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APPLICANT	ROYAL BANK OF CANADA
RESPONDENTS	ANS 1993 LTD., 1416452 ALBERTA LTD. 2242246 ALBERTA LTD., 2308213 ALBERTA LTD., 786 N AND S ENTERPRISES LTD., P & N DEVELOPMENT LTD., and RAZIA QARNI
DOCUMENT	**BOOK OF AUTHORITIES TO THE BRIEF OF LAW OF THE APPLICANT IN SUPPORT OF THE APPLICATION TO CONVERT THE INTER RECEIVERSHIP TO A FULL RECEIVERSHIP**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MLT AIKINS LLP** 2100, 222 3rd Avenue SW Calgary, Alberta T2P 0B4 Attention: Catrina J. Webster/Jaye Sutherland Phone: 403.693.4347/5441 Fax: 403.508.4349 Email: cwebster@mltaikins.com jsutherland@mltaikins.com File: 0001480.00463

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CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to March 17, 2026

Last amended on December 12, 2024

À jour au 17 mars 2026

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(g) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

f) changer ou prescrire, à l'égard de toute province, les catégories de dettes auxquelles la présente partie ne s'applique pas;

f.1) régir le renvoi des procédures dans une province autre que celle où l'ordonnance de fusion a été rendue;

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

(c) take any other action that the court considers advisable.

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

Office Consolidation

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General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

TAB 3

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 1, 2024

Office Consolidation

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together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(7) On the application of any interested person, the Court may

(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) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) 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 any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

1988 cP-4.05 s65;1990 c31 s52;1994 cC-10.5 s148

TAB 4

2023 ONSC 3230
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 170 Willowdale Investments Corp.

2023 CarswellOnt 10526, 2023 ONSC 3230, 2023 A.C.W.S. 2189, 8 C.B.R. (7th) 177

BUSINESS DEVELOPMENT BANK OF CANADA (Applicant) and 170 WILLOWDALE INVESTMENTS CORP. (Respondent)

Osborne J.

Heard: May 23, 2023
Judgment: May 25, 2023
Docket: CV-23-00699065-00CL

Counsel: Matilda Lici, for Applicant
Raymond Zar (Agent), for Respondent, 170 Willowdale Investments Corp.
Brian N. Radnoff, for 7291771 Alberta Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient

Debtor, small hotel operator, entered into loan and credit facilities with creditor bank pursuant to credit agreement — Debtor provided security with collateral charge/mortgage over $3.5 million registered on title to real property, and general assignment of rents — Credit agreement provided that indebtedness was payable on demand upon occurrence of event of default and provided for appointment of receiver — Debtor failed to pay principal, interest and fees — Creditor applied for receivership order of debtor's assets, properties and undertakings — Application granted; receivership order granted — Debtor failed or refused to acknowledge of creditor's demand to repay indebtedness or make any arrangements with creditor — Debtor's allegations, and unfounded applications for adjournment and recusal, were simply attempts to delay appointment of receiver — Debtor did not try to remedy default or seek revised terms — Creditor's application was brought following nonpayment of amounts and complete failure of debtor to engage with creditor, and not in bad faith — Appointment of receiver under circumstances was both just and convenient and would protect interests of all parties.

Bankruptcy and insolvency --- Receivers — Appointment

Debtor, small hotel operator, entered into loan and credit facilities with creditor bank pursuant to credit agreement — Debtor provided security with collateral charge/mortgage over $3.5 million registered on title to real property, and general assignment of rents — Credit agreement provided that indebtedness was payable on demand upon occurrence of event of default and provided for appointment of receiver — Debtor failed to pay principal, interest and fees — Creditor applied for receivership order for debtor's assets, properties and undertakings — Application granted; receivership order granted — Debtor failed or refused to acknowledge creditor's demand to repay indebtedness or make any arrangements with creditor — Debtor's allegations, and unfounded applications for adjournment and recusal, were simply attempts to delay appointment of receiver — Debtor did not try to remedy default or seek revised terms — Creditor's application was brought following nonpayment of amounts and complete failure of debtor to engage with creditor, and not in bad faith — Appointment of receiver under circumstances was both just and convenient and would protect interests of all parties.

APPLICATION by creditor for receivership order.

***Osborne J.*:**

1 The Applicant, Business Development Bank of Canada ("BDC") seeks the appointment of The Fuller Landau Group Inc. as receiver of all of the assets, properties and undertakings of the Debtor, 170 Willowdale Investments Corp. (the "Debtor").

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Those assets include a property located at 170 Willowdale Ave., Toronto (the "Real Property"). The Debtor operates a small boutique hotel on the Real Property.

2 Following the hearing of the application on May 23, 2023, I granted the relief sought with reasons to follow. These are those reasons.

3 Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

4 The Debtor was represented by Mr. Raymond Zar, the president, secretary and director of the Debtor, and himself a guarantor under the Credit Agreement referred to below.

5 No court reporter was available. The hearing commenced at 10:40 AM via Zoom and had been scheduled for 30 minutes. At 11:05 AM, and as explained further below, given that Mr. Zar requested additional time to make submissions and a brief opportunity (10 minutes) to gather his thoughts, which I granted, I stood down the continuation of this matter until 11:45 AM at which time the hearing resumed. As no court reporter was available, I requested that the Registrar record the hearing via Zoom. That recording has been preserved.

6 The Applicant relies on the affidavit of Dodie Ballesteros sworn May 5, 2023 and exhibits thereto. The Debtor did not file any responding materials.

The First Adjournment Request

7 At the outset of the hearing, Mr. Zar requested an adjournment of the application. BDC submitted that it should proceed.

8 Counsel for the second ranking creditor, 729171 Alberta Inc. ("171 Alberta"), opposed the request for an adjournment and supported the position of BDC.

9 Mr. Zar submitted, initially, that the Application should be adjourned for two reasons.

10 First, it was only a "first appearance and it never crossed [his] mind that any relief other than the imposition of a case management schedule would be granted at the hearing of the Application".

11 I do not accept this submission. The Application material is very clear that the Applicant sought the relief requested today.

12 The Notice of Application and the draft receivership order were served on Mr. Zar via email on May 5, 2023 and again in hard copy via personal service effected by process server three days later on May 8, 2023. The Notice of Application states on its face that the Application was returnable on May 23, 2023 at 10:30 AM.

13 The full Application Record was served on Mr. Zar on May 15, 2023. The electronic mail message under cover of which the Application Record was served clearly stated again the return date of May 23 at 10:30 AM.

14 Mr. Zar acknowledges receipt of these materials on these dates, but submitted that he requires additional time to respond to the Application. He submitted that, notwithstanding receipt of the Notice of Application and draft order on May 5, he did not receive the full Record until May 15, which is acknowledged by BDC. I observe, however, that the Record contains, in addition to the Notice of Application already delivered, only the affidavit of Dodie Ballesteros.

15 That affidavit contains nothing other than the facts clearly set out in the Notice of Application (although states them in properly sworn affidavit form), of which Mr. Zar was well aware in any event given his position as president, secretary and director of the Debtor and as guarantor. Even today, he does not deny any of the facts of the Credit Agreement (defined at para. 56), the defaults (including default of repayment), or the receipt of the demand for repayment and notice pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") on April 6, 2023.

16 Mr. Zar was personally involved throughout the transactions at issue. He signed all of the loan documentation comprising the Credit Agreement documents. He was the directing mind of the Debtor when it committed a default and failed to make

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payments when due in September, 2022 and at all times since then. He received the demand for repayment and Notice of Intention to enforce Security discussed below.

17 Mr. Zar's first submission did not persuade me that an adjournment should be granted.

18 Second, Mr. Zar submitted that on May 11, 2023, he attempted to retain Fogler Rubinoff LLP as counsel to respond to this Application. However, that firm advised that it was in a position of conflict vis-à-vis the Applicant, with the result that on the same day, Mr. Zar requested that BDC waive the conflict and permit that law firm to act for the Debtor.

19 BDC declined to waive the conflict. Counsel for the Applicant confirmed in Court that this was conveyed to Mr. Zar the very same day, on May 11, 2023. Mr. Zar does not dispute that, but rather, maintains that the declining to waive the conflict on the part of the Applicant was unreasonable, unfair and done in bad faith and for tactical reasons.

20 I asked Mr. Zar repeatedly what, if any, steps he as directing mind of the Debtor Company had taken in the intervening period of approximately two weeks to retain other counsel. He stated to the Court that he had attempted to retain other counsel, but as of the date of hearing had not done so. He reiterated that it was unreasonable and unfair for BDC to decline to waive the conflict with his chosen firm and submitted that they ought to waive the conflict even now in order that he could seek to retain that firm.

21 I do not accept this submission. Mr. Zar had sufficient time to retain counsel to appear today on his behalf. But for the concerns of the Applicants, I might have granted the adjournment request. However, those concerns, which I will discuss below, in combination with Mr. Zar's conduct of this litigation to date, persuaded me that I should not grant the adjournment.

22 It is important to note that Mr. Zar did not challenge the underlying debt, the default in repayment or the fact that the loan documents provided for the appointment of a receiver in such circumstances, but submitted that it was not just or convenient to appoint a receiver today.

23 There is no evidence from or on behalf of the Debtor as to any substantive response to BDC to the demand for repayment delivered in April. There is no evidence of any effort or response, formal or even informal, to the Notice of Application served on May 5. The Debtor reached out to BDC only to request that it waive the conflict with respect to his chosen law firm. That itself was on May 11, and the response was given the same day.

24 I also observe that Mr. Zar made no submission that the Debtor (the entity he controls) was, even at the hearing of the Application, prepared to propose or entertain any forbearance terms or make any repayment, even if partial and/or late, with respect to the acknowledged indebtedness. Nor did he offer any submission to the effect that alternative or replacement financing or investment was even on the horizon, let alone binding or available now, which might facilitate the repayment, in whole or in part, on any terms whatsoever, of the indebtedness owing to BDC.

25 In short, there was no suggestion or submission by Mr. Zar, even informally and in the absence of any properly filed evidence, to the effect that there was any prospect of additional funds to facilitate any repayment of the indebtedness on extended terms such as may have been agreed. On the contrary, he submitted that he intended to challenge any effort by BDC to enforce on its security every step of the way.

26 Both the Applicant and 171 Alberta submitted that they were concerned about the erosion of their respective security over the assets of the Debtor, had limited visibility into its operations or financial affairs, and given the events of default, maintained their position that a receiver should be appointed immediately.

27 For all of these reasons, I declined to adjourn the Application.

Merits of the Application and Mr. Zar's Renewed Request for an Adjournment

28 Counsel for BDC advised that it continued to rely on the facts as set out in the Application materials. I then asked Mr. Zar whether he wished to make any submissions in response to the Application and the relief sought, being the appointment of

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a receiver. He advised that he wished to do so, and requested a brief opportunity of ten minutes to gather his thoughts. I granted that, and the hearing was stood down for approximately 50 minutes.

29 As noted above, upon reconvening, I invited Mr. Zar to make submissions with respect to the appointment of a receiver.

30 Mr. Zar is a sophisticated businessperson, and an experienced litigant. When invited to make submissions on the merits of the motion, after his request for an adjournment had been denied, Mr. Zar continued to request an adjournment on various grounds, and made allegations of conflict of interest against each of the other counsel present and against the Court, and made allegations of bias and discrimination on the part of the Court. Mr. Zar advised that a higher court would review these matters. These requests and allegations were made on a continuing basis throughout the hearing.

31 Mr. Zar then renewed his request for an adjournment on the basis that he had, during the break, contacted potential new counsel via text message, and would be attempting to retain them. Mr. Zar and counsel for the Applicant disagreed on whether this new counsel had in fact previously been contacted about a potential retainer on this matter for the Debtor.

32 I advised that the adjournment request had already been denied for the reasons expressed above, and invited Mr. Zar to make any submissions as he wished with respect to the appointment of a receiver or the terms of any receivership.

Mr. Zar Alleges a First Reasonable Apprehension of Bias: Confidential Motion Record

33 Mr. Zar then submitted that I could not proceed to hear this matter either then or at any time, as a result of an apprehension of bias.

34 Mr. Zar submitted that since I had received and reviewed, earlier this year, a confidential motion record of counsel filed in support of a motion to remove themselves as counsel of record in another matter, I was in receipt of confidential information which operated to the prejudice of the Debtor in this matter. In the result, I could not be impartial and must recuse myself. He submitted that this was made clear by my endorsement in that other matter dated March 3, 2023.

35 The matter to which Mr. Zar refers is a different proceeding. On March 3, 2023, I heard a motion in another matter involving different parties: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.* (Ct. File No. CV-22-00674810-00CL). That motion, brought by counsel for the Debtor, sought an order removing them as counsel for the Debtor in that matter, 30 Roe Investments.

36 Counsel on that motion advised that they would be seeking similar orders removing themselves as counsel of record in four other proceedings pending in this Court in which they acted for corporate parties that were owned and/or controlled by the same individual who was the principal of 30 Roe Investments, Mr. Zar. One of those corporate parties was the Debtor, although in its capacity as a defendant in yet still another matter unrelated to this Application. (As noted above, this Application was not commenced until May 5, 2023 and was not pending at all on March 3, 2023).

37 I adjourned that motion to ensure that all responding parties had received proper notice. The motion was subsequently heard by Steele, J., who removed that law firm as lawyers of record, but as reflected in her Endorsement, such removal was without prejudice to the right of the receiver in that proceeding to oppose the law firm's removal as counsel in the Court of Appeal for Ontario in respect of appeals that were then pending from two sales orders made in that receivership proceeding.

38 That law firm then moved in the Court of Appeal to be removed as counsel of record on those pending appeals. By Endorsement dated March 20, 2023, Lauwers, J.A. dismissed the motion in what he described as the rare circumstances of that case: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*2023 ONCA 196, at para. 18.

39 In my view, the fact that I received a motion record by a law firm on a motion (ultimately heard by another judge) to be removed as counsel of record in a proceeding involving parties, none of which is a party to the current proceeding, and in respect of a corporate entity that is not a party to the current proceeding although apparently controlled by the same individual who controls the Debtor in this proceeding, does not disqualify me in the present circumstances from hearing any further step in this proceeding.

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40 I advised Mr. Zar that I declined his request that I recuse myself on the basis of the alleged apprehension of bias and that he should proceed to make submissions, if he wished to do so, on the appointment of a receiver.

Mr. Zar Alleges a Second Reasonable Apprehension of Bias: Prejudgment

41 Mr. Zar then requested that I recuse myself from this matter on a second alleged basis for a reasonable apprehension of bias; namely, that I appeared to have already concluded that a receiver should be appointed without having given Mr. Zar an opportunity to be heard.

42 I explained to Mr. Zar that he had been given every opportunity to be heard, but that that opportunity was now, with the result that he should make such submissions as he wished. I declined to recuse myself on this second allegation of bias. I advised Mr. Zar, again, that he should restrict his submissions to the merits of the Application.

43 Mr. Zar then proceeded to make lengthy submissions, although they largely consisted of repeated requests for an adjournment.

44 I advised that in the circumstances, I was inclined to grant the relief sought and appoint a receiver, and invited Mr. Zar to make submissions if he wished as to the terms of the receivership as set out in the draft order with which he was served on May 5, 2023.

Mr. Zar Alleges a Third Reasonable Apprehension of Bias: My Former Law Firm

45 Mr. Zar then submitted that I could not hear the matter for yet another new reason. He submitted that my decision to appoint a receiver was improper on the basis of a reasonable apprehension of bias resulting from an alleged conflict of interest, in that, he submitted (for the first time, not having raised the issue previously) another partner at my former firm was apparently engaged in litigation to which he, or at least companies he controlled, were parties. As a result, he submitted, I was in a position of conflict, and could not hear any matter to which Mr. Zar, or any company he controlled, was a party.

46 I advised I had no knowledge of any such matter and rejected this submission also, and invited Mr. Zar, yet again, to make submissions on the terms of the draft order if he wished to do so.

Mr. Zar Alleges that the Proposed Receiver had a Conflict of Interest

47 Mr. Zar then submitted that the proposed receiver, The Fuller Landau Group Inc., was not an appropriate candidate to act as receiver as a result of an alleged conflict of interest of that firm. When asked to explain or identify this alleged conflict, Mr. Zar declined to do so, stating that the nature and circumstances of the conflict were privileged. This alleged conflict had not been raised with counsel for the Applicant earlier.

48 There is no basis upon which I can conclude that the proposed receiver has any disqualifying conflict of interest.

It is Appropriate to Appoint a Receiver

49 The test for the appointment of a receiver pursuant to s. 243 of the *BIA* or s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 is not in dispute. Is it just or convenient to do so?

50 In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on Clair Creek*199640 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) (Ont. Gen. Div), at para. 11.

51 Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result,

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the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*2013 ONSC 6866, at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

52 The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*2020 ONSC 1953, 78 C.B.R. (6th) 299, at paras. 43-44.

53 It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd.*2011 ONSC 1007, 74 C.B.R. (5th) 300, at paras. 24, 28-29.

54 Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case? I am satisfied that in the circumstances of this case, it is.

55 The background to the Application is straightforward.

56 The Debtor entered into loan and credit facilities with BDC according to the terms of a letter of offer dated November 19, 2018, as amended ("the Credit Agreement").

57 Pursuant to the terms of the Credit Agreement, the Debtor provided security to BDC including a general security agreement ("GSA") dated November 30, 2018, a collateral charge/mortgage in the amount of $3,558,000 registered on title to the Real Property on November 30, 2018, and a general assignment of rents.

58 BDC is the first position creditor of the Debtor in that it is the first ranking registered secured creditor under the *Personal Property Security Act*, R.S.O. 1990, c.P.10 over the property of the Debtor, and the charge on the Real Property is a first charge.

59 The second ranking creditor of the Debtor, 171 Alberta, was represented in Court today and supports the relief sought and the appointment of a receiver.

60 The Credit Agreement provides that the indebtedness is repayable on demand upon the occurrence of an Event of Default (as defined in the Credit Agreement). It also provides for the appointment of a receiver pursuant to section 15.1 of the GSA.

61 Events of Default have occurred, including the failure by the Debtor to pay, when due, principal, interest and fees.

62 BDC issued a formal written demand on the Debtor for repayment by letter dated April 6, 2023. Together with that demand, BDC delivered a Notice of Intention to Enforce Security pursuant to s. 244 of the *BIA*.

63 As of April 6, 2023, BDC was owed by the Debtor the amount of $3,629,460.06, exclusive of legal fees, disbursements and interest which continued (and continue today) to accrue.

64 Since April 6, 2023, the Debtor has not repaid any indebtedness. The evidence of BDC is to the effect that the Debtor has further refused to engage in any meaningful dialogue with BDC for the purpose of entering into any arrangements as may have been agreed for the full repayment of the amounts owing.

65 Indeed, the Debtor has failed to make the scheduled payments since September 23, 2022 (Ballesteros affidavit, para. 16). In my view, the Applicant has not sought the appointment of a Receiver hastily or without giving the Debtor any opportunity to cure the default or even to seek an agreement with respect to extensions or possible forbearance terms.

66 Rather, the Debtor has been in default, in respect of repayment of amounts as and when due, for some eight months or the better part of one year, during which the Applicant has not sought to precipitously appoint a receiver, although it had the contractual right to do so last September.

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67 There is no evidence before me of any effort on the part of the Debtor to remedy the default or seek revised terms. As noted, there has been no repayment of indebtedness, in whole or in part at all, since last September. The Applicant has continued to be patient.

68 The formal demand for repayment, and Notice of Intention to Enforce, were delivered 1.5 months ago. Since that time, the Debtor has failed or refused to acknowledge that correspondence, repay the indebtedness, or enter into any arrangements acceptable to BDC (Ballesteros affidavit, para. 19).

69 Nor has the Debtor taken any steps whatsoever with respect to its indebtedness, the default and the demand since it was served with the Notice of Application seeking the appointment of a receiver, expressly returnable on the date of this hearing, together with the draft order, on May 5, 2023.

70 Instead, the Debtor has effectively ignored its contractual obligations and this proceeding until the hearing of this motion, at which time Mr. Zar appeared and requested an adjournment. When that was denied, he made various and repeated and in my view unwarranted, attacks on the Applicant, on counsel for the Applicant and on counsel for 171 Alberta, and this Court, all by way of his submission as to why I ought not to exercise my discretion to conclude that it was just or convenient to appoint a receiver.

71 Mr. Zar then submitted again that the Applicant was acting in bad faith and that my decision to deny his request for an adjournment and hear the Application on the merits was "ridiculous and disgraceful".

72 There is no basis upon which I can conclude that the Application has been brought in bad faith. It was brought in the circumstances described above following nonpayment of amounts due and the complete failure or refusal of the Debtor to substantively engage with the Applicant.

73 The statements of Mr. Zar at the conclusion of the hearing, after I confirmed to the parties that I was granting the order sought, are illustrative of the repeated attacks and allegations made. Mr. Zar stated that this Court was "ramming it through because [a partner at my former law firm] had accidentally sent him confidential information and [that partner] wants some insurance" (a bald allegation not further explained), and that the Court "clearly had a personal vendetta against [him]". Mr Zar then threatened, in response to my direction that he focus on the merits of the Application, that: "if [the Court] interrupts me one more time, I will submit a complaint to [the Chief Justice]".

