Court File No.: SJM-46-2020

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

IN THE MATTER OF THE RECEIVERSHIP OF:

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC.

-and-

PURSUANT TO Section 33 of The *Judicature Act,* R.S.N.B. 1973, Ch. J-2, Rule 41, *Rules of Court*, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3

BETWEEN:

FARM CREDIT CANADA, a Federal Crown Corporation

-and-

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC., each a New Brunswick Corporation

APPLICANTS,

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC., each a New Brunswick Corporation

RESPONDENTS

BRIEF ON LAW

Submitted on Behalf of Ernst & Young Inc.

(for the Motion scheduled for March 14, 2022 at 11:00 a.m.)

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AND The Parties on the Service List

INDEX

Part I – Facts

<u>Background</u>

1. The facts are generally set out in the Third Report dated January 28, 2022, (the "**Third Report**") of Ernst & Young Inc. ("**EYI**" or the "**Receiver**") as receiver and receiver-manager of certain assets of each of 693528 NB LTD. (formerly, Hillspring Farms Ltd.) ("**528 NB**"), HSF Foods Ltd. ("**HSF**") and 693206 NB INC. (formerly, Hillspring Warehouse & Logistics Inc.) ("**206 NB**" and collectively with 528 NB and HSF, the "**Respondents**").

2. The following is an overview of some of the key facts for the purpose of this brief. Capitalized terms not defined herein have the meanings attributed to them in the Third Report.

3. At the hearing of the Notice of Application on June 26, 2020 (the "**Application**") EYI was appointed as receiver and receiver-manager of all the Respondents' current and future assets, undertakings and properties wherever situate, including all proceeds thereof except for the Excluded Property as defined in the Receivership Order.

4. The Receiver was authorized and empowered to complete the sale of all or substantially all of the assets of 528 NB (formerly Hillspring Farms Ltd.) (the "**McCain Sale**") to McCain Farms, a division of Division of McCain Produce Inc. ("**McCain**"). The McCain Sale closed on June 30, 2020.

5. The remaining assets of the Respondents subject to the Receivership Order consisted of various pieces of personal property (the "**Residual Equipment**") and real property (the "**Residual Real Property**", and collectively with the Residual Equipment the "**Residual Property**").

6. The Receiver has now completed its efforts in relation to the Residual Property, and as set out in the Third Report the Receiver has realized on all Residual Property. As a result, the Receiver has completed its duties as required in accordance with the Receivership Order.

7. The Receiver has determined that the only creditors entitled to a further distribution are Farm Credit Canada ("**FCC**") and the Canadian Imperial Bank of Commerce ("**CIBC**"). The Receiver's proposed distributions are detailed in the Appendix "D" of the Third Report found at page 85 of the Record on Motion.

8. FCC and CIBC are the only parties with an economic interest in the proceedings and support the Receiver's requests as set out in the Notice of Motion.

Part II – Issues

9. The issues are as follows:

   a. Should the Court approve the proposed distribution?

   b. Should Ernst & Young Inc. be discharged as Court-appointed Receiver of the Respondents?

   c. Should this Court dispense with passing of accounts of the Receiver and its legal counsel?

Part III – Law & Argument

Issue A - Should the Court approve the proposed distribution as set out in the Third Report?

10. In accordance with paragraph 14 of the Receivership Order, the Receiver has retained all proceeds except for the prior distributions authorized by this Court.

11. As contemplated by paragraph 29 of the Receivership Order, the Receiver now seeks the authorization and direction of this Honourable Court to make the Distribution as detailed in its Third Report.

12. The Receiver has obtained independent legal opinions as to the security of FCC and CIBC and is not aware of any security interests that would have priority over FCC and CIBC with respect to the Property or the proceeds therefrom.

13. The proposed Distribution is in the aggregate $1,359,094.10 as follows:

    a. $1,195,798.15 payable to FCC with $1,150,000 being paid on approval of this Honourable Court and the residual balance paid upon the Receiver finalizing and discharging its final costs of the receivership; and

    b. $163,295.95 payable to CIBC with $143,295.95 being paid on approval of this Honourable Court and the residual balance paid upon the Receiver finalizing and discharging its final costs of the receivership.

14. It is respectfully requested that the Distribution be approved in order to maximize efficiency and allow for the completion of the Receiver's role.

Issue B - Should Ernst & Young Inc. be discharged as Court-appointed Receiver?

15. The appointment of a receiver is usually terminated when an estate has been completely administered and when there is no other function for the receiver to perform.

16. As more fully set out in the Third Report, the Receivership was limited to the Property subject to the McCain Sale and the Residual Property as described in the Receivership Order and that Property has been sold.

17. The Receiver has performed all acts capable of being completed by it as a result of realizing on the Property subject to the Receivership Order.

18. All parties with an interest have been served with this Notice of Motion and the Third Report.

19. Accordingly, the Receiver should be discharged as the estates of the Respondents have been fully administered to the extent possible, and all interested persons have been provided with notice of the Receiver's request for discharge.

Issue C - Should this Court dispense with passing of accounts of the Receiver and its legal counsel?

20. The Receivership Order directs the Receiver and legal counsel to pass their accounts before the Court unless otherwise ordered by the Court. It is respectfully requested that this Honourable Court exercise its inherent jurisdiction and dispense with the requirement to approve the fees and disbursements of the Receiver and its legal counsel through a formal passing of accounts.

21. The approval of the Receiver and its legal counsel's accounts in a Receivership is within the inherent jurisdiction of the Court. The passing of accounts affords a receiver with judicial protection but also provides parties with an interest in the proceedings an opportunity to raise any objections. The Court will inquire into the accounts of a receiver if there are any complaints from interested parties about the accounts or allegations regarding the receiver.[1]

22. There have been no complaints or allegations regarding the Receiver. Further, the only parties with an economic interest in the proceedings are CIBC and FCC who support the Receiver's request.

23. In the case of *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.* (2008), 54 C.B.R. (5th) 121 (A.B.Q.B.)[2], the receiver's accounts were being challenged. Justice Romaine of the Alberta Court of Queen's Bench considered the concerns of the parties and did not order a taxation of the accounts, but dealt with the receiver's accounts in a summary manner. Justice Romaine's decision was

[1] Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto, Ont.: Carswell, 2011) at 574-577.
[2] Affirmed in *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.* (2009), 2009 CarswellAlta 577, 2009 ABCA 145 (Alta. C.A.).

appealed to the Alberta Court of Appeal, *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.*, 2009 ABCA 145, 53 C.B.R. (5th) 167. The Court of Appeal affirmed the decision of Justice Romaine and stated at paragraph 3:

> The chambers judge declined to direct any further examination or taxation of the accounts, and instead approved them in a summary procedure. While a taxation might be the more normal way to deal with the issues raised by the appellants, it cannot be said that the chambers judge did not have the jurisdiction to proceed summarily as she did. While we have some concerns about the fees charged, her selection of the summary procedure cannot be said to be unreasonable, and does not warrant appellate interference.[3]

24. The initial receivership order granted in *Hongkong Bank of Canada v. H.E. Carson and Sons Limited*, having court docket number M/M/114/98 and dated September 24, 1998, provided that the receiver would, among other things, report to the Court and pass its accounts. In May of 2011, the receiver applied for an order discharging it as receiver and dispensing with the review and approval of its fees and disbursements and those of its legal counsel. Justice Dionne of the New Brunswick Court of Queen's Bench granted the Order on May 30, 2011. Paragraph 3 of the Order granted by Justice Dionne stated:

> The review and approval of the fees and disbursements of the Receiver and its counsel as described in the Report be and is hereby dispensed with as the sole party with an economic interest therein has approved of the Receiver's discharge and withdrawn from these proceedings.

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[3] *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc*., 2009 ABCA 145, 53 C.B.R. (5th) 167 at paragraph 3.

See also: the Order dated September 5, 2017 of the New Brunswick Court of Queen's Bench in *The Toronto Dominion Bank v. Matrix Management Inc.* having court docket number SJM-34-15.

the Order dated June 27, 2011 of the New Brunswick Court of Queen's Bench in C*omputershare Trust Company of Canada v. D.H.E. Weissman Holdings Ltd.*, having court docket number S/M/34/09.

25. In this case the Receiver has completed all of its duties in accordance with the Orders of this Honourable Court without complaint from any party.

26. The only parties with an economic interest support the Receiver's proposed approach to the completion of the administration of the Receivership. Any formal passing and taxation of the accounts would add cost to the proceeding, all of which expense would be borne by FCC and CIBC.

27. As a result of the foregoing, it is respectfully submitted that this Honourable Court should exercise its jurisdiction to review and approve the accounts of the Receiver and its legal counsel without a formal passing and taxation of same.

Part IV – Relief Sought

28. The Receiver respectfully requests this Court grant the relief requested in the Notice of Motion for this hearing.

All of which is respectfully submitted this 10th day of March, 2022.

