Court File No.: CV-16-11511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

WEST FACE CAPITAL INC., as Agent

Applicant

- and -

CHIEFTAIN METALS INC. AND
CHIEFTAIN METALS CORP.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

STATEMENT OF LAW OF THE APPLICANT

MOTION RETURNABLE AUGUST 11, 2020

Date: August 6, 2020

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TO: THE SERVICE LIST

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STATEMENT OF LAW

PART I. OVERVIEW

1. On September 6, 2016, West Face Capital Inc., as agent for West Face Long Term Opportunities Global Master L.P. ("**West Face**"), made an application for and obtained an Order (the "**Appointment Order**") issued by the Honourable Mr. Justice Newbould of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Grant Thornton Limited ("**GTL**") as receiver (the "**Receiver**"), without security, of all of the assets, undertakings, and properties (collectively, the "**Property**") of Chieftain Metals Inc. ("**CMI**") and Chieftain Metals Corp. ("**CMC**" and, together with CMI, the "**Companies**" or "**Chieftain**"). West Face holds first lien security over all of the Property, including an area of land known as the Tulsequah Project, which consists of certain mineral claims and Crown grants covering approximately 32,722 hectares located in northwestern British Columbia (collectively, the "**Tulsequah Project**").

2. The Receiver brought a motion (originally returnable on June 25, 2019 (the "**Original Discharge Motion**")) seeking an order (the "**Original Discharge Order**") for its discharge and release as Receiver. The Original Discharge Motion was adjourned on a number of occasions, in order to provide the parties with an opportunity to review and discuss certain concerns that were raised with the Original Discharge Order, which has since been significantly revised (the "**Revised Discharge Order**") and which was served on the Service List in these proceedings on August 4, 2020, by counsel for the Receiver.

3. The Revised Discharge Order is in a form that is agreeable to all parties, save and except for one issue. Her Majesty the Queen in the right of the Province of British Columbia (the "**Province**") requests that the Court take the extraordinary step of restricting the ability of West Face to move for the appointment of receiver over the Property of the Companies to a two year period. The Province is requesting that the Court grant relief that is of an injunctive nature and for which there is no authority to support such a request. The Province is attempting to turn a motion for a discharge of the Receiver into an enquiry as to whether it would be just or convenient to appoint a receiver at a future date. However, that is an issue for another hearing, whether that be pursuant to a motion in the within receivership proceedings bearing Court File No. CV-16-11511-00CL (the "**Receivership Proceedings**") or pursuant to a fresh application brought to the Court.

PART II. FACTS

4. The facts and background of the within Receivership Proceedings are set out in more detail in the third report of the Receiver dated June 17, 2019 (the "**Third Report**"), attached as Tab B of the Receiver's motion record dated June 18, 2019. Except where the context otherwise requires, capitalized terms that are used but not otherwise defined herein shall have the meanings ascribed to them in the Third Report.

PART III. ISSUES

5. The issues before the Court are as follows:

    1. What are the factors that are taken into account by courts on a motion for the discharge of a court-appointed receiver or the discharge of other insolvency officials?

2. Have Canadian courts, following the discharge of an insolvency official, appointed or reappointed an insolvency official for the purposes of realizing on assets that have not yet been realized or distributed?

3. Would West Face receive a "windfall" if the Province were to undertake the remediation of the Tulsequah Project mine site (the "**Mine**") and a subsequent sale of the Mine was pursued in a subsequent receivership proceeding?

PART IV. LAW AND ARGUMENT

1. Issue One: Considerations taken into account by courts on a motion for the discharge of a receiver or other insolvency official

6. A receivership ordinarily comes to an end when all the realizable assets have been disposed of and the proceeds have been distributed in accordance with the priority ranking of the parties.[1] A court-appointed receiver will pass its final accounts in respect of the administration and seek a discharge, on application to the court, which is generally granted once the receiver has completed its mandate.[2]

7. Given that the within motion is a motion for the discharge of the Receiver, the relevant considerations include, whether the Receiver has completed its mandate, whether any issues pertinent to the Receiver's duties (such as issues pertaining to priorities or distribution of proceeds) remain outstanding, the approval of the Receiver's final account of its administration and the approval of the Receiver's activities, as outlined in the Third Report of the Receiver dated June 17, 2019 (the "**Third Report**") and the supplementary report thereto, dated August 4, 2020 (the "**Supplementary Report**").

