File No. CI 15-01-97928

**THE QUEEN'S BENCH**
**WINNIPEG CENTRE**

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS AMENDED

B E T W E E N:

**CAMERON STEPHENS FINANCIAL CORPORATION,**

Applicant,

\- and -

**5448124 MANITOBA LTD.,**

Respondent.

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**MOTION BRIEF OF THE RECEIVER**
**DATE OF HEARING: THURSDAY, FEBRUARY 25, 2021 AT 9:00 A.M.**
**DEWAR, J.**

---


**TAYLOR McCAFFREY LLP**
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Client File No. 98665-1 DJAC

**THE QUEEN'S BENCH**
**WINNIPEG CENTRE**

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS AMENDED

BETWEEN:

**CAMERON STEPHENS FINANCIAL CORPORATION,**

Applicant,

\- and -

**5448124 MANITOBA LTD.,**

Respondent.

# MOTION BRIEF

## A. Authorities to be Relied Upon

1. Queen's Bench Rules 3.02(1), 16.04(1), 16.08, 37.04, 41.05 and 41.06.
2. *The Corporations Act* C.C.S.M. 1987 c.C225 s. 95.
3. *The Personal Property Security Act* C.C.S.M. c.P35 s. 64(7).
4. *Bennett on Receiverships* 3rd Edition, pp. 605-607.
5. Manitoba Model Discharge Order with blackline compare to Order sought.
6. Such further and other authorities as counsel may advise and this Honourable Court may permit.

## B. Documentary Evidence to be Relied Upon

1. The pleadings and proceedings herein.
2. The Amended and Restated Receivership Order dated October 27, 2015 ("Receivership Order").

3. The Approval and Vesting Order dated December 2, 2020.

4. Filed Receiver's Certificate dated December 10, 2020.

5. The Eighth Report of the Receiver dated February 17, 2021.

6. Such further and other evidence as counsel may advise and this Honourable Court may permit.

## C. <u>Points in Issue</u>

**Service**

1. Notwithstanding the ordinary requirements of service, the Court has the authority to abridge the time requirements, validate defective service or even dispense with service where necessary in the interest of justice. The Receivership Order contemplates parties on the Service List being served by e-mail or other alternative forms of service. To the extent it may be necessary, service of the motion materials ought to be validated.

Receivership Order, paras. 25 and 26

Queen's Bench Rules 3.02(1), 16.04(1), 16.08 and 37.08(2) (TAB 1)

**Jurisdiction to Approve the Receiver's Application for Discharge**

2. In addition to providing advice and directions, this Honourable Court has the jurisdiction to discharge a Receiver upon completion of its duties including approval of its conduct and accounts and related relief to protect it from claims for maladministration.

Receivership Order, para. 19 and 28

*The Corporations Act*, C.C.S.M. c.C225 s. 95(a) (TAB 2)

*The Personal Property Security Act* C.C.S.M. c. P35 ("PPSA") s. 64(7)(b) and (d) (TAB 3)

Queen's Bench Rule 41.05 and 41.06 (TAB 1)

*Bennett on Receiverships* 3rd Edition pp. 605-607 (TAB 4)

3. The Receiver has completed the sale of the property commonly known as 519 Burnell Street, Winnipeg, paid out the Receiver's borrowing charge and made the distribution to the Applicant contemplated under the Approval and Vesting Order. Subject to completing the Remaining Duties as set out in the Eighth Report the Receiver has completed the administration of this receivership and should be discharged and have its accounts approved.

**Blackline Compare to Model Manitoba Discharge Order**

4. The Manitoba Court of Queen's Bench has adopted a Model Discharge Order to be utilized in such circumstances in order to assist the Court in providing the relief sought by the Receiver. A blackline compare version of the Order being sought to the Model Order is attached in Tab 5.

**Unseal Confidential Appendices**

5. Over the course of the Receiver's administration of this estate various confidential appendices were filed under seal in order to protect confidential information until such time as the Receiver completes the sale of the Property. As the sale is now complete it would be appropriate to lift the previous Sealing Orders.

