A Year in Review – February 2014

Important Announcements

Mr. Justice Morawetz has been elevated to the position of Regional Senior Judge for Toronto Region, and Mr. Justice Newbould has been appointed Team Leader of the Commercial List. The Commercial List Users' Committee (CLUC) congratulates both of them on these appointments and looks forward to our continued work with the new Team Leader.

Message from Mr. Justice Frank Newbould

The Commercial List has suffered a loss, or at least half a loss, in the elevation of our own Justice Morawetz to the position of Regional Senior Judge. Half a loss because Justice Morawetz intends to spend half of his time on administrative matters for the Toronto Region and half of his time sitting on the Commercial List.

Justice Morawetz's appointment was well deserved and has been met with the unanimous support of the Toronto judges. For a number of months before his appointment, he was chosen to review the motions procedures in Toronto with a view to improving the backlog. That was no easy task, but not surprisingly, Justice Morawetz met with all of the players, including the judges and members of the bar, and his recommended changes are already paying dividends. It bodes well for his responsibilities in his new role.

It is hard to think of the Commercial List without Justice Morawetz, and thankfully he will still be around. He has been, and will continue to be, the go to person for insolvency matters. His knowledge and experience are really irreplaceable.

The Advocates' Society will be hosting a reception for the Bar and judiciary on February 26, 2014. Justice Morawetz will be honoured at that time. I hope you can all attend.

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Bankruptcy Discharge Applications

All bankruptcy discharge hearings expected to take longer than one day will be put over to a judge on the Commercial List. Accordingly, appropriate trial management practices must be followed for bankruptcy discharges where opposing parties have raised collateral issues. This is to ensure that these cases proceed in an efficient manner in which the focus remains on the discharge.

Counsel are reminded that a discharge hearing is summary in nature, and is not the appropriate forum to determine whether there has been fraud, the commission of a criminal offence, or a fraudulent preference, etc. as a ground to refuse, suspend or grant a conditional discharge. This was emphasized by Justice Newbould in his Endorsement from *Re Saban*.[1] In that case, a creditor appealed the conditional discharge of the bankrupt on the grounds that the bankrupt allegedly committed perjury at the discharge hearing before the Registrar. Justice Newbould held that issues of fraud are not to be explored at a discharge hearing and are to be considered only if fraud has previously been established.

9:30 Appointments

The CLUC is cognizant that the scope of 9:30 a.m. appointments has broadened beyond short scheduling or consent matters and as a result there have been delays in the commencement of matters scheduled for 10:00 a.m. Some judges, in their discretion, have commenced hearing 9:30 a.m. appointments at 9:00 a.m. to accommodate the increased number of urgent or long 9:30 a.m. appointments.

It is suggested that if counsel expects their appointment to require more than 10 minutes, they should consider seeking to schedule it at 9:00 a.m. or later in the day, through the Commercial List office.

Also, 9:30 a.m. appointments to deal with bankruptcy scheduling matters are available with the Registrar in Bankruptcy, either by telephone or in person. These can be scheduled through the Bankruptcy Court office.

Trial List

Commercial List cases have been settling at a good pace prior to trial or hearing date. In addition, there has been a decrease in insolvency filings. These two factors have led to increased availability on the Commercial List for trial scheduling. There is limited room for trials in the winter and spring sittings. There is more availability in the fall sittings. Long trials will also be repatriated to the Commercial List from the civil list if the reduced demand continues on the Commercial List.

[1] 2012 ONSC 6700 at para 13 (copy attached as **Appendix "A"**).

Estate Matters

Due to the long wait times for the general Civil Motion List and the reduced demand on the Commercial List, the Commercial List will be assisting the Estates Court by hearing estates matters. A separate Estates List will continue to be maintained. One Commercial List judge will deal with estates matters at 9:30 a.m. each day, and the 2 to 2.5 hours per day allocated to estates matters will be divided between two Commercial List judges. It is hoped that the effect of this change will be reduced wait times for both estates matters and long motions on the Civil Motion List.

This is a temporary arrangement while the Commercial List is less busy with insolvency matters and will be reviewed in the fall.

Best Practices

(i) Equipment in Courtrooms

Counsel wishing to have equipment and other items used for trials moved in and out of courtrooms outside normal court hours are asked to contact the Commercial List office well in advance of the hearing to arrange for these services.

(ii) Refusal Motions

Concerns have been raised that refusals motions add to the strain on judicial resources and cause unnecessary delay while having little impact on the evidence adduced at trial. In *Bank of Montreal v. Faibish*[2], Justice Brown offered the parties two options for dealing with the remaining refusals. Under the first option, the endorsement would reflect that the parties had agreed to refrain from bringing refusals motions on the understanding that they would not be faced at trial with the submission of the opposite party that their failure to do so should work against them. The trial judge would then deal with any refusals issues that arise at trial. Under option B, the parties were to advise his Honour of the volume and nature of the refusals on which they intended to move, and it would be decided whether to schedule a refusals motion. If the parties elected to pursue Option B, they risked cost consequences if their positions were found to be incorrect.

Justice Brown expanded on this method of dealing with refusals motions in *Caja Paraguaya de Jubiliaciones y Pensiones del Personal de Itaipu Binacional v. Eduardo Garcia Obregon*[3]. Under Option B, the cost consequences of a refusals motion would be on an "amount per refusal" basis, where parties would be ordered to pay $1,500 of costs for each refusal on which they move and do not succeed. Parties would receive a credit of $1,500 for any refusals they successfully move on. Justice Brown reiterated his intention of motivating parties to carefully consider which refusals are material for a fair determination of the issues at trial. His Honour also introduced an Option C in *Caya Paraguaya*, which functions as a hybrid of Options A and B. Under Option C, parties may elect to use Option A for certain refusals and Option B for others. In offering the third option, Justice Brown reasoned that in some actions, questions of

[2] 2013 ONSC 5848 (copy attached as **Appendix "B"**).
[3] 2013 ONSC 7647 (copy attached as **Appendix "C"**).

importance may be wrongfully refused and that fairness requires an adjudication of those refusals before trial so that actual disclosure of information occurs prior to trial, rather than relying on an adverse inference. The Case Conference Memoranda from both cases discussed above are attached to this newsletter.

As a general rule, refusals motions brought on the Commercial List will be referred to a Master, however, the Commercial List may entertain the motion where there are limited refusals.

(iii) Continued Concerns with Short Service

At the November CLUC meeting, there was a discussion concerning the escalating costs of proceedings and areas of possible improvement. One key area identified was the issue of short notice in CCAA proceedings, which leads to counsel being required to attend at proceedings because they are unclear of the relief sought and how it may impact their client's interests. Justice Morawetz also noted that short notice also leads to the problem of late filing, which places an obvious burden on the presiding judge. A suggestion was made that unless the relief sought is truly urgent so as to warrant abridged service, counsel should comply with the Rules and provide a minimum of one week's notice of applications and motions.