74 Mr. Zar submitted, and more than once during his submissions, that he had a medical condition as a result of which he was requesting additional time to make his submissions and formulate his thoughts. I reminded him that I had adjourned the matter earlier in the day when he requested 10 minutes to gather his thoughts and was given approximately 50 minutes, and I had allowed him to make submissions for approximately two hours thereafter.

75 In my view, all of the allegations represented continuing attempts simply to delay the appointment of a receiver notwithstanding that the Debtor had contractually agreed to that appointment in the event of default which occurred almost a year ago.

76 I observe that the various arguments, allegations and procedural issues that Mr. Zar raised are very similar to those he raised during the hearing of the appeal by the Court of Appeal for Ontario referred to above and on which Mr. Zar placed reliance in this Application: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 219.

77 In the Reasons for Decision of the Court of Appeal, the Court noted that Mr. Zar appeared in his capacity as guarantor of the responding party's debt, although the substance of his submission certainly conveyed a response by the debtor corporation to the Receiver's motion (para. 23).

78 At paragraphs 14 - 23 of the Reasons for Decision, the Court of Appeal addressed various procedural issues raised by Mr. Zar during the appeal. Those included:

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a. a request for a 24 hour adjournment; issues resulting from the fact that Mr. Zar orally changed his instructions to counsel in open Court;

b. the accommodation offered by the Court to permit Mr. Zar to file with the Court registrar a draft Debtor's factum that he was holding in his hands and the granting of a 30 minute adjournment to allow him to do so, only to be advised upon resuming that Mr. Zar had not filed a factum for the panel's consideration or provided copies to the other parties; and

c. the fact that instead of filing the factum, upon the resumption of the hearing Mr. Zar requested that Brown J.A. recuse himself because some familial relationship created a conflict of interest, although when questioned, Mr. Zar was not prepared to name the person who allegedly had some familial relationship with Brown J.A., as a result of all of which the panel called upon the moving party receiver's counsel to make submissions on the motion. Then, when the panel called upon Mr. Zar to make responding submissions, he advised that a medical condition of his was making it difficult for him to formulate submissions. The panel offered, and Mr. Zar accepted, a 10 minute recess to allow him to collect his thoughts. Upon reconvening, argument proceeded.

79 The delay tactics employed there were nearly identical to those employed on this Application.

80 In the present case, the Applicant, fully supported by the second ranking secured creditor, seeks the appointment of a receiver not only on the basis of the clear and continuing repayment default, but in the absence of any effort on the part of the Debtor or its principal to make any repayment of any amounts whatsoever, or effectively, to take any step to meaningfully engage as a reasonable sophisticated commercial party, (as the Debtor here clearly is), and respond to its contractual obligations or to this proceeding.

81 While a receiver may be appointed where it is just *or* convenient to do so, in my view the circumstances of this case are such that it is both just *and* convenient. There is no basis upon which I can conclude that the circumstances will be materially different if a receiver were not appointed today and the matter were put over for a short period of time.

82 Accordingly, and having considered all of the circumstances and the relevant factors, including the rights of the affected parties, it is my view that the interests of all parties will best be protected, in a transparent and fair manner, by the appointment of a receiver who will act in a neutral and impartial way, under the supervision of the Court.

83 The terms of the proposed receivership are consistent with the Model Order of the Commercial List. The obligations, as well as the permitted activities, of the proposed receiver are clearly set out and in my view are appropriate in this matter.

84 As I specifically highlighted to Mr. Zar, paragraph 33 of the proposed order contains the usual "comeback" provision, providing that any interested party may apply to the Court at any time to vary or amend the order on seven days' notice.

85 I observe in addition that there is of course nothing preventing the parties from having discussions with a view to reaching a consensual resolution of this matter, in whole or in part, at any time.

86 For all of the above reasons, I granted the receivership order.

Application granted.

End of Document

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TAB 5

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: Colin K. Irving for Applicant, RJR-MacDonald Inc.
Simon V. Potter for Applicant, Imperial Tobacco Ltd.
Claude Joyal, Yves Leboeuf for Respondent
W. Ian C. Binnie, Q.C., Colin Baxter for Heart and Stroke Foundation of Canada, Canadian Cancer Society, Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Injunctions --- Availability of injunctions — Public interest

Injunctions --- Availability of injunctions — Need to show irreparable injury

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal

Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could

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apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.
Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.
Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit

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the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

***Sopinka and Cory JJ.*:**

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment,* SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act,* R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act,* particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(/) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. *2(b)* of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on

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advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment,* SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act,* R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada,* SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

14 *Tobacco Products Control Act,* R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> > (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> >
> > (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> >
> > (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

15 *Supreme Court Act,* R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> **65.1** The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

16 *Rules of the Supreme Court of Canada,* SOR/83-74, s. 27:

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27. Any parly against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

18 *Superior Court,* [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

19 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

20 Chabot J. found that, with respect to s. 2(*b*) of the *Charter,* the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

21 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

22 In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

23 But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

24 The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

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> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended *A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 127, 135).
>
> [Emphasis in original.]

25 *Court of Appeal (on the validity of the legislation),* [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

26 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

27 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

28 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. *2(b)* of the *Charter* but found that it was justified under s. 1 of the *Charier*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

29 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

30 However, he did not think that the violation of s. *2(b)* of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

31 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

32 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of

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the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

33 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

34 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada.*

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

35 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada,* 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rulemaking power. Subsection (l)(*a*) of that section provides that the rules may be enacted:

97 . . .

(a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

36 Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a. party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

37 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

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38 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

39 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just.
>
> [Emphasis added.]

40 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.
>
> 41 Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

42 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

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43 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

44 The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control. Act,* S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

45 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra*. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

46 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

47 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

48 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

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49 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

50 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores,* at p. 127, Beetz J. expressed the position in these words:

51 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

52 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

53 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

54 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid,* however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

55 In *Metropolitan Stores,* Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

56 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.
>
> It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

57 To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

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> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

58 And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

59 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

60 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores,* at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

61 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra,* at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

62 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

63 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods,* [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have

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succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

64 Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

65 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all.
>
> [Emphasis added.]

66 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

67 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

68 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores,* at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms,* could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

69 A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

70 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.
>
> To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be

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before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

71 Beetz J. determined in *Metropolitan Stores,* at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

72 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

73 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation *(American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration *Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

74 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

75 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of juris-prudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

76 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the First test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

77 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid,* Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

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He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

78 The decision in *Metropolitan Stores,* at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

79 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives,* 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

80 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

81 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants,* which would warrant this court issuing an injunction at their behest.
>
> [Emphasis in original.]

82 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

83 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing*

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Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act,* R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

84 This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

85 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal ....

86 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

87 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

88 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores,* it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

89 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the lax into court pending the disposition of the main action.

2. The Status Quo

90 In the course of discussing the balance of convenience in *American Cyanamid,* Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited

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value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

91 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

92 As indicated in *Metropolitan Stores,* the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

93 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

94 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

95 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

96 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

97 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent juris-prudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals

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on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal staled that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

98 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

99 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

100 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

101 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the longterm viability of the applicants.

102 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

103 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores:*

> Whether or not they are ultimately held to be constitutional. the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance:... the protection of public health .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.
>
> [Emphasis added.]

104 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

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3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

105 The Regulatory Impact Analysis Statement, in the *Canada Gazette,* Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

106 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

107 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

108 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

109 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais*, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault*, Montreal.
Solicitors for the respondent: *Côté & Ouellet*, Montreal.

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Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault*, Toronto.

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TAB 6

2013 ABQB 335
Alberta Court of Queen's Bench

Murphy v. Cahill

2013 CarswellAlta 1490, 2013 ABQB 335, [2013] A.J. No. 854, 231 A.C.W.S. (3d) 960, 568 A.R. 80, 88 Alta. L.R. (5th) 69

Gerald Murphy and Gerald Murphy in his capacity as Trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust Applicant and Margaret Cahill, Christopher Cahill, 1248429 Alberta Ltd., 554168 Alberta Ltd., 1247738 Alberta Ltd., and Canadian Consolidated Salvage Ltd. Respondents

J.B. Veit J.

Heard: June 4-6, 22, 2013; August 6, 2013
Judgment: August 15, 2013
Docket: Edmonton 1203-04666

Counsel: Sandeep K. Dhir, Lindsey E. Miller for Applicants, Gerald Murphy and Gerald Murphy's Children's Parallel Life Interest Settlement Trust
Rostyk Sadownik for Respondent, Margaret Cahill
Terrence Warner, Lesley M. Akst for Respondent, Christopher Cahill, Sr.
M.T. Coombs, D.R. Peskett for Inspector, BDO Canada Ltd.

Subject: Occupational Health and Safety; Corporate and Commercial; Civil Practice and Procedure
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
GM resided in Ireland; GM's sister, MC, emigrated to Canada and ran companies — GM alleged MC had mismanaged large matters such as funding by companies of residences put into MC's name and to small matters such as MC's authorization of purchase of baby clothes for employees — MC and husband, CC, alleged that GM failed to recognize their equity interest in companies and MC's right to manage companies, including right to authorize payment to others for work done on behalf of companies — GM brought application for appointment of receiver-manager — Application dismissed — GM's serious complaints about management raised serious issues to be tried; complaints of MC and CC also raised serious issues to be tried — However, GM had not established irreparable harm would be suffered if relief was not granted; GM failed to establish that balance of convenience favoured appointing interim receiver-manager — There was no need for immediate corporate action and there was no important corporate issue that needed to be addressed in near future — Current value of properties owned by companies exceeded GM's original investment; if MC was responsible for financial losses suffered by companies then her apparent equity interest in companies appeared to be adequate to compensate for losses — GM had considerable financial resources whereas financial resources of MC and CC were tied to employment and equity positions in companies — Granting interim relief that would deal with GM's concerns but not those of MC and CC and would create inappropriate balance in GM's favour — Appointment of receiver-manager would give GM relief that he requested without addressing fundamental issue of corporate structure — Parties would be ready for trial within short time and there was no justification for proceeding with interlocutory remedy without full hearing on contested evidence.

APPLICATION by GM for appointment of receiver-manager.

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***J.B. Veit J.*:**

Summary

1 Since 2006, Gerald Murphy has provided all of the capital funding, amounting to millions of dollars, for the CCS group of companies. In this interlocutory application, relying on 242(3) of Alberta's *Business Corporations Act* and on s. 13(2) of the *Judicature Act*, Mr. Murphy asks for the appointment of a receiver-manager on an interim basis based on evidence of what he describes as mismanagement of the companies by the respondent Margaret Cahill, Mr. Murphy's sister. The mismanagement complained of is extensive, relating both to relatively large matters - such as the funding by the companies of residences that were then put into Ms. Cahill's name - and to small ones - such as Ms. Cahill's authorization of the purchase of baby clothes for the new-born children of two employees. There is abundant evidence that Mr. Murphy's serious complaints about management raise serious issues to be tried.

2 In the originating application which commenced these proceedings, in addition to the appointment of a receiver-manager, Mr. Murphy also asks for rectification of the share register and corporate documents and for related relief.

3 The respondent Cahills have complaints relating to Mr. Murphy: they assert that Mr. Murphy has failed to recognize their equity interest in the companies and Ms. Cahill's right to manage the companies, including her right to authorize payment to others, including her adult son, for work done on behalf of the companies. The evidence on which the Cahills rely consists of corporate documents which appear to have been executed by Mr. Murphy, and which state on their face that, despite his sole funding of the companies, Mr. Murphy only has a 50% voting position with respect to the operation of, and an 80% equity stake in, the companies. In addition, according to the Unanimous Shareholders' Agreement, also apparently executed by Mr. Murphy, internecine corporate disputes must be arbitrated. There is abundant evidence that the Cahills' complaints raise serious issues to be tried.

4 The application for an interim receiver-manager is denied.

5 The court is entitled, in assessing the application, to consider the hearsay information contained in the Inspector's Third Report. However, in the circumstances of this case, the court does not attach any weight to that hearsay evidence.

6 The applicants cite Margaret Cahill in contempt for having, in the face of the court's sealing order, provided a copy of the Inspector's Third Report to a non-party, Chris Cahill Jr., who was the focus of much of the information contained in the Third Report. In the circumstances here, the sealing order was not sufficiently clear and unequivocal so as to constitute an adequate basis for contempt proceedings.

7 An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

8 Moreover, the test itself must be interpreted within the court's equitable jurisdiction. One effect of the equitable character of the relief is that the granting of this exceptional relief is discretionary. Another is that general equitable principles infuse the court's assessment of the positions of the parties on such an application, especially with respect to the balancing of convenience; as one example of the overarching effect of equitable principles in this context, the dictates of fairness may exceptionally be so overwhelming that interim relief is justified even where one or more branches of the tripartite test have not been met.

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9 It can be misleading to express the appropriate test as consisting merely of a requirement that the applicant has established a strong *prima facie* case of oppression. In any event, even if the test could be formulated in that way, the applicant has not satisfied that test.

10 Dealing then with the test as elaborated in the case law, as is agreed by the parties, the first branch of the tripartite test has been met: clearly there are serious issues to be tried.

11 However, in relation to the second branch of the test, Gerald Murphy has not established that he, or the Trust, will suffer irreparable harm if the relief is not granted. There is no need for immediate corporate action; as the Inspector observes, nothing much will change in the companies' outlook within the next several months. There is no important corporate issue that must be addressed in the near future. Also, the lowest appraisal of the current market value of the real property owned by the CCS companies establishes that the current value of those properties significantly exceeds the original investment. If Ms. Cahill has been responsible for financial losses suffered by the companies, her apparent equity interest in the companies appears to be adequate to compensate the Trust for such losses.

12 Nor, with respect to the third branch of the test, has Mr. Murphy been able to establish that the balance of convenience favours the appointment of an interim receiver-manager. The evidence on this application is that Mr. Murphy has considerable financial resources whereas the financial resources of the respondent Cahills are tied to their employment at, and apparent equity position in, the companies. The granting of interim relief which deals with Mr. Murphy's concerns but not those of the Cahills and which virtually cuts off the financial ability of the Cahills to advance their apparently legitimate interests would create an inappropriate balance in favour of Mr. Murphy.

13 In considering the equities of the overall application, Mr. Murphy has not established that this is a situation where the dictates of fairness are so overwhelming that they justify the appointment of a receiver-manager. Mr. Murphy's legitimate expectations do not justify the appointment of a receiver-manager on an interim basis: there has been no material change of management style of the CCS group since Mr. Murphy acquired the companies and put Ms. Cahill in charge of the day to day operations of the companies. Furthermore, the appointment of an interim receiver-manager would presume that Mr. Murphy's position with respect to the corporate structure is correct and that he is therefore entitled to present this application. However, the only evidence on this application with respect to the corporate structure consists of documents apparently executed by Mr. Murphy which require him to go to arbitration to solve management disputes rather than to invoke the assistance of courts. Also, in light of the Inspector's opinion about the current status of the companies, it is obvious that the appointment of an interim receiver-manager would not deal effectively with the real problems facing this group of companies. Also, the appointment of an interim receiver-manager would give Mr. Murphy the relief which he requests without addressing the fundamental issue of corporate structure.

14 Lastly, the biggest hurdle which Mr. Murphy faces in obtaining this relief on an interim basis is his acknowledgement that he would be prepared for a final hearing on the merits of his oppression application within months, a timing estimate with which the respondents agree. In such a situation, especially where the consequences of the appointment of a receiver-manager would be so dire from the respondents' perspective, there can be no justification for proceeding with an interlocutory remedy without a full hearing on contested evidence when a full hearing can finally resolve the crucial factual disputes between the parties.

Cases and authority cited

15 *By the Applicants: Murphy v. Cahill*, 2012 ABQB 220 (Alta. Q.B.); *R. v. Canadian Consolidated Salvage Ltd.*, 2012 ABPC 133 (Alta. Prov. Ct.); *Murphy v. Cahill*, 2012 ABQB 446 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 530 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 531 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 793 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 754 (Alta. Q.B.); *Business Corporations Act*, R.S.A. 2000, c. B-7, s. 242(3)(b) and Part 8; *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.*, 1999 ABQB 406 (Alta. Q.B.); *BCE Inc., Re*, 2008 SCC 69 (S.C.C.); *Seidel v. Kerr*, 2003 ABCA 267 (Alta. C.A.); *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.); *Kumra v. Luthra*, 2010 ABQB 772 (Alta. Q.B.); *Citibank Canada v. Calgary*

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Auto Centre (1989), 98 A.R. 250 (Alta. Q.B.); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Chow v. Bresea Resources Ltd.* (1997), 209 A.R. 284 (Alta. C.A.); *Garratt v. Charlton*, 2012 ONSC 1129 (Ont. S.C.J.); *Fernando v. Francis*, [2007] O.J. No. 1644, 2007 CarswellOnt 2619 (Ont. S.C.J. [Commercial List]); *781952 Alberta Ltd. v. 781944 Alberta Ltd.*, 2003 ABQB 980 (Alta. Q.B.); *Deluce Holdings Inc. v. Air Canada*, 1992 CarswellOnt 154, 98 D.L.R. (4th) 509 (Ont. Gen. Div. [Commercial List]); *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565 (Alta. Q.B.); *Connelly v. Connelly-McKinley Ltd.*, 2010 ABQB 515 (Alta. Q.B.); *Seymour Resources Ltd. v. Hofer*, 2004 ABQB 303 (Alta. Q.B.); *719946 Alberta Ltd. v. Alberta's B.E.S.T. Inc.*, 2005 ABQB 771 (Alta. Q.B.); *Such v. RW-LB Holdings Ltd.* (1993), 15 Alta. L.R. (3d) 153 (Alta. Q.B.); *Stech v. Davies* (1987), 80 A.R. 298 (Alta. Q.B.); *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, ss. 96(3), 323(1) and 330; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended, s. 227.1; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 128; *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Co.* (1978), 23 N.B.R. (2d) 261 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301 (Ont. Bktcy.); *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.* (1992), 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.) [1992 CarswellOnt 4933 (Ont. Gen. Div.)]; *Weaver v. Cahill*, 2011 ABCA 290 (Alta. C.A.); *R. v. Cahill*, 2006 ABCA 119 (Alta. C.A.).

16 *By the Respondent, Margaret Cahill: Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.), *Bennett on Receiverships*, Second Edition, pages 130-132; *Bennett on Receiverships*, Second Edition, pages 138-140; *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Murphy Oil Co. v. Predator Corp.* (2002), 7 Alta. L.R. (4th) 369 (Alta. Q.B.); *Spartan Drilling Ltd. v. Snowhawk Energy Inc.* (1986), 46 Alta. L.R. (2d) 67 (Alta. Q.B.); *Kumra v. Luthra*, [2010] A.J. No. 1581 (Alta. Q.B.); *Citibank Canada v. Calgary Auto Centre*, [1989] A.J. No. 347 (Alta. Q.B.); *Alberta Health Services v. Networc Health Inc.*, [2010] A.J. No. 627 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) (para 18); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, [2010] A.J. No. 1189 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] A.J. No. 358, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v. Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.) para 9; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.); *Goebel v. Edmonton (City)*, [2004] A.J. No. 193 (Alta. C.A.); *Monco Holdings Ltd. v. B.A.T. Development Ltd.*, [2005] A.J. No. 1218 (Alta. Q.B.); *Lindsey Estate v. Strategic Metals Corp.*, [2008] A.J. No. 1076 (Alta. Q.B.); *Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co.* (1993), 11 Alta. L.R. (3d) 222 (Alta. Q.B.).

17 *By the Respondent, Christopher Cahill (Sr.): BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

18 *By the Inspector: Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 (Alta. Q.B.). *Consolidated Enfield Corp. v. Blair*, 1995 CarswellOnt 1067 (Ont. Div. Ct.); *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2005 CarswellOnt 2193 (Ont. S.C.J.)

19 *By the court: Leggat v. Jennings*, 2013 ONSC 903 (Ont. S.C.J.); *Nicolas c. Perrier*, 2012 QCCA 99 (Que. C.A.); *St-Germain c. St-Germain*, 2011 QCCA 608 (Que. C.A.); *Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.*, 2013 ONSC 4194 (Ont. S.C.J.); F. Bennett, *Bennett on Receiverships*, 3rd ed., 2011, Carswell

Appendix A: Sections 242 and 243 of Alberta's *Business Corporations Act*

Section 13(2) of Alberta's *Judicature Act*

1. Background

a) Factual

20 In March, 2012, under the authority of ss. 242 and 244 of Alberta's *Business Corporations Act* and s. 13 of Alberta's *Judicature Act*, and claiming oppression, Gerald Murphy brought an originating application in his personal capacity and in his capacity as trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust, hereafter "the Trust", to appoint a

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receiver-manager of the CCS Group of companies, to rectify the registers and records of the CCS Group to reflect that Murphy is the sole shareholder of the CCS Group, and to compensate himself for loss caused by the oppressive conduct of the respondents. This special chambers application is for the appointment of an interlocutory receiver-manager in these proceedings.