All of which is respectfully submitted.

February 18, 2021

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# TAB 1

EXTENSION OR ABRIDGMENT

**General powers of court**

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

**Where order may be made**

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

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

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

**Exception**

16.08(2) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

PLACE OF FILING

37.04 A motion shall be filed in the administrative centre in which the court file is located.

DIRECTIONS

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the master who has conduct of the reference.

DISCHARGE

41.06 A receiver may be discharged only by the order of a judge.

# TAB 2

**Directions given by court**

95 Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve the person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager;

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

# TAB 3

**Powers of court respecting receiver**

64(7) Upon application by an interested person, the court may do one or more of the following:

(a) appoint a receiver;

(b) remove, replace or discharge a receiver, whether appointed by the court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve the receiver or person from any default on such terms as the court thinks fit;

(f) exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court.

# TAB 4

# BENNETT

# on

# RECEIVERSHIPS

**Third Edition**

by

**Frank Bennett**

**L.S.M., LL.M.**

**Toronto, Canada**

**CARSWELL®**

If the receiver's appointment is terminated before the administration of the estate is completed, the receiver must pass on the balance of the assets and proceeds to the successor receiver, if any, as soon as possible. The terminated receiver remains liable for its actions and will of course have the duty to account fully to the court, to the debtor, to the security holder, and to all other stakeholders. The successor receiver ought to be appointed immediately in order to provide continuity in the administration. If there is any appreciable lapse of time before a successor is appointed, it may be necessary for the security holder to move for a restraining order against the debtor.

In the case where a successor receiver is not appointed, the security holder may have to pursue other remedies that are available such as foreclosing or simply suing for arrears. If the security holder does nothing, the receiver nonetheless remains accountable for its conduct and activities. The receiver must return the debtor's property to the debtor at which time the powers of the directors and officers of the debtor corporation are restored.[20]

On the other hand, if the receiver has successfully managed the debtor's business to the extent of retiring the debt to the security holder, the receiver ought not to continue operating the business. The receiver will be without authority and therefore, notwithstanding its good intentions, the receiver may become a trespasser and liable for damages. The receiver remains accountable and becomes a fiduciary until the time when the receiver returns the business to the debtor.[21]

## 2. COURT APPOINTMENT

In most cases, a court-appointed receiver proceeds to administer the estate in receivership until completion. Thereafter the security holder can move for an order terminating the appointment and requiring the passing of the receiver's final accounts. However, there are situations where the receivership may be substituted or terminated earlier than by completion. Once the court terminates the appointment, the receiver then passes its accounts while the successor receiver continues with administration. The terminated receiver retains the right to apply to the court under the original order for directions.[22] When the accounts are passed, the receiver obtains an order of discharge. Usually, throughout the receivership, the receiver reports periodically to the court on the stage of the administration and at the same time requests that its conduct and activities be approved to date. The discharge order then protects the receiver from claims for maladministration and any disputes as to the validity of the appointment especially when it is on consent.[23] The order, however, does not protect the court-appointed receiver for gross negligence or wilful misconduct. If the debtor or other creditor wishes to pursue the receiver after its discharge for gross negligence or wilful misconduct, the debtor should post a full indemnity

20 See below, "4. Refloating the Charge".

21 See *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Eng. Ch. Div.), appeal dismissed [1897] A.C. 180 (U.K. H.L.).

22 *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*, [1992] 3 W.W.R. 106 at p. 115 (Sask. C.A.).

23 *Re Abacus Cities Ltd.*, [1986] 4 W.W.R. 564, 45 Alta. L.R. (2d) 113, 70 A.R. 55 (Alta. C.A.), leave to appeal refused (1986), 69 N.R. 240 (S.C.C.).

to protect the receiver in the event the claim is dismissed. Such an indemnity can be a payment into court or more conveniently by a letter of credit.[24]

The parties to the receivership action may settle or otherwise provide security to the court's satisfaction, thereby rendering the position of the receiver ineffective or unnecessary. Similarly if the costs of a continued receivership may lead to a dissipation of assets, the court may consider terminating the receivership where there is no likely benefit to be derived for the stakeholders.[25]

In the situation where the receiver may be substituted or replaced, the receiver must continue to act honestly and in good faith and the receiver should deal with the property in a commercially reasonable manner. Where the debtor or other stakeholders allege acts of impropriety, the court has the inherent power to remove its own officer and substitute another in its place prior to the completion of the administration.