It was also suggested that the first paragraph of the Model Orders should be revised so that approval of short service is the exception and not the rule. Another possible amendment to the Model Orders would be the addition of a provision requiring that objections to the relief sought on an application or motion must be filed within a specified time, failing which the application or motion would be dealt with on a no objection basis.

(iv) Independent Counsel for Court-Appointed Receivers

Unless the presiding judge determines otherwise in the circumstances of the matter, Court-appointed Receivers should retain independent counsel, and not rely on the lawyer for the secured creditor that sought the appointment. It may be appropriate for counsel to act for both the secured creditor and the Court-appointed Receiver where it is clear that the secured creditor is the only party with a substantial economic interest in the proceedings and there are no other circumstances which could require independent counsel. Whether independent counsel is required or not should be addressed at the initial application.

(v) Email Addresses

Justice Newbould reminds counsel that they should include their e-mail addresses on the front of all application and motion records and facta.

Report on Sub-Committees

Disclaimers in Monitor's and Receiver's Report

The previous issue of the Newsletter reported that a sub-committee had been established to report on concerns that the standard disclaimers in monitor's and receiver's reports may be too broad in particular cases, leading to the evidentiary value of the report being compromised.

The sub-committee's report was raised for discussion at the golf and education day program in June 2013. No concerns or issues were raised by those in attendance. Accordingly, the sub-committee subsequently obtained CLUC approval of the report. A copy of the report was widely disseminated and attached to Commercial List Users' Committee Newsletter Issue #4 in May 2012 and Issue #5 in March 2013. Copies of CLUC Newsletters can be located on various industry websites. See below.

Model Orders

E-Service Protocol

The E-Service Protocol was widely circulated and comments were received from a broad range of stakeholders. The Protocol was reviewed at the golf and education day program and has received approval from the Office of the Chief Justice. The Protocol is now available online at **http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/**.

Accordingly, model orders have been amended, where appropriate, to incorporate the E-Service Protocol, as well as other minor amendments. Attached as **Appendix "D"** are copies of the amended pages to the Model Orders, with amendments blacklined, as approved by CLUC.

Electronic Delivery Protocol

Since its implementation, the e-Delivery Protocol has been working well and improving efficiency in the practice. However, Justice Morawetz noted that some Court filings are not compliant with the protocol. Counsel are urged to familiarize themselves with the Protocol as technical compliance is necessary in order for the judge hearing the matter to make use of the materials submitted on the USB key.

One specific issue is that many firms continue to use non-searchable PDF formats when submitting documents. The protocol requires PDF files to be in a format that allows searching within the document and the copying of extracts from the document.

A goal of the Protocol is that, with the use of electronic material and the addition of monitors in courtrooms, paperless hearings and trials may become possible in the future.

The Protocol, entitled "Toronto Region Commercial List e-Delivery Pilot Project: Guidelines for Preparing and Delivering Electronic Documents requested by Judges" is available on the Superior Court of Justice website at **http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/electronic-documents/**.

Digital Recording Device (DRD)

DRDs have been implemented in all courtrooms in Toronto and, as of the November 2013 CLUC meeting, 282 copies of audio court-recordings have been requested. Commercial List users should be aware that the DRD is only available when a Court reporter is present and should not assume that a Court reporter will be present at a non- trial hearing. Court reporters are only present at the request of the judge and, absent a request by a party to the judge, will typically only be requested where there is oral evidence expected or a party is self-represented. It should be noted, however, that the DRD is always activated during bankruptcy hearings before the Registrar, due to the number of self-represented litigants.

Counsel requesting a DRD recording are required to sign an undertaking to ensure that only authorized individuals gain access to the recording. This is due to the ease of which a digital recording can be uploaded, copied or distributed compared to a traditional transcript. At present, it does not appear that the Bar has taken any issue with the current form of the undertaking and there are no plans to alter it. The Ministry of the Attorney General is interested in receiving feedback from the Bar regarding the DRD process in Toronto. The CLUC will be monitoring the DRD program on an ongoing basis and feedback from Commercial List users is welcomed.

A copy of the undertaking is attached to this Newsletter as **Appendix "E"**.

Sitting Judges

The following judges will be sitting on the Commercial List in the 2014 Winter Term (January - March): Justices Morawetz, Brown, McEwen, Newbould, Thorburn and Wilton-Siegel.

The following judges will be sitting on the Commercial List in the 2014 Spring Term (April - May): Justices Morawetz, Brown, McEwen, Newbould, Penny and Wilton- Siegel.

The following judges will be sitting on the Commercial List in the 2014 Fall Term (September - December) Justices Morawetz, Brown, McEwen, Newbould, Pattillo and Wilton-Siegel.

Murray Klein Award

Congratulations to Gale Rubenstein of Goodmans LLP who was selected the 2013 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Gale on May 29, 2013 at the Albany Club in Toronto.

CLUC Annual Education And Golf Retreat

The Users' Committee, in partnership with the Ontario Bar Association, Insolvency Law Section, and the Ontario Association of Insolvency & Restructuring Professionals, will once again be hosting the annual educational program and golf retreat on **June 4, 2014** at the **Richmond Hill Golf & Country Club**. Please mark this date in your calendars and keep your eyes open for further information.

Retirement

Justice Colin Campbell who has been a mainstay on the Commercial List over the past many years retired as a judge of the Ontario Superior Court of Justice on September 30, 2013. During his years on the Commercial List, Justice Campbell presided over many important cases including ABCP and Indalex and made significant contributions to the development of the law in the area of insolvency and restructuring. CLUC would like to extend its thanks and best wishes to Justice Campbell as he embarks on his next career in the practice of mediation, arbitration and case management with Neeson Arbitration Chambers.

Posting of Newsletters

This is Issue #6 of the Commercial List Users' Committee Newsletter. The creation of a newsletter was felt important so that members of the Bar and other organizations who use the Commercial List are informed of the workings of the Users' Committee and given the opportunity to make recommendations for the continued improvement of the operation and administration of that Court.

Copies of this Issue and all previous issues of the Newsletter may be found on the following websites: (i) Ontario Bar Association: **https://www.oba.org/Sections/Insolvency-Law/Articles**; (ii) OAIRP: **http://www.oairp.com/courtmatters.htm**; and (iii) Toronto Lawyers Association: **http://www.tlaonline.ca/?page=CommercialListUsers**.

Advocates Society Reception - February 26, 2014

We encourage members of the Bar to attend the Advocates' Society reception featuring the Justices of the Commercial List, to be held on February 26, 2014 at 250 Yonge Street, Suite 2700 between 5:30 - 8:00 p.m., at which time Justice Morawetz will be recognized for his service on the Commercial List. Details can be obtained at **www.advocates.ca**.