21 Between 2006 and 2008 the Trust invested between $9 and $16 million dollars in an Alberta group of companies, the CCS Group. The exact amount of the investment is known to the parties but is not repeated here because of privacy issues relating to the potential marketing of the properties. The money invested in the CCS Group was part of the proceeds of the sale by Gerald Murphy of his interest in a family-run salvage business in Ireland. Gerald Murphy is the sole funder of the Trust and the Trust is essentially the sole capital funder of the CCS Group.

22 Margaret Cahill, Gerald Murphy's older sister, had emigrated to Canada with her family in the late 1970s. In 2006, she had no experience in the management of a junk yard or a salvage yard, and, indeed, no experience in the management of a large commercial enterprise. She is, nevertheless a woman of ability, having trained as a nurse.

23 Margaret Cahill's husband, Christopher Cahill Sr., read law at Trinity in Dublin. However, there is no evidence that he was ever admitted to the practice of law either in Ireland or in Canada.

24 Although Gerald Murphy, or his representatives and agents, has visited the Edmonton business on a few occasions, Gerald Murphy continues to reside in Ireland.

25 In 2006, Gerald Murphy, an adult person with no disabilities, executed documents which established a share structure in the CCS Group in which Margaret Cahill, Gerald's sister, and Christopher Cahill Sr., Margaret's husband, each owned 10% of the equity shares and the Trust owned the remaining 80% equity shares, but Margaret and Gerald together owned 50% of the voting shares and the Trust owned the remaining 50%. Amongst the various documents Mr. Murphy executed when the company structure was set up was a Unanimous Shareholders Agreement which, among other terms, required the parties to arbitrate disputes:

> **8.02 Arbitration**
>
> If at any time during the continuance of the Corporation or after the dissolution or termination thereof, any dispute, difference or question shall arise between the Shareholders touching the Corporation, or the amounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning or effect of these presents or anything herein contained, or the rights or liabilities of the parties under this agreement or otherwise in relation to the premises, then every such dispute, difference or disagreement shall be referred to a single arbitrator, if the parties agree upon one, but should the parties be unable to agree upon the identity of such single arbitrator, then each such dispute, difference or disagreement shall be referred to a single arbitrator, to be appointed by a Judge of the Court of Queen's Bench of the Province of Alberta pursuant to *The Arbitration Act* of Alberta and every award or determination thereof shall be final and binding. Any arbitrator under this clause shall not be bound by legal precedent, nor by the rules of evidence or procedure. He shall be bound to impose the solution which is most equitable, having regard to the terms hereof, under the circumstances, and every award or determination so imposed shall be final and binding.

26 Gerald Murphy swears that he did not read any of the documents he signed, that he was not aware of their contents, and that in signing every document that was put before him he was relying on his lawyers and on his brother-in-law, Christopher Cahill Sr. - as a person who had represented to him that he was a practising lawyer, as a fellow trustee of the Trust, and as a member of the family. Mr. Murphy maintains that the documents were not explained to him by his then law firm, that he did not retain copies of the documents that he signed and that he never received the advice of the Trust's Irish lawyers with respect to those documents. Because he asserts that the USA is not binding on him, he has declined to access the arbitration provisions of the USA to resolve any corporate disputes he had with the Cahills.

27 Mr. Murphy swears that he first became aware of the share structure in the CCS Group in 2008. In that year, his relationship with his sister changed from one of trust to one of contestation. For example, in the original corporate records, Mr. Murphy agreed to dispense with an auditor and with an annual meeting and also waived receipt of financial statements; by 2008, Mr.

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Murphy was demanding financial disclosure. Mr. Murphy initiated proceedings with respect to the share structure of the Group in 2010; he asserts that the period between 2008 and 2010 was taken up with settlement negotiations between himself and the Cahills.

28 After the relationship with his sister became acrimonious, the CCS Group received an unsolicited offer to purchase one of the three groups of real properties owned by them. The amount of the offer was for one property and, had the offer been accepted, it would have equalled more than half of the total amount of money invested by Mr. Murphy in the companies. Mr. Murphy refused to accept the offer.

29 In 2011, the parties agreed to the appointment of Deloitte, as a consultant to Mr. Murphy, and became vested with the role of making inquiries into various matters relating to the companies. The type of information requested by Deloitte included financial statements, real estate appraisals, corporate income tax returns, general ledgers, HR information about management and employees, inventory, insurance coverage, management fees, etc. From the beginning, there were difficulties in obtaining the requested information. For example, as a result of water damage to the premises in February 2011, it was not possible for Deloitte to actually work at the premises occupied by the companies. Deloitte eventually reported that it had not been able to obtain all of the information which it had requested.

30 In August, 2012, Mr. Murphy asked the court for additional relief, including the appointment of an interim receiver-manager. Although that relief was denied, the court did appoint an Inspector, BDO Canada Ltd., whose task was defined, in general terms, as reviewing and assessing the CCS companies' current and historical financial position and historical operating results; reviewing and assessing the group's accounting and control procedures with respect to accounts receivable, accounts payable, inventory, and in general; and, attempting to address the questions and issues arising from the Deloitte report. One of the terms appointing the Inspector provided that the Inspector's reports would be sealed. The Inspector's First Report was presented to the Court on November 22, 2012. That report stated that, despite often repeated requests for information, the information had "generally been slow in delivery, and a significant amount of information remains outstanding as at the Cut-Off Date": para. 11. The report also continues, in para. 12, however, that "there does appear to be some merit to the concerns raised by the Management of the CCS Group"; those concerns were identified by the management as: shortage of staff, limited knowledge/expertise in the area of accounting; the use of an external accounting firm for some aspects of the information requested, including compilation of financial statements and preparation of tax returns; pressures on existing personnel to comply with information requests in relation to the ongoing legal dispute; a power outage in the week of October 9, 2012 which caused the group's computer network to crash and delayed matters for approximately one week; and, the demands of ongoing management. In addition, the Inspector fairly observed that, despite requests made by it to Deloitte to obtain from Deloitte the information which it had already received from the management of the companies, the Inspector only received the information from Deloitte on October 10, 2012. The Inspector was "hesitant to try and continue the review without first having access to, and reviewing the information previously provided to Deloitte". Nevertheless, the Inspector attempted to retrieve information from the management of the group which it had previously provided to Deloitte; this "required a tremendous amount of time and effort by both the Inspector and the CCS Group": para. 13. Nor surprisingly, the CCS Group was "not pleased with the Inspector's numerous requests to provide information that they indicated had been provided previously.": para. 14. As a result of these experiences, the Inspector instituted a "Cut-Off Date" of October 23, 2012. Its First Report was based on information received from the CCS Group up to and including the Cut-Off Date.

31 On January 31, 2013, this court granted an order that required the Inspector to provide the CCS Group by February 4, 2013 with a comprehensive written list of outstanding issues from the Inspector's own work and from the work undertaken by Deloitte; that authorized the Inspector to attend the Group's premises on February 5, 2012 to attempt completion of the outstanding internal control testing and documentation referred to in the First Report, and that required the CCS Group to provide responses to the Inspector by February 14, 2013. In the event, the Inspector granted some short extension to the time allowed to the CCS Group to answer the Inspector's queries. In its Second Report, tendered on March 8, 2013, the Inspector commented:

> 20. Generally speaking, despite the efforts of the CCS Group, and the extension of time granted by the Inspector, there still remains a significant amount of information outstanding and questions to be addressed/resolved as of February 19, 2013,

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(hereinafter referred to as the "Second Cut-Off Date"). Furthermore, the information supplied by the CCS Group up to the Second cut-Off Date as not materially altered the information previously reported to the Court by the Inspector to date.

32 The Second Report states that the bulk of the information requested in the Deloitte Report has been provided: see para. 36.

33 At paras. 22 and 23 of the Second Report, copies of which are in the hands of each of the parties, the Inspector sets out three key facts and an opinion with respect to the issues which it was asked to address. Because of privacy concerns relating to the market position of the companies, the court will not reproduce the Inspector's identification of key facts or its opinion. However, it is crucial to note that the Inspector identifies systemic problems rather than problems attributable solely to Margaret Cahill. Indeed, Margaret Cahill is not in a position to unilaterally remedy the problems identified by the Inspector. On the contrary, one of the main problems identified by the Inspector is a problem to which Margaret Cahill proposed a solution some time ago, but which Gerald Murphy declined to accept.

34 The Inspector's Concluding Comments in the Second Report include the following:

> Notwithstanding the significant volume of information that remains outstanding as at the Second Cut-Off Date, at this stage in the proceedings, the Inspector feels that continued work and expense under its current mandate will not result in any additional benefit to the Court or the Parties as it is clear that ....

35 For the privacy reasons mentioned earlier, the court does not reproduce all of the Inspector's Comments. Nonetheless, it is clear that one of the problems identified by the Inspector is the significant weakness in the Companies' internal controls. The cause of that weakness is not spelled out and is not attributed to delinquency on the part of Margaret Cahill.

36 In addition to the current proceedings, there has been parallel litigation involving the same parties involving, on the one hand, an apartment building in Edmonton, and, on the other, debt actions alleging a failure of the CCS Group to repay a debt owing to the Trust. In July 2012, Mr. Murphy made a first receivership application, which was dismissed: see 2012 ABQB 446 (Alta. Q.B.) . The existence of parallel proceedings can legitimately be taken into account when assessing the ability of the respondents to answer requests for information from Mr. Murphy at the same time as it was defending other lawsuits.

b) Legislative

37 The oppression provisions of the *Business Corporations Act* and the authority under the *Judicature Act* to appoint a receiver or receiver manager are set out in Appendix A.

2. How should the material contained in the Inspector's Third Report be treated?

38 On June 11th, 2013, i.e. 5 days after the conclusion of the three day special chambers application in the month of June, the Inspector was advised by Mr. Murphy that Mr. Murphy had become privy to new information relative to the affairs of the companies which was relevant and material. The Inspector contacted my office stating that the new information raised serious concerns with respect to the information previously provided by the Inspector. Discussions then ensued with all the parties relating to this development.

39 Although there is not yet any evidence before the court with respect to the exact circumstances concerning the tendering of this new information, it appears that the individual who brought the information to Mr. Murphy had been, from some date which is not yet clear on the information before the court up to the time of the special chambers hearing in early June, employed on a contract by the CCS companies to assist in answering various queries from the Inspector, especially with respect to the period during which she had been employed by the companies. It may be that, shortly after the June special chambers meeting, she had had a meeting with the lawyer for Ms. Cahill and that a difference of opinion had arisen between them. In any event, the individual shortly after June 6 attended at the offices of the lawyers for Mr. Murphy.

40 On June 12, 2013, this individual entered into an agreement of indemnity with Gerald Murphy's Children's Parallel Life Interest Settlement Trust pursuant to which the individual requested, and the Trust agreed to provide: the costs of fully furnished

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accommodation for a period which has been redacted from the agreement included in the Third Report, must which term "may be extended as necessary depending on the status of the lawsuit and upon the request of the Indemnified Party to the Indemnifier; the costs of a rental vehicle for a term similar to the term relating to the accommodation; all costs and damages which may be incurred by the Indemnified party related to any lawsuit commenced by any of the Cahills relating directly to the provision of the information; and, all legal fees and disbursements for the provision of independent legal advice to the Indemnified party. The solicitors for the Trust in these proceedings executed the agreement on behalf of the trust.

41 The solicitors for Mr. Murphy and the Trust have advised this court that they asked the individual to present her information to the Inspector direct, rather than through the law firm representing Mr. Murphy, because they were concerned that Rule 4.03 of the Law Society of Alberta's Code of Conduct may have prevented them from interviewing the witness themselves. In particular, the law firm was concerned about the Commentary to the rule which highlights the fact that, although there is generally no property in a witness, there are certain recognized exceptions to that rule.

> **Interviewing witnesses**
>
> 4.03 Subject to the rules respecting communication with a represented party set out in Rule 6.02 (8-10), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter.
>
> **Commentary**
>
> There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.
>
> In Alberta, there are certain recognized exceptions to the rule:
>
> . . .
>
> > (b) Decision makers within a corporate client. Since a corporation must act through human agents, it is necessary to identify those within a corporate client having authority to act on its behalf. Generally, all directors and officers, as well as management level personnel with decision-making authority, have sufficient identity with the corporation to be considered equivalent to the client for the purposes of this Rule.

42 In this context, it is potentially useful to note that the person who presented herself to Mr. Murphy's lawyer had been, until 2011, employed as a book-keeper for the companies. She had never been a director or officer of the companies. On the other hand, on an undated letter sent some time after December 3, 2010 but prior to the termination of her initial employment, she had sent a letter on CCS letterhead in which she had signed herself "Executive Assistant". Also in this context, it might be useful to note that the Inspector referred to the management team with whom it met as being composed of Margaret Cahill and Mr. Filipiak who, in August 2011, appears to have assumed the position previously occupied by the individual who went to Mr. Murphy's lawyer. It will be seen, therefore, that the concern expressed by Mr. Murphy's lawyer in dealing with this potential witness was understandable.

43 On July 16th, 2013, the Inspector provided to the court and to the parties a Third Report consisting of allegations made by a former book-keeper of CCS, whose employment with the companies had ceased in 2011. Recently, the individual had been retained by Margaret Cahill, on a contract basis, to answer the various questions put to the management of the CCS companies by the management. That individual told the Inspector that while she had not provided erroneous information to the Inspector in her previous dealings with them, she had deliberately withheld relevant and material information, in part at the request of Margaret Cahill and Chris Cahill Jr.

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44 The Inspector prudently advised the court that it had not had either the time or the opportunity to test the allegations made by the former book-keeper. Indeed, in response to the court's questions at the August 6 hearing, the Inspector candidly advised that there was relatively little that it could do in the relatively short term to assess the validity of the allegations made by the former book-keeper.

45 It goes without saying that the Inspector acted in an entirely appropriate fashion in ensuring that the court had access to the hearsay material with a view to determining what use should be made of that material.

46 As to the use which the court should make of the Third Report, Ms. Cahill acknowledged, on the authority of *Principal Group Ltd.*, that even though information in an Inspector's report was, typically, hearsay, it was the kind of hearsay which could be tendered in evidence and considered by the court.

47 This raises a procedural issue that is relevant to the issue of contempt which must be addressed by the court. The *Principal Group Ltd.* decision emphasizes that an Inspector's report, albeit hearsay, can become evidence. While Canadian case law generally holds that Inspectors, as court officers, are to be shielded from cross-examination on their reports - see, for example, *Consolidated Enfield Corp.*, that does not mean that the reports should not be filed as court exhibits. Here, because of an earlier decision in these proceedings which provided for the sealing of the Inspector's reports, the Reports have not in fact been introduced as exhibits. The court hereby orders that each of the three reports shall forthwith be entered as exhibits in the proceedings, and, according to the order of Lee J., shall be sealed until further order of the Court.

48 Although the respondents do not object to the Court's consideration of the Inspector's Third Report, they ask the court to consider the content of the report to be mere hearsay, even contested hearsay, and to give it no weight.

49 Mr. Murphy asks the court to give full weight to the hearsay evidence contained in the Inspector's report. He states that the court has not required other individuals to provide sworn evidence before it could be considered by the Inspector.

50 I have concluded that, because they are not sworn and been subject to cross-examination, I should give no weight to the allegations made by the CCS's former book-keeper. Although an Inspector's report is admissible, even if it contains hearsay, the court retains the discretion to give the hearsay content of the report little weight: *Envirodrive Inc.*, at para. 38.

51 In coming to that conclusion, I have taken the following into account:

- although it is obvious that the Inspector has not required all individuals who have provided information used as the basis for the First and Second Reports to provide that information by way of affidavit or equivalent. However, much information in these proceedings, and certainly most of the information which is contested, has in fact been provided by affidavit or equivalent and there has been the opportunity to cross-examine on that evidence. Both Mr. Murphy and Ms. Cahill have been subject to questioning with respect to the affidavits they have provided;

- the evidence before the court on this application establishes that there was a personal relationship between the former book-keeper and Chris Cahill Jr. which may provide an explanation for the former book-keeper's current information. This is not a situation where the source of the new information is disinterested;

- on the basis of the very information provided by the former book-keeper to the Inspector, that individual has acknowledged that, in the past, she has not been forthright with the Inspector. When a witness admits to having deliberately withheld evidence in the past, that individual's current statements must be assessed in light of her acknowledged past lack of candour. It is reasonable to require the new information to be provided under oath and to be subject to questioning.

3. Should Ms. Cahill, or her lawyer, be found in contempt, and sanctioned, for having disclosed to Chris Cahill Jr. the contents of the Inspector's Third Report which dealt principally with allegations against Chris Cahill Jr.?

52 I have concluded that, in the circumstances here, no finding of contempt should be made with respect to the distribution to Chris Cahill Jr. of the Inspector's Third Report.

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53 The hearsay information which constitutes the content of the Inspector's Third Report centers on Chris Cahill Jr. It appears that the individual who provided the information to the Inspector had had at the very least an emotional, as opposed to a purely professional, relationship with Chris Cahill Jr. Although the information provided to the Inspector relates in part to Margaret Cahill, the focus of the disclosure is on Chris Cahill Jr. and the allegations against him of assault and of other personal impropriety as well as of business impropriety. Clearly, Margaret Cahill provided her son with a copy of the Third Report; indeed, Chris Cahill Jr. - who is identified in the materials before the court as part of the management team of the CCS Group -has filed affidavits responding to the allegations made in the Third Report. The fact that a person affected by a sealing order would likely have obtained disclosure of the sealed document in the interests of fairness had an application been made to lift the order does not resolve the issue of whether a contempt of the order has occurred, although such a background may affect the sanction imposed for contempt. However, before getting to that issue, the court must begin by determining whether the circumstances here justify a contempt citation.

54 The test for contempt has recently been articulated by Quinn J. in *Cassels Brock & Blackwell LLP* - a decision chosen only because of its recency -in a format which, in my view, represents the weight of the jurisprudence on the issue:

> 60 In *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27, a three-pronged test for contempt was articulated: (1) "the order that was breached must state clearly and unequivocally what should and should not be done"; (2) "the party who disobeys the order must do so deliberately and wilfully"; (3) "the evidence must show contempt beyond a reasonable doubt."
>
> . . .
>
> (c) is the Order for Assessment clear and unequivocal?
>
> 62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:
>
> "It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see *Bell ExpressVu Limited Partnership v. Torroni* (2009), 94 O.R. (3d) 614 (C.A.), at para. 22, citing *Hobbs v. Hobbs* (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.
>
> "The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.), at para. 13.

55 In the circumstances of this case, I have concluded that the sealing order was not sufficiently clear and unequivocal so as to provide a basis for a contempt finding. As I understand it -in the absence of a transcript of the proceedings that led to the making of the sealing order - the sealing clause of the order appointing the Inspector was not the subject of real discussion amongst the parties. No notice of the application to request a sealing order was brought pursuant to the provisions of R. 6.29 for a restricted court access order; therefore, there was no elucidation on the record of the intended objective of the sealing order. In those circumstances, the parties may understandably have been of the view that the obligation to prevent disclosure of the order and its terms rested essentially on the Inspector. Such an interpretation would have been reasonable, given the type of information which the Inspector was to uncover, relating for example to real estate appraisals; such information, if publicly disclosed, might have put the companies at a disadvantage in dealing with the properties and the corporate disadvantage would have had negative consequences for all the shareholders.

56 Incidentally, the existence of the sealing order would also limit the Inspector's ability to approach outside sources for information. That reality is reflected in the Inspector's answer to the court's query about which, if any, of the allegations made in the Third Report could be effectively assessed by the Inspector: the Inspector could not, as suggested by Mr. Murphy, merely go to a lawyer and ask that lawyer if s/he is driving a vehicle leased to the companies, and, if so, under what authority.

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4. What test applies to a request for the appointment of an interim receiver-manager?

57 Mr. Murphy asserts that a strong *prima facie* case of oppression constitutes a sufficient basis for the appointment of an interim receiver- manager under the *Business Corporations Act* and that a test comparable to the tripartite test for interlocutory injunctive relief is the test that should be applied in relation to the *Judicature Act* application. Mr. Murphy adds that deadlock is sometimes mentioned as a justification for the appointment of a receiver-manager and that Lee J. has, in these very proceedings, made a finding of deadlock even though that finding did not result in Lee J.'s acquiescence to the request for the appointment of an interim receiver-manager.

58 The respondents assert that the test for the appointment of an interim receiver-manager under the *Business Corporations Act* is akin to the test for the issuance of an interlocutory injunction, i.e. the tripartite test set out in *RJR-MacDonald Inc.*

59 In essence, the difference between the parties on this issue is whether proof of irreparable harm is a necessary hurdle for an applicant requesting the relief requested here.

