the Receiver from all liability, by way of a general release. Some members of the subcommittee felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership. The general release language has been added to this form of model order as an option only, to be considered by the presiding Judge in each specific case."

[14] It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions. That said, post discharge, a

claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.

[15] In this case no one took issue with the order requested by the Receiver except for Mr. Verdun and Mr. Stinson who questioned the scope of the proposed release in paragraph 11 and asked that the release be amended to exclude gross negligence and willful misconduct. For the reasons given, this is a reasonable position. I am granting the order requested but amended so that the words "save and except for gross negligence or willful misconduct" are added to the first and second sentences of paragraph 11.

_____

Pepall J.

Released: September 25, 2009

TAB 3

CITATION: West Face Capital Inc. v. Chieftain Metals Inc., 2020 ONSC 5161
COURT FILE NO.: CV-16-11511-00CL
DATE: 2020-10-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WEST FACE CAPITAL INC., AS AGENT

AND:

CHIEFTAIN METALS INC. AND CHIEFTAIN METALS CORP.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Mark Laugesen* and *Danish Afroz*, for the Receiver Grant Thornton Limited

Roger Jaipargas, for West Face Capital Inc., as Agent

Colby Linthwaite and *Aaron Welch*, for the Her Majesty the Queen in right of the Province of British Columbia

Robin Dean and *Robert Janes*, for Taku River Tlingit First Nation

Erin Gray, for Rivers Without Borders

HEARD by ZOOM CONFERENCE: August 11, 2020

ENDORSEMENT

[1] Grant Thornton Limited ("GTL") as court-appointed receiver and manager (the "Receiver"), of the assets, undertakings and property (the "Property") of Chieftain Metals Inc. ("CMI") and Chieftain Metals Corp. ("CMC" and, together with CMI, the "Companies" or "Chieftain") brings this motion for an order (the "Discharge Order"):

(a) approving the Third Report of the Receiver dated June 17, 2019 (the "Third Report"), including the actions and activities of the Receiver referred to therein;

(b) approving the Receiver's final Statement of Receipts and Disbursements;

(c) approving the fees and disbursements of the Receiver and its legal counsel, Bennett Jones;

(d) approving the anticipated further fees and disbursements of the Receiver and Bennett Jones, estimated not to exceed $25,000 to complete the

administration of the receivership (the "Receivership") in the context of these proceedings (the "Receivership Proceedings");

(e) approving the repayment to the ranking secured creditor West Face Capital Inc. as Agent ("West Face") of any monies remaining in the hands of the Receiver after payment of the fees and disbursements;

(f) sealing Confidential Appendix 1 to the Third Report;

(g) subject to the possible revival of the Receivership and re-appointment of the Receiver in the Receivership Proceedings as set forth in (i) immediately below, terminating the Receivership and discharging GTL as Receiver;

(h) releasing GTL while acting in its capacity as Receiver, save and except for gross negligence or wilful misconduct;

(i) providing for the possible revival of the Receivership and the re-appointment of GTL as Receiver of the Companies in the Receivership Proceedings on the same terms as provided for in the Appointment Order, with any such revival and re-appointment to become effective on the date and time of the filing by GTL of a certificate with the Court (the "Re-appointment Certificate"), for the general purpose of implementing a transaction in connection with the Property; and

(j) providing that, if the Re-appointment Certificate is not filed with the Court within two years from the date of the Discharge Order, the Receivership Proceedings shall be terminated.

[2] Since the date of the Third Report there have been extensive discussions among the Receiver, West Face, and various departments of the Government of British Columbia, including the Ministry of Energy and Mines and Petroleum Services, the Ministry of the Environment, the Ministry of Forests, Land and Natural Resources, the Ministry of Indigenous Relations and Reconciliation and Ministry of the Attorney General (collectively, the "Province").

[3] The Receiver subsequently filed a Supplement to the Third Report (the "Supplementary Report") to support the Receiver's request for a revised form of discharge order (the "Revised Discharge Order", substantially in the form attached to the Supplementary Report.