COX & PALMER

Per: ______________________________

Josh J.B. McElman, Q.C. of Cox & Palmer,
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SCHEDULE "A" – List of Authorities

Legislation:

1. *Rules of Court*, NB Reg 82-73. https://www2.gnb.ca/content/gnb/en/departments/public-safety/attorney-general/content/acts_regulations/content/rules_of_court/rules_of_court.html

Secondary Sources:

2. Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto, Ont.: Carswell, 2011) at 574-577.

Case Law.

3. *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.* (2008), 54 C.B.R. (5th) 121 (Alta. Q.B.) - https://nextcanada.westlaw.com/Document/I6aca7aab6c505765e0440003bacbe8c1/View/FullText.html?docFamilyGuid=Ic941c5703aa111deb23ec12d34598277&ppcid=623735442c924175bea71fb6236db013&transitionType=History&contextData=%28sc.Search%29

4. *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.,* 2009 ABCA 145, 53 C.B.R. (5th) 167 - https://www.canlii.org/en/ab/abca/doc/2009/2009abca145/2009abca145.html?resultIndex=1

Orders of the Court:

5. Order of the Honourable Justice Dionne of the Court of Queen's Bench of New Brunswick dated May 30, 2011 in Cause No. M/M/114/98.

6. Order of the Honourable Justice Stephenson of the Court of Queen's Bench of New Brunswick dated September 5, 2017 in Cause No. SJM-34-15

7. Order of the New Brunswick Court of Queen's Bench dated June 27, 2011 in Cause No. S/M/34/09.

he or she was participating in a syndicated loan, whether the investor knew that his or her money was be mixed with the money from others, whether there were any trust declarations, the receiver's or, in the case of bankruptcy, the trustee's recommendation, and the recommendation of any steering committee or of the investors themselves.[92] Where the court comes to the conclusion that the investor chose the particular investment, the investor should share in the proceeds of realization of that investment or where there are no proceeds, the investor should bear the adverse consequences.[93] If the court cannot separate the claim of each investor, the court will co-mingle or pool the proceeds of realization for distribution.

3. PASSING THE ACCOUNTS OF RECEIVER AND MANAGER

(a) Duty to Pass

There are no set time periods for the passing of accounts by a court-appointed receiver. On the other hand, apart from receiverships governed under Part XI of the *Bankruptcy and Insolvency Act*,[94] the privately appointed receiver has no duty to pass the accounts unless an application is brought for an accounting. In both cases, the receiver should maintain books, records, vouchers, receipts, bank statements, and other documents in case its conduct is subsequently challenged. Documents created in the course of operating the debtor's business should be accessible to both the security holder and the debtor. However, documents created or received in advising or informing the security holder regarding the conduct of the receivership are not the property of the debtor and, therefore, they do not have to be delivered up to the debtor.[95]

Where the receivership is governed under Part XI of the *Bankruptcy and Insolvency Act*, subsection 248(2) provides that any interested person, including the debtor, or in the case of bankruptcy, the trustee in bankruptcy, may apply for an order directing the receiver to submit its statement of accounts to the court for review. However, before such application can be made, the receiver must first submit its statement of accounts to the Superintendent of Bankruptcy for review. Subsection 248(2) provides:

92 *Re Taylor Ventures Ltd.* (2007), 73 B.C.L.R. (4th) 330, [2007] 12 W.W.R. 166, 32 C.B.R. (5th) 248 (B.C. S.C.) where, after a careful review of the evidence, the court concluded that despite the recommendations of the trustee in bankruptcy and the steering committee, there should not be a pooling or co-mingling of proceeds of realization, but that the investors should have direct recourse to their investment after allocating the expenses.

93 *Eron Mortgage Corp.* (1999), 70 B.C.L.R. (3d) 381, 10 C.B.R. (4th) 257, 1999 CarswellBC 307 (B.C. S.C.) ("Eron No. 3"); *Re Taylor Ventures Ltd.*, above.

94 See Chapter 16.

> (2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3) [receiver's final report and statement of accounts], the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

Therefore, an interested person must make regular inquiries to the receiver as to whether the receiver submitted its statement of accounts to the Superintendent. The interested person must bring an application to the court for review within six months after the statement has been delivered.[96] Unless interested persons monitor the receivership, they will not know when the receiver submits the statement to the Superintendent. Therefore, interested persons must monitor the receivership in order to avoid missing the limitation period. Alternatively, the interested person may apply for an extension of time to review the receiver's statement on sufficient grounds.[97] On reviewing the accounts, the court can adjust the fees and charges.

Depending upon the size and duration of the receivership, the security holder who initiated a court appointment should bring a motion to have the receiver pass its accounts at convenient intervals or as specifically required in the initial order appointing the receiver. In any event, once the receivership has been terminated, the receiver should proceed to pass the accounts. If the security holder delays or refuses, the receiver may move on its own behalf.[98]

The receiver's final accounts may be passed before or after the discharge. If the accounts are referred to the master, the practice varies as to whether the receiver first passes the final accounts and then proceeds to obtain a discharge or whether the receiver obtains a discharge subject to passing its final accounts. If the accounts are not referred to a master of the court, the judge can approve them at the same time as the motion for discharge. This would likely be a faster and less expensive route.

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties and to satisfy the court that the fees and disbursements were fair and reasonable.[99] Another purpose is to afford the debtor, the security holder, and any other interested person the opportunity to question the receiver's activities and conduct to date.[100] On the passing of accounts, the

96 If the receiver delays in filing the statement, there is power in subsection 248(1) to compel the receiver to produce the statement.

97 Subsection 187(11).

98 See *Wahl v. Wahl et al. (No. 2)*, [1972] 1 O.R. 879, 16 C.B.R. (N.S.) 272, 1972 CarswellOnt 60 (Ont. H.C.).

99 *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 41 C.B.R. (3d) 251 (B.C. C.A.), on appeal from (1994), 1 B.C.L.R. (3d) 232, 30 C.B.R. (3d) 241, 1994 CarswellBC 640 (B.C. S.C.).

100 See, for example, *Walter E. Heller (Canada) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252, 1974 CarswellOnt 73 (Ont. S.C.), appeal dismissed (1976), 21 C.B.R. (N.S.) 272, 1976

court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities.[101] However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts.[102] The court will inquire into complaints about the calculations of the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may in addition consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions.[103]

There is no jurisdiction at the passing of accounts to make an award against the receiver.[104] If a complaint is justified, all the court can do is order the receiver to

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CarswellAlta 261 (Alta. Master.), reversed on other grounds (1995), 28 Alta. L.R. (3d) 282, 168 A.R. 295, 1995 CarswellAlta 131 (Alta. Q.B.).

In *Prince Edward Island Development Agency v. Perfection Foods Ltd.* (1994), 124 Nfld. & P.E.I.R. 142, 29 C.B.R. (3d) 137, 384 A.P.R. 142 (P.E.I. C.A.), the court granted the principals of the company, which was also in bankruptcy, the right to oppose the application for passing of accounts and discharge as they had a beneficial interest. Presumably, the trustee in bankruptcy should also have that interest primarily for the creditors, but perhaps also for the shareholders.

In *Kerrigan Ventures Corp. v. Reynolds, Mirth, Richards & Farmer* (1996), 1996 CarswellAlta 59, 178 A.R. 246, 110 W.A.C. 246 (Alta. C.A.), leave to appeal allowed (1996), 193 A.R. 179 (note), 205 N.R. 394 (note), 135 W.A.C. 179 (note) (S.C.C.), the court re-iterated that the proper procedure to challenge a receiver's disbursements was on the passing of accounts.

In *Re Regal Constellation Hotel Ltd.* (2004), 50 C.B.R. (4th) 253, 37 C.L.R. (3d) 207, 2004 CarswellOnt 428 (Ont. S.C.J.), appeal dismissed (2004), 71 O.R. (3d) 355, 50 C.B.R. (4th) 258, 23 R.P.R. (4th) 64 (Ont. C.A.), the shareholder of the debtor questioned the receiver's conduct in marketing and selling the hotel.

See *Bank of Montreal v. Dedicated National Pharmacies Inc. (Fees)* (2011), 73 C.B.R. (5th) 13, 2011 ONSC 346 (CanLII), 2011 CarswellOnt 185 (Ont. S.C.J. [Commercial List]) where the court delayed the review of the receiver's conduct and activities and its remuneration pending the completion the sale of the debtor's assets.

101 *Bank of America Canada v. Willann Investments Ltd.* (1993), 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223, 1993 CarswellOnt 216 (Ont. Gen. Div.), appeal dismissed 1996 CarswellOnt 2969, [1996] O.J. No. 2806 (Ont. C.A.).