60 In my view, the respondents are more nearly correct on this issue than is the applicant: as the applicant himself recognizes, this court has, in *MTM Commercial Trust*, noted with approval the decision in *Anderson v. Hunking* [2010 CarswellOnt 5191 (Ont. S.C.J.)] which stated, among other things, that "the test for the appointment of a receiver is comparable to the test for injunctive relief". Indeed, it may be useful to quote from that decision more extensively:

> 15 Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
>
> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
>
> (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
>
> (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
>
> (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;
>
> > (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
> >
> > (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

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(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

(Emphasis added)

61 However, I don't disagree with the applicant's overall position concerning the applicable test, assuming that that position includes acceptance that irreparable harm must usually be established. Nor would I disagree with the applicant's overall position assuming that the position recognized that the test under the *Judicature Act* is not markedly different from that which applies under the *Business Corporations Act*: in my view, since the specific provisions of the *Business Corporations Act* overtake the general provisions of the *Judicature Act* where the request is for the appointment of an interim receiver of a corporation.

62 I have concluded that requiring an applicant for the appointment of a receiver-manager of a business corporation to satisfy each of the requirements the tripartite test may, in some exceptional circumstances, be relaxed. Along with Clackson J., and recognizing that the application in the Ontario case related "only" to an interim order "prohibiting the respondents from proceeding with the proposed purchase transaction with Luna Tech without obtaining shareholder approvals as set out in the USA and an interim order prohibiting the respondents from continuing to operate the business and manufacturing facility of Luna Tech pending the closing of the Luna Tech transaction and requiring them to immediately cease all such activity and to remove any and all of their assets from the Luna Tech facility" rather than to the more comprehensive remedy of appointment of an interim receiver-manager, I endorse the view of Pepall J. in *Le Maitre Ltd. v. Segeren* [2007 CarswellOnt 3226 (Ont. S.C.J.)]:

30 It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as *Deluce Holdings Inc. v. Air Canada*, 10 *M. v. H.*, 11 *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, 12 *Ellins v. Coventree*13 and *RV&S Ltd. v. Aiolos Inc.*14

(Emphasis added)

63 I note that two relatively recent Quebec Court of Appeal decisions, *Nicolas* and *176283 Canada Inc.*, have usefully emphasized that the situations in which the "dictates of fairness are so overwhelming" that the traditional tripartite test can be ignored will be few and far between.

64 In order to provide as straightforward as possible an expression of the legal test applicable here, I would slightly reframe the test in this way: An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, brought by a person who is not a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the tripartite test for obtaining an interlocutory injunction: it must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the

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relief. Exceptionally, the dictates of fairness may be so overwhelming that interim relief is justified even where one or more terms of the tripartite test have not been met.

65 In coming to the above-noted formulation of the test, I begin with the view that the fact that what is requested in interlocutory relief, i.e. relief without hearing the substantive application on the merits, is a key factor which cannot be ignored.

66 Next, I emphasize that the remedy requested by the applicant is an important component of the test which the applicant has to meet: what must be proved in order to obtain the appointment of an inspector can, in my view, differ from what is necessary to obtain the appointment of a receiver-manager. Indeed, because the role of an Inspector is so markedly different from that of a receiver-manager, the evidence required for the appointment of an Inspector can legitimately, as Lee J.'s decision in this very case has already demonstrated, be materially less than the evidence required for the appointment of a receiver-manager.

67 Nor, in my view, should a court generally explore on its own whether a remedy set out in 242(3) other than the remedy requested by the applicant should be awarded: the parties opposite only have notice of, and can only be expected to respond to, a specific application. It would be unfair to the respondents to consider granting relief which had not, at least impliedly, been requested. Moreover, if a court were, for example, to appoint a Monitor where an applicant had requested the appointment of a receiver-manager, the court might only be imposing an onerous expense without any commensurate benefit on the applicant.

68 It is true that, in *HSBC Capital Canada Inc.*, the court described the test under then s. 234 of the Business Corporations Act as "a strong *prima facie* case": para. 44. There was no consideration in that case of irreparable harm or of the balance of convenience. However, to my mind a crucial difference between the situation in that case and the one here is that, in that case, the actual relief requested was "only" the appointment of an Inspector. In other words, the relief that was granted in that case was exactly the relief which has already been granted in this case prior to the bringing of this application. The decision in that case cannot, therefore, serve as justification for the appointment of an interim receiver-manager in this case. The difference is that the applicants now want additional relief - the appointment on an interim basis of a receiver-manager, and the question is whether the same test that applies to the appointment, on an interim basis, of an inspector also governs the appointment of an interim receiver-manager. In my view, the answer is no.

69 In concluding that the nature of the relief requested is a factor in determining the test that must be met, I also take comfort in McDonald J.'s decision in *Citibank Canada*, where the court again referred to *Bennett* as authoritative, but added the following at para. 31:

> In the present case, I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.
>
> (Emphasis added)

70 Similarly, in *Leggat*, a recent Ontario court decision, Coats J. outlined the varying circumstances which must be taken into account in determining what test the applicant must meet to justify the relief:

> 24 The Respondents have filed several cases with respect to the test to be applied for interim relief. In my view, none of these cases are of assistance in the determination of the issues before me. In *1384034 Alberta Ltd. v. 1180263 Alberta Ltd*, 2011 ABQB 599, the Court granted some interim relief, including access to financial statements of the corporation consisting of weekly accounting reports and monthly financial statements. No test for interim relief was articulated. In *Dee Ferraro Ltd. v. Pellizzari*, 2010 ONSC 3013, again no test for interim access to financial records was set out. On a short motion list it was not possible to make such a determination. In *Padda v. 2074874 Ontario Inc.*, 2010 ONSC 2872, the interim relief requested was the appointment of a receiver. This is completely different than a request for a declaration enforcing a statutory right to access to books and records. I do note that in *Padda v. 2074874* at para. 20 it is clear that Justice Gray had ordered as a term of the previous adjournment that business records in the possession of either party were to be provided to the other party forthwith. In *Le Maitre Ltd. v. Segeren*, [2007] O.J. No. 2047 (SCJ) the interim relief sought was to restrain the Respondents from concluding a transaction. The relief sought before me is completely different. The Applicants are

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> not seeking interim relief under the oppression remedy section at this stage of the proceeding. The Applicants are seeking a declaration permitting access to books and records, documents to which Mr. Leggat as a director has a statutory right to access. The relief is available under s. 247 of the CBCA and this issue easily lends itself to summary disposition. The primary issue before me is not in the nature of an injunction. In *PADP Holdings Inc. v. Information Balance Inc.*, [2006] O.J. No. 5518 (O.S.C.), the primary interim relief sought was the reinstatement of employment and the standard test for injunctive relief was applied. Once again, the primary issue before me is not of an injunctive nature.

71 In *Paragon*, adopting a list established in *Bennett on Receiverships*, 2nd ed., the court approved some factors which a court may consider in determining whether it is appropriate to appoint a receiver. At least three points can be made in relation to that decision: first is that the reference to Bennett, which is undoubtedly useful, should be updated to the 3rd ed, 2011, where the comparable list is found starting at p. 156. There are a few additional comments made in the third edition which may be of interest here: the current edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder". From that perspective, the factor appears to be an example of what might not constitute irreparable damage. One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds "... where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity". In reviewing the 18 factors currently mentioned in Bennett, I have concluded that each of those factors, other than factor 10 which emphasizes that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly and part of factor 18 which refers to the principles of equity, can be seen as a particularization of one of the three branches of the tripartite test; factor 10 and part of factor 18, while not part of the tripartite test constitute the often only implied basis for granting equitable relief such an the appointment of an interlocutory receiver. As to the remainder of the factors, irreparable harm is not only mentioned as the first factor, but is also explicitly addressed in factors 2 and 5. The balance of convenience is not only an explicit factor on its own, but also constitutes the substance of factors 11, 12, 14, 15, 16 and 17.

72 Second, it must be noted that, in *Paragon*, the application before Romaine J. was brought by a security holder in reliance on its explicit right in the security documents to have a receiver appointed, a situation which does not apply here. Bennett emphasizes that, where a security holder's instrument provides for the appointment of a receiver, the security holder is *prima facie* entitled to that relief on proof of the required default.

73 Third, Bennett does address the type of situation which has arisen here, i.e. one where the applicant is not a security holder relying on an instrument. At page 159 of the third edition, the learned author states:

> If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v Canada (Attorney General).*

74 The reference at p. 159 to "creditor" can, in light of the case law, for example *Segeren* which is discussed herein, apply to a person with Mr. Murphy's status. This conclusion does, however, raise another issue: the reference in the Bennett text at the locations indicated above refer essentially to the appointment of a receiver at the request of a security holder. Indeed, most of that text deals with the security holder situation. However, some comments about the appointment of a receiver under business corporations legislation can be found commencing at p. 823 of the text. In dealing with the grounds of appointment of a receiver

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under business corporations legislation, the text states: "The test ... requires the applicant to have a strong *prima facie* case but not to the same degree as in the test for a *Mareva* injunction. Much of the case law relating to situations where a liquidator would be appointed can be considered in an application under section 241 (of the *Canada business Corporations Act*). For example, 'deadlock companies' may be considered unfairly prejudicial to each side, such that a court may appoint a receiver for the protection of all parties." There is no mention at that point in the text of the *BCE Inc., Re* oppression decision of the Supreme Court; indeed, it might be fairly said that the Bennett text does not focus on receiverships under business corporations legislation.

75 In *Kumra*, a similar, albeit shortened, set of Bennett factors is set out at para. 61.

76 The decision of our Court of Appeal in *Chow* merely confirms the appointment of a receiver-manager without analysis of the justification for that appointment because justification was not necessary in the appeal decision. Similarly, the decision in *Alberta's B.E.S.T. Inc.* is not of assistance in determining the appropriate test because that decision does not deal with the appointment of a receiver-manager and that decision relies on a decision of our court in a case management situation where the case manager ordered 5 representative claims to be tried - a situation which is in no way comparable to the situation here.

77 The legal analysis in the *Such* decision on which the applicant relies heavily has been overtaken, so far as the legal content of oppression is concerned, by the Supreme Court of Canada decision in *BCE Inc., Re*. Insofar as the interlocutory nature of the remedy is concerned, the judge in that case did not analyse the requirements for obtaining an interlocutory remedy; it seems likely, given the analysis that was made, that the judge merely came to the conclusion that, in contemporary terms, the dictates of fairness were overwhelming. In other words, that decision is important insofar as it is fact-driven, not for the legal analysis of the remedies available.

78 In my view, in light of the evidence in this particular case which will be reviewed shortly, it is not necessary to determine whether or not the existence of deadlock is a sufficient basis for the appointment of an interim receiver-manager if the tripartite test cannot be satisfied.

79 Finally, I note that - for reasons that are obvious - an undertaking in damages is typically required on applications for interlocutory injunctions in commercial matters. I agree with Romaine J's approach in *MTM Commercial Trust* that it is equally useful to establish such a standard with respect to the interim application for a receiver-manager in a corporate context.

5. How does the test apply in the circumstances here?

80 Before commencing an analysis of each branch of the tripartite test and of the dictates of fairness in the situation here, I remind myself that the remedy requested is equitable relief, in other words that the court has a discretion to grant the relief requested - rather than an obligation to grant the relief upon proof of the underlying requirements - although that discretion must, of course, be exercised judicially. I also remind myself that the relief requested here is interlocutory in nature, i.e. it is requested prior to the trial of highly contested factual issues.

a) The tripartite test

(i) Is there a serious issue to be tried?

81 There are two main issues that must be tried here: has Mr. Murphy been oppressed by the respondents in the way in which they have conducted the CCS business and has he been oppressed by the respondents in the way in which the share register and corporate documents have been executed..

82 All parties agree that there are serious issues to be tried.

83 The point of this branch of the test is to weed out applicants for interlocutory relief who don't have a serious claim to the final relief which they are seeking. This case is somewhat unusual in that, although it is clear that Mr. Murphy has serious grievances which must be explored relating to the way in which his multi-million dollar investment is being managed, it is equally clear that the respondents have serious grievances which must be explored relating to the way in which the corporate structure is being

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used. The application is ironic: Mr. Murphy complains, essentially, about the lack of record keeping by Margaret Cahill and her management, whereas Margaret Cahill complains that Mr. Murphy refuses to recognize the corporate records which are extant.

84 What is also clear is that this is not a case like *Seymour Resources Ltd.*, cited by the applicant, where the court is able to make determinations on the basis of affidavit evidence. On the contrary, the affidavit evidence here is highly contested.

85 As explained above, in my opinion contemporary Canadian corporate law does not suggest that an applicant who establishes a strong *prima facie* case of oppression can expect that a court will grant the request for the appointment of an interim receiver-manager. On the contrary, for the reasons given above, I am of the view that the real test is, on the one hand, a lesser one than the one advanced by the applicant: an applicant need only prove that there is a serious issue to be tried, not that the applicant need prove a strong *prima facie* case of oppression. On the other hand, however, the real test is more onerous than the one advocated by the applicant: in addition to the serious issue branch, an applicant must also prove irreparable harm and the balance of convenience.

86 The applicant has greatly emphasized the evidence which he asserts constitutes a strong *prima facie* case of oppression. Because of the view which I have taken of the applicable law, I will not exhaustively review the applicant's argument in support of his strong *prima facie* case argument. As I have said, Mr. Murphy has amply established that there are serious oppression issues to be tried. Really, no more needs to be said with respect to the first branch of the tripartite test. Nevertheless, I will add that all of the evidence advanced by Mr. Murphy in relation to the establishment of oppression - the failing to hold formal shareholder meetings, the failure to provide information, the loss of money, the misuse of corporate assets, the way in which private residences were acquired, the payment of professional fees which may not relate to corporate business, incurring penalties for late payment of taxes, shoebox accounting generally, etc., etc. - does not constitute in the circumstances here, a strong *prima facie* case of oppression. Rather, in light not only of the affidavit evidence provided by the respondents but also the comments of the Inspector with respect to the Inspector's assessment of the respondents' responses, the court is left with only the realization that the oppression issue must be tried because there are serious credibility issues on both sides. To take one small example: Mr. Murphy complains about his inability to get financial information about the companies. However, he does not acknowledge the fact that he originally was content to receive only the barest possible information about the operation of the companies and that when his change of attitude arose he often made it impossible for the shareholders to act and for there to be effective interaction between the directors. To take another small example: even if it were true that the companies initially paid for some expenses that were later properly characterized as personal rather than corporate expenses, the initial recording of expenses as corporate does not, by itself, constitute *prima facie* evidence of oppression. It only constitutes evidence of possible oppression which must be tried.

87 In the end, however, having recognized that there are serious issues to be tried, Mr. Murphy cannot expect to receive the relief which he seeks unless he satisfies the remaining two branches of the tripartite test.

(ii) Will Mr. Murphy, or the Trust, suffer irreparable consequences if an interim receiver-manager is not appointed?

88 Mr. Murphy argues that he and the trust are at risk of irreparable harm if an interim receiver-manager is not appointed.

89 I cannot accept that argument.

90 The first aspect of this issue is the risk of need for immediate corporate action. No such need is apparent on this application. The companies have neither initiated actions nor are being compelled to take action in the relatively near future, and certainly not before the triable issues could be fully heard on their merits.

91 In this context, I note that the applicant has complained of the lease proposal authorized by Margaret Cahill in relation to some of the lands owned by the companies. The applicant strongly objected to the leasing initiative, even though he placed Margaret Cahill in charge of the day to day operation of the companies, even though the leasing of the property would presumably conform to the overall objective when the applicant first invested money in the Edmonton properties, and even though the applicant refuses to take the steps set out in the USA to resolve disputes between himself and Margaret because he denies the

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validity of the USA which he appears to have signed. At his request, this leasing initiative has now been abandoned. Nothing of importance is therefore on the horizon in terms of the need for corporate decision making.

92 The second aspect of this issue is the risk of financial loss if the relief requested is not granted. Mr. Murphy has not established that he or the Trust will suffer irreparable financial harm unless an interim receiver-manager is appointed. In coming to that conclusion, I rely on the following:

• Mr. Murphy's objective in funding the Edmonton investment is disputed. As strange as it may appear, it may be that Mr. Murphy was not concerned with an operating profit from the salvage business but was, instead, intent upon making a profit as a result of the increase in the value of the real property in which he invested. The evidence available on this application is not overwhelming on one side or the other of the objective issue. On the one hand, Mr. Murphy put his older sister who had no experience in the management of an operating salvage business in charge of the day to day operations of the business and invested heavily in land, but did not invest heavily in operating capital. On the other hand, Mr. Murphy did invest in acquiring machinery presumably for the better operation of the business. In any event, however, the opinion of the Inspector is that the business outlook for the companies is at least as dependent on the actions of Mr. Murphy as on the actions of Ms. Cahill. For example, the problem identified at para. 22(b) of the Second Report is, as to the first half of the sentence, something which may be attributable in part to Ms. Cahill, but, as to the second half of the sentence, is attributable to Mr. Murphy;

• the various real property appraisals provided by the parties establish that, even using the lowest appraisals, the lands have appreciated considerably in value since the date of investment. Indeed, an unsolicited offer for the purchase of one of the three property groups establishes that the appraisals are, generally, reliable; had Mr. Murphy accepted the offer for the one property, the companies would have recovered a little over half of the original investment. There is no suggestion in any of the materials before me that the land values are likely to decrease in the foreseeable future;

• given the increase in the value of the property owned by the companies, and the apparent equity interest of Margaret Cahill as shown on the face of documents apparently executed by Mr. Murphy, Ms. Cahill's equity stake in the companies is high enough that, if it were eventually found that she has caused financial harm to the companies, the damages found against her could be offset from her equity interest. Mr. Murphy suggests that an analysis of this sort is tantamount to condoning theft from the company; with respect, I disagree. I don't disagree with the principle that theft should not be condoned merely because the thief has the financial resources to repay the theft; the whole of the criminal law relating to theft and fraud makes that abundantly clear. The point on which I disagree is whether theft has been proved here. The evidence available on this application does not establish theft by Ms. Cahill from the company. I accept that the salvage business is a cash business and that such a business must, therefore, have adequate cash management systems and that this group of companies did not have such adequate systems. Whether that was due to ineptitude or lack of operating capital is not yet clear. Whether the vulnerability of the system to material misappropriation in fact came to pass is one of the questions of fact which remains to be determined.

93 In summary, therefore, I conclude that Mr. Murphy has not established that he and/or the Trust will suffer irreparable harm if an interim receiver-manager is not appointed.

(iii) Does the balance of convenience favour the appointment of an interim receiver-manager?

94 The balance of convenience does not favour the appointment of an interim receiver-manager. In coming to this conclusion, I rely on the following:

• the appointment of a receiver-manager would deal only with the management concerns raised by Mr. Murphy; it would not deal with the corporate structure concerns of the Cahills. Moreover, the information before the court on this application is that Mr. Murphy has access to considerable financial resources as established not only by the size of his initial investment in the CCS Group, but also by the indemnity agreement which he has made with the former employee of the CCS Group. In comparison, although the evidence on this application is that Ms. Cahill has clear title to the home in which she resides, she

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has no source of income other than the full time work she has done for the CCS Group since 2006. If Mr. Murphy were to be successful in obtaining the appointment of a receiver-manager, that official might conceivably terminate both Ms. Cahill's employment and that of her son Chris Cahill Jr. While Mr. Murphy would then have unimpaired resources to deal with the corporate structure dispute, the Cahills would find themselves with minimal resources with which to advance their position. Even though the Cahills have executed documents in support of their position, without significant financial resources to maintain their position in legal proceedings, they might not be financially able to put forward their best position;

• at para. 36 of the Inspector's Third Report, there is a comment about the financial position of the CCS Group. The exact words used by the Inspector are not reproduced here for the privacy concerns alluded to earlier. I accept the Inspector's assessment of the financial position of the CCS Group with respect to its ongoing operations; indeed, I am of the view that all of the information provided to the Inspector amply supports the Inspector's conclusion. It is true that an interim receiver-manager could do many things the Inspector cannot do. However, the appointment of a receiver-manager would not solve the crucial problem of the CCS Group which is the resolution of the dispute about the corporate structure;

95 In summary with respect to the tripartite test, although Mr. Murphy has satisfied the first branch of the test, he has failed to satisfy the remaining two branches.

b) The equitable issues

96 As indicated above, I am of the view that, in addition to the tripartite test, a court which is asked to appoint an interim receiver-manager for a corporation must also consider the equities, and not only the narrow legalities, of the situation. However, in my view the case law establishes that, with the exception of the potential relief from compliance with the tripartite test arising out of the application of equitable principles, the general approach to the appointment of a receiver-manager of a corporation under the provisions of the *Judicature Act* are, generally, the same as those which apply to the granting of such relief under corporate legislation.

97 I accept that another way of referring to the equitable issues would be to say that where the evidence of oppression is overwhelming, an applicant for relief in Mr. Murphy's position need not satisfy the tripartite test.

(i) Are the dictates of fairness so overwhelming that they require the appointment of a receiver-manager?

98 In my view, the dictates of fairness are not so overwhelming in the circumstances here that they compensate for Mr. Murphy's inability to satisfy the last two branches of the tripartite test.