Users' Committee Members

- Mervyn D. Abramowitz, Kronis Rotsztain Margles Cappel LLP
- Scott Bomhof, Torys LLP
- Harvey Chaiton, Chaitons LLP
- Robin Dodokin, Garfinkle, Biderman LLP
- Catherine Francis, Minden Gross LLP
- Deborah Grieve, Cassels Brock & Blackwell LLP
- Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP
- Geoff Hall, McCarthy Tetrault LLP
- Brett Harrison, McMillan LLP
- Jeff Hoffman, Gowling Lafleur Henderson LLP
- Pamela Huff, Blake Cassels & Graydon LLP
- Bruce Leonard, Cassels Brock & Blackwell LLP
- Alex MacFarlane, Gowling Lafleur Henderson LLP
- Chris Matthews, Aird & Berlis LLP
- Elizabeth Pillon, Stikeman Elliott LLP
- Barbara Krever, Ministry of Attorney General
- Tony Reyes, Norton Rose Canada LLP
- Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
- Allan Sternberg, Ricketts Harris LLP
- Sheldon Title, MNP LLP

Editors:
Pamela L. J. Huff, Partner, Blake, Cassels & Graydon LLP & Harvey G. Chaiton, Partner, Chaitons LLP

Appendix "A" – Additional Reasons at *Saban, Re*

APPENDIX "A"

2012 CarswellOnt 15015, 2012 ONSC 6700, 223 A.C.W.S. (3d) 774, 99 C.B.R. (5th) 285

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2012 CarswellOnt 15015, 2012 ONSC 6700, 223 A.C.W.S. (3d) 774, 99 C.B.R. (5th) 285

Saban, Re

Bankruptcy of Zeev Saban

Ontario Superior Court of Justice [Commercial List]

Newbould J.

Heard: November 20, 2012
Judgment: November 26, 2012[FN*]
Docket: 31-1127752

Proceedings: additional reasons at *Saban, Re* (2012), 2012 ONSC 7009 (Ont. S.C.J. [Commercial List])

Counsel: Mrs. Dora Machtinger for herself and, for her husband/creditor, Marek Machtinger

Paul H. Starkman for Bankrupt, Zeev Saban

Subject: Insolvency

Bankruptcy and insolvency --- Discharge of bankrupt — Conditional discharge — Appeal

Debtor received conditional discharge from bankruptcy, suspended for 36 months — Creditor claimed that debtor had lied to official receiver, which was reflected in receiver's report — Creditor appealed discharge — Appeal dismissed — Registrar rightly pointed out that receiver's report was not in itself evidence, and opportunity for cross-examination was given — Statements that creditors were not diligent in extending credit were not improper — Fraud is not to be considered in discharge hearing if proof is required, rather fraud must be previously proven to be taken into account — Registrar made error regarding disposition of funds from settlement of legal proceedings but this error was inconsequential — Registrar did not err in finding family income was below level for surplus payments and some evidence to contrary was hearsay — Registrar did not err in finding failure to keep proper books and records not made out — Matter of perjury on part of debtor, claimed by creditor, was better heard by original registrar and was not considered — Issue of raising stay had not been before registrar and should not be considered on appeal.

Cases considered by *Newbould J.*:

Borden, Re (2010), 69 C.B.R. (5th) 251, 2010 ONSC 3506, 2010 CarswellOnt 4350 (Ont. S.C.J.) — referred to

Clarke, Re (2000), 17 C.B.R. (4th) 49, 2000 CarswellBC 879, 2000 BCCA 256 (B.C. C.A.) — referred to

Gura, Re (1989), 73 C.B.R. (N.S.) 250, 1989 CarswellOnt 156 (Ont. S.C.) — considered

Horwitz, Re (1984), 52 C.B.R. (N.S.) 102, 1984 CarswellOnt 149 (Ont. H.C.) — considered

Horwitz, Re (1985), 53 C.B.R. (N.S.) 275, 1985 CarswellOnt 152 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 173(1) — considered

s. 173(1)(b) — considered

s. 173(1)(k) — considered

s. 173(1)(l) — considered

s. 173(1)(o) — considered

s. 178(1) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 362(4) — considered

APPEAL by creditor from discharge of bankrupt.

***Newbould J.*:**

1 This is an appeal under the BIA by a creditor Marek Machtinger from the decision of the Deputy Registrar Mills made November 15, 2001 granting Mr. Saban a conditional discharge from bankruptcy. The discharge from bankruptcy was suspended for 36 months consecutive to (i) Mr. Saban paying $1,500 to the Trustee for outstanding fees, (ii) paying $4,500 to his estate and (iii) banning him from obtaining credit for 5 years.

2 In his notice of appeal, Mr. Machtinger claims several things, including an order refusing Mr. Saban an "absolute discharge" because of alleged perjury at the hearing before the Registrar, that fraud committed by Mr. Saban be declared under the Criminal Code and the BIA, that debts incurred by Mr. Saban be declared to survive bankruptcy or that leave be given to lift the stay under the BIA to commence an action against Mr. Saban for fraud, plus other consequential relief.

3 Mr. Machtinger has filed an affidavit. It refers to many instances of alleged perjury committed by Mr. Saban before the Registrar. Mrs. Machtinger appeared in person on her husband's behalf as she said he had a medical condition. She said she wishes to set aside the decision of Registrar Mills because of perjury allegedly

committed by Mr. Saban at the hearing of his discharge application. It is my view, and I so explained to Mrs. Machtinger, that if an application is to be made to vary a decision of the Registrar on the basis of perjured evidence, it is better made to the Registrar who heard the matter or another Registrar. I declined to hear that application.

4 Regarding the ground of appeal that leave should be given to lift the stay, Mr. Machtinger did not bring a motion before the Registrar to lift the stay in order to proceed with an action for a debt claimed not to be discharged by reason of section 178(1) of the BIA, and thus the lifting of the stay was not before the Registrar. This kind of an order should not be raised on an appeal from a discharge order. It should be raised on a proper motion brought before the Registrar. I decline to deal with it. I would observe that on the face of it, there may be a serious limitations issue.

5 So far as the appeal is concerned, an appeal is not a trial de novo and a judge can consider only the evidence before the Registrar. The appellant must establish that the Registrar erred in principle, erred in law or failed to take into account a proper factor or took into account an improper factor that demonstrably led to a wrong conclusion. See *Borden, Re* (2010), 69 C.B.R. (5th) 251 (Ont. S.C.J.) per Hoy J. (as she then was). If an appeal is based on an alleged error in a finding of fact, the error must be palpable and overriding. See *Clarke, Re* (2000), 17 C.B.R. (4th) 49 (B.C. C.A.) and Houlden, Morawetz and Sarra, 2012-2013 *Annotated Bankruptcy and Insolvency Act* (Carswell) at I§61.