102 *Prince Edward Island Development Agency v. Perfection Foods Ltd.* (1994), 124 Nfld. & P.E.I.R. 142, 29 C.B.R. (3d) 137, 384 A.P.R. 142 (P.E.I. C.A.), allowing an appeal from (1994), 119 Nfld. & P.E.I.R. 231, 370 A.P.R. 231, 1994 CarswellPEI 84 (P.E.I. C.A.). If a creditor wants to challenge a receiver's conduct during the course of an administration, which conduct has already been court approved, the creditor has a higher onus to prove when it applies for leave to sue: *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249, [1993] O.J. No. 3039 (Ont. Gen. Div.).

103 *Manufacturers Life Insurance Co. v. Gordon* (1992), 126 A.R. 354, 1992 CarswellAlta 410 (Alta. Master.). In this case, the court-appointed receiver removed goods from the premises without the

make further and better accounts, and penalize the receiver with respect to its remuneration. Where the receiver fails to administer the receivership economically or where the receiver is negligent, the court can reduce the receiver's remuneration.[105] Any substantive issue would have to be dealt with in a trial of an issue or be the subject matter of a separate action in which damages or other relief, including the discharge of the receiver, may be claimed.[106]

(b) Procedure

There is no prescribed form as to the passing of accounts. Invariably the receiver assembles its narrative reports and summarizes them. The receiver also prepares a summary statement of affairs in the report or affidavit setting out the assets which came under the receiver's possession and control and the debtor's liabilities segregated into different categories of claims without making any admission as to their validity or priority. Schedules showing the various types of assets and liabilities with relevant particulars are regularly attached. The receiver sets out in a detailed narrative format the particulars of the receiver's disposition of assets in general terms.

The second part of the receiver's accounts sets out the financial information relating to the disposition of assets, costs of realization, and operational expenses. The receiver produces a statement of receipts and disbursements connected with the administration of the receivership. The statement refers to all proceeds received from the realization of the debtor's assets and the disbursements connected thereto.

With respect to the disposition of assets, the receiver reports about the collection of receivables, the dispositions of assets, and sales ordered by the court.

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105 *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 29, 41 C.B.R. (3d) 251 (B.C. C.A.), affirming (1994), 1 B.C.L.R. (3d) 232, 30 C.B.R. (3d) 241, 1994 CarswellBC 640 (B.C. S.C.); *Willows Golf Corp. (Receivership) v. International Capital Corp.* (1994), (sub nom. *Willows Golf Corp. (Receivership) v. International Capital Corp.*) 122 Sask. R. 75, 16 C.L.R. (2d) 206, 1994 CarswellSask 292 (Sask. Q.B.), appeal allowed in part (1995), 134 Sask. R. 81, [1995] 9 W.W.R. 1, 34 C.B.R. (3d) 82 (Sask. C.A.) where the court found that a trustee appointed under the *Builders' Lien Act* did not take steps to prevent an ousted director from misappropriating moneys. The director had a dishonest and untrustworthy reputation. On an application to pass accounts and discharge, the trustee in bankruptcy opposed. The court held that the trustee was negligent in failing to collect rent and profits and reduced its fees accordingly.

106 See *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*, [1992] 3 W.W.R. 106 at pp. 117-118 (Sask. C.A.), also cited at (1992), 97 Sask. R. 170, 89 D.L.R. (4th) 246 (Sask. C.A.), allowing an appeal from (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.).

See also *Robdale Contractors Ltd. v. Deloitte & Touche Inc.* (1991), 3 C.B.R. (3d) 251, 1991 CarswellAlta 303 (Alta. Master).

In *Argiris v. A. & T. Food Holding Ltd.* (1985), 4 C.P.C. (2d) 263, 1985 CarswellOnt 528 (Ont. Assess. O.), a client moved successfully to stay an assessment of the lawyer's account on the basis that the client commenced an action for damages based on the lawyer's negligent advice. The court concluded that the action was wider in scope than an assessment and that there were procedural advantages of discovery, production, motions, and requests to admit. The lawyer could counterclaim

2008 CarswellAlta 2244
Alberta Court of Queen's Bench

Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.

2008 CarswellAlta 2244, 54 C.B.R. (5th) 121

Quorum P.I.P.E. Managements Inc., as Manager for Quorum Secured Equity Trust and Quorum Secured Equity (Plaintiffs) and Globel Direct Inc. (Defendant)

Romaine J.

Heard: September 30, 2008
Judgment: September 30, 2008
Docket: Calgary 0701-05880

Proceedings: affirmed *Quorum Secured Equity Trust (Manager of) v. Globel Direct Inc.* (2009), 2009 CarswellAlta 577, 2009 ABCA 145 (Alta. C.A.)

Counsel: D. LeGeyt for Plaintiffs
G.W. Coombs for Defendant

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Miscellaneous issues

Receivership resulted from failed proceeding under Companies' Creditors Arrangement Act ("CCAA") — Issue arose as to receiver's remuneration — Receiver's accounts were fair and reasonable, unavoidable in circumstances and consistent with its retainer — Receivership was complex — Former management complicated matters and made receivership more difficult — Fact that business was carried on in three locations made cessation of operations much more difficult — Fact that there had to be second possession of premises after first occurred and fact of co-tenancy also made receivership difficult — Sales process was accelerated, complicated and unsatisfactory — Accounts receivable were success story by receiver who was able to collect about 93 per cent — Hourly rates charged by receiver were not unreasonable, appeared to be market rate and were less than those quoted in retainer letter — There was nothing in accounts which demonstrated imprudence or extravagance.

HEARING concerning remuneration of receiver.

***Romaine J.* (orally):**

1

THE COURT: Mr. LeGeyt, we are ready to proceed?

MR. LEGEYT: Yes. Thank you, My Lady. For the record my name is David LeGeyt. I appear on behalf of the Receiver, Myers Norris Penny. My friend is Mr. Coombs appearing on behalf of the plaintiffs, who I will refer to as Quorum. Also present are Mr. Wood and Ms. Bouchald (phonetic) of the Receiver's office.

My Lady, this is a continuation of the Receiver's application for its discharge, the majority of which you disposed of on September 3rd. The issue which is adjourned to today is the issue of the Receiver's remuneration or the approval of its statement of receipts and disbursements.

THE COURT: Mr. LeGeyt, before you proceed, I received a brief of argument and authorities from you.

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MR. LEGEYT: Yes.

THE COURT: Mr. Coombs, I did not received anything from you. Was I supposed to? No.

MR. COOMBS: No, My Lady.

THE COURT: Okay.

MR. COOMBS: I didn't prepare —

THE COURT: Just to be sure that I was not —

MR. COOMBS: No. No.

THE COURT: — missing a brief. Thank you. Go ahead.

MR. LEGEYT: Yes. And so, I believe the materials which have been filed since we were last before you, our brief that you've referred to, an affidavit of Mr. Gauffin (phonetic) - that is Quorum's evidence.

THE COURT: Right.

MR. LEGEYT: The Receiver has also filed a Notice of Motion and its supplemental report.

THE COURT: I have received that as well. Okay.

MR. LEGEYT: Okay.

THE COURT: Thank you.

MR. LEGEYT: So, I believe you have everything, My Lady.

2 The main focus today is the Receiver's fees and disbursements and its remuneration. The legal analysis of that does require a description of the facts. At some level, My Lady, I will go through what I believe are the important facts.

3 This receivership resulted from a failed CCAA proceeding of Globel and its subsidiaries. During the CCAA proceedings the Court ordered a number of charges against the debtor's property, first the admin charge securing the accounts of KPMG, Burnet Duckworth & Palmer, Macleod Dixon, then the DIP charge and then a director's charge. During the CCAA the monitor reported to the Court and warned the creditors that there would be a significant decrease in value if there was a liquidation of Globel as opposed to a going-concern sale. Nonetheless, Quorum applied to the Court for the termination of the CCAA proceedings and the appointment of a Receiver. And very early on in the receivership the Receiver also advised the Court and the creditors that a liquidation would result in a significant decrease in value as opposed to a going-concern sale.

4 Shortly after the Receiver was appointed we were back before you on December 21st and sought your advice and direction with respect to the priority between the receivership fees and disbursements and the CCAA charges. The Court ruled that the CCAA charges had priority, and one of the results of that finding, My Lady, was to make Quorum the seventh highest ranking creditor in these proceedings. First were the three admin creditors KPMG, BDP, and Macleod Dixon, then the DIP lender, Express, then the Directors, then The Receiver and then Quorum. And so, I think it is important to recall that the objecting creditor here, Quorum, is the seventh highest ranking secured creditor.

5 The Court's direction with respect to priority came on December 21st, 2007, which was effectively the Friday before Christmas. The Receiver immediately recognized that it would not be able to make ends meet, would not be able to pay employees, rent and utilities if it first had to pay the admin creditors, which was the case, so it immediately set about attempting to locate financing for the receivership. It approached Quorum, and initially there was a suggestion that it may be prepared to

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advance more funds, but ultimately they did not. And similarly the Receiver approached lenders of last resort such as Century Services and even they were not prepared to fund the receivership.