99 In coming to that conclusion, I have taken the following into account:

• the reasonable expectations of the parties would not be served by the appointment of an interim receiver-manager. When Mr. Murphy appointed Ms. Cahill as the day to day manager of the CCS Group, he was aware of her lack of business experience. Since there is no evidence that, under Ms. Cahill's management, the CCS Group abandoned or modified the internal controls that were in place when Mr. Murphy acquired the businesses and there is no evidence that Mr. Murphy provided funding to improve the internal controls that were practicable given the operating structure at the time of the acquisition, it is not reasonable for Mr. Murphy to expect that Ms. Cahill would prove to be a sufficiently sophisticated manager to be able to deal adequately with an under-funded operation;

• the only deadlock which has arisen in the circumstances here has been created by Mr. Murphy. The executed documents relating to the corporate structure provide a mechanism for resolving deadlock - the decision of an arbitrator. It would be unfair for Mr. Murphy to both refuse to comply with executed documents which provide a mechanism for dealing with deadlock and at the same time to insist on receiving the benefit of a court order based on deadlock which he has created;

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(ii) Timing

100 Finally, I note that the applicant concedes that he could be ready for trial almost immediately. The respondents agree that they are also virtually ready for trial. This straightforward admission by Mr. Murphy attracts the application of the following commentary made by Sharpe J. in his authoritative text as reproduced in *Connelly*:

> 2.110 Ideally, the problem could be avoided were it possible to devise procedures to provide for immediate final resolution of such cases on the merits. However, in the absence of immediate and final resolution, the task of the court is to balance the risk of harm to the defendant, inherent in granting remedial relief before the merits of the dispute can be fully explored, against the risk that the plaintiff's rights will be significantly impaired in the time awaiting the trial.

101 Here, the fact that all parties agree that they can be ready for trial in very short order is a strong factor militating against the granting of interlocutory relief where there is no immediate danger to the applicant's interests and where the facts are so hotly contested that only a trial can safely resolve the contested issues.

102 In summary, therefore, the dictates of fairness are not so overwhelming in the circumstances here that they relieve Mr. Murphy with the obligation to satisfy the second and third branches of the tripartite test.

6. Costs

103 If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Application dismissed.

AppendixA

Sections 242 and 243 of Alberta's *Business Corporations Act* read as follows:

> **Relief by Court on the ground of oppression or unfairness**
>
> 242(1) A complainant may apply to the Court for an order under this section.
>
> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> > (a) an order restraining the conduct complained of;
> >
> > (b) an order appointing a receiver or receiver-manager;
> >
> > (c) an order to regulate a corporation's affairs by amending the articles or bylaws;

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(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

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Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

Section 13 of Alberta's *Judicature Act* reads as follows; Mr. Murphy relies on 13(2).:

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

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TAB 7

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Headnote

Receivers --- Appointment — General

Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

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FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

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11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable

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apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

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b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all,

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but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

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37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

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TAB 8

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495,
[2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies and A Inc. were complicit in fraud perpetrated by B — S Corp. was placed into receivership — Investors brought application to have same receiver appointed over assets and undertakings of A Inc. and companies owned by B and S — Application granted — Although S was not involved directly in proceedings before commission, his companies and A Inc. were subject of investigation in view of flow of monies — B's companies, S's companies and A Inc. were involved in receipt and transfer of tens of millions of dollars which flowed freely between B's companies and S's companies — There was no evidence put forward by S to lend any credence to position that he was conducting legitimate business at arm's length with B — There was evidence which suggested contrary — S and his companies received over $50 million directly or indirectly from B and his companies and there was no accounting for any of these monies — B was directing mind of A Inc. and A Inc. shared address and director with S Corp. — There was real risk of irreparable harm in wasting of proposed receivership companies' assets if no order was made — Appointment of receiver would allow assets to be preserved which was essential given nature of claim — Balance of convenience favoured

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placement of receiver — Receiver would be able to preserve assets and further investigate whereabouts of any other assets — There was no evidence of any harm to companies by placement of receiver.

Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies were complicit in fraud perpetrated by B — Investors brought application for attachment order against S — Application granted — In order to obtain attachment order, investors had to show that there was reasonable likelihood of success at trial — S and his companies received between $50 and 80 million in investor funds — There had been no accounting with respect to these funds — S had to do more than simply say he never had contact with investors and that he did not solicit funds from them directly — Looking at conclusions of commission, there was little doubt that S and his companies were key element in raising and dissipation of funds — S appeared to have been key element in fraud perpetrated by B.

APPLICATION by investors for receivership and attachment orders.

***G.C. Hawco J.*:**

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

4 Mr. Quilling is granted an Attachment Order against Mr. Sorenson.

Background

5 By way of brief background, in May and June of 2006, a hearing took place before the Alberta Securities Commission ("ASC") against Milowe Allen Brost, one of two Respondents, and others, with respect to allegations of misrepresentations and fraud, relating to Strategic and investors in Strategic. On February 16, 2007, the ASC found that Strategic and a number of their representatives, specifically Edna Forrest, Carol Weeks, Bradley Regier and Mr. Brost, were responsible for false or misleading statements in an Offering Memoranda and that all of those parties engaged in a course of conduct that amounted to a fraud on the shareholders of Strategic. Mr. Sorenson was not a named party to the ASC hearing and did not appear, but was featured prominently in the deliberations and findings of the ASC.

6 What appears to be fairly clear from the ASC hearings is that Mr. Brost and Strategic were involved in a massive fraudulent scheme whereby the Applicants and other investors were induced to trust Mr. Brost and his associates with large amounts of money to be invested on their behalf. The information which was provided to the investors has been determined to be false. The total amount of money received by Mr. Brost and his associates was upward of $500 million. None has been recovered.

7 The decision of the ASC was appealed to our Alberta Court of Appeal. On October 3, 2008, the Court dismissed the appeals by Mr. Brost, Strategic and others. *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (Alta. C.A.).

8 In paragraph 20 and 21*o*f the Court of Appeal's decision, it stated:

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> 20. The Commission summarized the fraudulent scheme, and the roles of each of the Appellants played in that scheme as follows (at para. 13 of the *Sanctions Decision):*
>
> > ... Brost was at the centre of the activities of Strategic and alternatives and ... when he developed Strategic and his business plan, he had in mind the involvement of Gary Sorenson ("Sorenson") and Art (Arthur) Wigmore ("Wigmore") [neither of whom were involved in the proceedings before the Commission] and the funding of mining ventures of either or both of them (as indeed incurred in respect of ventures within the Merendon orbit).... [The] plan was to lure public investor (with promises of high returns and safety along with tantalizing references to gold) into putting money into securities of Strategic - essentially a shell of a company whose main (but undisclosed) function was to finance Sorenson's mining ventures. ...
>
> 21. The Commission described the materials that Alternatives put out to market Strategic shares as "highly promotional", "factually weak" and "clearly designed to entice investors." It noted blatant untruths and misrepresentations in those materials. For example, it noted that Strategic's shares were touted as being secured by precious metals when that clearly was not the case. The Commission was convinced that Strategic investors would not see the returns they expected to realize on their investments and was doubtful that they would recover much of the money they paid.

9 In paragraph 42, the Court concluded that it was reasonable for the ASC to conclude that each of the Appellants engaged in conduct that amounted to regulatory fraud. It went on to say, at para. 47:

> We are of the view that there was evidence upon which the Commission could reasonably conclude, on a balance of probabilities, that Brost was responsible for making false and misleading statements to, and participating in a fraud on, investors.

The Court went on to dismiss the Appeals.

10 Pursuant to a Notice of Hearing dated May 17, 2009, the ASC has commenced proceedings against Arbour, Brost, IFFL, Sorenson, MMCL and a number of additional parties. The Notice of Hearing alleges, among other things, that the Respondents engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors. That hearing is on-going.

Receivership

11 As mentioned, Strategic has been placed into receivership. Mr. Quilling has delivered two reports. The Applicants and others are, or were, investors who allege that the Respondents conspired and acted jointly together to defraud them of funds through the use of an investment scheme that operated in the same way as the investment scheme alleged and referred to in the ASC hearing in 2006 and in the Strategic action.

12 The hearing before the ASC and the matters heard by this Court and our Court of Appeal concerned Strategic and Mr. Brost. Mr. Sorenson and his companies (collectively referred to as the Merendon Companies) were not parties to those proceedings. Neither was Arbour a party.

13 The Applicants allege that Mr. Sorenson, the Merendon companies and Arbour are complicit in the fraud perpetrated by Mr. Brost. They seek to have Mr. Quilling appointed as Receiver of the Respondent companies and seek to have an injunction or attachment order against Mr. Sorenson.

14 Mr. Sorenson states that he was not a party to the original ASC hearings and denies even having anything to do with Mr. Brost's investment schemes. He admits to having been involved in "arm's length business dealings with Mr. Brost and certain of his corporate entities" but denies having been in business with Mr. Brost. I must assume he means that he has not conducted any nefarious business with Mr. Brost.

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15 Mr. Sorenson objects to the evidence of Mr. Quilling being received because Mr. Quilling relies upon certain findings of the ASC. He argues that the ASC was not bound by the rules of evidence. Contrary to those rules, the ASC received and relied upon hearsay evidence. As neither Mr. Sorenson nor his companies were parties to that proceeding, the evidence ought not be relied upon. Nor should any of the ASC reasoning or findings be relied upon.

16 The argument of the Applicants is that their case is not founded upon any hearsay evidence which may be found in Mr. Quilling's affidavit, but rather upon the evidence of the financial documents which had been placed before the ASC and which have been examined by Mr. Quilling, as well as the affidavit of Mr. Sorenson and his cross-examination upon that affidavit.

17 What must be born in mind is that the Court of Appeal of this province has considered the decisions of the ASC in some detail and has upheld those decisions with respect to its findings relating to false and misleading statements and misrepresentations of Mr. Brost and others involved with Strategic and the related corporate vehicles. The ASC found that the Offering Memoranda "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money". The ASC further found that fraud had been perpetrated on the investors, who include the Applicants.

18 The Court considered the grounds of appeal of Mr. Brost and the others and, in its analysis referred to the arguments of the Appellants which included the objection to the admission of the hearsay evidence. In paragraph 34, the Court stated:"The Commission acknowledged that transcripts of investigative interviews are not the same as live testimony in that hearsay evidence can be problematic. It treated the impugned hearsay evidence with caution when assessing its value and reliability." In paragraph 36, the Court concluded that the Appellant's arguments (including its arguments to exclude the hearsay evidence) were without merit.

19 Clearly, Mr. Sorenson was not involved directly, as a party, in the previous proceedings before the ASC. Just as clearly, however, his Merendon companies and Arbour were the subject of investigation in view of the flow of monies that went through Mr. Brost, Strategic and his related companies including IFFL and Capital Alternatives. Mr. Brost was the principle of Strategic, Capital Alternatives, IFFL and Merendon Mining (Colorado). These companies and Mr. Sorenson's Merendon companies, and Arbour were involved in the receipt and transfer of tens of millions of dollars which flowed freely between Mr. Brost's companies and Mr. Sorenson's companies.

20 MMCL received over $26 million from Mr. Brost's company - IFFL. MMCL purchased a mine in Tulameen, British Columbia for $1 million and sold it shortly after to Strategic for $9.6 million. That mine was held out by Strategic to be a prime property. It was information and belief of Sgt. Fuller that it was a sham. That appears to be confirmed from Mr. Quilling's investigation.

21 Arbour went from an insolvent company to one loaning $39 million in investors funds in a matter of months to MMCL. Mr. Sorenson claims that MMCL extinguished its obligation to Arbour by selling back to Arbour 25% interest in Tar Sand Recovery Limited. Nothing has been presented by Mr. Sorenson to justify Tar Sand's worth.

22 SGD was another Brost/Sorenson company which received money from Strategic and then directed huge sums of money (over $50 million) to MMCL. Again, no accounting is offered by Mr. Sorenson. Mr. Sorenson simply says that these were monies lent to MMCL and that the debt was retired. The documentation as to how it was retired and the documentation with respect to the value of any assets transferred is sadly lacking. There is simply no evidence put forward by Mr. Sorenson to lend any credence to his position that he was conducting a legitimate business at arm's length with Mr. Brost. There is evidence which suggests the contrary.

23 Mr. Quilling's report of August 26, 2008 states that as a result of information he has received, the Merendon Mining operation in Honduras is a sham as well. I have already determined that the Tulameen mine is basically a sham.

24 Both Mr. Brost and Mr. Sorenson were shareholders of SGD which provided funds to MMCL. Mr. Sorenson was aware that funds were being provided to MMCL through SGD and that they were being sourced from IFFL.

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25 SGD existed for the sole purpose of channelling tens of millions of dollars of IFFL members' money to MMCL in exchange for no discernable value.

26 Mr. Sorenson argues he is being tarred by Mr. Brost's brush yet says that he does not have to disprove what is alleged. He continues to argue that he had no involvement in Strategic. Yet, it was Mr. Brost's evidence that Mr. Sorenson initially agreed to, and did become, a director of Strategic.

27 Mr. Sorenson continues to assert that the Honduran mine is continuing to produce gold while the evidence of Mr. Quilling, as fully set out in his report, is that the mine is a sham.

28 Serious allegations have been made against Mr. Sorenson and his companies in these proceedings. Mr. Sorenson has filed an affidavit and has been cross-examined on it. However, he has failed to produce any documentation which would speak to the value of any companies owned by him or that would answer in any manner the allegations of either fraud or dissipation of assets within the companies. Indeed, neither Mr. Sorenson nor MMCL have put forth any independent or reliable evidence of legitimate operations or value in MMCL or any of its subsidiaries or to account for any of the tens of millions of dollars of investors funds that Mr. Sorenson admits that his companies received. His position is that "only" $26 million went to his companies through Mr. Brost and that these were arm's length transactions which were legitimately retired.

29 I am satisfied that Mr. Sorenson and his companies have indeed received over $50 million directly or indirectly from Mr. Brost and his companies. There is no accounting for any of these monies. Mr. Sorenson's explanation of repaying the $26 million loan lacks credibility.

30 With respect to Arbour, Mr. Brost was its directing mind. Arbour and Strategic shared an address and had at least one common director. Arbour received $820,000.00 from Strategic and has accounted for none of it. Arbour was used as a flow-through to send investment funds to Mr. Sorenson's company, MMCL. Arbour appears to be insolvent at this time. It is not carrying on business presently. It has been the recipient of at least $28 million from the Applicants and other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

32 In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am

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satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

38 Mr. Sorenson appears to have gone to great lengths to make himself judgment-proof. He claims that he has not dissipated assets yet refuses to answer specific questions on his cross-examination with respect to asset dissipation or the presence of any bank accounts he may have.

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements of Mr. Brost, Mr. Sorenson must do more than simply say that he never had any contact with these Applicants and that he did not solicit funds from them directly. When I looked at the conclusions of the ASC there is little doubt but that Mr. Sorenson and his companies were a key element in the raising and dissipation of those funds. He appears to have been a key element in the fraud perpetrated by Mr. Brost.

40 In the end result, I am satisfied that an Attachment Order is appropriate and such Order will issue together with the Receivership Order as indicated.

Application granted.

Footnotes

* Affirmed at *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.).

End of Document

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TAB 9

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — General principles

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Pursuant to s. 50(12) of BIA, proposal would not likely be accepted by creditors, and was deemed refused — ATB had true veto, it intended to vote no, and proposal would necessarily fail — ATB would vote no because it regarded proposal as unsatisfactory — Focus was on existing proposal — None of identified ATB steps showed absence of good faith or showed commercial unreasonableness — ATB was not attempting to pursue improper purpose, and was pursuing its interests and asserting its rights within bounds of and for purposes squarely within Canadian insolvency system — Given its secured position, BIA provisions governing secured creditors and approval of proposals, and proposal itself, and ATB was entitled to oppose proposal and seek deemed refused ruling — ATB believed, on reasonable or defensible or arguable grounds, that it would fare better by receivership than under proposal — ATB was not acting perversely or vindictively or otherwise than in its own economic interests, and it was not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50(12).

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming

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joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

APPLICATION by secured creditor for orders deeming refused joint proposal made by three related corporations, lifting proposal stay of proceedings, and appointing receiver and manager.

***M.J. Lema J.*:**

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the *Bankruptcy and Insolvency Act* (*BIA*) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

• Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

• after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

• the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

• Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

• however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

• on March 22, 2019 and in response, Schendel filed a notice of intention to file a proposal under s. 50.4(1) *BIA*, triggering a stay (under s. 69.1 *BIA*) of enforcement action by ATB and other creditors;

• on April 18, 2019, Mah J. granted a 45-day extension and dismissed an application by ATB to lift the stay and appoint a receiver or interim receiver;

• on June 3, 2019, Little J. granted an interim extension to allow time for a further extension application;

• on June 11, 2019, Yamauchi J. granted a further extension, to July 11, 2019;

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• on July 10, 2019, Schendel filed a proposal to ATB and its other creditors;

• the proposal treats ATB's claim (approximately $22 million) in two segments: it gauges the secured portion of ATB's claim at $11.2 million and the unsecured portion at $11 million. ATB's secured claim is the sole occupant of Secured Class; its unsecured portion joins other unsecured creditors in steerage. (Various other secured creditors are excluded from the proposal);

• by virtue of the solo nature of its secured claim, ATB has a veto over the proposal i.e. if it votes no to the proposal, it will fail, per para 62(2)(b) *BIA*. (ATB does not contest that aspect);

• for whatever difference it makes, ATB may also have a veto in the unsecured class, at least for Mechanical;

• ATB contends that, with no order consolidating the affairs of the three Schendel companies for proposal purposes, Schendel was not authorized to file a joint proposal;

• assuming that a joint proposal is authorized, the creditors' meeting to vote on it is set for July 31, 2019;

• on July 12, 2019, ATB applied for the deemed-refusal and stay-lifting orders described at the outset and heard at the application on July 16, 2019;

• ATB intends to vote no at the meeting, based on having lost confidence in Schendel's management, on Schendel's ongoing losses, on concerns about preferential payments having been made to certain pre-NOI creditors, on losing access (under the proposal) to personal guarantees, and on its perception that it will fare better in a bankruptcy or receivership than under the proposal (among other grounds);

• it argues that, in light of that position, which it maintains is fixed, the failure of the proposal on July 31, 2019 is a foregone conclusion and that, accordingly, the proposal should be "deemed refused" under ss. 50(12) or the s. 69.1 stay should be lifted (or both), followed the appointment of PwC as receiver-manager; and

• as noted, Schendel is opposed, citing the possibility of an amended (and enhanced) proposal between July 16 and 31 and, more fundamentally, based on what is perceives as the commercial unreasonableness of and inequitable and improper conduct by ATB. It believes the proposal process should continue until July 31 at which time the proposal (existing or amended) can be voted on by all of its creditors.

C. Issues

4 The issues are:

1. whether the proposal should be deemed refused under ss. 50(12), which has three separate triggers (any one of which is sufficient):

• the debtor has not acted, or is not acting, in good faith and with due diligence;

• the proposal will not likely be accepted by the creditors; or

• the creditors as a whole would be materially prejudiced if the application under this subsection is rejected;

2. in any case, whether the s. 69.1 stay should be lifted under s. 69.4, which has two separate triggers (either of which is sufficient):

• the creditor is likely to be materially prejudiced by the continued operation of s. 69.1; or

• it is inequitable on other grounds to make such a declaration; and

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3. if ss. 50(12) is satisfied (in which case Schendel will be deemed bankrupt and ATB, as a secured creditor, will be free to enforce its security) or if the stay is lifted (permitting the same thing), ATB intends to enforce its security, and the issue becomes whether PwC should be appointed receiver and manager of Schendel.

D. Analysis

5 I start by examining the second branch of ss. 50(12), namely, whether the proposal will not likely be accepted by the creditors. (I see ss 50(12) as the more fundamental provision: if it applies, the proposal proceeding is eclipsed. The "stay lift" application contemplates an ongoing proposal.)

6 The answer is yes: the proposal will not likely to be accepted — in fact, it is almost *guaranteed* not to be accepted.

7 My reasoning is outlined below.

ATB veto

8 ATB has a true veto, which Schendel acknowledges: if ATB votes no, the proposal will necessarily fail. (ATB is the only creditor in the "Affected Secured Creditors" class, and the proposal require a yes vote by ATB for the proposal to succeed: Article 9.1.)

9 ATB intends to vote no. Its evidence is that that position will not change i.e. it would necessarily vote no at the July 31 meeting (if it occurs).

10 It would vote no because it regards the proposal as unsatisfactory, for reasons including:

• it is effectively being asked to take a 50 per cent discount on its claim;

• the "secured" portion of its claim will be replaced by two unsecured promissory notes, the payment of one of which depends on the (uncertain) outcome of certain events;

• the unsecured portion of its claim may be effectively blocked by the proposal mechanics;

• ATB already has first-position security on the assets out of which Schendel proposes to pay it under the proposal;

• it undercuts ATB's recourse against five guarantees provided by individuals associated with the Schendel; and

• overall, ATB believes it will fare better under a bankruptcy.

Uncertainty over possible amendments

11 While Schendel's evidence includes the details of a potential deal with a third party, which it described as "possibly" leading to a sweetened amended proposal, the evidence does not disclose the (even estimated) timing of the deal, its potential terms, the likelihood of consummation, or by how much the proposal's terms might be enhanced as a result.