6 I will deal with the errors alleged by Mr. Machtinger to have been made by the Registrar.

7 Mr. Machtinger contends that the Registrar failed to take into account alleged perjury committed by Mr. Saban during his sworn examination by the Official Receiver. What happened is that at the outset of the discharge hearing before any evidence was called, another opposing creditor named Rand asserted to the Registrar that Mr. Saban had lied in his examination before the Official Receiver. The Registrar pointed out that the Official Receiver's report was not in itself evidence and so that the information contained in the report needed to come out, i.e. come out in evidence, unless Mr. Saban was prepared to admit that he was examined under oath and relied on the statements made at the time. The Registrar told Mr. Rand that he would have an opportunity to deal with it in due course. I see no error in what the Registrar said, and Mr. Rand or anyone else was entitled to cross-examine Mr. Saban on his examination by the Official Receiver and also to adduce any evidence they wished.

8 In her reasons for decision, the Registrar stated in paragraph 5 that the creditors failed to do any measure of appropriate due diligence when advancing loans to the bankrupt and had they done so, the fact that the promise of security in various assets was illusory would have come to light. Mr. Machtinger contends that the Registrar thus minimized the fraud committed by Mr. Saban and did not hold it against him. However, I note that the Registrar went on to be quite critical of Mr. Saban in what he had done. I see no error in her statements in paragraph 5 of her reasons.

9 Mr. Machtinger testified before the Registrar that Mr. Saban had deceived him as to the ownership of his house, which was to be used as security if the loan to Mr. Saban was not repaid. The home was registered in Mr. Saban's wife's name. The grounds to refuse, suspend or grant a conditional discharge in section 173(1) of the BIA include (k), being the fact that the bankrupt has been guilty of a fraud. In her reasons for decision, the Registrar listed several sections of subsection 173(1) that had been proven, but she did not include sub-section (k).

10 In her reasons in paragraph 5, the Registrar did state that the promise of security in various assets was in fact illusory and one of the things she said that was illusory was that the matrimonial home was in the name of the bankrupt's spouse. I would say three things to this point.

11 First, whether to order a conditional discharge rather than refusing a discharge is a discretionary matter for the Registrar as is whether something that has been proven that is listed under section 173(1) should be taken into account. It is quite clear from paragraph 5 of her reasons that the Registrar was of the view that Mr. Saban had misrepresented the ownership of his house but she was of the view that had the creditors undertaken any due diligence, they would have discovered this. She made no express finding of fraud.

12 Second, the Registrar did make a finding that section 173(1)(l) had been proven. That section lists as a ground the fact that the bankrupt has committed any offence under the BIA or any other statute in connection with the bankrupt's property. What the basis of this aspect of the decision, however, was not expressly stated by her, but it is possible it referred to the ownership of the house issue.

13 Third, and perhaps most importantly, in Ontario, unlike some other provinces, the weight of authority is that because an application for discharge is intended to be a summary hearing, issues of fraud are not to be explored and are to be considered only if fraud has previously been established. In *Horwitz, Re* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.), aff'd (1985), 53 C.B.R. (N.S.) 275 (Ont. C.A.), Osborne J. (as he then was) in hearing a trial of an issue as to fraud that had been ordered in a bankruptcy discharge hearing stated his concerns regarding the trial of an issue in a discharge hearing:

> 10. An application for discharge was always intended to be a summary hearing. Issues such as settlements or fraudulent preference or fraudulent representations leading to the extension of credit are not to be explored on a discharge application. Those natters are factors to be considered by the court on an application for discharge by the plain wording of Section 143 (1) (h), 143 (1) (k). In that the discharge hearing is a summary hearing, it is not the appropriate forum in which to determine whether there has been a settlement or fraudulent preference or an extension of credit because of the bankrupt's fraud. Those are matters to be weighed and considered on the bankrupt's application for discharge, after they have already been established. The discharge hearing is not the forum in which Section 143 factors are to be established *ab initio*, nor do I think the proper approach to be taken is to adjourn the application for discharge by resorting to the vehicle of a direction of a trial on an issue.

14 See also *Gura, Re* (1989), 73 C.B.R. (N.S.) 250 (Ont. S.C.), (Granger J.) for the same principles.

15 What the Registrar did in this case, therefore, in not making any express finding of fraud appears to be in conformity with the settled law of Ontario regarding the proof of fraud required in a discharge hearing.

16 The same can be said regarding another contention of Mr. Machtinger that the Registrar erred by not finding that fraud had been proven under section 173(1)(k). The Registrar stated in paragraph 6 of her reasons for decision that the bankrupt had a propensity to write post dated cheques to his creditors for which there were insufficient funds in his bank account and that there were too many occurrences of providing NSF cheques for the bankrupt to suggest it was anything but a premeditated scheme to delay or avoid paying his creditors. Mr. Machtinger contends that this is an offence under section 362(4) of the *Criminal Code*.

17 It would be inappropriate in my view for the reasons stated in *Horwitz, Re* and *Gura, Re* for a Registrar

on a discharge hearing to get into whether an offence under the *Criminal Code* had been proven. Moreover, section 362(4) makes it an offence to obtain anything by means of a cheque that was dishonoured for insufficient funds unless the accused believed on reasonable grounds that the cheque would be honoured. The Registrar did not say that any of the creditors had given something to Mr. Saban on the basis of a cheque that was dishonoured but rather that the cheques were to delay or avoid paying his creditors. Thus whether on the fact fraud could be proven is speculation.

18 Mr. Machtinger contends that the Registrar erred in believing Mr. Saban's testimony that he and his wife did not receive any money from a settlement of a car accident insurance claim. In paragraph 5 of her reasons for decision, in listing promises of security that were illusory, she stated that "the personal injury settlement funds were fully committed to pay the legal fees associated with the action". The insurance proceeds totalled $112,449. Only $65,916 was used to pay the fees associated with the action. However, another $29,833.51 was used to pay Mr. Saban's solicitor's fee for previous accounts in other matters that had been undertaken by his solicitor that were outstanding. Another $17,000 was used to repay a loan that had been advanced by his solicitors to him, which had been made for him to pay $8,000 owing to the CIBC, $4,000 owing to his criminal lawyer and $5,000 which had covered a personal cheque he had written. The evidence of this was before the Registrar, and she made a mistake in saying that all of the proceeds were used to pay the fees for the automobile claim. However, this error was trifling and could not be said to be a palpable and overriding error that would constitute grounds to overturn the decision of the Registrar.