[4] Subject to certain exceptions noted below, the relief sought in the Revised Discharge Order mirrors that in the Discharge Order.

[5] The requested Revised Discharge Order provides at paragraph 14:

> [14] THIS COURT ORDERS that this Order, including the discharge of the Receiver as Receiver of the Property of Chieftain granted hereunder, shall be without prejudice to West Face's right to bring a motion before this Honourable Court to seek the appointment of a receiver and/or manager of the Companies and the Property pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B – 3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, in the within receivership proceedings, bearing Court File Number CV–16–11511–00CL, and any such motion shall be served on Her Majesty the Queen in right of the Province of British Columbia.

[6] The Receiver reports that by late January 2020, there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project (the "Project") on terms which would be acceptable to the Receiver and West Face.

[7] The Receiver also reported that a draft Closure and Reclamation Plan for the Project was finalized on April 24, 2020.

[8] During the first months of 2020, the Receiver determined that the most prudent course of action was to amend the relief sought in the Discharge Order in an effort to eliminate or reduce the issues of concern to the Province.

[9] In the Supplementary Report, the Receiver reports that, with one remaining exception, all issues in the proposed form of Revised Discharge Order have been settled among the Receiver, West Face and the Province.

[10] The unresolved issue concerns the proposed paragraph 14 of the Revised Discharge Order.

[11] Having reviewed the record and, in particular, the Third Report and the Supplementary Report, I am satisfied that with the exception of the sole issue in dispute, the relief requested by the Receiver is appropriate in the circumstances and is granted. In arriving at this conclusion, I have taken into account that no party is opposed to the requested relief. The requested fees and disbursements appear to be reasonable in the circumstances. In addition, I am satisfied that the requested sealing order provision is appropriate as the disclosure of the information in Confidential Appendix I to the Third Report could be harmful to stakeholders. The *Sierra Club* principles have been taken into account.

Issue for Determination

[12] The Receiver takes the position that it should be discharged at this time. The Receiver has concluded that incurring the cost necessary for the continuation of the receivership is no longer beneficial to the stakeholders of the Companies, including the secured creditor West Face. With no credible and interested parties willing to pursue a transaction to acquire the Project, the

further costs of administering the Receivership cannot be justified at this time. West Face intends to continue in its efforts to find or develop a private-sector solution.

[13] West Face wants the Receiver to be discharged at this time and accepts the terms set forth at paragraph 14 of the Revised Discharge Order.

[14] The Province wants the language in paragraph 14 of the Revised Discharge Order augmented to provide that, "should West Face fail to bring the said motion to seek the appointment of a receiver and/or manager not later than two years from the date of this order, it may not do so thereafter without first obtaining the express written consent of Her Majesty the Queen in Right of the Province of British Columbia".

[15] The Taku River Tlingit First Nation ("TRTFN") does not oppose the discharge of the Receiver but submits that the Receiver should be discharged without the benefit of the proposed "without prejudice" provision and that the court should not exercise its discretion so as to give the secured creditor rights that it would not normally have under the BIA, particularly given the prejudiced innocent third parties like the TRTFN. Nor does the TRTFN agree with the additional wording proposed by the Province.

[16] The original version (paragraphs 12 – 14 of the Discharge Order) provided that the Receivership shall be revived and the Receiver re-appointed in the within Receivership Proceedings, in both cases effective on the filing of the Re-appointment Certificate. If the Re-appointment Certificate was not filed within two years, the Receivership Proceedings were to be terminated. No court order would be required to revive the Receivership Proceedings.

[17] The proposed Revised Discharge Order provides for a different path to revive the Receivership Proceedings. It requires West Face to bring a motion for the appointment of a receiver in the Receivership Proceedings on Notice to the Province. The two-year period within which to revive the Receivership Proceedings as set out in the Discharge Order is no longer referenced.