12 Pointing to almost 40 possible deals or other lifelines disclosed by the Schendel's evidence, none of which came to fruition and the vague details of the latest potential deal, ATB sees next-to-no chance of an enhanced proposal coming forward at this stage.

Focus of ss 50(12) BIA on proposal "as is"

13 In any case, the focus is on the existing proposal. Subsection 50(12) refers to "the proposal" being deemed refused if the court is satisfied that "the proposal" will not likely be accepted i.e. nothing in the provision contemplates an amendment or how it might be received by the creditors.

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14 Where a creditor seeks to have the proposal deemed refused, it is effectively saying that:

• it does not support the proposal; *and*

• it sees no prospect of an acceptable amended proposal.

15 Otherwise, the creditor would presumably be prepared to wait, through to the vote meeting, to see if worthwhile amendments might be proposed.

16 Subsection 50(12) allows a veto creditor in such circumstances (opposed to proposal; no prospect of acceptable amendments) to fast-forward to the inevitable result i.e. the proposal's termination.

17 The proposal proponent's reaction, as here, may be to say "wait, there may be a better proposal soon." The answer to that is:

• this is the proposal it made;

• the focus of the ss 50(12) exercise is the proposal *as filed*;

• the proposal cannot be withdrawn (ss 50(4) *BIA*);

• the applicant creditor had the option of waiting, until the vote meeting, for proposal "sweetening";

• if the applicant perceived the likelihood or even a real possibility of worthwhile amendments, it would not have brought the "deemed refused" application;

• even if it had seen such likelihood or possibility, it is entitled to balance the potential upside of waiting against the downside e.g. the costs associated with waiting;

• if the debtor had needed more time (i.e. to put forward a different, and better, proposal), it had the option (as here) of seeking another extension of the notice-of-intention period (six-month maximum had not been reached);

• having not done so (instead, filing the proposal now under review), the debtor must live with that proposal. For the ss. 50(12) exercise, *that* proposal is the only slide under the microscope. The possibility of a different, and better, slide is *not* a factor;

• in other words, by laying down a proposal, the proponent takes the risk that a creditor (or group of creditors) will say "this is not good enough" and move for termination under ss 50(12). The section weighs who is supporting and who is not and whether the outcome at the voting stage is "likely" refusal; and

• here, with ATB having an effective veto, its "opposed" stance is determinative: *this* proposal will fail. The possibility of a different proposal down the road does not enter into the equation.

Subsection 50(12) exists for a reason

18 If Parliament had intended an "unabridgeable" period between the proposal filing and the vote meeting (whether to ensure "full consideration" by the creditors, an opportunity for the debtor to propose amendments, or otherwise), it would not have included the "deemed refused" element in ss 50(4).

Case law recognizes impact of veto in "deemed refused" scenarios

19 In materially identical circumstances to those here, LaVigne J. held in *Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.* [1] :

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> *Sport Maska* [the veto-position creditor] asserts that the Proposal will not succeed, as there is no chance [it] will accept this Proposal, or any Proposal made by RBI. It therefore submits that it is not necessary or indeed practical, that a meeting of creditors be held, since it is already known that [it] will vote to defeat the Proposal.
>
> *It is obvious that no plan of arrangement can succeed without [its] approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance it cannot succeed.*
>
> *It is apparent that Sport Maska is overwhelmingly opposed to the plan. No persuasive argument was put forward as to why the vote should proceed in those circumstances.*
>
> *I am of the view that it is fruitless to proceed to a further stage with this Proposal.*
>
> RBI argues that while it may be appropriate for the Court to use its discretion when the Proposal has not yet been tabled, the Court should not use its discretion in the present case since RBI has made its Proposal and a meeting date has been set. I find that *it is easier for the Court to make a finding as to what the creditors are likely to do when the terms of the Proposal are known, and the meeting of the creditors is set to occur in the very near future such as in situations contemplated in subsection 50(12)*, then when the terms of the Proposal are unknown and the date of the meeting of creditors is to happen sometime later.
>
> RBI also argued that it may obtain sufficient financing to pay off completely the debt actually owed to Sport Maska. In my view, that is highly unlikely considering the evidence presently before this Court.
>
> *A creditor does not have to show beyond certainty that a Proposal would be rejected in order to be successful on a Motion under subsection 50(12). A creditor simply has to show that the Proposal would not likely be accepted by the creditors.*
>
> Therefore, on a balance of probabilities, based on the evidence before this Court, I am satisfied that the Proposal that was filed by RBI will not likely be accepted by the creditors. [emphasis added]

20 *Sport Maska* is anchored on a body of case law (reviewed in the decision) taking the same approach: where the writing is on the wall (with a veto-position creditor steadfastly opposed), the proposal may be, and has been, deemed refused or the proceedings otherwise terminated.

Same approach taken under CCAA

21 The same approach has been taken under the *Companies' Creditors Arrangement Act*: see, for example, the analysis of Butler J. in *Marine Drive Properties Ltd., Re*[2] :

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).
>
> *In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved*. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the

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secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

Good faith

22 Schendel argues that ATB has not acted in good faith or in a commercially reasonable way during their dealings relating to the fall-out of the halting, in September 2018, of work on the Grande Prairie Hospital project, through to mid-March 2019, when ATB demanded repayment. In particular it says that "ATB's conduct . . . was not consistent with it proposing to take immediate steps to enforce its security" (Schendel brief, p 4). On that aspect, it points to:

• its ATB account manager advising over the course of fall 2018 to spring 2019 that ATB would work cooperatively with Schendel to restructure its loan commitments;

• Schendel believing, in late February 2019, that its account with ATB was still in the hands of the account manager i.e. not under the effective control of ATB's special-credit group i.e. ATB did not make plain to it that the special-credit group was involved;

• an early March 2019 meeting where ATB advised that it was patient, was working through the issues, and was considering parking Schendel's debt;

• at a Schendel-ATB meeting on March 13, 2019, ATB outlining restructuring steps for Schendel with a three- to six-month horizon, starting later in March, once Schendel had provided certain information to ATB;

• at the same meeting, ATB advising Schendel that "this [was] not the end", instead, was part of the process and restructuring;

• at that meeting, and although ATB did disclose an intention to seek a receivership if certain conditions of the three- to - six month restructuring period were not achieved, it making no mention then of an intention to issue payment demands;

• ATB obtaining payables information requested at that meeting (understood by Schendel to assist in working through the restructuring period) and using it as evidence of Schendel's inability to carry on business; and

• later on March 13, 2019, ATB issuing demand letters and s. 244 *BIA* (intention to enforce security) notices.

23 Schendel maintains that, if it had known earlier that ATB had shifted to viewing the Schendel loans as seriously troubled, it would have taken more, and earlier, restructuring steps.

24 It also points to ATB demanding "commercially unreasonable" terms in proposed forbearance agreements (before the NOI was filed) that ultimately led nowhere.

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.* [3] and *Toronto-Dominion Bank v. Rismani* [4], as well as *Good Faith as an Organizing Principle in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back*, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

26 I note as well that academic commentary on the subject of creditors acting in good faith in insolvency proceedings has not suggested good-faith testing of creditors voting on proposals or arrangements i.e. outside of the "improper purpose" (i.e. abuse of system) contexts discussed below. In "*What Does "Good Faith" Mean in Insolvency Proceedings*?" [5], the authors suggest that imposing an explicit "vote in good faith" duty on creditors may "ultimately have a paralyzing effect on negotiations, add greater litigation costs, impair efficiency, and alter the carefully calibrated balance between the rights of creditors and their insolvent debtors."

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27 See also Professor Janis P. Sarra's article "*Requiring Nothing Less than Good Faith in Insolvency Proceedings*" [6], where she proposes a good-faith duty for creditors, but not to the extent of weighing voting decisions beyond "improper purpose" contexts.

28 In any case, I find that none of the identified ATB steps, alone or collectively, show an absence of good faith or show commercial unreasonableness. ATB had no duty to advise Schendel who at ATB was running or reviewing its account at any particular time. ATB was indeed working with, and funding, Schendel through a financial crunch for many months before and even after the hospital-work halt. [7] It was entitled to intensify its scrutiny of Schendel's loans and overall business condition as it did, to obtain more information via that scrutiny, and to demand payment (in light of commitment-letter defaults and, in any case, the demand character of the loans here) when it did, and to notify Schendel of its intention to enforce security per the *BIA*-prescribed notice period. ATB had no duty to forbear from enforcing its rights.

29 As for whether Schendel might have been able to pursue restructuring earlier and more effectively, and assuming that to be so, Schendel knew its own financial condition throughout. It was not incumbent on ATB to guide Schendel's rescue efforts. In any case, Schendel pointed to no material difference that earlier restructuring efforts might have made.

30 In any case, Schendel ended up filing a proposal, regardless of any perceived difficulties with ATB's conduct. That filing triggered a right for ATB (in fact, any Schendel creditor) to apply under ss. 50(12) for "deemed refusal." The narrow test (as noted) is whether the proposal is unlikely to be accepted.

31 As Schendel acknowledges, ATB is the sole occupant of the secured class, and the support of that class is necessary for proposal approval. Those are just "givens" in the circumstance here i.e. reflect ATB's position as Schendel's principal lender, its security, and the *BIA*'s treatment of secured creditors in proposals i.e. are not a function of ATB's conduct in its dealings with Schendel.

32 As for how ATB is using its veto position derived from those circumstances (i.e. to seek a "proposal deemed refused" ruling), Schendel argues that that decision is commercially unreasonable and inequitable. In support it cites cases such as *West Coast Logistics Ltd. (Re)* [8] and *Laserworks Computer Services Inc., Re* [9]

33 The Alberta Court of Appeal endorsed the *Laserworks* approach to "improper purpose" in *Promax Energy Inc. v. Lorne H. Reed & Associates Ltd.* [10]:

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

34 Those cases are distinguishable. They deal with creditors attempting to use the insolvency system for an improper purpose e.g. attempting to drive a competitor out of business or escaping from a royalty regime.

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35 No evidence here showed that ATB was attempting to pursue an improper purpose, whether within the meaning of those cases or otherwise. Instead, ATB was pursuing its interests and asserting its rights *within the bounds of, and for purposes squaring with, the Canadian insolvency system* i.e. recovering its loans.

36 In *Hypnotic Clubs Inc., Re* [11] , Cumming J. held:

> The intent and policy underlying the BIA is that *creditors* should consider and *vote* upon a *proposal* advanced pursuant to a NOI as they see fit in their own *self interest*. . . .
>
> . . .
>
> . . . the underlying policy of the BIA [includes] letting creditors *vote* as they choose in respect of accepting or rejecting a *proposal* .... [emphasis added]

37 Given its secured position, the *BIA* provisions governing secured creditors and the approval of proposals, and the proposal itself, ATB is entitled to oppose the proposal and, on the basis of that opposition, seek a "deemed refused" ruling.

38 By ATB's calculations it foresees materially greater recoveries in a bankruptcy or receiver than via the proposal. The proposal trustee is currently reviewing the "bankruptcy versus proposal" outcomes and is due to report shortly on that. Schendel does not agree with ATB; it filed the proposal on the basis it would produce a more favourable outcome for all the creditors, including ATB, than bankruptcy. It points to recovery estimates showing that ATB may fare better under the proposal than its low-end estimate of receivership recovery and may even recovery (slightly) more than its high-end estimate.

39 I make no ruling on the respective anticipated recoveries i.e. what is the likely better avenue recovery-wise. I simply note that ATB believes, on reasonable, or at least defensible, or at least arguable, grounds, that it will fare better by a receivership than under the proposal i.e. ATB is not acting perversely or vindictively or otherwise than in its own economic interests i.e. it is not pursuing any ulterior purposes.

40 To summarize here, I find that ATB has been acting in good faith and in a commercially reasonable way, including in deciding to oppose the proposal and seek a "deemed refused" ruling.

Enirgi Group Corp. v. Andover Mining Corp. ***also distinguishable***

41 Schendel also cited this decision. [12] It too is distinguishable, concerning a clash between a request for more time to file a proposal and a creditor seeking to terminate the proposal proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down "sight unseen."

42 In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on "proposal deemed refused" application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the *Judicature Act*. Schendel opposes.

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Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [13], Romaine J held:

The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

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> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
  - the Proposal is not viable;
  - the Debtors operate at a loss;
  - the Proposal will not be approved by [ATB]; and
  - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";
- per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";
- ATB has not provided evidence to support its receiver-related arguments; and

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• more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

• Schendel is a large enterprise with complex construction projects underway;

• coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

• recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

• ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

• Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

• ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

• as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

54 I note that, under section 33 of the draft order, "any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver . . . "

G. Closing note

55 I thank all counsel for their very helpful briefs and submissions.

56 On a final house-keeping note, I grant the order sought by Ms. Fisher in her July 17, 2019 email (concerning the sealing of a certain affidavit).

Application granted.

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Footnotes

1 2005 NBQB 394 (N.B. Q.B.) at paras 36-43

2 2009 BCSC 145 (B.C. S.C.) at paras 31 and 32

3 2018 ONSC 4669 (Ont. S.C.J.) at paras 13-15

4 2015 BCSC 596 (B.C. S.C.) at paras 31-37

5 Rogers, LA, Sieradzki D, and Kanter M, Journal of Insolvency in Canada, Vol 4 [2015] 55 at 77

6 2014 Annual Review of Insolvency Law (ed Janis P Sarra)

7 Affidavit of Alex Corbett filed April 4, 2019, paras 31-41

8 2017 BCSC 1970 (B.C. S.C.)

9 1998 NSCA 42 (N.S. C.A.)

10 2002 ABCA 239 (Alta. C.A.)

11 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) at paras 33 and 36

12 2013 BCSC 1833 (B.C. S.C.)

13 2002 ABQB 430 (Alta. Q.B.) at paras 26-32

14 2013 ABQB 335 (Alta. Q.B.) at para 71

End of Document

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TAB 10

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Natural resources --- Oil and gas — Oil and gas leases — Transfer of title

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

APPLICATION seeking order for appointment of receiver and manager of company's assets and undertaking.

***Donald Lee J.*:**

Introduction

1 This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

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Facts

2 Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

3 Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

4 The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of $567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

5 On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

6 By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

7 As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

8 On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

9 At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

10 On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58 which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

11 The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

12 The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

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> An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Parties' Positions and Analysis

13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

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Kasten's Submissions

14 The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

15 Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

17 The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc.*, 1992 ABCA 93 (Alta. C.A.); at para 10, [1992] 4 W.W.R. 499 (Alta. C.A.). Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at 576, (1971), [1972] 2 W.W.R. 28 (S.C.C.). The contract is assignable and subject to seizure.

Shamrock's Submissions

18 The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

19 Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not

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be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

22 Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

23 In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

24 In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

25 Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

26 After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

27 Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

28 Shamrock agrees that a Receiver could only be appointed over its personal property, which includes the oil when it is produced and removed from the ground. However, it contends that the authority of the Receiver does not extend to the lease or the sale of Sawn Lake Well since Kasten has no security over the PNG lease under the GSA and can only receive revenue from the Well. Shamrock takes the position that the oil and gas lease is a *profit à prendre*, which is an interest in land excluded under Alberta's *PPSA*, s 4(f).

29 I note that the Supreme Court of Canada in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58, [2008] 3 S.C.R. 166 (S.C.C.) [Saulnier] discussed the term "property" in the context of a commercial fishing licence under the *Bankruptcy and Insolvency*

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Act, RSC 1985, c B-3, s 2 [*BIA*] and *Nova Scotia's Personal Property Security Act*, SNS 1995-96, c 13 [*PPSA*]. The provision of the relevant section of Nova Scotia's *PPSA* is identical to that of *Alberta's Personal Property Security Act*, RSA 2000, c P-7.

30 The Supreme Court in *Saulnier* held that the *BIA* and *PPSA* should be interpreted in a way best suited to enable them accomplish their respective commercial purposes. Binnie, J, writing for the Court, observed that:

> [28] ... [A] fishing licence ... bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds ...
>
> [29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) ... The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.
>
> [30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on The Law of Real Property (4th ed. 1975), at p. 779:
>
> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree.
>
> And at p. 822:
>
> A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.
>
> [31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in ***Harper v. Minister for Sea Fisheries*** (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:
>
> A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]
>
> . . .
>
> [33] In my view these observations are helpful ... there are important points of analogy between the fishing licences issued to the appellant ***Saulnier*** and the form of common law property called a *profit à prendre* ...
>
> [34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.
>
> (emphasis added)

31 In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in *Saulnier*. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: *Saulnier* at para 29. The right to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": *Saulnier* at para 34.

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32 In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: *Saulnier* at para 34; *Stout & Co. LLP v. Chez Outdoors Ltd.*, 2009 ABQB 444 (Alta. Q.B.) at para 39, (2009), 9 Alta. L.R. (5th) 366 (Alta. Q.B.) [*Chez Outdoors*]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": *Chez Outdoors* at para 15. That right is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

33 This Court has the authority to make an Order either "unconditionally or on any terms and conditions" it thinks just, including a restriction of the powers of a Receiver and Manager if necessary in the circumstances of the case before it: *Judicature Act*, s 13(2).

34 Kasten seeks a court-appointed Receiver who is a court officer owing a fiduciary duty to all parties, including the debtor: *Philip's Manufacturing Ltd., Re* (1992), 92 D.L.R. (4th) 161 (B.C. C.A.) at para 17, [1992] 5 W.W.R. 549 (B.C. C.A.) (WL). It argues that the court-appointed Receiver would take instructions from the Court and not from Kasten. The Receiver would be bound to act in the best interests of all parties. In a *volte-face*, Kasten seeks in its supplemental brief that this Court should appoint it as a Receiver. There was no reason specifically advanced by Kasten for its new position.

35 Shamrock submits that a Consent Receivership Order should be granted and the Receiver should not be conferred with a power of sale. It wants the Order held in abeyance until April 1, 2013 or when Shamrock/Stout fails to make a payment of interest as scheduled, whichever occurs first, in order to allow for the sale of Sawn Lake Well.

36 The Respondent notes that Kasten now seeks to be appointed as the Receiver and Manager instead of the earlier proposed independent body corporate, MNP Ltd. which had given its consent to act as Receiver and Manager of Shamrock, the debtor.

37 In the absence of any clear objection to the appointment of MNP Ltd., an independent and neutral entity in this matter, an Order will issue to name MNP Ltd. as the court-appointed Receiver and Manager of all the current and future assets, undertakings and properties of Shamrock Oil and Gas Ltd. until Kasten and other creditors (secured and unsecured) are paid in full. The Receiver and Manager will have no power of sale, except as approved by an Order of this Court. However its authority is suspended until April 1, 2013 in order to accommodate any potential sale of Sawn Lake Well by Shamrock. To be clear, if Sawn Lake Well is not sold on or before April 1, 2013, the power and authority of the Receiver and Manager is to become effective immediately on that day.

38 If parties are unable to agree on costs, they should arrange to speak to me within 30 days of the issue of this decision.

Application granted.

End of Document

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TAB 11

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Subject: Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Applicant Australian company lent funds to respondent Ontario company under Facility Agreement (FA) — Parties to FA included mining company in Colombia owned by respondent — All amounts under FA became payable upon default — Applicant and respondent entered into general security agreement under which respondent charged all its assets — Parties and mining company entered into share pledge agreement which provided that, in event of default under FA, applicant had right to appoint receiver — In June 2014, respondent had insufficient funds to make interest payment, triggering default — Applicant demanded payment of outstanding amounts under FA, gave notice of intention to enforce security, began enforcing its pledge of shares in mining company, and replaced mining company's board of directors — Mining company's ousted CEO refused to relinquish control and sought creditor protection in Colombia — Applicant applied to appoint receiver over respondent's assets — Application granted — It was just and convenient to appoint receiver — In accordance with FA, respondent's default granted applicant right to seek appointment of receiver — Appointment of receiver was necessary to stabilize corporate governance of mining company, as respondent's wholly-owned subsidiary and its major asset — Failure to obtain additional financing for respondent and mining company might result in significant deterioration in value — Applicant was prepared to advance funds to receiver to fund receivership and mining company's liability, thereby preserving mining company's enterprise value.

APPLICATION to appoint receiver over respondent company's assets.

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

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5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

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15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

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(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

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34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

End of Document

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TAB 12

2012 BCSC 437
British Columbia Supreme Court [In Chambers]

Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.

2012 CarswellBC 813, 2012 BCSC 437, [2012] B.C.W.L.D.
4215, 217 A.C.W.S. (3d) 94, 24 C.P.C. (7th) 1, 93 C.B.R. (5th) 57

Canadian Imperial Bank of Commerce, Petitioner and Can-Pacific Farms Inc., Daljit Singh Kooner, Manjeet Samra and Raman Samra, Respondents

Burnyeat J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: Vancouver H100986

Counsel: G. Thompson, for Petitioner
K.E. Siddall, for Respondents

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Property

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Berry farm was foreclosed upon — Creditor brought application to appoint receiver — Receiver appointed — No compelling reason to not appoint receiver, and appointing receiver was normal course of affairs — Order nisi had been granted so that there was no doubt as to legitimacy of security — Order for conduct of sale had been granted and two offers had been received but without certain clauses being removed, and probable shortfall to creditor existed — No interest payments had been made for about 19 months — Efforts under Farm Debt Mediation Act failed — Creditor had diverted funds from sale of berries.