6 As a result the Receiver was forced to shut down the operation on December 31st, 2007 and all employees were "terminated. That, My Lady, necessitated the Receiver taking a second possession of the assets. When it initially took possession in early December, the employees came to work and former management came to work and they continued Globel as a going concern. Once those people were terminated, the Receiver was required to exclude them from the operations, change the locks, secure the property and its operations and prevent those people from dealing with Globel's property. The cessation of operation and the termination of employees was very much at odds with what those individuals wanted.

7 As a quick aside, My Lady, former management of Globel was uncooperative, adversarial and obstructionists to the Receiver throughout these proceedings and on multiple occasions they actively interfered with the Receiver discharging its duties.

8 The second possession was particularly difficult in Calgary, My Lady, where there was a co-tenant, Alberta Trade Bindery. The co-tenancy created a large number of unique challenges for the Receiver. Things as basic as identifying Globel's property became difficult because the two operations were in the same building, the same rooms and you couldn't tell whose computer was whose or whose boardroom table was whose. Additionally, segregating and safeguarding the property from the co-tenant became an issue. The Receiver also had to resolve issues of co-ownership because some of the chattels were owned jointly. All of this added to the time and effort of the Receiver, in addition to protecting Globel's Estate from the co-tenant and former management who were friendly with the co-tenant and who were allowed access to the property. On a couple of occasions, My Lady, former management was caught red-handed attempting to deal with the property or the accounts receivable or the customers of Globel, all of which was probably in violation of your order and added to the work of the Receiver.

9 My Lady, I simply cannot stress enough the extra challenges that the Receiver faced and the extra efforts which it was required to make as a result of the co-tenancy in Calgary. And of course, My Lady, that's on top of the Receiver's usual duties of taking possession in three geographically distinct locations - Calgary, Edmonton and Richmond.

10 So, while dealing with these issues, the Receiver nonetheless devised, implemented and completed its sales process for the hard assets of Globel and it did so in accordance with the following time line. It really didn't begin until January after the termination of operations.

11 Nonetheless, by January 25th the sales package had been created and distributed to prospective purchasers. The assets were advertised for sale by the end of January. The deadline for offers was February 11th. Twenty offers were received. However the en bloc offers were not the acceptable ones and as a result the Receiver needed to analyze the different combinations of offers and determine which combination would create the greatest return. It did that, My Lady, and six offers were accepted. The purchase prices were paid within 24 hours and the purchasers were required to come and retrieve their goods within seven days.

12 So, when you add it all up, My Lady, the sales process was complete by about the third week of February, and in our submission the Receiver has acted with dispatch and with diligence in starting and completing the sales process that quickly.

13 It was also important to the economics of the Estate to act quickly, My Lady. As set out in the Receiver's final report the carrying costs of the three locations were just under $3,000 per day, almost $90,000 per month. Once the assets were sold, the Receiver was able to vacate the three locations by March 4th, 2008, thereby eliminating those burdensome carrying costs and benefitting the Estate.

14 After March the Receiver's primary task was the collection of accounts receivable. That is a success story in this receivership, My Lady. Out of about 1.2 million in accounts receivable, all was collected except for 63,000. That's well over a 90 per cent success rate. The 63,000 still exists and may be collectable, and once Quorum and Express have their hearing before you for the priority to those receivables they will be assigned to someone.

15 So, those, My Lady, are the high level facts. Moving on to my legal submissions, the issue before the Court is whether the Receiver's accounts are fair and reasonable. That is the test as set out in the Belaya (phonetic) and Blakemates (phonetic) cases

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which are the leading cases in our brief. The cases talk about two methods for determining whether the Receiver's accounts are fair and reasonable, first to award a reasonable lump sum percentage based on the value of the Estate and second to look at the Receiver's hourly rates and multiply that by the time spent on the file and apply all the appropriate factors and make an assessment.

16 My Lady, in this case it is the Receiver's submission that to utilize the first method would be completely inappropriate. At no point has there been a suggestion that the Receiver would be remunerated based on any percentage of the value of the Estate, and to the contrary the retainer letter which is Exhibit 'A' to Mr. Gauffin's affidavit clearly contemplates the Receiver will charge its hourly rates and render its accounts accordingly. As Your Ladyship will have observed, that's exactly what happened. The accounts are attached to the reports and they demonstrate how the Receiver billed its time. So, in our submission it would be inappropriate to use the lump sum method here. It would be unfair to the Receiver to do so. So, obviously what I submit is correct is the alternative and that is to look at the rates and the time spent on the file and apply the Belaya factors.

17 Starting with the rates, My Lady, we have an average weighted hourly rate of $222 per hour here. That information is set out in the Receiver's supplemental report September 25th. It is our submission that that average rate is more than reasonable. This Court will be familiar with the rates charged by receivers and legal counsel in Calgary. I can advise that even the most junior lawyers at our firm are charging more than $222 an hour. So, in our submissions the rate is more than reasonable and there are no grounds upon which that could be modified.

18 Moreover, My Lady, - and this is important - the actual rates charged by the Receiver are less than those quoted in the retainer letter between Quorum and the Receiver. That is set out in the Receiver's supplemental report, and the discount, My Lady, has resulted in a savings of approximately $51,000 to the Estate. Based on my very quick math, if the Receiver is at about $400,000 and if the discount is about 51, that's a discount of around 12 per cent.

19 At page 16 of our brief we've summarized the Belaya factors. These are the factors the Court is to look at in determining whether the Receiver's remuneration is fair and reasonable. I will run through them briefly.

> THE COURT: Okay. Mr. LeGeyt, I do not require you to do that.
>
> MR. LEGEYT: Oh, okay.
>
> THE COURT: If you need to after Mr. Coombs replies, certainly I will give you that opportunity.
>
> MR. LEGEYT: Thank you, My Lady,
>
> THE COURT: Thank you.
>
> MR. LEGEYT: I would draw the Court's attention to one passage from — or sorry, two passages from two different cases. Under Tab 8 of our brief is the BTPR Realty case, a case of Mr. Justice Farley where the application was to reduce a Receiver's fees and disbursements. On page 5 of that case at paragraph 24 he sets out the Belaya factors and after that he says:
>
> > However I would add (j), other material considerations. For example in this case the April 12 agreement to the fees.

20 And then in the next sentence he says:

> I would think however that where there is a retainer given which indicates the fee will be based upon the multiplicand of hourly rates and time expended, this factor should receive special emphasis as it is what the parties bargained for.

21 And I commend that to you, My Lady. In addition to an assessment which is before you today there is a contractual aspect. The retainer letter indicates that Quorum will pay the Receiver in accordance with its rates, and as Mr. Justice Farley states, quite correctly, when you have those facts they should be given special emphasis. The Court's role is to enforce contractual obligations not to relieve anyone of their contractual obligations unless there are extreme or extraordinary circumstances.

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22 And my final submission with respect to the cases, My Lady, is that the Receiver here has undertaken a complex, high-end, professional engagement. It is an accounting firm and it should be remunerated as such. When accountants are engaged to do high-end audit work or tax work and when retainer agreements are entered into, the client pays the accountant at its full rates and it does so because the accountants bring expertise and diligence and experience to the matter. It is the same for a receivership. This is a high-end, complicated, professional engagement and the law should encourage the best and brightest to this line of work. That could only happen, My Lady, if the accountants are remunerated as they are for their other engagements.

23 And that theme is found in the case law. Under Tab 10 of our brief is the Prairie Place Motel case and on page 2, paragraph 6, in about the middle of the paragraph the Court says:

> In any event, the parties to this matter are all aware that the Receiver and manager is a firm of chartered accountants of high reputation. In this day and age if chartered accountants are going to do the work of receiver/managers in order to facilitate the ability of disputing parties to carry on and preserve the assets of the business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render.

24 In my submission, My Lady, that is important because we do not want second rate, cut-rate individuals acting as the Court's officer in receiverships and as a result receivers should be remunerated appropriately. For these reasons, My Lady, it is the Receiver's submission that its fees and disbursements ought to be taxed in full.

25 I will conclude shortly, but I would first like to comment on Mr. Gauffin's affidavit briefly. There's a suggestion in that affidavit that Mr. Gauffin or Quorum was not aware of FMC's involvement as counsel. However, I would suggest that that evidence is incorrect for the following reason. The engagement letter alludes to Myers Norris. Penny engaging counsel. In his affidavit Mr. Gauffin says the retainer money was paid into FMC's trust account. The receivership order which was drafted by Quorum's formal counsel Gerry Hawkin (phonetic) allows the Receiver to retain legal counsel.