Analysis

[18] In its factum, counsel for West Face submits that the Province is requesting that the court take the extraordinary step of restricting the ability of West Face to move for the appointment of receiver over the Property to a two-year period and that it is the Province that is requesting that the court grant relief that is of an injunctive nature for which there is no authority to support such request.

[19] In my view, such a submission is misguided.

[20] In the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That is not the situation in these Receivership

Proceedings. This is not a case of ancillary work that remains to be completed. A court supervised sale transaction involving the Project is the fundamental purpose of the Receivership Proceedings.

[21] West Face is the party that initiated the Receivership Proceedings in 2016. The Receiver has been attempting to find a commercial resolution, satisfactory to West Face and other stakeholders since that time but has been unable to do so. It is understandable that West Face does not wish to continue to fund the Receivership Proceedings without any commercial resolution being implemented. West Face now proposes that its exposure in continuing to fund the Receiver should come at an end while the same time, it can continue to pursue, outside of the Receivership Proceedings, potential commercial transactions and, if a suitable transaction can be agreed upon, the Receivership Proceedings can be revived to provide a vehicle to complete the transaction.

[22] In seeking to preserve a route to revive the Receivership Proceedings, it is West Face and not the Province that is requesting extraordinary relief. In my view, the onus is on West Face to justify whether such relief is appropriate in the circumstances.

[23] West Face references that a re-appointment of a trustee in bankruptcy, is expressly contemplated in S. 41(11) of the BIA, which provides:

> 41(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appointed a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

[24] Counsel to West Face submits that courts have interpreted this this provision to mean that the "door is not closed on the administration of an estate by the simple fact of a trustee's discharge", as the trustee may be reappointed to deal with assets which have not been realized or distributed. As such, courts have recognized that "it cannot be said that the trustee's powers end permanently and unequivocally following discharge or that the bankrupt's assets are unavailable."

[25] In considering this submission, it is necessary to take into account two points. First, bankruptcy proceedings differ from receivership proceedings. In a bankruptcy scenario, the assets of the bankrupt vest in the trustee in bankruptcy (s. 71 of the BIA). This is to be contrasted with a receivership scenario where there is no statutory vesting of assets in the receiver. Second, the re-appointment of a trustee is specifically provided for in the BIA.

[26] Section 41(11) of the BIA should not be read in isolation. Section 40 and 41 address issues relating to the discharge of the trustee and the treatment of remaining assets. In particular, section 40 deals with disposal of property and s. 41(10) provides that notwithstanding the discharge, the trustee remains trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

[27] There are no corresponding provisions to sections 40 and 41 in Part XI of the BIA which deals with secured creditors and receivers, other than perhaps, s. 247(b) which requires the receiver to deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

[28] In my view, the authorities referenced by counsel to West Face which reference s. 41(11) of the BIA and the realization and distribution of assets are of limited assistance.

[29] However, I am satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances. I arrive at this conclusion for two reasons. First, *Re Grand River Railway Co. Limited* [1933] O.J. 151, at para. 19 a decision of the Court of Appeal for Ontario, provided for the re-appointment of a receiver. Second, there is no express prohibition in the BIA that would prevent the court from re-appointing a receiver.

[30] In my view, the court does have the jurisdiction to reappoint a receiver in appropriate circumstances. The question is whether I should exercise my discretion to include a provision in the Revised Discharge Order that could result, at some future date, in a motion for the appointment or re-appointment of the receiver.

[31] The Province submits that if West Face is granted an unlimited time within which to move for the re-appointment of a receiver for the purpose of selling the Project, the Province will be required to run an unlimited risk that any costs it incurs and resources it expends with respect to the remediation of the Project will (i) be made redundant, or (ii) be for the benefit of West Face. The Province contends that West Face is content for the Province to solve the problem, while it retains its rights forever. In such circumstances, the re-appointment of a receiver, at some future time for the purpose of completing a sale of the Project would be convenient for West Face, but it would certainly not be just.