APPLICATION by creditor for appointment of receiver regarding property.

***Burnyeat J.*:**

1 These are foreclosure proceedings. This is an application pursuant to s. 143(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*B.I.A.*"), and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The application would see the appointment of KPMG as the Receiver of the property, which is a berry farm in the Lower Mainland ("Property"). The application requests that the Receiver have borrowing powers up to $75,000 and the ability to sell particular assets but with any sale transaction not to exceed $50,000 and the aggregate of all sales not to exceed $250,000. Can-Pacific Farms Inc. ("Can-Pacific") has also commenced proceedings pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*C.C.A.A.*")

Background

2 There was a loan in April of 2010 for $10 million to Can-Pacific with a guarantee by its principal and sole shareholder, Mr. Kooner. In support of that loan, a general security agreement and mortgage charging all of the property, assets and undertaking of Can-Pacific was provided.

3 In July 7, 2010, demand was made for repayment of the balance that was owing at that time, being roughly $7,500,000. As well, a notice of intention to enforce security was provided pursuant to both the *B.I.A.* and the *Farm Debt Mediation Act*, R.S.C. 1997, c. 21. No payments were made and Can-Pacific did not seek mediation under the *Farm Debt Mediation Act*. These foreclosure proceedings were then commenced on August 10, 2010.

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4 In September 2010, the parties came to an agreement which was subsequently encapsulated in a forbearance agreement. The Petitioner agreed that it would only take a three-month redemption period on any application for an order nisi of foreclosure. Can-Pacific agreed to make certain payments during the term of the forbearance agreement and keep the Petitioner informed regarding its effort to obtain refinancing. The Petitioner submits that it was not informed of the efforts to obtain refinancing and that Can-Pacific was in default under the forbearance agreement by September 22, 2010.

5 The Petitioner also discovered that Can-Pacific had been using its funds to fund a proposal filed under the *B.I.A.* by a related company, Meadow Creek Cedar Ltd. Various other defaults occurred. Those defaults had not been cured by late November 2010.

6 On December 2, 2010, the Petitioner discovered that Can-Pacific and Mr. Kooner were continuing to use Can-Pacific monies for the benefit of Meadow Creek. The Petitioner instructed its counsel to continue with the foreclosure proceedings and January 12, 2011 was set as the date when an application was to be made to apply for an order nisi of foreclosure. As a result of further negotiations, an agreement was reached that a redemption period of six months would be sought by the Petitioner and that any order would not be entered for a period of three months to accommodate the attempts of Can-Pacific to conclude refinancing arrangements.

7 The Order Nisi of Foreclosure was granted on January 9, 2011. Judgment was granted against Can-Pacific and Mr. Kooner for $7,361,232.05 with the six-month redemption period to expire on July 19, 2011. To date, the Petitioner has not undertaken enforcement proceedings against Mr. Kooner or against other assets owned by Can-Pacific.

8 The Petitioner learned that Can-Pacific had sold its 2011 berry crop and had deposited the proceeds with another financial institution despite the fact that the accounts receivable reflected by the sales constituted funds available to the Petitioner under its security.

9 The application of the Petitioner on July 21, 2011 for an Order for Conduct of Sale was granted by the Court. The Property was listed for sale with Colliers International at a listing price of $13.5 million. The listing price was subsequently reduced to $12.5 million, then to $11.5 million, and then to $11 million.

10 The materials which are in evidence indicate that there was an appraisal done in April of 2011 indicating a value of the Property of $15 million if a freezer building that is partially constructed on the Property was completed.

11 Despite the optimism in the appraisal and despite the optimism of the listing prices, only two offers were received by December 2011, being an offer of $8 million and an offer of $9 million. The subject clauses on those two offers were never removed.

12 The balance owing to the Petitioner is approximately $7.5 million. Taking into account the real estate commission, the property taxes which are in arrears for approximately $25,000, the balance owing under the security of the Petitioner and of the second mortgage, and the claims of builders lien which have been filed against the Property, it would take a sale of in excess of $8.6 million to clear those debts. Any such sale would not provide payment for unsecured trade creditors of approximately $600,000 and the significant shareholders loan from Mr. Kooner of $5.5 million.

13 The Petitioner obtained short leave to have this application for the appointment of a Receiver heard on February 15, 2012. On February 14, 2012, Can-Pacific filed for mediation under the *Farm Debt Mediation Act* which had the effect of staying the Petitioner's ability to proceed with the application. That stay was subsequently lifted by the Farm Debt Mediation Service. On February 27, 2012, an appeal of that decision was taken by Can-Pacific and, on March 6, 2012, the Farm Debt Mediation Service dismissed the appeal and filed a notice of termination of the stay of proceedings.

14 The application before me is one which should, pursuant to the principles set out in *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]), result in the order requested being granted as a matter of course. Accordingly, I make the order requested. What has happened between the parties makes the appointment of a Receiver inevitable. In the case at bar, Can-Pacific has not met the onus of showing that there are compelling commercial or

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other reasons why such an order ought not be made. It would ordinarily be the case that the appointment of a receiver should be made as a matter of course: *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149 (B.C. S.C.); *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]); *Ross v. Ross Mining Ltd.* (2009), 57 C.B.R. (5th) 77 (Y.T. S.C.); and *United Savings Credit Union*, *supra*.

15 In that regard, the Order Nisi has been granted so that there can be no doubt as to the legitimacy of the security of the Petitioner; an Order for Conduct of Sale has been granted; two offers of $9 million and $8 million have been received but without the subject clauses being removed; there is a possible shortfall to the creditors having secured or other claims against the Property if the Property can only be sold for less than $8.6 million; no interest payments have been made for about 19 months; efforts under the *Farm Debt Mediation Act* have failed; and monies otherwise available to the Petitioner have been diverted by Can-Pacific.

16 Counsel has drawn to my attention the decisions in *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]) and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 (B.C. S.C. [In Chambers]), where the Court concluded that it was necessary to show that it was just and convenient to make an appointment before an appointment of a receiver would be made. In *Textron*, judgment had not been obtained. The same was the case in *Maple Trade*. From the Reasons, it is clear that the decision in *United Savings Credit Union* and the decisions relied upon in that decision were not drawn to the attention of the Court in *Maple Trade*. The decision in *United Savings Credit Union* was considered by the Court in *Textron*, but the Court relied on the decision in *Maple Trade* which had not considered the decision. While I am able to distinguish the decisions in *Textron* and *Maple Trade* on the basis that they dealt with applications for the appointment of a receiver prior to judgment being obtained, I find no need to do so as I am satisfied that neither decision correctly states the law in British Columbia.

17 On the assumption that I am incorrect in arriving at the conclusion that an order for a receiver should go as a matter of course, I also find that it would be just and convenient for this appointment to be made. In particular, I take into account the dissipation of assets which has occurred as a result of the activities of Can-Pacific in using the sale proceeds from the sale of berries other than in accordance with the security of the Petitioner, the apparent deterioration of the Property as evidenced by the state of cleanliness and repair that was present when the security was first put in place and what is evident now, and the fact that no interest has been paid to the Petitioner for approximately 19 months. Other than the fact that the order takes effect from today, I do not see any commercial or other reasons why any harm will come to Can-Pacific as a result of the appointment.

18 I am satisfied that the order requested by the Petitioner should be granted. In view of the fact that there is a filing under the *C.C.A.A.*, I will stay all aspects of the appointment for a period of two weeks to April 2, 2012. That stay includes any statutory or common-law obligations of the Receiver in the interim. Accordingly, the Receiver will not be in a position to take possession. It will not be required to undertake those matters which are set out in the Order. It will not be necessary to take any of the statutory or common-law obligations ordinarily imposed on a Receiver.

19 The stay will end at 4:00 p.m. on April 2, 2012. I adjourn the application under the *C.C.A.A.* Counsel will set a date for a full-day hearing on the question of whether the orders sought under the *C.C.A.A.* should be made.

Application granted.

End of Document

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TAB 13

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2022 ONSC 2777
COURT FILE NO.: CV-22-00674810-00CL
DATE: 20220509

2022 ONSC 2777 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: KINGSETT MORTGAGE CORPORATION, Applicant

AND:

30 ROE INVESTMENTS CORP., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Richard Swan*, *Sean Zweig*, and *Joshua Foster*, for the Applicant

Symon Zucker, for the Respondent

Ben Frydenberg and *Darren Marr* for Canadian Imperial Bank of Commerce

Chris Armstrong for proposed Receiver, KSV Restructuring Inc.

HEARD: May 6, 2022

ENDORSEMENT

Introduction

[1] The Applicant, Kingsett Mortgage Corporation, brings this application for an order appointing KSV Restructuring Inc. ("KSV") as receiver and manager, without security, of real property owned by the Respondent, 30 Roe Investments Corp., (the "Real Property") and other property as described in the Notice of Application (collectively, the "Property").

[2] For the following reasons, I grant the Applicant's application.

Procedural background

[3] The Real Property consists of nine residential condominium units within a thirty-five story, 397 unit, condominium known as "Minto 30 Roe" located at 30 Roehampton Avenue in Toronto. The Applicant is a second mortgagee in respect of the Real Property.

[4] This application was commenced by a Notice of Application issued on January 7, 2022. The application first came before me on January 17, 2022. At that appearance, the Respondent was not represented by legal counsel. Mr. Raymond Zar, a director and principal of the Respondent, requested an adjournment of the application to allow the Respondent to retain counsel and respond to the application. The request for an adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce

("CIBC"). I granted the request for an adjournment and the application was adjourned to be heard on February 22, 2022.

[5] On February 22, 2022, counsel who had just been retained appeared on behalf of the Respondent. There was evidence that the Respondent had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Respondent requested an adjournment to prepare responding materials and respond to the application. This request was opposed by the Applicant. I granted the Respondent's request for an adjournment and the application was adjourned to March 28, 2022. I directed counsel to agree on a timetable for the application.

[6] A case conference was held before me on March 8, 2022. At that case conference, counsel for the Respondent advised that they were moving for an order removing them as lawyers of record for the Respondent. I was advised that the Respondent would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, I concluded that the hearing of the Applicant's application seeking the appointment of a receiver needed to be adjourned. The adjournment was opposed by the Applicant. A new hearing date for the application was set for May 6, 2022. In my endorsement, I wrote that "[t]he Respondent is responsible for retaining counsel, if necessary, and following a timetable to meet this hearing date".

[7] The motion by counsel for the Respondent to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Respondent as counsel of record. The Respondent was served with the formal Order on April 20, 2022.

[8] A case management conference was held before me on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6. I approved a timetable and I directed the parties to comply with it.

[9] The Respondent retained new legal counsel on May 2, 2022. A supplemental affidavit of Mr. Zar was sworn on May 5, 2022. Some other documents relating to the Respondent's efforts to refinance were uploaded to CaseLines, including a letter of intent from Firm Capital Corporation dated May 4, 2022.

Analysis

[10] The issues raised at the hearing of the application were (i) whether the Respondent's request for an adjournment of the hearing should be granted, and, if not, (ii) whether the Applicant's application for the appointment of a receiver should be granted.

Request for adjournment

[11] The Respondent requested an adjournment of the hearing of the application for 30 days to allow time for the Respondent to complete the refinancing of the Real Property and pay out the second mortgage. The Applicant opposed this request. At the hearing, I denied the request for an adjournment. These are my reasons.

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[12] The Firm Capital letter of intent is not a binding commitment and is simply an expression of interest in providing refinancing. The Respondent has had many months to arrange to refinance. There is no assurance that if a further adjournment were to be granted for 30 days, as requested, the Respondent would be successful in paying out the indebtedness secured by the applicant's second mortgage.

[13] I granted adjournments to allow the Respondent to retain counsel and to accommodate the motion by former counsel to move to be removed as counsel of record. These adjournments were opposed by the Applicant. I set the hearing date for this application on February 22, 2022 that would having regard to the motion by former counsel for the Respondent to be removed as counsel of record.

[14] In his May 5, 2022 affidavit, Mr. Zar gives evidence of his attempts to retain counsel for the Respondent. According to his affidavit, Mr. Zar did not contact any prospective counsel between February 22, 2022 and April 11, 2022. After April 11, 2022, Mr. Zar contacted several counsel who had conflicts or were not available. Mr. Zucker was retained on May 2, 2022.

[15] In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022.

[16] The Applicant's mortgage loan has been past due for many months. The Applicant is entitled to seek remedies to enforce payment of this loan. In the circumstances, I concluded that it would not be just to the Applicant to grant a further adjournment to accommodate the Respondent's continuing efforts to refinance. The request for an adjournment was denied.

Has the Applicant shown that it would be just or convenient for a receiver to be appointed?

<u>Loan and security</u>

[17] The Applicant is a party to a commitment letter dated March 29, 2019 with the Respondent pursuant to which the Applicant agreed to provide, among other things, a non-revolving demand loan secured by a second mortgage against the Real Property. This loan was originally advanced on April 8, 2019.

[18] The parties entered into four amendments to the original commitment letter which, among other things, increased the loan facility from $1,500,000 to $1,875,000 and provided three extensions to the maturity date to December 1, 2021. The Applicant's evidence is that as

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at December 13, 2021, the total indebtedness under the commitment letter, as amended, is $1,895,958.85.

[19] As general and continuing security for the payment and performance of its obligations under the commitment letter, as amended, the Respondent granted the Applicant various security including (a) a second charge/mortgage in respect of the Real Property securing the principal amount of $1,875,000, (b) a General Assignment of Rents and Leases dated April 8, 2019 pursuant to which, among other things, the Respondent assigned to the Applicant all of its rights in and to the Leases and Rents (as defined in the Assignment of Rents) in respect of the Real Property, (c) an Assignment of Material Agreements dated April 8, 2019, (d) a General Security Agreement dated April 8, 2019 pursuant to which, among other things, the Applicant was granted a security interest in all of the present and future undertakings and property of the Respondent which is located at or related to or used or required in connection with or arising from or out of the Charged Property (as defined in the second mortgage).

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Default by Respondent

[20] The original maturity date of the loan facility was in April 2021. The Applicant granted extensions to the maturity date to and until December 1, 2021. In the amendment letter dated October 25, 2021 in respect of the fourth amendment, the Respondent acknowledged that "there shall be no further extensions of the Term beyond December 1, 2021".

[21] On December 1, 2021, the Respondent failed to make its monthly interest payment. By letter dated December 6, 2021, the Applicant advised the Respondent that (a) as result of the defaulted payment of interest, the loan facility was in default and an event of default had occurred under the loan documents; (b) the December 1, 2021 interest default was particularly concerning because it was not the first interest-related default under the loan facility; (c) the loan facility matured on December 1, 2021; and (d) unless the Respondent paid the December interest payment by 4 o'clock p.m. on December 8, 2021, the Applicant would demand the immediate repayment of the loan facility and enforce the security it held.

[22] On December 13, 2021, the Applicant issued a demand letter to the Respondent advising that the mortgage was in default and demanding repayment of the indebtedness. The demand letter was delivered to the Respondent contemporaneously with a Notice of Intention to Enforce Security in accordance with s. 244 of the *Bankruptcy and Insolvency Act*. The Applicant demanded payment of $1,895,958.85.

[23] Mr. Zar submits that there is evidence that the Applicant implicitly agreed to extend the loan until April 1, 2022 by debiting the extension fee from the Respondent's account on January 4, 2022, and again in February 2022, and leaving the interest rate at 9%. Mr. Zar's evidence is that the Applicant only returned the extension fee after he brought it to the Applicant's attention in settlement talks. He states that it was a shock and surprise to him when he heard about the application seeking the appointment of a receiver.

[24] In the affidavit of the Applicant's Senior Director with responsibility for this loan, Daniel Pollack, he explains that the Applicant's finance department made an error in debiting the extension fee. A draft fifth amendment to the commitment letter (that, if agreed upon, would have extended the maturity date to January 1, 2022) had had been under consideration and would have provided for an extension fee. The draft fifth extension was not executed and did not become effective. When the error was discovered, the Applicant's finance department was instructed to correct the error (which was done when the Applicant debited the Respondent's account for the December interest payment, less the extension fee).

[25] I accept the evidence from Mr. Pollack that the extension fee was debited in error and, when the error was discovered, it was corrected. I do not accept the Respondent's submission that by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022. I note that, in any event, April 1, 2022 has passed, and the mortgage debt remains unpaid.

[26] Section 243 (1) of the *BIA* and s. 101 of the *Courts of Justice Act* provide that the Court may appoint a receiver where it is just or convenient to do so.

[27] In determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, at para. 11.

[28] In *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866, Morawetz J., at para. 27, accepted the submission that while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. Morawetz J., at para. 28, accepted that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have a receiver appointed.

[29] In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, Koehnen J., at paras. 43-44, held that when the court is dealing with a default under a mortgage, the relief becomes even less extraordinary, citing *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511, at para. 20. Koehnen J., at para. 45, referenced four additional factors set out by Farley J. in *Confederation Life*, at paras. 19-24, that the court may consider in determining whether it is just or convenient to appoint a receiver:

a. the lenders' security is at risk of deteriorating;

b. there is a need to stabilize and preserve the debtors' business;

c. loss of confidence in the debtors' management; and

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d. positions and interests of other creditors.

[30] In the third and fourth amendments to the commitment letter, the Respondent consented to the Applicant's appointment of a receiver, either privately or court appointed, in the event of a default by the Respondent beyond the applicable cure period. In the General Security Agreement, the Respondent agreed that after the occurrence of an event of default, the Applicant will have the right to appoint a receiver.

[31] On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application.

[32] Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed.

[33] The Respondent submits that there is evidence that the Applicant is not acting in good faith by seeking to appoint a receiver. In support of this submission, the Respondent relies on the evidence of Mr. Zar in his May 5, 2022 affidavit that in discussions between his former lawyer and a lawyer for the Applicant, the Applicant's lawyer advised "in highly defamatory terms what his clients thought of me and wanted to do to me". Mr. Zar states that it was clear to him and his former counsel that the Applicant is using the application to appoint a receiver to cause him significant harm, such that this application is excessive and unnecessary, and is brought in bad faith.

[34] The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. The information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said. Mr. Zar does not recite any particular statements that were made by the Applicant's counsel to the Respondent's former counsel. If Mr. Zar's hearsay evidence is admitted into evidence notwithstanding rule 39.01(5) of the *Rules of*

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Civil Procedure, it is far from sufficient to allow me to draw the inference I am invited to make, that the Applicant lacks good faith in bringing this application. I do not draw this inference.

[35] The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it. The Applicant is not required to do so only through private power of sale proceedings. The appointment of a receiver will provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders.

[36] I have considered the relevant circumstances and I am satisfied that the Applicant has shown that the appointment of receiver is just and convenient in the circumstances.

Disposition

[37] For these reasons, I grant the Applicant's application.

[38] Order to issue in form of Order signed by me today.

Cavanagh J.

Date: May 9, 2022

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TAB 14

Court of King's Bench of Alberta

Citation: ATB Financial v Mayfield Investments Ltd, 2024 ABKB 635

Date: 20241030
Docket: 2403 12343
Registry: Edmonton

2024 ABKB 635 (CanLII)

Between:

ATB Financial

Plaintiff

- and -

Mayfield Investments Ltd., Howard Pechet, Chalmers Investment Corp. Ltd., Mayfield Homes Ltd., and Pechet 2018 Family Winery Trust by its trustee and litigation representative Jason Pechet

Defendants

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] The applicant, Mayfield Investments Ltd (**Mayfield**), applies (**Application**) to stay the effects of a consent receivership order granted September 6, 2024 (filed September 10, 2024) (**Consent Receivership Order**) and an October 24, 2024 certificate (**Lender's Certificate**) filed by ATB Financial (**ATB**), until November 30, 2024[1] or, alternatively, until after Mayfield's application under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) (*CCAA* Application) is decided. ATB opposes the Application.

[1] The Application originally requested a stay until February 1, 2025, but in oral argument counsel amended the request to November 30, 2024.

II. Background

[2] Mayfield, either in its own capacity or through several subsidiaries or other entities, holds direct or indirect interests in a portfolio of commercial real estate properties and businesses in Alberta, including among others the Camrose Resort and Casino, the Medicine Hat Lodge and the Stage West Dinner Theatre. Some of the assets underlying its interests are regulated by Alberta Gaming, Liquor and Cannabis Commission (**AGLC**). Mayfield indirectly employs in the range of greater than 450 people.

[3] Mayfield has been in financial distress and in default of its financial obligations to ATB since March 2021. It continues to be insolvent, although Mayfield argues it is on the eve of solvency.

[4] Mayfield and its personal guarantor, Howard Pechet (together the **Credit Parties**), entered into credit facilities with ATB; their obligations are secured by various security agreements.

[5] Following initial default in March 2021, the Credit Parties and ATB entered into an Initial Forbearance Agreement dated June 29, 2022. There were further defaults, and, among other things, the parties executed a First Forbearance Amending Agreement dated August 31, 2022, a Second Forbearance Amending Agreement dated December 16, 2022, and a Third Forbearance Amending Agreement dated March 22, 2023.