8. In the present case, as detailed in the Third Report and the Supplementary Report, the Receiver has concluded that, absent any credible or interested parties willing to pursue a transaction to acquire the Property, incurring further costs for the continuation of the Receivership Proceedings at this time is no longer beneficial to the stakeholders of the Companies, or conducive to preserving the value of the Property. The Receiver has

[1] Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd Ed (Toronto: Irwin Law Inc., 2015) at 541.
[2] Kevin P. McGuinness, *Receivers and Other Court Officers* (2017 Reissue) at Part I.35(1) ["McGuinness"].

discharged its duties, to the extent that it is able to do so, at this time. Continuing the Receiver's sustained efforts to sell the Property at this time, particularly in the midst of a global pandemic, would have the undesirable effect of increasing costs and thus be counterproductive for the stakeholders of the Companies.

9. Finally, it is premature for the Court to consider any objections that may be raised at a future hearing that might be required in respect of a motion or an application for the appointment of a receiver. Whether or not a receiver should be appointed at a future date (after the discharge of the Receiver, if the Revised Discharge Order is made by the Court), is an enquiry that should be undertaken at that time, having regard to the the factors that courts have considered in determining whether it would be "just and convenient" to appoint a receiver,[3] with a view to the facts that exist at the time of the hearing for the appointment of a receiver, not at a hearing for the discharge of the current Receiver.

10. To engage at a hearing for the discharge of the Receiver, in a determination, at this time, as to whether a receiver should be appointed in the future, is tantamount to a premature request for injunctive relief. It would require the Court to predetermine the appropriateness of the appointment of a receiver, at this time, without the benefit of considering whether the facts at the relevant time, make the appointment of a receiver, just and convenient. Such an approach would unduly fetter the Court's discretion at a future date to consider and adjudicate this issue.

11. As such, a motion for the discharge of the Receiver is not the appropriate forum in which to address the merits of a potential future motion or application for the appointment of a fresh receiver over the Property of the Companies.

12. In essence, barring a potential future motion or application for the appointment of a fresh receiver over the Property of the Companies to complete the realization of the Property, beyond a prescribed period of time, would require the Court to make a determination on the basis of hypotheticals. Courts have held that hypothetical issues need not be addressed on discharge motions. In *Bank of Montreal v. Probe Exploration Inc.*, the Alberta Court of

[3] *Garratt v. Charlton*, 2012 ONSC 1129 at para 28; *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 at para 26.

Queen's Bench held that the issue of whether the discharge of the receiver affects the ability of Alberta Environment to advance a future claim for any future costs of remedying any environmental damage as against the proceeds from the disposition of the property was, at best, purely hypothetical at that stage of the proceedings, as no claim had been advanced. The issue of the Crown's notional rights with respect to the estate of the bankrupt therefore did not need to be addressed when considering an application for the discharge of the receiver, as there was no basis for the discharge of the Receiver to be refused based upon such notional or contingent rights.[4]

13. As such, the discharge of the receiver need not be subject to the determination of hypothetical issues or contingent claims.[5]

2. Issue Two: The reappointment of insolvency officials for the realization of unrealized assets

14. Canadian Courts have appointed insolvency officials following their discharge. For instance, the right of insolvency officials, or other interested parties, to seek a reappointment of a trustee in bankruptcy, is expressly contemplated in s. 41(11) of the *BIA*, which provides:

> 41(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appoint a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.[6]

15. Courts have interpreted this provision to mean that the "door is not closed on the administration of an estate by the simple fact of a trustee's discharge",[7] as the trustee may be re-appointed to deal with assets which have not been realized or distributed. As such, courts have recognized that "it cannot be said that the trustee's powers end permanently and unequivocally following discharge or that the bankrupt's assets are unassailable."[8] The

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[4] *Bank of Montreal v. Probe Exploration Inc.* [2006] A.J. No. 1178, 26 C.B.R. (5th) 183 (Alta. Q.B.) at para 23 ["*Probe*"].
[5] *Ibid* at para 13; McGuinness at Part I.35(1).
[6] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s.41(11).
[7] *Dubyk, Re*, 2009 SKQB 426 at para 46.
[8] *Ibid*.

sale of an asset would be one such instance that would require the reappointment of the trustee.