[32] Counsel to the Province references *Bank of Nova Scotia* v. *Freure Village on Clair Creek*, [1996] 40 C.B.R. [3rd] 274 [Ont. Commercial List] for the proposition that the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This involved an examination of all the circumstances, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[33] The Province submits that in this case, the "potential cost" to the Province is the time, effort and money expended upon work towards the development and implementation of a final remediation and closure plan that is ultimately for the benefit of West Face and its buyer.

[34] The Province contends that there should be some time limit imposed on West Face's ability to bring a motion to request the re-appointment of the Receiver and that the issue to be determined is what time limit should be imposed. The Province contends that it should be no

longer than two years and that the consent of the Province should be a precondition to bring such a motion.

[35] Counsel to the TRTFN detailed that since the 1990s, the TFTFN has taken considerable steps to protect its lands and that the protection and stewardship of the TRTFN territory is fundamental to the TRTFN way of life. The TRTFN is opposed to the project as it views the Project as a threat to their lands and waters as well as to their way of life.

[36] With respect to the issue of the discharge of a Receiver, counsel to TRTFN submits that the BIA makes no provision for without prejudice discharge of a receiver and if there is any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding, it lies in the discretionary power of the court in managing insolvency proceedings. I agree.

[37] Accordingly, in the exercise of its discretion, counsel submits that the court should take into account all interests of innocent third party such as the TRTFN. The TRTFN submits that permitting West Face to move for the re-appointment of a receiver will have a chilling effect on the remediation plan and the Province will be reluctant to engage in an expensive environmental cleanup to benefit West Face and future purchasers.

[38] It is clear that West Face is not satisfied with the status quo. It does not wish to maintain the receivership and accept the costs and responsibilities associated with the Receivership Proceedings, including the ongoing supervision by the court. West Face desires an outcome which limits their ongoing financial exposure, but at the same time, preserves their ability to seek a satisfactory commercial resolution which may include the use of Receivership Proceedings to consummate a future transaction. West Face does not want a termination of the Receivership Proceedings. It is conceivable that there may be limitation period consequences to West Face if this course of action is implemented and West Face wanted to initiate a second receivership proceeding. While I acknowledge the practical concerns of West Face, the solution proposed by West Face results, in my view, in an unwarranted transference of risk and uncertainty to other parties.

[39] The Province raises legitimate concerns. In my view, the Province should not be faced with an unlimited period of time of uncertainty. There are environmental concerns with the Project which will have to be addressed. It has proposed a two-year period during which West Face can explore the possibilities of a commercial transaction. However, beyond that period, the Province quite properly put forward the position that it should have some certainty in the outcome.

[40] The TRTFN has also raised legitimate concerns and want these Receivership Proceedings to be dealt with in a definitive manner.

[41] In my view, the Province and the TRTFN are entitled to certainty of outcome. The only question to be addressed is whether West Face should have a defined period of time to bring a motion to revive the receivership proceedings, and if so, whether that time period shall be extended only with the consent of the Province.

Disposition

[42] In balancing the interests of the Receiver, the secured creditor West Face, the Province and TRTFN, I have concluded that the Receiver is to be discharged at this time, without prejudice to the right of West Face to bring a motion to seek the appointment of a receiver in these proceedings no later than August 11, 2022, this date being two years from the date of this hearing. This gives West Face adequate time to assess its options.

[43] I have also concluded that it is not appropriate, in the circumstances to include a provision that would potentially extend the timeline beyond August 11, 2022. To do so would just prolong a period of uncertainty that could be detrimental to the TRTFN and the Province. If circumstances are such that require this issue to be revisited on or before August 11, 2022, it is open to West Face to bring its motion in the Receivership Proceedings and, if reappointed, the Receiver can seek further direction from the court.

[44] An order shall issue to give effect to the foregoing.

Chief Justice Geoffrey B. Morawetz

Date: October 8, 2020