If the debtor or a creditor brings a motion for the receiver's termination for cause, the court requires that the receiver report to the court as to the status of the administration in a timely manner. If the receiver does not present an accurate account and a record of receipts and disbursements, the court cannot assess the receiver's remuneration let alone order the discharge.[26]

On the motion for termination and discharge, the security holder and receiver should give notice to all defendants or respondents in the action and to all interested persons.[27] In many cases, only the debtor and guarantors are the defendants, although, depending upon the practice in the particular court, subordinate security holders and execution creditors may have been added as parties if they have not been paid.

The motion to discharge the receiver should be relatively straightforward when the administration has been completed since all the proceedings in the realization of assets will have been finalized, including the passing of the receiver's accounts and taxation. Persons having an interest in the debtor's equity have already had an opportunity to contest the sale proceedings and challenge the receiver's accounts. The court is reluctant to keep the administration open where all issues have been dealt with, except for possible potential claims against the estate or the receiver. In this case, the court analyzes whether such claims are sufficiently remote and hypothetical so that the administration can be finalized.[28] Thus, the motion to discharge the receiver is, in most instances, merely a house-keeping measure in the finalization of the lawsuit and relieves the receiver of any further obligations. The motion may also be a motion for advice and directions on the distribution of the sale proceeds. How-

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24 *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, 2009 CanLII 55113, 2009 CarswellOnt 6167, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]).

25 See *Kotler et al. v. Bayshore Invts. Ltd. et al.* (1982), 41 C.B.R. (N.S.) 223, 1982 CarswellBC 482 (B.C. S.C.), appeal allowed on other grounds (1982), 42 C.B.R. (N.S.) 127, 1982 CarswellBC 484 (B.C. C.A.). See above "1. Grounds".

26 *Guar. Trust Co. of Can. v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd. et al.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CanLII 1100 (Alta. Q.B.).

27 The purchaser of assets from the receiver has standing on such a motion where the purchaser has potential liability: *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

28 *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

ever, if the receiver has not taken all reasonable steps to realize the assets, the court may adjourn the motion pending finalization of the estate.[29]

Once the receiver completes the administration, the security holder may then proceed to obtain the receiver's discharge or an order granting the discharge on a fixed date or on the completion of the administration. Where security is posted for the receiver's performance, the receiver's surety will not, however, be discharged until such time as the receiver passes the final accounts and taxes its remuneration.

If the receiver has assets which are unrealizable, as, for example, books and records, the court will direct that the assets be returned to the debtor subject to the security holder's charge if the debt has not been fully satisfied. Where the holder has been repaid, the receiver must deliver such surplus assets and proceeds from realization to any subordinate security holder, the debtor, or the trustee in bankruptcy as the case may be.

As indicated above, the court usually grants the receiver's fees and expenses on a full indemnity basis where the receiver can establish entitlement through dockets and expenses receipts. In addition, where the debtor or other stakeholders challenge the receiver's conduct and activities, the receiver is usually entitled to the full indemnity as well. If the debtor or creditors unsuccessfully attack the receiver for claims of negligence, breach of fiduciary duty, dereliction of duty, abuse of power, or bad faith, the court has the inherent discretion to award full or substantial indemnity costs against the challenger especially where the facts have been litigated in previous proceedings.[30] The court can award costs on a full or substantial indemnity basis where the party can show reprehensible, scandalous, or egregious conduct. Similarly, if the receiver's reputation and integrity are being attacked, the court can award costs against the other party and even against a non-party if unsuccessful.[31]

## 3. PRIVATE APPOINTMENT

After the receiver disposes the debtor's property, the receiver normally prepares a statement of receipts and disbursements for the security holder and, if requested or required by statute, for the debtor and creditors. Such a statement is needed if the security holder intends to pursue a deficiency balance against the debtor or against any guarantor.