> THE COURT: And I am sorry, I have read and recently read Mr. Gauffin's affidavit, but I do not seem to have brought it down with me. Does anybody have a second copy?
>
> MR. LEGEYT: I have only one. And I —
>
> THE COURT: Okay.
>
> MR. LEGEYT: I could pass it to you.
>
> THE COURT: Do not worry. As I say I have recently read it and —
>
> MR. COOMBS: I might have a second.
>
> THE COURT: — that might be why it is not here. It is probably at my house. But go ahead.
>
> MR. LEGEYT: I believe we have an extra here, My Lady.
>
> THE COURT: Thank you. Thank you, Mr. Coombs.
>
> MR. COOMBS: It doesn't have a backer, My Lady, but —
>
> THE COURT: That is not a problem. Thank you. Go ahead, Mr. LeGeyt.
>
> MR. LEGEYT: Mr. Gauffin also suggests that his former lawyer, Parlee McLaws, could act as the Receiver's counsel. My Lady, that simply would not be appropriate for an independent court officer. The Receiver needs its own legal counsel.

26 Then around paragraph 12 Mr. Gauffin seems to suggest that there is a lack of responsiveness or information from the Receiver. I submit to you that he then immediately contradicts himself in paragraph 13 where he says the Receiver provided me

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with a estimated statement of realizations in December, January, February, March and April, the first five months of this thing, My Lady. The Receiver also periodically billed its accounts, and so, Mr. Gauffin and Quorum had the information before them from which they could determine the economics of what was happening in the Estate.

27 Mr. Gauffin suggests that four people could do this receivership. I submit to you that's simply incorrect. There were three geographically different locations. You needed more than one person at each location. And in any event, My Lady, I submit that that misses the point. If there were fewer people on the file, presumably they would have had to expend more time and the net result to the Receiver's accounts would likely have been nil, meaning that the accounts would likely have been the same had there been fewer people on the file.

28 Mr. Gauffin says that no cost benefit analysis was provided by the Receiver. My Lady, Quorum lived through the CCAA. It applied for the termination of the CCAA and it applied for the appointment of a receiver. I submit to you that there must have been some analysis done by Quorum at that point, and as I alluded to earlier, it had the statements of RND before it, it had the accounts, it had the information with which it could do its own cost benefit analysis.

29 And finally, My Lady, when I look at Mr. Gauffin's affidavit, I don't really see any specific complaints in it. He never says the Receiver did anything wrong. He never says the Receiver should have done something differently. The Receiver here liquidated the assets within six or seven weeks. It collected all of the AR. It dealt with all of the issues that a Receiver deals with. And in rendering your decision you should think about what a different Receiver might have done differently or what this Receiver could have done differently. There's really nothing, My Lady.

30 In closing, My Lady, please keep in mind the following. Quorum chose money to lend — chose to lend money to Globel. Presumably it understood the risks in doing so. Quorum chose to appoint the Receiver, notwithstanding the monitor's advice that a liquidation would result in a great loss of value. Quorum is the seventh ranking secured creditor here and its voice should be given that weight. This was a successful receivership. The top three ranking secured creditors were paid in full, My Lady. All of the AR was collected and virtually all of the assets were sold. The remaining assets literally could not be given away, My Lady. And the value of the Estate is not the Receiver's fault.

31 And finally, My Lady, I would stress that Quorum has already agreed to pay the Receiver's fees and disbursements. This is more than an assessment. There's a contractual aspect here. Thank you.

THE COURT: Thank you. Mr. Coombs?

MR. COOMBS: Thank you, My Lady. What Quorum is objecting to is not what the Receiver did, but essentially how they did it and more specifically how much they charged for doing it. We're here to look at the Receiver's accounts and indirectly or directly the accounts of their legal counsel.

32 I'm going to frame my comments looking at the factors as set out by Belaya in terms of looking at this receivership. My friend talks about the complexity of this receivership, that it was a complex engagement. This was a small business. I mean, at the time that the Receiver was appointed the sale — the revenues were $5 million. The assets of this business were sold for less than $170,000. Throughout the engagement and certainly at the start of the engagement when the Receiver took over, they took over the management of Globel for approximately three weeks. December 31st you know they shut the business down. At that time the Receiver, they knew or they ought to have known about the amounts that were — they were able to collect — the value of the assets that they had. They knew of the creditors' claims. They were aware of the payroll and the occupancy costs. They knew that the amounts collected were not going to provide receipts that would cover the creditors' claims, let alone the Receiver's costs.

33 In looking at the sale of the assets there was 14 transactions, six of which — six transactions resulted in proceeds of $140,000. Half of the assets sold were sold through an auction or were sold to the co-tenant of the premises. And certainly there's activities involved in coordinating these sales, no question about it. It's not as if the Receiver conducted these sales themselves.

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34 In terms of complications of this receivership, there was $160,000 in professional fees spent in the first four weeks of the receivership. Now, there's — certainly there was applications to be made, but at — during three of those four weeks Globel was still — the existing management and staff were still there running the operations. At the time that they closed the doors, albeit understood that nobody wanted to lose their job at the end of the year, and so, this would have resulted in some unhappy staff and a need to take action by the Receiver, but they suggest that the former management continued to cause problems, continued to attend the site in Calgary. There's no suggestion that the Receiver, other than continuing to try to attend and stop the former management from taking possession of stock, that they did anything — there was no suggestion that they put in place any kind of injunction or got a restraining order for any of the management staff that would have assisted them in that manner.

35 They talk about the complexity of the fact that a number of the assets were jointly owned by the — what I'll refer to — the party referred to as the bindery. Well, these assets were sold to the bindery for all of $7,500. I'm going to suggest that it would have been cheaper to — just to provide the bindery with these assets, as opposed to the time that it took to negotiate the sale if that was a complexity that added to the cost of this receivership. In terms of looking for the — looking for assistance from Quorum or any of the other creditors - but I'm primary exclusively concerned with Quorum - we submit that the Receiver never sought assistance from Quorum. And —

THE COURT: I am sorry, Mr. Coombs, how can you say that?

MR. COOMBS: Never sought assistance —

THE COURT: What is your — what is the basis for saying that?

MR. COOMBS: My client has told me that certainly there was never a request from Myers Norris Penny for Quorum —

THE COURT: Sorry, was —

MR. COOMBS: — to come and assist in the receivership.

THE COURT: Oh, you mean in the nuts and bolts of the receivership?

MR. COOMBS: Exactly.

THE COURT: Okay. Okay. Fine.

MR. COOMBS: Sorry.

THE COURT: No, that is okay.

MR. COOMBS: I mean it's my friend's argument that — part of his argument that Quorum never provided any assistance to the Receiver.

THE COURT: Right.

MR. COOMBS: Quorum is an investment fund. It's not — it's not challenging the expertise of Myers Norris Penny. It recognizes that Myers Norris Penny is a reputable national accounting firm and they have extensive experience in these matters and matters of this nature. But I would point out that the communication between the Receiver and Quorum in terms of what was happening and the status of the receivership primarily consisted of the reports that were submitted to Quorum roughly on a monthly basis, the reports being the status of receipts and disbursements. But Quorum — Mr. Gauffin repeatedly asked for an explanation as to how these costs were being — how these costs were escalating and the receivership was going to be able to at the end of the day provide Quorum with some kind of return on their significant investment.

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I suggest to you, My Lady, that Mr. Gauffin's affidavit is not contradictory in the sense that he indicates that he made these requests about the escalating fees that were associated with the receivership, and the response that he got is well, that's just what it costs and by the way there's more costs coming. He continually asked for information about does this make sense, these escalating costs, when there's — it appears that there's not going to be any return at the end of the day?

And this relates to how much time the Receiver took to effect the receivership. Over the course of the period from January, February to the beginning of March, roughly ten or eleven weeks, they accomplished the collection of the accounts - most of the accounts and the sale of the assets, certainly. But how many people did they use to do that? How many hours did they bill accordingly? There's certainly the impression by my client that this was viewed as, we have a — we have an indemnity from an investment fund so the — we have a backstop that has big deep pockets and we're going to — we're going to go about our business and get it done. But the question is was this done prudently? Was it done — was it done economically? Was it done efficiently? There's a number of days that are identified in the Receiver's bills that they billed — the individuals billed in excess of seven, eight, nine, ten hours. So, you know, billing that many hours that's extraordinary. It's not the fact that the liquidation of assets and the question of receivables took 11 weeks. That's quite quick. It's the hours that were billed during this time. And after March 4th the Receiver indicates that the overhead was significantly reduced, however it still managed to bill $50,000 in receivership accounts and $22,000 in legal fees.

As I pointed out earlier — as I suggested earlier, the knowledge and skill and experience of the Receiver is not questioned. But was it actually necessary to apply the skill and expertise to the extent and degree they did? Was it actually necessary to have a couple of individuals — I mean, they worked ten hour days on New Year's Eve. There's professionals that were billing $250 an hour to — for 11 to 12 straight hours to supervise individuals in cleaning up the premises.