16. In *Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy*), the Alberta Court of Appeal considered the administrative gap between the date of the trustee's discharge and the subsequent reappointment of the trustee to complete the administration of the estate. The issue was whether creditors with proven claims at the commencement of the bankruptcy proceedings were entitled to share in subsequent distributions if the provincial limitation period had expired during that gap. In that case, there was a ten-year gap between the discharge of the trustee and the subsequent reappointment. The Alberta Court of Appeal held that such creditors remain eligible to share in subsequent distributions notwithstanding the provincial limitations legislation. Proceeds from the realization of property by the trustee are reserved for proven creditors under the *BIA*, such that provincial limitations legislation cannot interfere to deny eligible creditors their entitlement to distribution under the federal *BIA*.[9] The Alberta Court of Appeal further held:

> …the discharge of a trustee in circumstances where the bankrupt is not discharged merely leads to a hiatus in the administration of the estate. It does not divest a creditor with a proven claim of his entitlement to share in the division of the bankrupt's property.[10]

17. In light of the above, it is evident that temporal restrictions have not been imposed on the reappointment of a trustee. By analogy, to bar a secured creditor from pursuing a motion or an application for the appointment of a receiver at a future date, beyond a period of two years, would be to impose an arbitrary limit on a secured creditor's right to seek recovery of the secured obligations. Such an approach would have a chilling effect on those organizations engaged in lending transactions, especially if their ability to pursue remedies and recovery is unduly restrained by the courts.

18. In the case of s. 41(11) of the BIA, the application for the reappointment of a trustee may be made by the creditors of the bankrupt. In *Edgar, Re*, the bankrupt was the owner of certain lands and premises which were fully encumbered by secured creditors at the time

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[9] *Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy)*, 2010 ABCA 189 at para 29.
[10] *Ibid* at para 38.

of administration by the trustee. As the property had no equity at the time, the trustee did not realize on the property prior to its discharge. The value of the property subsequently increased as a result of the bankrupt maintaining payments on the charges against the property, and the unsecured creditors sought and obtained an order reappointing the trustee to administer the property.[11]

19. In *Ghanem (In Trust) v. D. & A. MacLeod & Co.*, the trustee in bankruptcy was discharged without having sold certain property of the bankrupt. The property was subsequently purchased by the Ontario Ministry of Transportation. In order to distribute the proceeds of the sale to the creditors of the bankrupt, the trustee applied for reappointment under s. 41(11) of the *BIA* and was reappointed trustee, *nunc pro tunc,* to complete the administration of the Applicant's estate.[12]

20. Courts have also reappointed receivers. In *Northland Bank v. G.I.C. Industries Ltd.*, Northland Bank appointed a receiver pursuant to the terms of a debenture the secured creditor held as security for its loan to G.I.C. Industries Ltd. It subsequently entered into an intercreditor agreement with a competing lender, but ultimately applied for and obtained an order of the court for the reappointment of the receiver.[13] In *Re Grand Valley Railway Co. Ltd.*, the Ontario Court of Appeal allowed an appeal by the National Trust Company from an order dismissing its application to reappoint a receiver. The receiver was initially appointed in 1907 and discharged in 1917, and subsequently reappointed in 1933 to allow for the enforcement of payment of bonds that had become due in 1932.[14] As with the above-mentioned cases, wherein trustees in bankruptcy were reappointed several years following discharge, the Ontario Court of Appeal did not impose a temporal restriction on the reappointment of the receiver.

21. It is not uncommon for insolvency proceedings, such as receiverships, to last for many years. For instance, in *Jethwani v. Damji*, the duration of the receivership was more than 15 years since the appointment of the interim receiver in 2002. Moreover, the Court issued an order that the receiver would continue to have the powers and protections granted under

[11] *Edgar, Re* (1982), 42 C.B.R. (N.S.) 125 (B.C.S.C.) at para 6.
[12] *Ghanem (In Trust) v. D. & A. MacLeod & Co.*, [2009] 65 C.B.R. (5th) 212 at para 11.
[13] *Northland Bank v. G.I.C. Industries Ltd.*, [1985] 57 C.B.R. (N.S.) 26 at para 7.
[14] *Re Grand Valley Railway Co. Ltd.*, [1933] O.J. No. 151 at paras 8, 19, 21-22.

the appointment order, including the power to deal with any matters in relation to the receivership after its discharge for a period of one year from the date of the decision, further extending the receiver's administrative powers.[15]

3. Issue Three: The potential for West Face to receive a "windfall" from the sale of the Mine following remediation

22. The Revised Discharge Order provides that the discharge of the Receiver is without prejudice to West Face's right at any time to bring a motion (or for that matter an application), before the Court to seek the appointment of a fresh receiver.