19 Mr. Machtinger contends that the Registrar erred in paragraph 5 of her reasons for decision in stating that the bankrupt's business was in fact established in the name of a personal friend. This was one of the illusory promises that she was critical of Mr. Saban for making. It appears from the evidence that the business name was first registered with the Ministry years after the loan from Mr. Machtinger to Mr. Saban. Whether that means that the business did not exist before, or existed without registering the business name, is not in the evidence. If the statement of the Registrar was in error, and this is by no means clear, it would be an irrelevant error. Whether the business was not owned by Mr. Saban or it commenced some years after the loan by Mr. Machtinger, the result would be the same, i.e. it was not available to secure a loan.

20 Mr. Machtinger is critical that the Registrar only cited one failure of Mr. Saban to comply with his duties as a bankrupt in that he still owed $1,500 to his Trustee. Mr. Machtinger asserts that Mr. Saban did other things that were not in compliance with his duties as a bankrupt. Whether or not Mr. Machtinger is correct in this, it makes no difference. The Registrar found that s. 173(1)(o), which refers to the bankrupt failing to comply with his duties as a bankrupt, had been proven.

21 The Registrar stated in her reasons for decision that the family unit income for Mr. Saban was below the Superintendent's standards for surplus income. Mr. Machtinger contends that this was an error as he had told the Trustee that the income of Mrs. Saban was $983 per month higher than contained in the Trustee's statement of income and expenses provided to the Registrar for the discharge hearing. The fact that Mr. Machtinger told the Trustee that Mrs. Saban had a higher income than stated in the Trustee's report is not any evidence of that but only an assertion and although he states in his affidavit that it became apparent at the discharge hearing that Mr. Saban had a greater surplus income, I was pointed to no evidence in the transcript of the discharge hearing to that effect. Even assuming that the affidavit was properly before me, which it was not, I ignore the hearsay statements in Mr. Machtinger's affidavit of what he says he has learned outside of the discharge hearing. The Registrar was entitled to rely on the Trustee's report, and it has not been established that the Registrar made a palpable and overriding error in stating that the family unit income for Mr. Saban was below the

Superintendent's standards for surplus income.

22 Finally, Mr. Machtinger contends that the Registrar erred by not finding that section 173(1)(b) had been proven. That section refers to the fact that the bankrupt has omitted to keep books and records. However, the evidence referred to by Mr. Machtinger does not establish that. It was a letter from Mr. Saban who had been asked by a creditor to provide bank deposit books and cancelled cheques for four months in 2006 in which he stated that all of his documents were not available as he had been evicted from the premises and he understood that "they" had cleaned out and thrown away all paper and furniture that he had left. Whether or not that statement was true, it is no evidence that he failed to keep his bank deposit books and cancelled cheques for the four months in question.

23 In the circumstances the appeal from the Deputy Registrar's order granting a conditional discharge is dismissed. Mr. Saban has requested an order for costs on a substantial indemnity basis. I heard no argument on costs. Counsel for Mr. Saban may make written submissions of no longer than three pages in length, along with a proper cost outline, within 10 days and Mr. Machtinger shall have 10 days in which to make reply written submissions of no longer than three pages in length.

Appeal dismissed.

FN* Additional reasons at *Saban, Re* (2012), 2012 CarswellOnt 15593, 2012 ONSC 7009 (Ont. S.C.J. [Commercial List]).

END OF DOCUMENT

Appendix "B" – *Bank of Montreal v. Faibish*

APPENDIX "B"

CITATION: Bank of Montreal v. Faibish, 2013 ONSC 5848
COURT FILE NO.: CV-11-9287-00CL
DATE: 20130917

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Bank of Montreal, Plaintiff

AND:

Mair Faibish et al., Defendants

BEFORE: D. M. Brown J.

COUNSEL: M. Mohamed and J. Woycheshyn, for the Plaintiff

R. Quance, for the defendants, Taragh Bracken and Tarbrac Holdings Inc.

G. Bowley, for the defendants, Mair Faibish, and as agent for Renee Faibish and Libra Marketing Inc.

M. Cooper, for the defendant, Bektrom Foods Inc.

H. Wright, for the defendant, Terry Mak

G. Chouest and A. MacDonald, for the defendant, BDO Canada Limited

J. Philpott, for Giuseppe Gatti

J. DiFederico, for the defendants, Michael Falcone, Michael Falcone Professional Corporation and FalconeTurnerMoore LLP

HEARD: September 16, 2013

CASE CONFERENCE MEMORANDUM NO. 4

I. Examinations for discovery

[1] Discoveries are nearing completion. Two non-parties will be examined this week; Mr. Gatti will be examined on October 17. Wrap-up discoveries on undertakings are scheduled for October 17/18. Parties can agree to conduct wrap-up discoveries by way of written questions delivered by the end of October and answered by the end of November.

[2] All parties must deliver answers to undertakings by October 15, 2013.

II. Mediation

[3] The parties remain committed to the mediation before the Honourable Ian Binnie for December 9 and 10, 2013.

III. Expert reports

[4] BMO's forensic accounting expert report is done. The following parties indicated that they might file responding reports on that topic: BDO; Gatti; Faibish.

[5] BDO intends to file an expert report or reports on the issues of (i) the standard of care for operating lines of credit and (ii) the standard of care for factoring arrangements. The Falcone Defendants intend to file an expert report on the issue of reasonable reliance on audited statements.

IV. Refusals

[6] In these times of very constrained judicial resources, I am loath to schedule refusals motions, in large part because experience shows that in most cases they have little tangible impact on the evidence adduced at trial. Dare I say that frequently refusals are no more than tactical posturing by a party, and when the party is faced with the issue of what a trial judge likely will want to hear by way of material evidence, advisements or refusals often crumble in the weeks just before trial.

[7] Accordingly, I offer the parties a choice on the issue of any remaining refusals:

(i) **Option A**: I am prepared to write an endorsement which states that the parties have agreed to refrain from bringing refusals motions, but on the clear understanding that by so doing they will not be faced at trial with the submission by an opposite party that their failure to move on refusals should work against them. Under this scenario, if, at trial, an issue arises about a question refused, then the trial judge can consider the matter. If the trial judge concludes that the refusal was proper, so be it. If the trial judge concludes that the refusal was improper, then an adverse inference would be drawn against the refusing party for failing to disclose material evidence; or,

(ii) **Option B**: Alternatively, if the parties cannot agree on that approach, they should let me about the volume and the nature of the refusals on which they wish to move. I will consider whether or how to schedule a refusals motion. I should observe that in light of the offer of Option A, if the parties insist on a refusals motion, they risk cost consequences if their positions turn out to be incorrect.

The parties shall send me a joint letter no later than September 30 advising which option they choose.

V. Setting a trial date

[8] I think the parties have reached the stage where they are ready to discuss potential trial dates with Morawetz J. The parties contemplate a 6 to 8 week trial. The parties shall contact Morawetz J. to secure an appointment with him to discuss trial scheduling.