THE COURT: Mr. Coombs, this was an incredibly unsatisfactory outcome to this receivership, there is no doubt about it, but what is the court appointed Receiver supposed to do when it has to unexpectedly and quickly shut down operations in a business of this kind on New Year's Eve, terminating employees, trying to prevent the loss of assets, dealing with an uncooperative management? You are asking me to second guess what the Receiver did.

MR. COOMBS: My Lady, I'm not asking you to second guess what the Receiver did. I'm asking you to question how much they charged for doing it.

THE COURT: Well, how much they charged — they charged less than what they had bargained with your client to charge.

MR. COOMBS: Well, I guess I'd like to talk about that. I mean, certainly in the engagement letter it refers to rate. It doesn't identify sort of a total amount. It doesn't identify any kind of estimate of the cost of this, and it seems — well, I'd like to use the word disingenuous, but I'm not sure that that's appropriate. It seems odd that they would claim that there's a $50,000 discount. A discount on what?

THE COURT: On their basic hourly rate times the amount taken.

MR. COOMBS: On the hourly rates that they could charge. I mean, I don't know what the fee schedule is or the fee rates are for all of the Myers Norris Penny individuals". But it suggests that a $50,000 discount is based on if they — the identified rate that they — is that low, medium, high rate of the individuals that they have working for you? Did they have the appropriate people put onto doing the task? Now, as I said, they had a manager, an accountant manager, at $250 an hour supervising a cleanup of the premises. That's an example. I mean, there's — the line — there's pages and pages of documented time.

I think — I think it's important to keep in mind the big picture here. I mean, this was a receivership that generated about $1.2 million. And the Receiver and its legal counsel have charged over half a million dollars for doing that. They've already been paid over $400,000 and they're still looking for another $100,000.

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I guess in terms of — in terms of the case law that we — that my friend has referred to, I mean, we're talking about the fees should be reasonable, fair and reasonable. It shouldn't be an expensive foreign sports model. There has to be some reasonable proportion to the amount — the value of the amount that was collected. They're looking for approval of the fees of over half a million dollars, and we submit that that's not fair and reasonable in this situation. The Receiver was indemnified and it appears to be taking full advantage of that, and they appear to — and these are words from Justice Farley, that "They let the taxi meter run without check."

THE COURT: I am not — where did they let the taxi meter run without check? Where specifically did they do something that was unnecessary or extravagant, Mr. Coombs?

MR. COOMBS: Well, as I said — or I tried to allude to an example as being where they would, I mean, use managers to supervise a cleanup — where they had individuals charging out at — I just lost my notes — charging out at $125 an hour for packing box — books and records for eight hours a day several days in a row. I mean, they had a job to do and they did it, but it certainly appears to my client that they did it in the most expensive way it could be done.

I mean, there's another issue here, My Lady, and I guess I want to — I don't know if — yeah, I think I need to take this opportunity to address it. In the Receiver's supplemental report they've entered into — they're asking for, in the motion, an approval of a mutual release that has been executed by Parlee McLaws and Myers Norris Penny. And I bring this up because this again goes to the kinds of funds that are being — are disappearing from this fund, and from my client's eyes. And actually my client is — will be bearing the burden of these expenses. I mean, this — from appearances this mutual release seems to be inappropriate, based on your order earlier this month that we would be coming before you to talk about the — and to make an application to you regarding the priority between Express and its assignee, Parlee, and my client, Quorum. This seems to be — certainly Parlee is attempting to create something before the — create an arrangement whereby they can scoop up money prior to the application being heard.

THE COURT: Well, this — what I understand is Parlee is in the shoes of Express here, and the Receiver has chosen to reach a settlement on the claim made by Express on its DIP lending. Is that not correct?

MR. COOMBS: That's —

THE COURT: Am I — is there something —

MR. COOMBS: That's what they're —

THE COURT: — wrong with that characterization?

MR. COOMBS: That's what they're doing, yes.

THE COURT: Right. Exactly. So, instead now of having a claim for I think — what was it $280,000, it has been settled for roughly $60,000. Is that correct? Yeah.

MR. COOMBS: Well, the Parlee claim is for $90,000.

THE COURT: But it has been settled for 60 has it not, Mr. LeGeyt?

MR. LEGEYT: Yes.

THE COURT: Right?

MR. COOMBS: But there's some — I guess what I — what I would say is that on October 14th you'll hear that Express — actually the DIP lender is in reality Quorum through Express. And there — that will be information, evidence that will be presented to you —

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THE COURT: Sure. I mean, I am not — let's not get into that till the 14th.

MR. COOMBS: Okay. But I think it's germane to this particular release because whether or not Parlee has a claim even should — is — comes into question as to whether or not the assignment from Express is valid.

THE COURT: Well, that is something between your client and Express that really does not have much to do with the Receiver, does it?

MR. COOMBS: But it has something to do with Parlee's claim against the Receiver.

THE COURT: Okay.

MR. COOMBS: I mean, if the assignment to — from Express to Parlee was not — was inappropriate or not valid, then —

THE COURT: Okay. Where — you are telling me this now. Is your client taking the position that the assignment was not appropriate for today's purposes?

MR. COOMBS: Well, my understanding is that was going to be the basis of the application in front of you —

THE COURT: On the 14th.

MR. COOMBS: — on the 14th.

THE COURT: Okay.

MR. COOMBS: So, for them to — and my friend knew this and Myers Norris Penny knew this, and for them to enter into this mutual release with Parlee seems to be at odds with what was —

THE COURT: Okay. So, you are saying the fact of entering into this release with Parlee should affect their remuneration on this receivership because it is imprudent or something? I am not sure how this fits in, Mr. Coombs, to what we are talking about today.

MR. COOMBS: Well, I guess it fits in because they are asking — my friend — part of this application is asking for approval of this mutual release, so that's why I'm bringing it up.

THE COURT: Okay.

MR. COOMBS: It's — it's not directly related to how much we are opposing. It doesn't relate to the fact that we're opposing how much the Receiver is — has been charged for — or has charged for its receivership directly.

THE COURT: Okay. Thank you. Thank you. I appreciate that clarification.

MR. COOMBS: I'm sorry. My apologizes for —

THE COURT: Okay.

MR. COOMBS: So, My Lady, again I — just for — in conclusion I'll just wrap up by saying we — we're talking about the fact that the Receiver has charged — the accounts of the Receiver are over — and its legal counsel are over half a million dollars for a receivership that collected $1.2 million. That's a 40 per cent commission. That is in our estimation the exotic foreign sports car. They knew or ought to have known — the Receiver knew or ought to have known of the likelihood of any money being left over for the creditors, and when it became clear to them that there wasn't going to be any money left over —

THE COURT: What should it have done?

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MR. COOMBS: Let Quorum know and take advice as to how they can minimize the expenses. As I — as I point out —

THE COURT: Well, didn't it do that with monthly reports to Quorum?

MR. COOMBS: Monthly reports. They provided Quorum with numbers.

THE COURT: December 21st.

MR. COOMBS: Yes.

THE COURT: January 15th, February 29th, March 14th and April 17th.

MR. COOMBS: That had varying numbers that were showing that this was — it was almost a moving target.

THE COURT: Okay.

MR. COOMBS: The Receiver — the DIP financer has not been — my understanding is has not received any money. I mean, the administrative creditors have and the Receiver has.

THE COURT: Right.

MR. COOMBS: But certainly — certainly my client who my friend says is seventh position, but in actual fact is — or I guess this will be determined — is — was the — was party that put up the $250,000.

THE COURT: You are saying your client was in effect the DIP lender.

MR. COOMBS: Through Express they were. They provided — right —

THE COURT: Okay. Okay.

MR. COOMBS: — I understand.

THE COURT: Yes. I mean, not for —

MR. COOMBS: I understand.

THE COURT: — today, Mr. Coombs. Okay.

MR. COOMBS: The Receiver and its legal counsel have already been paid, as I said, over $425,000 and they're looking for another in excess of $100,000. And notwithstanding the fact that there is a retainer letter that talks about hourly rates, stepping back it just seems disproportionate to charge over half a million dollars for a receivership that — is it — was it — was the complexity such that it warranted that kind of billing? Again, this was a small business and it was done — receivership and liquidation was done relatively quickly by an experienced receiver. I think the factors of this receivership point to the fact that it wasn't overly complex.

We're asking the Court to look at this — look at the accounts of the Receiver and its legal counsel and assess what's reasonable, what's fair, what's prudent. I'm going to suggest that the Receiver and its legal counsel have been paid a large amount of money and that they — that any more payments, any further payment, just add further injury to my client, a client who has invested and lost over — almost $2 million already.

THE COURT: I understand.