23. The Province, in its factum, maintains that if West Face is able to bring a motion or an application at a time that is beyond two years from the date of the discharge of the current Receiver, that this would give rise to a "windfall" for West Face or "unlimited risk" for the Province, in undertaking proposed remediation efforts that may be taken at a future date, with respect to the Mine.

24. The Province further states in its factum that unless the Court restrains or limits West Face's ability to bring a motion or an application for the appointment of a fresh receiver to a period that is two years from the date of the discharge of the current Receiver, that the Court would be "blessing a free-rider".

25. The arguments advanced by the Province about a possible "windfall" for West Face or that West Face is a "free-rider" are, simply put, a red herring and same is not supported by the evidence, having regard to the approximately $62,000,000 owing to West Face, (as noted in the Receiver's Final Statement of Receipts and Disbursements, which is Appendix 1 to the Supplemental Report). Further, such arguments ignore the statutory regime in place under the *BIA* that guide the courts on such issues.

26. Sections 14.06(7) and 14.06(8) of the *BIA* provide:

> 14.06(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an

[15] *Jethwani v. Damji*, 2017 ONSC 3524 (Ont. S.C.J. [Commercial List]) at paras 47-48 ["*Jethwani*"] at para 163.

> immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
>
> (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.
>
> 14.06(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

27. To the extent that the Province engages in any activities that come within the ambit of s. 14.06(7) or s. 14.06(8) of the BIA, these provisions provide for certain protections. As such, the notion that the Province would be assuming unlimited risk without any prospect of protection or recourse for the costs it may incur in remediating the Mine is misleading, if any such remediation is in fact undertaken, and if such work falls within the ambit of s.14.06(7) of the *BIA*.

28. While West Face does not concede any issues of priority at this time, just as the Province can maintain all of its arguments that the appointment of a receiver at a future date is not just or convenient at the appropriate time, the issue of priority in respect of remediation costs for work done at the Mine, if any, can be put to the Court for consideration at the appropriate time.

29. In *Probe*, the Court of Queen's Bench held that the issue of whether the discharge of the receiver affects the ability of Alberta Environment to advance a future claim for any future costs of remedying any environmental condition or damage as against the proceeds from the disposition of the property was purely hypothetical at that stage of the proceedings. As such, the issue of the Crown's notional rights with respect to the proceeds did not need to be addressed when considering an application for the discharge of the receiver:

> As the Crown has not yet advanced a claim, it has no present enforceable right that should be protected as a condition of discharge. At best, any rights it may have against the proceeds are purely hypothetical. There is no appropriate basis for the Court to refuse the discharge of the Receiver based upon a notional, contingent right that would exist, only if, as and when a party chooses to initiate a claim particularly when, but for the Order, no rights of preference would have been available against the proceeds.[16]

30. As with the issue of whether or not a receiver should be appointed at a future date, the issue of whether s. 14.06(7) or s. 14.06(8) are applicable, is a matter to be addressed at the appropriate time, based upon the facts that exist at that time.

PART V. RELIEF REQUESTED

31. The Applicant respectfully requests that this Court grant the Revised Discharge Order sought, substantially in the form filed by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 6, 2020

Roger Jaipargas
Lawyers for the Applicant

[16] *Probe* at para 23.

SCHEDULE "A"

List of Authorities

1. *Garratt v. Charlton*, 2012 ONSC 1129
2. *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128
3. *Bank of Montreal v. Probe Exploration Inc.* [2006] A.J. No. 1178, 26 C.B.R. (5th) 183 (Alta. Q.B.)
4. *Dubyk, Re*, 2009 SKQB 426
5. *Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy)*, 2010 ABCA 189
6. *Edgar, Re* (1982), 42 C.B.R. (N.S.) 125 (B.C.S.C.)
7. *Ghanem (In Trust) v. D. & A. MacLeod & Co.*, [2009] 65 C.B.R. (5th) 212
8. *Northland Bank v. G.I.C. Industries Ltd.*, [1985] 57 C.B.R. (N.S.) 26
9. *Re Grand Valley Railway Co. Ltd.*, [1933] O.J. No. 151
10. *Jethwani v. Damji*, 2017 ONSC 3524 (Ont. S.C.J. [Commercial List])

SCHEDULE "B"

Statute and Regulations

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

PART I

APPOINTMENT AND SUBSTITUTION OF TRUSTEES

Section 14.06(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Section 14.06(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

DISCHARGE OF TRUSTEE

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

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PROCEEDINGS COMMENCED IN TORONTO

STATEMENT OF LAW OF THE APPLICANT
(Motion Returnable August 11, 2020)

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