VI. Next case conference

[9] If the December mediation does not result in a settlement, the parties shall book a two hour case conference before me for January, 2014 to discuss any remaining pre-trial issues, with the conference starting around 3 p.m. or so.

(original signed by)
D. M. Brown J.

Date: September 17, 2013

Appendix "C" – *Caja Paraguaya de Jubiliaciones y Pensiones del Personal de Itaipu Binacional v. Eduardo Garcia Obregon*

APPENDIX "C"

CITATION: Caja Paraguaya de Jubiliaciones y Pensiones del Personal de Itaipu Binacional v. Eduardo Garcia Obregon, 2013 ONSC 7647
COURT FILE NO.: CV-11-9210-00CL
DATE: 20131210

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Caja Paraguaya de Jubiliaciones y Pensiones del Personal de Itaipu Binacional, Plaintiff

AND:

Eduardo Garcia Obregon a.k.a. Eduardo Garcia a.k.a. Eddie Obregon, Claudia Patricia Garcia a.k.a. Patricia Garcia a.k.a. Claudia Patricia de Garcia a.k.a. Claudia Santisteban, Ligia Ponciano, Managed (Portfolio), Corp., Genesis (LA), Corp. (Ontario Corporation Number 1653094), Genesis (LA), Corp. (Alberta Corporate Access Number 2013145921), FC Int, Corp., First Canadian Int, Corp., Union Securities Limited, Scott Colwell, Marty Hibbs, Hibbs Enterprises Ltd., Columbus Capital Corporation, Antonio Duscio, Leanne Duscio, Leanne Duscio carrying on business as The Queen St. Conservatory, Catan Canada Inc., Vijay Paul, Greg Baker, Bradley F. Breen, Lou Maraj, 2138003 Ontario Inc., Mackie Research Capital Corporation, First Canadian Capital Markets Ltd., First Canadian Capital Corp., FC Financial Private Wealth Group Inc., Jason C. Monaco, Daniel Boase, Paolo Abate, Nikolaos Sylianos Tsimidis, Genesis Land Development Corporation, Limited Partnership Land Pool (2007), and GP LPLP 2007 Inc., Defendants

AND BETWEEN:

Eduardo Garcia, FC Int, Corp., Genesis (LA), Corp. (Ontario Corporation Number 1653094) and Patricia Garcia, Plaintiffs by Counterclaim

AND

Upper Canada Explorations Limited, Parkside Resources Corporation, Global Sport Technologies Corp., and Caja Paraguaya de Jubiliaciones y Pensiones del Personal de Itaipu Binacional, Defendants by Counterclaim

BEFORE: D. M. Brown J.

COUNSEL: J. King and J. De Vellis, for the Plaintiff

R. Craigen, for the Defendants, Eduardo Garcia, Patricia Garcia, Managed (Portfolio), Corp., Genesis (LA), Corp. (Ontario Corporation Number 1653094), Genesis (LA), Corp. (Alberta Corporate Access Number 2013145921), FC Int, Corp. and First Canadian Int, Corp. (conference call only)

A. Rose and D. Spence, First Canadian Markets Ltd., First Canadian Capital Corp., FC Financial Private Wealth Group Inc., Jason C. Monaco, Daniel Boase, Paolo Abate and Nikolaos Sylianos Tsimidis

A. Vivolo, Genesis Land Development Corporation, Limited Partnership Land Pool (2007) and GP LPLP 2007 Inc.

Not participating

G. Watt, Union Securities Limited

E. Sherkin, for the Third Party, Parkside Resources Corporation

Ligia Ponciano, defendant

G. Petker, for Scott Colwell, Marty Hibbs and Hibbs Enterprises Ltd.

K. Sherkin, for Antonio Duscio, Leanne Duscio, Leanne Duscio carrying on business as The Queen St. Conservatory and Catan Canada Inc.

Vijay Paul, defendant

Greg Baker, defendant

HEARD: Case conference held December 9, 2013.

CASE MANAGEMENT MEMORANDUM NO. 2

I. Genesis Land Development settlement motion

[1] Genesis Land Development recently served its motion for the approval of a settlement which would see the deposit into court of certain units. From the discussion with counsel, the motion may resolve. **I would ask counsel to let me know by January 8, 2014, whether the motion will proceed on consent, unopposed or opposed. If a motion date will be required, counsel shall provide me with some suggested dates.**

II. The "Fogler Cajubi Documents" Motion

[2] Counsel previously advised that this issue has been resolved without the need for a motion.

III. Status of the examinations for discovery

[3] Significant progress has been made on the examination for discovery front. If the Genesis Land Development settlement is not resolved or approved, examinations of its representative will be required. Two more days of examination of Mr. Garcia are needed – one by the plaintiff and one by the First Canadian defendants. Mr. Garcia has requested banking records from financial institutions. Mr. Craigen intends to direct the financial institutions to send

his client's banking records to him to deal with outstanding undertakings given by Mr. Garcia. Once those records have been produced, the examinations of Mr. Garcia can continue. In my view, the examinations of Mr. Garcia should be completed by the end of February, 2014.

IV. Undertakings

[4] I order that all parties provide answers to their undertakings no later than 60 days following receipt of the transcript of their examination for discovery.

V. Refusals

[5] On the issue of refusals I offer the parties the following options:

a. **Option A**: I am prepared to write an endorsement which states that the parties have agreed to refrain from bringing refusals motions, but on the clear understanding that by so doing they will not be faced at trial with the submission by an opposite party that their failure to move on refusals should work against them. Under this scenario, if, at trial, an issue arises about a question refused, then the trial judge can consider the matter. If the trial judge concludes that the refusal was proper, so be it. If the trial judge concludes that the refusal was improper, then an adverse inference would be drawn against the refusing party for failing to disclose material evidence;

b. **Option B**: The parties may deliver, to my attention, motion records for refusals motions in writing no later February 28, 2014. They shall deliver responding motion records or materials, to my attention, no later than March 14, 2014. I shall deal with the refusals motions as motions in writing. However, as indicated at the case conference, I wish to give the parties a "heads-up" that if they proceed by way of motion, I shall approach the costs of that motion on an "amount per refusal" basis, specifically $1,500.00 per refusal, payable within 30 days. That is to say, if the defendants move on 8 refusals, but succeed only on two, they may risk adverse cost consequences of up to $6,000 (i.e. success on 2 refusals (+$3,000) less failure on 6 refusals (-$9,000), or a "net" adverse cost award of $6,000). By communicating my approach to costs to the parties in advance of them bringing a refusals motion, I wish to afford them an opportunity to a take a sober look at exactly how many refusals are material for a fair determination of the issues at trial and therefore require adjudication by this Court;

c. **Option C**: The parties can identify those refusals in respect of which they wish to use Option A and those in respect of which they wish to proceed with a motion under Option B. I offer this third option recognizing that in some actions important, proper questions may well be wrongfully refused on an examination and that fairness requires an adjudication of those refusals in advance of the trial so that the actual disclosure of specific information occurs before trial, rather than simply relying on the drawing of an adverse inference. The number of such material refusals in any action usually is quite small, based upon my review over the years of transcripts filed by parties in other cases. The cost consequences

outlined in Option B should operate to confine the number of argued refusals only to very material issues.