MR. COOMBS: Thank you, My Lady.

THE COURT: Thank you, Mr. Coombs.

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Mr. LeGeyt, I appreciate you might want to say something about the release with Parlee or is there something more?

MR. LEGEYT: Correct, My Lady. And you've appreciated the situation, that the risk, if you will, to the Estate was 288. I believe that's the number. You know, it's a release. It's a settlement of an uncertain claim. The Receiver in its — in its experience and in its commercial wisdom settled for $60,000. It's in our submission appropriate to do so and certainly permitted by your initial order to compromise claims against the Estate. And it is a strange thing, My Lady, because had the Receiver litigated and lost to Parlee, the exposure to the Estate would have been the entire DIP loan, 288, and in which case the Receiver would have been pursuing Quorum for" more money under its indemnity, so —

THE COURT: Okay.

MR. LEGEYT: I don't think I have much more to say, My Lady. I feel I must object to the suggestion that the Receiver conducted itself the way it did because of the indemnity and was in fact attempting to take advantage of Quorum. That's simply not the case. The Receiver as a court officer conducted itself appropriately, and I reiterate my initial submission that this was a successful receivership with the highest ranking creditors paid out. It could not have been done any more differently or quickly or more economically.

THE COURT: Okay. Thank you, Mr. LeGeyt.

MR. LEGEYT: And I do have a form of order which allows the Receiver's accounts in full and approves the settlement agreement —

THE COURT: Okay.

MR. LEGEYT: — if you so find.

THE COURT: Okay. Firstly, as I have indicated in my questions to Mr. Coombs, this was an entirely unsatisfactory resolution of this receivership for almost all of Globel's creditors and stakeholders. There were warnings from the Monitor, as Mr. LeGeyt has pointed out, during the CCAA proceedings of the risks of a forced liquidation sale over a going-concern sale. Nonetheless Quorum applied for a receivership. I am not suggesting that was a wrong decision. There were certainly a number of issues that had arisen during the CCAA proceedings that no doubt prompted that application. Then, at the beginning of the receivership, the Receiver found it necessary to issue a similar warning about the risks of a forced sale of this business.

36 The cessation of operations made necessary by my December ruling made this a very complex receivership. I also note that former management complicated matters and made the receivership more difficult. The fact that this business was carried on in three locations made the cessation of operations much more difficult. The fact that there had to be a second possession of premises after the first had occurred and the fact of the co-tenancy in Calgary also made this all difficult. This was perhaps a small business in a certain sense, but for all of these reasons the receivership was very complex.

37 The sales process was accelerated, complicated and unsatisfactory. There could not be an en-block sale. There had to be, as you have pointed out, Mr. Coombs, 14 transactions to liquidate the assets of this business.

38 The accounts receivable were in fact a success story by the Receiver, who was able to collect about 93 per cent I believe Mr. LeGeyt said of the accounts receivable, which in the circumstances is amazing.

39 I am well satisfied that the Receiver's accounts are fair and reasonable and that the percentage of estate approach to fees does not work in this case. This approach would have been inappropriate from the beginning as all stakeholders must have been aware from the beginning of the risks of a forced liquidation sale.

40 That leaves the hourly rate approach. I cannot say that the hourly rates here charged by the Receiver are unreasonable. They appear to be at least market rate. They were in fact less than quoted in the retainer letter.

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41 I have gone through the Bank of Montreal factors both as delineated in Mr. LeGeyt's brief and as you have argued before me today, Mr. Coombs. I am not going to review them extensively except to say that I agree with the submissions made by the Receiver about the application of those factors to the facts of this case. I also agree that the terms of the retainer here support the position of the Receiver and should, as in the BTPR Realty case, receive special emphasis as evidence of what the bargain was between the parties.

42 I am also satisfied that it was entirely appropriate for the Receiver to retain its own counsel. It would indeed have been inappropriate for the Receiver to use Quorum's counsel. Mr. Gauffin's complaints about the Receiver as expressed in his affidavit are unfounded on the evidence of what actually occurred - what the Receiver was required to do to diligently fulfil its role as a court appointed officer.

43 It is certainly true that the liquidation of this business led to disappointing results, that the Receiver's inability to continue the business led it to make some rapid decisions in an effort to cut losses and to make the best of a wholly unsatisfactory situation with unhappy stakeholders on all sides. This was not attributable to the Receiver. I can find nothing in the accounts that demonstrates imprudence or extravagance. Added to the circumstances in which the Receiver had to operate were circumstances which Quorum had received warnings about from the beginning of this process, and made its choices accordingly.

44 I am satisfied that the Receiver's fees are fair and reasonable, unavoidable in the circumstances and consistent with its retainer, and I would approve the accounts.

45 I am not clear where I am left with respect to the question of the release, Mr. Coombs. Is that something that you wanted to go over until after the 14th, or is it something that — I am just not clear of your position.

MR. COOMBS: I guess, My Lady, yes, I would like to have that held" over until the application of the 14th is heard.

THE COURT: Mr. LeGeyt, what do you say about that? I mean, I am very, very reluctant to, for instance, Mr. Coombs, require Mr. LeGeyt to participate in the hearing on the 14th, which is what you are in essence suggesting, because that is going to only incur more fees for the Receiver and the Receiver's counsel.

MR. LEGEYT: It certainly was not our intention to participate in the priority dispute between the two creditors, My Lady. I suggest that if the settlement agreement were approved today my friend could put Parlee McLaws on notice that he nonetheless claims priority to those funds, and I would think of course —

THE COURT: And the fight would be with Parlee - Mr. Coombs?

MR. LEGEYT: I don't know, but presumably even if Parlee cashed the cheque they would be good for it if you found —

THE COURT: Well, probably.

MR. LEGEYT: — that his client was entitled to the funds. So, I guess that's the long way of saying you can approve the deal today, the fact the funds can be paid to Parlee, and my friend can keep his powder dry as it were.

THE COURT: Mr. Coombs, what do you say about that?

MR. COOMBS: Well, I know my client doesn't certainly want to incur any more expenses related to the Receiver or its legal counsel, and I believe based on your — the application will be put forward to you on the 14th. At that point I guess we would have an issue with Parlee over the money they received from the Receiver.

THE COURT: Right.

MR. COOMBS: And we'll take it up with —

THE COURT: To be clear, I mean, if I —

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MR. COOMBS: We'll take it up with Parlee.

THE COURT: — approve the release today that — if I approve the release today that finishes things with respect to the Receiver and the Receiver's counsel on that issue. But I do not believe that it prevents you from making an argument that the — I guess that the agreement between Express and Parlee should never have been made or from pursuing Parlee.

MR. LEGEYT: I think that —

MR. COOMBS: Yes, My Lady.

MR. LEGEYT: If I understand my friend's argument it boils down to a priority argument between initially Quorum and Express. And Parlee is in no better position than Express.

THE COURT: Right.

MR. LEGEYT: So, if his client can establish priority over Express, presumably that would include these funds.

THE COURT: Right. Mr. Coombs.

MR. COOMBS: Yes.

THE COURT: Okay. Given that then I will approve the release today as well.

MR. LEGEYT: Thank you, My Lady.

THE COURT: Thank you.

46 PROCEEDINGS CONCLUDED

Order accordingly.

End of Document

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NB7931
ESTATE NO: 047123

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
IN BANKRUPTCY

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
MAY 30 2011
COUR DU BANC DE LA REINE
DIV. DE PREMIERE INSTANCE
MONCTON, N.-B.
DÉPOSÉ/ENREGISTRÉ

IN THE MATTER OF the Proposal of
H.E. CARSON & SONS LIMITED,
an insolvent

- and -

CAUSE NO. M/M/114/98

IN THE COURT OF QUEENS BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

BETWEEN:

HONGKONG BANK OF CANADA

Applicant

- and -

H.E. CARSON AND SONS LIMITED

Respondent

ORDER

UPON READING the Notice of Motion of PricewaterhouseCoopers Inc. ("**PWC**"), as the Court appointed receiver (the "**Receiver**") of H.E. Carson & Sons Limited ("**Carson**") for an Order granting PWC its discharge as Receiver and the Receiver's Report dated April 28, 2011 (the "**Receiver's Report**");

AND UPON hearing counsel for the Receiver;

AND UPON being satisfied that the Respondent, G.W.R. Realty Ltd and Carson Realty Ltd. have withdrawn from these proceedings and consented to the discharge of the Receiver;

2. D

AND UPON contacting George Kinsman of Ernst & Young Inc., the Trustee in Bankruptcy of the Respondent, by telephone conference during the hearing and the Trustee confirming that it was satisfied with the abridgement of service of the Motion materials, which materials were served on it on May 24, 2011, so that the Motion could proceed as scheduled and that it did not intend to oppose the Motion;

IT IS ORDERED THAT:

Service

1. The time for any required service or notice of the Motion be and it is hereby abridged and validated such that the Motion is properly returnable today.