If the receiver does not produce a statement of receipts and disbursements, the debtor can commence a common law cause of action against the security holder for a detailed accounting with respect to the property taken and realized. In addition, the receiver is usually deemed to be the agent of the debtor, and as agent of the

29 *Re Atlantic Travel Service Ltd.* (1982), 44 C.B.R. (N.S.) 218, 1982 CarswellBC 502 (B.C. S.C.).

30 *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2007), 31 C.B.R. (5th) 167, 2007 ONCA 145 (CanLII), 2007 CarswellOnt 1182 (Ont. C.A.); *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), (sub nom. *Bricore Land Group Ltd., Re*) 299 Sask. R. 194, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.), allowing an appeal from (2007), (sub nom. *Bricore Land Group Ltd., Re*) 298 Sask. R. 158, 33 C.B.R. (5th) 46, 2007 SKQB 144 (CanLII) (Sask. Q.B.) with respect to costs where bad faith was not alleged.

31 *Re Party City Ltd.* (2002), 32 C.B.R. (4th) 286, 20 C.P.C. (5th) 156, 2002 CarswellOnt 1116 (Ont. S.C.J. [Commercial List]).

# TAB 5

File No. CI 15-01-97928

**THE QUEEN'S BENCH**
**WINNIPEG CENTRE**

| | |
|---|---|
| IN THE MATTER OF: | THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS AMENDED |

B E T W E E N:

**CAMERON STEPHENS FINANCIAL CORPORATION,**

Applicant,

- and -

**5448124 MANITOBA LTD.,**

Respondent.

---

**DISCHARGE ORDER**

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**TAYLOR McCAFFREY LLP**
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Client File No. 98665-1 DJAC

**THE QUEEN'S BENCH**
**WINNIPEG CENTRE**

| | | |
|---|---|---|
| THE HONOURABLE | ) | THURSDAY, THE 25TH DAY OF |
| MR. JUSTICE DEWAR | ) | FEBRUARY, 2021 |
| | ) | |

B E T W E E N:

**CAMERON STEPHENS FINANCIAL CORPORATION,**

Applicant~~Plaintiff~~,

- and –

**5448124 MANITOBA LTD.,**

Respondent.~~Defendant.~~

## DISCHARGE ORDER

THIS MOTION**,** made by Grant Thornton Limited in its capacity as the Court-appointed ~~r~~Receiver and Manager (the "Receiver") of the undertaking, property and assets of the Defendant, 5448124 Manitoba Ltd. (the "Debtor"), for an Order discharging the Receiver and other relief was heard this day at Winnipeg, Manitoba.

ON READING the Eighth Report of the Receiver dated February 17~~——~~, 2021 ~~**[add any other supporting materials]**~~, and on hearing the submissions of counsel for the Receiver and counsel for the Applicant, Cameron Stephens Financial Corporation ("Cameron Stephens"), no one else appearing although served as evidenced by the Affidavit of [NAME] sworn [DATE], filed~~[1]~~:

~~[1] This model order assumes that the time for service does not need to be abridged.~~

1. THIS COURT ORDERS that the time for service of the motion materials in support of this Discharge Order is hereby validated and abridged such that the motion is properly returnable today and hereby dispenses with further service.

2~~1~~. THIS COURT ORDERS that the Eighth Report and activities of the Receiver, as set out ~~in the Eighth Report~~therein, are hereby approved.

3~~2~~. THIS COURT ORDERS that the fees and disbursements of the Receiver and its counsel, as set out in the Eighth Report including their Final Fees , are hereby approved.

4~~3~~. THIS COURT APPROVES the Receiver's final statement of receipts and disbursements as attached to the Eighth Report.