I would ask counsel to write me a joint letter no later than Friday, January 24, 2014, advising which of the Options their clients have selected.

VI. Potential summary judgment motion

[6] The plaintiffs have prepared a summary judgment motion against some of the First Canadian defendants: FC Financial Private Wealth Group Inc., Jason C. Monaco, Daniel Boase, Paolo Abate and Nikolaos Sylianos Tsimidis. The scheduling of any summary judgment motion will be held in abeyance until the completion of the examinations of Mr. Garcia by the end of next February.

VII. Expert witnesses

[7] I direct that target dates for the delivery of reports-in-chief by any expert shall be May 1, 2014, with responding expert reports to be delivered by August 4, 2014.

VIII. Next case management conference

[8] **The next case management conference shall be held before me no later than March 28, 2014. Counsel shall consult about a date convenient to the greatest number and book that date no later than February 15, 2014.** Items to be discussed at the next case management conference will include: (i) reviewing the status of examinations for discovery and related issues; (ii) scheduling any summary judgment motion; (iii) any issues regarding securing the evidence of any trial witness out-of-court in advance of the trial; (iv) any issues regarding securing documents from third parties, either those in Canada or those outside of Canada; and, (v) tentative trial dates - I would like to target fixing a trial date for this action for early 2015. Finally, I would ask counsel to prepare a preliminary chart which identifies every witness who will be called at trial and estimates of the lengths of their examinations-in-chief and cross-examinations.

D. M. Brown J.

Date: December 10, 2013

Appendix "D" – Amended Pages to the Model Orders

APPENDIX "D"

Revised: January 21~~5~~, 201~~0~~4

Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE ___	)	_____DAY, THE ____
	)	
JUSTICE _____	)	DAY OF _____, 20__

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF [APPLICANT'S NAME] (the "Applicant")

INITIAL ORDER

THIS APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME] although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of [MONITOR'S NAME] to act as the Monitor,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicant ~~shall be~~is authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. [THIS COURT ORDERS that the Applicant shall be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of [NAME] sworn [DATE] or replace it with another substantially similar central cash management system (the "Cash Management System") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash

premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer **[or resiliation]** of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer **[or resiliation]** is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer **[or resiliation]**, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer **[or resiliation]**, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises ~~and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable~~, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

14. THIS COURT ORDERS that until and including [DATE – MAX. 30 DAYS], or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicant pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

43. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

44. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in [newspapers specified by the Court] a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

45. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<@>'.

46. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicant and the Monitor ~~be~~are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or ~~electronic~~facsimile transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or ~~notice~~distribution by courier, personal delivery or ~~electronic~~facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

~~46. THIS COURT ORDERS that the Applicant, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at [INSERT WEBSITE ADDRESS].~~

GENERAL

47. THIS COURT ORDERS that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

48. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

49. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

~~November~~Revised: January ~~23~~1, 201~~4~~4
s.243(1) BIA (National Receiver) and s. 101 CJA (Ontario) Receiver

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE ___	)	__DAY, THE ___ DAY
	)	
JUSTICE _____	)	OF _____, 20__

PLAINTIFF[1]

Plaintiff

- and -

DEFENDANT

Defendant

ORDER
(appointing Receiver)

THIS MOTION made by the Plaintiff[2] for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing [RECEIVER'S NAME] as receiver [and manager] (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of [DEBTOR'S NAME] (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

[1] The Model Order Subcommittee notes that a receivership proceeding may be commenced by action or by application. This model order is drafted on the basis that the receivership proceeding is commenced by way of an action.

[2] Section 243(1) of the BIA provides that the Court may appoint a receiver "on application by a secured creditor".

7. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. ~~7.~~ THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

9. ~~8.~~ THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. ~~9.~~ THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

24. ~~23.~~ THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. ~~24.~~ THIS COURT ORDERS that the ~~Receiver be~~E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<@>'.

26. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or ~~electronic~~facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or ~~notice~~distribution by courier, personal delivery or ~~electronic~~facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

~~25. THIS COURT ORDERS that the Plaintiff, the Receiver, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service~~

~~List from time to time, and the Receiver may post a copy of any or all such materials on its website at [INSERT WEBSITE ADDRESS].~~

GENERAL

27. ~~26.~~ THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. ~~27.~~ THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

29. ~~28.~~ THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

30. ~~29.~~ THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. ~~30.~~ THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

32. ~~31.~~ THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party

Revised: ~~May 1~~January 21, 201~~0~~4

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE _____	)	_____DAY, THE___DAY
	)	
JUSTICE _____	)	OF _____, 20__

B E T W E E N:

PLAINTIFF

Plaintiff

- and –

DEFENDANT

Defendant

APPROVAL AND VESTING ORDER

THIS MOTION, made by [RECEIVER'S NAME] in its capacity as the Court-appointed receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and [NAME OF PURCHASER] (the "Purchaser") dated [DATE] and appended to the Report of the Receiver dated [DATE] (the "Report"), and vesting in the Purchaser the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Receiver, [NAMES OF OTHER PARTIES APPEARING], no one appearing for any other person on the

Company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed on Schedule "●" to the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

7. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be ~~a settlement,~~ fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

9. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this

Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE	)	WEEKDAY, THE # DAY
	)	
JUSTICE	)	OF MONTH, 20YR

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF THE [LIST DEBTOR NAMES](the "Debtors")

APPLICATION OF [NAME OF FOREIGN REPRESENTATIVE] UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

SUPPLEMENTAL ORDER[1] (FOREIGN MAIN[2] PROCEEDING)

THIS APPLICATION, made by [NAME OF FOREIGN REPRESENTATIVE] in its capacity as the foreign representative (the "Foreign Representative") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the

[1] As noted in several footnotes in this model order, practice under Part IV of the CCAA is still developing, and as certain issues are determined by Canadian courts, this model order will be amended to reflect the development of the law in this area.