Approval of Activities

2. The Report, and the activities of the Receiver as described therein and throughout these proceedings be and are hereby approved.

Approval of Fees

3. The review and approval of the fees and disbursement of the Receiver and its counsel as described in the Report be and is hereby dispensed with as sole party with an economic interest therein has approved of the Receiver's discharge and withdrawn from these proceedings.

Discharge

4. The appointment of PWC as Receiver in these Proceedings pursuant to the Order of this Court dated September 24, 1998 be and is hereby terminated and PWC is discharged from any further obligations pursuant to the Orders made in these proceedings, provided that PWC shall continue to have the benefit of the provisions of all Orders made in the proceedings, including all approvals of its activities, protections and stays of proceedings in favour of PWC in its capacity as Receiver.

5. This Court Orders and Declares that PWC is hereby released and discharged from any and all liability that PWC now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of PWC while acting in its capacity as the Receiver. Without limiting the generality of the foregoing, PWC is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the

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proceedings, provided that nothing herein shall relieve PWC from any liability arising out of gross negligence or willful misconduct on the part of PWC while acting in its capacity as the Receiver. No action, application or other proceeding in any way arising from or related to the performance or intended performance of the Receiver's mandate or any activity in the proceedings shall be taken, made or continued against the Receiver without the leave of this Court first being obtained.

6. The within proceedings are hereby terminated in their entirety.

Dated at Moncton, New Brunswick this 30th day of May, 2011.

Justice Zoël R. Dionne of the Court of
Queen's Bench of New Brunswick

Court File Number: SJM-34-15

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

IN THE MATTER OF THE RECEIVERSHIP OF:

MATRIX MANAGEMENT INC.

-and-

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN
REC'D REÇU SEP 05 2017 FILED DÉPOSÉ
COUR DU BANC DE LA REINE
GREFFIÈRE / SAINT-JEAN

PURSUANT TO Section 33 of The *Judicature Act*, R.S.N.B. 1973, Ch. J-2, Rule 41, *Rules of Court*, N.B. Reg 82-73 and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

BETWEEN:

THE TORONTO DOMINION BANK, a Canadian Chartered Bank maintaining a branch in the City of Saint John, Province of New Brunswick,

APPLICANT,

-and-

MATRIX MANAGEMENT INC., a body corporate under the laws of the Province of New Brunswick, having its registered office in the City of Saint John,

RESPONDENT.

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05/09/17
NBQJ

ORDER

THIS MOTION made by Grant Thornton Limited ("**Grant Thornton**") in its capacity as Court-appointed receiver and manager (the "**Receiver**") of MATRIX MANAGEMENT INC. (the "**Company**"), for, inter alia, the termination of these proceedings and the discharge of the Receiver, was heard on September 5, 2017 at Saint John, New Brunswick.

UPON READING the Second Report of the Receiver;

AND UPON HEARING Josh J. B. McElman on behalf of the Receiver;

AND UPON READING the material as filed by counsel;

THE COURT ORDERS:

Service

1. That there has been good and sufficient notice, service, and delivery of the within Notice of Motion and Record on Motion and further service on any interested party is hereby dispensed with.

Approval and Distribution

2. That the Receiver is hereby authorized and directed to remit the balance of the net receipts of the receivership estate in accordance with applicable commercial priorities as recommended by the Receiver in its Second Report.

~~3. That the Receiver has satisfied his obligations as set out in the Second Report.~~ 895

Approval of Fees

4. That the requirement of the initial appointment order that the Court approve the fees of the Receiver and its counsel is hereby dispensed with in view of the significant shortfall (in the order of approximately $575,331.01 in the case of TD) being realized by the secured creditors.

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05/09/17
NBGS

Discharge of Receiver

5. That Grant Thornton has satisfied its obligations as Receiver and, upon completion of the final distribution, is hereby discharged and released from any and all obligations under the orders made in these receivership proceedings, provided that the Receiver shall continue to have the benefit of the orders made in these receivership proceedings including all approvals, protections and stays of proceedings in favour of the Receiver.

Dated at Saint John, New Brunswick this 5th day of September, 2017.

Judge of the Court of Queen's Bench of New Brunswick

Court File Number: S/M/34/09

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

REC'D / REÇU JUN 27 2011 FILED / DÉPOSÉ

COUR DU BANC DE LA REINE
GREFFIER / SAINT-JEAN

IN THE MATTER OF THE RECEIVERSHIP OF D.H.E. WEISSMAN HOLDINGS LTD., carrying on business in the Town of Sussex, County of Kings, Province of New Brunswick

PURSUANT TO Section 33 of the *Judicature Act*, R.S.N.B. 1973, Ch. J-2, Rule 41, *Rules of Court*, New Brunswick and Section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

BETWEEN:

COMPUTERSHARE TRUST COMPANY OF CANADA,

APPLICANT,

-and-

D.H.E. WEISSMAN HOLDINGS LTD.,

RESPONDENT.

DISTRIBUTION AND DISCHARGE ORDER

COURT OF QUEEN'S BENCH ★ NEW BRUNSWICK ★ COUR DU BANC DE LA REINE ★ NOUVEAU-BRUNSWICK

I certify that this is a true copy of the original on file in the Court Office, Judicial District of Saint John
Dated this 27th day of June, 2011

Edward Joas, under written authorization of The Registrar dated the 21st day of December 2007

UNPON READING the Notice of Motion of PricewaterhouseCoopers Inc. ("**PWC**"), as the Court appointed receiver (the "**Receiver**") for an Order approving the distribution of proceeds, granting PWC its discharge as Receiver, and approving the Receiver's Report dated June 20, 2011 (the "**Report**");

AND UPON hearing counsel for the Receiver;

IT IS ORDERED THAT:

Defined Terms

1. All terms not otherwise defined in this Order shall have the meanings ascribed to them in the initial order of this Court dated May 25, 2009 (the "**Receivership Order**") as amended by subsequent orders of this Court.

Service

2. The time for any required service or notice of the Motion be and it is hereby abridged and validated such that the Motion is properly returnable today.

3. There has been good and sufficient notice, service and delivery of the within Notice of Motion and Record on Motion and further service on any interested party is hereby dispensed with.

COURT OF QUEEN'S BENCH · NEW BRUNSWICK · COUR DU BANC DE LA REINE · NOUVEAU-BRUNSWICK

Approval of Distribution

4. The Receiver's proposed distribution as set forth in the Report is hereby approved.

5. In accordance with the Receiver's proposed distribution:

    a. the Receiver is hereby authorized and directed to pay to Computershare Trust Company of Canada (“**Computershare**”) the sum of $800,000.00;

    b. the Receiver is hereby authorized and directed to pay the balance of the funds to PWC, in its capacity as trustee in bankruptcy of the Corporation, to fund the fees and expenses of the estate until administration of the estate is complete; and

    c. PWC, in its capacity as trustee in bankruptcy of the Respondent, is hereby authorized and directed to pay, upon completion of the administration of the estate, any amount remaining to Computershare.

Approval of Activities

6. The Report, and the activities of the Receiver as described therein and throughout these proceedings be and are hereby approved.

COURT OF QUEEN'S BENCH · NEW BRUNSWICK · NOUVEAU-BRUNSWICK · COUR DU BANC DE LA REINE

Approval of Fees

7. The review and approval of the fees and disbursement of the Receiver and its counsel as described in the Report be and is hereby dispensed with as the only parties with an economic interest in these proceedings have approved and consented to the Receiver's discharge and dispensed with the approval of fees and disbursements.

Discharge

8. The appointment of PWC as Receiver in these Proceedings pursuant to the Order of this Court dated May 25, 2009 be and is hereby terminated and PWC is discharged from any further obligations pursuant to the Orders made in these proceedings, provided that PWC shall continue to have the benefit of the provisions of all Orders made in the proceedings, including all approvals of its activities, protections and stays of proceedings in favour of PWC in its capacity as Receiver.

9. This Court Orders and Declares that PWC is hereby released and discharged from any and all liability that PWC now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of PWC while acting in its capacity as the Receiver. Without limiting the generality of the foregoing, PWC is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the proceedings, provided that nothing herein shall relieve PWC from any liability arising out of gross negligence or willful misconduct on the part of PWC while acting in its capacity as the

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Receiver. No action, application or other proceeding in any way arising from or related to the performance or intended performance of the Receiver's mandate or any activity in the proceedings shall be taken, made or continued against the Receiver without the leave of this Court first being obtained.

10. The within proceedings are hereby terminated in their entirety.

DATED at Saint John, New Brunswick, this 27th day of June, 2011.

Judge of the Court of Queen's Bench
of New Brunswick

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NEW BRUNSWICK
NOUVEAU-BRUNSWICK
COUR DU BANC DE LA REINE