5. THIS COURT ORDERS that, after payment of the fees and disbursements herein approved, the Receiver shall pay the monies remaining in its hands to Cameron Stephens[2].

65~~4~~. THIS COURT ORDERS that upon payment of the amounts set out in paragraph 5~~3~~ hereof and upon the Receiver filing a certificate substantially in the form attached hereto as Schedule A to this Order certifying that it has completed the Remaining Durties~~other activities~~ described in the Report, the Receiver shall be discharged as Receiver of the undertaking, property and assets of the Debtor, provided however that notwithstanding its discharge herein (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Grant Thornton Limited in its capacity as Receiver.

~~[2] This model order assumes that the material filed supports a distribution to a specific secured creditor or other party.~~

7~~65~~. THIS COURT ORDERS AND DECLARES that Grant Thornton Limited is hereby released and discharged from any and all liability that Grant Thornton Limited now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Grant Thornton Limited while acting in its capacity as Receiver herein, save and except for any gross negligence or willful misconduct on the Receiver's part. Without limiting the generality of the foregoing, Grant Thornton Limited is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings, save and except for any gross negligence or willful misconduct on the Receiver's part~~[3]~~.

8~~76~~. THIS COURT ORDERS AND DECLARES that no action or other proceeding shall be commenced against the Receiver, including its officers, directors, employees, solicitors and agents and assigns in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on notice to the Receiver, and upon such terms as this Court may direct.

9~~8~~. THIS COURT ORDERS AND DIRECTS that the confidential appendices to the previously filed Receiver's Reports, in particular:

a) The Confidential Appendices to the Third Report dated August 5, 2016;

b) The Confidential Appendix 1 to the Sixth Report dated May 1, 2019;

c) The Confidential Appendices to the Seventh Report dated November 25, 2020. ("Confidential Appendices")

~~[3] If this relief is being sought, stakeholders should be specifically advised, and given ample notice.~~

shall no longer remain stored electronically on an encrypted basis with this Court and hereby directs the Registrar of this Court to make the Confidential Appendices accessible to the public and to form part of the Public Record.

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I, David R.M. Jackson~~[NAME]~~, of the firm of Taylor McCaffrey LLP~~[NAME]~~ hereby certify that I have received the consents as to form of the following parties:

[INSERT]

As directed by the Honourable [INSERT]

SCHEDULE A

**THE QUEEN'S BENCH**
**WINNIPEG CENTRE**

| | | |
|---|---|---|
| THE HONOURABLE | ) | THURSDAY, THE 25TH DAY OF |
| MR. JUSTICE DEWAR | ) | FEBRUARY, 2021 |
| | ) | |

B E T W E E N:

**CAMERON STEPHENS FINANCIAL CORPORATION,**

Applicant~~Plaintiff~~,

- and –

**5448124 MANITOBA LTD.,**

Respondent.~~Defendant.~~

**RECEIVER'S DISCHARGE CERTIFICATE**

A. Grant Thornton Limited was appointed Receiver ("Receiver") of all of the assets, property and undertaking of the Defendant 5448124 Manitoba Ltd. ("Debtor") pursuant to an Amended and Restated Order of the Court of Queen's Bench signed~~dated~~ October 28, 2015 ("Receivership Order");

B. Pursuant to the Discharge Order of this Court pronounced February 25, 2021 ("Discharge Order") the Receiver has paid out any net realizations as directed by the Discharge Order and completed the administration of the Debtor's estate;

C. Unless otherwise indicated the Receiver's Certificate shall have the same meaning as given to them in the Discharge Order.

THE RECEIVER CERTIFIES the following:

1. The Receiver has paid the net proceeds in accordance with the Discharge Order and in particular:

[INSERT PARTICULARS OF PAY OUT]

2. The Receiver has completed the Remaining Duties~~outstanding activities~~ described in the Eighth Report and completed its administration of the Debtor's estate.

DATED at _____________, Manitoba, this ____ day of ____________, 2020.

Grant Thornton Limited in its capacity as Receiver of
5448124 Manitoba Ltd.

Per:_________________________________