[2] If the Canadian Court has recognized a foreign proceeding as a "main" proceeding, then section 48 of the CCAA provides that the Court must grant certain relief, subject to any terms and conditions it considers appropr iate. The provisions of the model Initial Recognition Order (Foreign Main Proceeding) fulfill the mandatory requirements of section 48 with respect to a foreign main proceeding. Section 49 of the CCAA also allows the Court to make any order that it considers appropriate for the protection of the debtor company's property or the interests of a creditor or creditors. This Supplemental Order contains discretionary relief that might be granted by the Court in the appropriate circumstances. The Model Order Subcommittee has attempted to make the provisions of this model Order consistent with similar provisions in other model Orders. Supplemental relief (whether contained in this Order or in subsequent Orders) may also include provisions dealing with the sale of assets, the recognition of critical vendors, a claims process, or any number of other matters, or may recognize foreign orders or laws granting such relief.

declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds any Debtor, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by a Debtor of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

26. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Debtor's interest in such real property leases.

SERVICE AND NOTICE

27. THIS COURT ORDERS that that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule

3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<@>'.

28. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Debtors, the Foreign Representative and the Information Officer ~~each be~~are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or ~~electronic~~facsimile transmission to the Debtors'' creditors or other interested parties at their respective addresses as last shown on the records of the ~~Debtors~~applicable Debtor and that any such service or ~~notice~~distribution by courier, personal delivery or ~~electronic~~facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

~~28. THIS COURT ORDERS that the Debtors, the Foreign Representative and the Information Officer, and any party who has filed a Notice of Appearance, may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.~~

GENERAL

29. THIS COURT ORDERS that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

30. THIS COURT ORDERS that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, a monitor, a proposal trustee, or a trustee in bankruptcy of any Debtor, the Business or the Property.

31. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the [JURISDICTION OF THE FOREIGN PROCEEDING], to give effect to this Order and to assist the Debtors, the Foreign Representative, the Information Officer, and their respective agents in carrying

50. THIS COURT ORDERS that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

51. THIS COURT ORDERS that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

52. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

DOCSTOR: ~~1~~2847697~~836~~\93

Appendix "E" – Undertaking of Counsel/Licensed Paralegal of Record to the Court for Access to Digital Court Recordings

APPENDIX "E"

Superior Court of Justice/Ontario Court of Justice

Undertaking of Counsel/Licensed Paralegal of Record to the Court for Access to Digital Court Recordings

1. I, _____ (please print legibly), acknowledge that:

   a. The digital recording is being provided to me for the purpose of:
      i. preparation in connection with the legal proceedings with respect to this case; and/or,
      ii. replacing or supplementing notes of the legal proceedings with respect to this case.

   b. Any other use of the digital recording is prohibited without an order from the presiding judicial officer or a judicial officer of the Court.

2. I understand and agree that the digital recording to be provided pursuant to this request will be provided subject to the following terms and conditions:

   a. I am legal counsel/licensed paralegal of record and I am a member in good standing of the Law Society of Upper Canada.
   b. I have read and understand s.136 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, including that every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than six months, or to both.
   c. Subject to section (f) below, I will not publish, broadcast, reproduce or otherwise disseminate the digital recording, including any annotation in the audio file, in any way.
   d. I will not copy, save, upload or download the digital recording, except:
      i. onto one or more computers under my direction and control, for my own use in this case; or
      ii. for the purpose of sharing an electronic copy of the file in accordance with section (f) below.
   e. Subject to section (f) below, I will not authorize, assist or permit anyone to publish, broadcast, reproduce or otherwise disseminate the digital recording, including any annotation in the audio file, in any way.
   f. I acknowledge that I may share an electronic copy of the digital recording with only those individuals enumerated below in (i) or (ii), and further that where such individuals are accessing the digital recording, it will be only for the purposes listed in section 1(a) and that I will ensure that those individuals are aware of, and comply with, all of the conditions set out within this undertaking:
      i. other lawyers, articling students or administrative staff who are assisting me in this matter;
      ii. an expert witness whom I have retained to assist me in this matter.
   g. I acknowledge that I may allow my client to listen to the digital recording in my presence or in the presence of someone from my firm, but my client will not be provided with the digital recording or a copy of the digital recording.
   h. If a witness exclusion order has been made in the proceeding, I will not disclose the contents of the digital recording to any prospective witness who has not given evidence.
   i. When the digital recording is not being used for the purpose permitted by the undertaking, I will keep the digital recording in a secure place where it cannot be accessed by persons other than those persons listed in section (f) above.
   j. I will safeguard the digital recording in accordance with my professional obligations regarding client files.

_____ _____

Signature **Firm Name & Address**

Law Society of Upper Canada Number: _____ _____

Date (mm-dd-yyyy)

To be completed by persons attending on behalf of counsel/licensed paralegal of record - agent authorized to receive the digital recording on behalf of counsel/licensed paralegal of record:

_____ _____ _____

Name of Authorized Agent **Signature of Authorized Agent** **Date (mm-dd-yyyy)**

Firm Name & Address:
(If different from above) _____ _____

Firm Name **Firm Address**

Ontario

Request Form/Undertaking of Counsel/Licensed Paralegal of Record to the Court for Access to Digital Court Recordings

Case Information

Order Date: _____ *(mm/dd/yyyy)*

Name of Case: _____ **Court File/Info/Indictment#:**

Presiding Judicial Official: _____

Court Address: _____

Date(s) of Proceeding: _____ *(mm/dd/yyyy)*

_____

Proceedings from: ☐ Ontario Court of Justice ☐ Superior Court of Justice

Type of Proceeding: ☐ Civil ☐ Criminal ☐ Family ☐ Intake Court

☐ *YCJA* ☐ *POA* ☐ Other: _____

(legal counsel only) *(Please specify)*

Ordering Party Information

Please check the appropriate box:

Legal counsel of record licensed by the LSUC:

- ☐ Counsel representing a party to the proceeding
- ☐ Provincial Crown Attorney
- ☐ Federal Crown Attorney

☐ Paralegal of record licensed by the LSUC
(Non-YCJA matters only; Court order required for SCJ matters)

Name: _____ **Organization/Firm:** _____
(Last Name, First Name) *(If applicable)*

Address: _____ **City:** _____ **Postal Code:** _____

E-Mail: _____ **Phone Number(s):** _____
(Include all contact numbers)

Date Required*(mm/dd/yyyy)*: _____ **Cost Centre Code:** _____
(Only required for Provincial Crown Attorneys)

Law Society of Upper Canada Number: _____

Digital Recording Fee Schedule

1. **Single Day's Recording Per Case**: For a request for a single day's recording, per case:
   - $22.00 (regardless of the length of the day's proceeding)
2. **Multiple Day Recordings Per Case**: For a request for multiple day recordings, per case:
   - $22.00 for the first day requested (regardless of the length of the day's proceeding)
   - $10.50 for each additional day ordered of the same case (regardless of the length of each day's proceeding)*

* In order for the $10.50 fee to apply, the order for multiple days must be received at the same time and all proceedings ordered must have taken place so that the request can be processed as a single transaction.