[6] On August 29, 2023, ATB demanded repayment of the Credit Parties' indebtedness.

[7] On December 12, 2023, ATB delivered a demand letter and corresponding Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). ATB demanded repayment of Mayfield's indebtedness, plus all accrued and accruing interest, standby fees, costs, prepayment fees, and expenses.

[8] The parties negotiated. On February 5, 2024, the parties entered into a further forbearance agreement (**Amended and Restated Forbearance Agreement**).

[9] Following that, the Credit Parties engaged in a sales process that failed to generate any proposal sufficient to repay the indebtedness to ATB.

[10] Mayfield also committed further "Forbearance Defaults" as defined under the Amended and Restated Forbearance Agreement. On April 15, 2024, ATB issued a "Forbearance Notice of Default and Reservation of Rights Letter" to the Credit Parties. Mayfield then committed further Forbearance Defaults.

[11] As of June 14, 2024, the Credit Parties were indebted to ATB for more than $38 million. Further, the "Forbearance Period", as defined in the Amended and Restated Forbearance Agreement, had expired.

[12] On June 25, 2024, ATB applied to appoint a receiver and manager (**Receivership Application**). The Receivership Application was scheduled to be heard by the Court on July 4, 2024; however, this was adjourned because the parties entered into another agreement dated

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effective July 4, 2024 (**First A&R Forbearance Amending Agreement**), which amended the Amended and Restated Forbearance Agreement.

[13] The Credit Parties defaulted under the First A&R Forbearance Amending Agreement. On August 16, 2024, ATB delivered a "Notice of Defaults, Terminating Events, and Reservation of Rights" letter to the Credit Parties.

[14] On August 29, 2024, Mayfield filed the *CCAA* Application.

[15] On August 30, 2024, the Forbearance Period under the First A&R Forbearance Amending Agreement expired.

[16] On September 4, 2024, at the Credit Parties' request, the parties entered into further negotiations about a potential further extension of the Forbearance Period.

[17] On September 6, 2024, immediately before the Court was to hear the Receivership Application and the *CCAA* Application, the parties entered into a Second Forbearance Amending Agreement dated effective August 30, 2024 (**Second A&R Forbearance Amending Agreement**).

[18] The Second A&R Forbearance Amending Agreement contemplated that the parties would consent to the entry of the Consent Receivership Order on September 6, 2024, but that the activation of the receivership under the Consent Receivership Order would be stayed until the earlier of certain conditions (as set out below).

[19] On September 6, 2024, Justice Lema granted the Consent Receivership Order and adjourned the *CCAA* Application *sine die*. The *CCAA* Application has never been brought back before the Court.

[20] Paragraph 3 of the Consent Receivership Order provides for the stay (**Stay**) of the Consent Receivership Order, to be effective until the earlier of:

> […] (i) October 31, 2024, or such date as may be amended or extended by the written agreement of the Lender and the Debtor, in their sole discretion; or, (ii) the date on which the Lender files a certificate, substantially in the form attached as Schedule "B" hereto (the "**Lender's Certificate**"), certifying that a Forbearance Default (excluding and in addition to the Current Forbearance Default Events) has occurred. Upon the filing of the Lender's Certificate, the Stay shall, without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver pursuant to paragraph 2 hereof. […]

[21] The Amended and Restated Forbearance Agreement, as amended by the Second A&R Forbearance Amending Agreement, required (among other things) the Credit Parties to deliver an unconditional commitment letter from Canadian Western Bank (**CWB**) in a form acceptable to ATB (**CWB Commitment Letter**), by October 15, 2024. The Credit Parties did not do so. This is not in dispute. These defaults, along with others, constituted "Forbearance Defaults" under the Second A&R Forbearance Amending Agreement which entitled ATB to file a Lender's Certificate.

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ATB did not file a Lender's Certificate initially, to allow the Credit Parties more time to cure the defaults and, in particular, to obtain the CWB Commitment Letter.

[22] By October 19, 2024, Mayfield had not delivered the CWB Commitment Letter and has still not done so. Several Forbearance Defaults continued, and continue now, to be uncured.

[23] On October 23, 2024, Mayfield filed its application seeking to stay "the effects of the Consent Receivership Order", returnable on October 28, 2024. The application is supported by an affidavit of Mayfield's then President, Jason Pechet (**Pechet**).

[24] On October 24, 2024, ATB filed the Lender's Certificate. As of that date, the aggregate indebtedness owed to ATB was more than $38.8 million.

[25] On October 28, 2024, the Receiver filed its First Report. It summarizes the Receiver's activities since the Lender's Certificate was filed on October 24, 2024, which included, among other things:

(a) attending at the Medicine Hat Lodge, the Camrose Resort and Casino and Mayfield's head office;

(b) meeting with Mayfield's Vice President of Operations, general managers and employees;

(c) inspecting some of the properties and identifying operational and maintenance requirements and capital deficiencies;

(d) meeting with representatives of AGLC;

(e) obtaining and reviewing Mayfield financial information;

(f) working on operational procedures;

(g) reviewing insurance;

(h) communicating with employees about the receivership and the Receiver's intentions. On October 25, 2024, the Receiver provided a letter to all Mayfield employees outlining the details of the receivership and the Receiver's intention to, among other things, continue operating Mayfield's business without interpretation, to maintain the employment of all current Mayfield employees and to determine the most appropriate sales strategy for Mayfield's assets (which could include selling Mayfield as a going concern);

(i) putting restrictions on fund outflow and reviewing cash flow forecasts;

(j) maintaining an onsite presence at the Medicine Hat Lodge and Camrose Resort and Casino since October 24, 2024; and

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(k) terminating the employment of Mayfield's President, Pechet, effective on October 24, 2024.

[26] On October 25, 2024, ATB provided the Court its response materials to the Mayfield application, including an October 24, 2024 affidavit of ATB's Director, Risk Advisory & Management.

[27] On October 25, 2024, legal counsel amended Mayfield's application and brief of argument and provided a supplemental Pechet affidavit.

[28] On October 28, 2024, the Receiver filed its First Report and ATB filed additional materials. I heard the Application and briefly reserved my decision.

III. Issues

[29] Mayfield argues that it is not just and convenient to decide on or continue Mayfield's receivership (including where debtor refinancing is imminent), that the Court has the power to stay the effects of the Consent Receivership Order and the Lender's Certificate (including staying the actions of the Receiver even after the granting of the Consent Receivership Order and the filing of the Lender's Certificate), and that Mayfield meets the tripartite test for a stay (either until November 30, 2024 or until its *CCAA* Application is heard).

[30] ATB argues that the question of whether it is just and convenient to appoint the Receiver has already been decided by Justice Lema when he granted the Consent Receivership Order, and that the Credit Parties are estopped from arguing that the Consent Receivership Order should be stayed. ATB notes that no appeal or application to set aside or vary the Consent Receivership Order has been filed, and in any event any application to set aside or vary the order would be unsuccessful. ATB argues that the test to stay the Consent Receivership Order is not met in any event.

[31] In argument, I posed the question to Mayfield's counsel whether anyone other than the Receiver had standing to continue Mayfield's initial application or to file the amended Application, given the terms of the Consent Receivership Order and following the delivery of the Lender's Certificate. Paragraphs 2, 4 (and, in particular, 4(j)), 8, 9 and 10 of the Consent Receivership Order were discussed or considered. Ultimately, since no party (including the Receiver) objected to Mayfield's standing to continue the amended Application, but rather argued it on the merits, I have proceeded on the basis Mayfield has standing to continue the Application.

[32] Accordingly, based on the materials provided and the parties' submissions, the issues on this Application are:

(a) What is the effect of the Consent Receivership Order and the Lender's Certificate?

(b) Is Mayfield estopped from arguing that the Consent Receivership Order should be stayed?

(c) Should the Consent Receivership Order be stayed?

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IV. Analysis

A. The Effect of the Consent Receivership Order and the Lender's Certificate

[33] As noted above, paragraph 3 of the Consent Receivership Order provides that, upon the filing of the Lender's Certificate, the Stay shall "without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver".

[34] Mayfield does not dispute that ATB was entitled to file the Lender's Certificate or that the Lender's Certificate was validly filed based on Mayfield's Forbearance Defaults. Accordingly, since October 24, 2024, the Consent Receivership Order's terms have been activated. Since that date, the Receiver has been and is the receiver over Mayfield's property and the stay of proceedings against Mayfield has been and is in place.

[35] Therefore, I agree with ATB that the question of whether it is "just and convenient" to appoint a receiver under section 243 of the *BIA* or section 13(2) of the *Judicature Act*, RSA 2000 c J-2 has been overtaken. The Consent Receivership Order provided a clear and simple mechanism to terminate the Stay under paragraph 3 of the Consent Receivership Order, and those provisions have been engaged and implemented. Put another way, whether it is just and convenient to appoint a receiver was decided by this Court on September 6, 2024 based on the agreement and consent of ATB and Mayfield.

[36] The issue, then, is not whether the Stay under paragraph 3 of the Consent Receivership Order should be *extended*, as it was originally articulated by Mayfield. That Stay has ended on its own terms and cannot be extended. The issue is whether the Consent Receivership Order, looking at the situation now, should be stayed after its terms have been active for only a few days.

B. Mayfield is Not Estopped from Arguing that the Consent Receivership Order Should be Stayed

[37] ATB argues that Mayfield's Application is subject to issue estoppel, relying on ***Toronto (City) v CUPE***, Local 79, 2003 SCC 63 at para 23:

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.).

[38] In my view, the argument that issue estoppel applies fails on the first ground. The issue is not precisely the same on this Application as it was on the day the Consent Receivership Order was presented to the Court and granted. On September 6, 2024, the issue was whether it was just and convenient to appoint a receiver over Mayfield's property at that time, coupled with the Stay on certain conditions. There is new evidence before the Court that was not before the Court on

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September 6, 2024. The issue now, as I alluded to above, is whether the Consent Receivership Order, now activated through an agreed and court-ordered process, should be stayed.

[39] Accordingly, I find that Mayfield was not legally barred by issue estoppel from bringing the Application. This finding is consistent with the Court's jurisdiction to consider an application for stay of receivership proceedings "at any stage of the proceeding" pursuant to section 17(1) of the *Judicature Act*. That determination is made at the time of the application based on the then prevailing circumstances.

[40] However, to be clear, the finding that issue estoppel does not apply does not mean Mayfield can ignore its previous consent to the Consent Receivership Order and its effects. Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order (including, for example, and without limitation, for matters such as fraud or misrepresentation): ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 42-50, 60; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC). There is no application to set aside or vary the Consent Receivership Order based on fraud or misrepresentation, or on any other basis. The relief sought is a stay.

[41] Mayfield's consent to the Consent Receivership Order will be considered within the applicable legal framework as to whether the Consent Receivership Order should be stayed.

C. The Consent Receivership Order is Not Stayed

[42] Mayfield argues that the Court's authority to order a stay extends to the ability to order a stay of the actions of a receiver/manager well into an extant receivership, relying on ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 3659 at paras 44-54 and 77. I agree with ATB that ***BCIMC*** is wholly distinguishable and does not assist Mayfield's position. ***BCIMC*** did not involve a stay of a receivership, but rather the Court's refusal to approve a receiver-proposed Sale and Investor Solicitation Process for a condominium project where the debtor was in the position to immediately, and without conditions, pay out the indebtedness of the secured creditor. The Court gave the debtor an opportunity to pay out the secured debt, the receivership debt and interest within 72 hours instead of approving the sale. In this case, as noted further below, Mayfield has not established that it is in a position to imminently and unconditionally pay or redeem its indebtedness to ATB.

[43] However, a proceeding or judgment can be stayed under rule 1.4(2)(h) and sections 17(1) and (4) of the *Judicature Act* pending trial, pending other processes in the action, or in favour of different proceedings which may overlap with the existing proceedings: see, for example, ***1499925 Alberta Ltd v NB Developments Ltd***, 2023 ABKB 114 at paras 96-100 and 108-109 (and cases cited therein).

[44] The parties agree that the applicable test for a stay in this proceeding is the tripartite test. It has been described in ***Stephenson v Romspen Investment Corporation***, 2020 ABCA 316 at para 13:

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> [13] The well-known tripartite test for a stay pending appeal is set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 334, 111 DLR (4th) 385, following ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd***, 1987 CanLII 79 (SCC), [1987] 1 SCR 110, 38 DLR (4th) 321. The applicant has the burden of showing that: (i) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

[45] See also ***HML Contracting Ltd v Pinder***, 2022 ABCA 185 at paras 18-19.

[46] Even where the tripartite test is not met, the Court may have a residual discretion to grant a stay "where the interests of justice so require": ***HML Contracting*** at para 19; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2015 ABCA 406 at para 33; ***Stephenson*** at paras 14, 17 and 37.

1. Serious Question or Arguable Issue

[47] I agree with ATB that Mayfield has not raised a serious question or arguable issue with respect to a stay in this action, as it pertains to the Consent Receivership Order, *per se*. The Consent Receivership Order was a final receivership order (subject to the usual comeback provision) granted with Mayfield's consent and agreement, including the conditions upon which the receivership would be activated. By consenting to its terms, Mayfield is in much the same position as the debtors in ***Servus***, as described by Justice Lema at paras 50-56:

> [50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.
>
> [51] The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."
>
> [52] I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.
>
> [53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

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> [54] Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.
>
> [55] Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.
>
> [56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

[48] In fact, Mayfield is in an even more difficult position than the debtor in ***Servus***, as the Consent Receivership Order has already been granted. In ***Servus***, the Court still had to consider whether granting the receivership order on consent was just and convenient. Here, the Consent Receivership Order is already activated, the Receiver has been appointed and has already commenced its work.

[49] The Consent Receivership Order has not been appealed. There is no application to vary it pursuant to the comeback provision in paragraph 34 of the order. As noted above, there is no suggestion it was procured by fraud or misrepresentation or is otherwise tainted.

[50] However, Mayfield also relies on the existence of its *CCAA* Application. It argues that the receivership should be stayed to allow Mayfield to pursue protection under the *CCAA* which it argues is preferable to a receivership. Mayfield relies on several cases by which it argues courts consider several criteria when faced with competing applications for the implementation of a receivership and proceedings under the *CCAA*: ***Pacific Shores Resort & Spa Ltd (Re)***, 2011 BCSC 1775; ***Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd***, 2013 BCSC 2358; ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60. Mayfield argues this establishes a serious question or arguable issue.

[51] ATB argues that Mayfield should have raised its argument about the *CCAA* Application at the time the Consent Receivership Order was granted. The transcript of the attendance before Justice Lema is not before me. What is before me is that both matters were before Justice Lema, the Consent Receivership Order was granted, and the *CCAA* Application (which is not addressed in any material way in the Consent Receivership Order) was adjourned *sine die*. The fact the *CCAA* Application was adjourned *sine die*, rather than dismissed, suggests that it was contemplated as a possibility that it could be brought back on.

[52] I have considered Mayfield's arguments and am satisfied that the pre-existing *CCAA* Application sufficiently meets the low threshold of a serious question or arguable issue in the context of an application to stay the Consent Receivership Order. Whether Mayfield is barred from raising the *CCAA* Application for failing to raise this issue before Justice Lema also raises a serious question or arguable issue that would have to be addressed, if necessary, on a more complete record of what happened on September 6, 2024. I make no findings in that regard.

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[53] I raised with Mayfield's counsel the practical question of exactly how the stay would implement what Mayfield appears to seek, namely maintaining control of the management of Mayfield's assets pending the *CCAA* Application (and pending a hoped-for CWB refinancing) given that the Receiver has already been appointed. Stays in this context typically pause proceedings and operate prospectively, not retroactively. Arguably, a prospective stay of the Consent Receivership Order would simply postpone further activity by the Receiver but would not necessarily reverse the effect of the Consent Receivership Order and give possession and control of Mayfield's property back to Mayfield's directors. What Mayfield really seeks is a stay of the Consent Receivership Order that is retroactive back to before October 24, 2024 when the Receiver's appointment was activated by the filing of the Lender's Certificate. Effectively, it seeks an unwinding of events since October 24, 2024.

[54] Counsel provided me no authority that would support a retroactive stay of proceedings. However, the Court of Appeal has noted that the jurisdiction to grant retroactive stays (at least in *CCAA* proceedings) is a novel issue. For example, in ***Wiebe v Weinrich Contracting Ltd***, 2021 ABCA 242, the Court of Appeal, at para 20, a single Justice of the Court stated:

> [20] As previously recognized by this Court, stays in insolvency proceedings are very common, and "the ability of a case management judge to grant retroactive stays is of significance to the practice": 2019 ABCA 323 at para 17. This question was not answered in the first appeal, which was determined on the basis of procedural fairness. Therein, however, the Court noted: "Whether a supervising judge in *CCAA* proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court: 2020 ABCA 396 at para 42.

[55] In the circumstances, I proceed on the basis that Mayfield has raised a serious question or arguable issue about whether the Consent Receivership Order should be stayed until November 30, 2024 to allow it to pursue the *CCAA* Application (and associated refinancing), and also about whether the Court could potentially implement a stay on such conditions to allow Mayfield's directors to pursue that application during the stay period.

2. Irreparable Harm

[56] Mayfield argues that it will suffer irreparable harm if a stay is not granted because its assets will "likely be irreversibly disposed of, with little recourse". It also argues that receivership will decrease the value of Mayfield's business and assets, and that the opportunity cost of seizing and likely dissolving Mayfield's assets "when it is so close to a possible Court-sanctioned *CCAA* proceeding is impossible to calculate".

[57] I agree with ATB that Mayfield has failed to establish irreparable harm, for several reasons, including but not limited to:

(a) the alleged immediate irreversible loss or devaluation of Mayfield assets is not established. The Receiver has taken steps to work with AGLC to ensure a smooth transition and has been granted a temporary casino facility licence for the Camrose Casino and Resort until January 22, 2025. Further, the Receiver's First Report has

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indicated the Receiver's intentions to continue operating Mayfield's business without interruption and to determine the most appropriate sales strategy which could include selling Mayfield as a going concern;

(b) the ability of Mayfield to continue operations for the benefit of its employees and charities with which it works, and to maintain Mayfield's present asset values, pending refinancing or a *CCAA* Application, has not been established. The Receiver's opinion is that cash levels, of at least some of the businesses, are insufficient to maintain business operations and meet critical expenditures, and has been advised by Mayfield's Vice President of Operations that Mayfield was forecast to have insufficient funds, without a cash injection, to operate beyond November 1, 2024. Mayfield has not established on a balance of probabilities that Mayfield's past or potential future sales of assets, or possible further infusions of capital from the Pechet family or others, are sufficient for ongoing operations or to address capital deficiencies or repairs already identified by the Receiver;

(c) Mayfield does not have a concrete refinancing plan in place. Mayfield has been advising ATB (since June 2024) and the Court (since at least August 2024), that a CWB refinancing is forthcoming or imminent. The evidence now before the Court illustrates that CWB has not yet provided credit approval (let alone executed a CWB Commitment Letter), and Mayfield's 2023 financial statements are still being prepared or, at best, have only very recently been provided to CWB;

(d) it is not clear that an unconditional repayment of the indebtedness to ATB would be possible upon a CWB refinancing, even if it occurs. The CWB refinancing appears now to contemplate funding of $30 million instead of $35 million[2], and it is not clear that a $4.125 million deposit relating to the transfer of the Camrose Casino Corporation casino facility licence is imminently releasable. Further, Mayfield argued that getting the CWB Commitment Letter during the proposed stay would help Mayfield to "better negotiate with ATB"; it did not argue that the CWB Commitment Letter *would* allow Mayfield to expeditiously and unconditionally pay out the ATB indebtedness; and

(e) Mayfield is not "so close to a possible Court-sanctioned *CCAA* proceeding" as it asserts. It has not taken any steps to bring the *CCAA* Application back before the Court.

[58] Mayfield's stay application fails on the irreparable harm element of the tripartite test.

3. Balance of Convenience

[59] Mayfield's application also fails on the balance of convenience element of the test.

[60] ATB has agreed to forbear on enforcement of its security for many months. Based on the understanding, among other things, that a CWB Commitment Letter was imminent, ATB agreed

[2] Pechtel advised the Court during argument that a $35 million CWB refinancing was still available but may be necessary. This was not in his affidavit. It would not have changed my decision even if were accepted as evidence.

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to further forbear for a short time, by agreeing to the terms of the Consent Receivership Order. It was entitled to file the Lender's Certificate and crystallize the benefits of its bargain with Mayfield. The CWB Commitment Letter has still not arrived almost two months later, Mayfield remains in default, and there are further Forbearance Defaults. ATB has lost confidence that the CWB Commitment Letter is forthcoming. The indebtedness to ATB is significant and ATB is the primary secured creditor with assets at risk. A subordinate secured creditor supports ATB's position on the Application. No stakeholder other than Mayfield, through its directors/shareholders, voiced opposition the continuation of the receivership.

[61] Again, critically, Mayfield agreed to the terms of the Consent Receivership Order and the clear terms that the receivership would be activated upon the filing of a Lender's Certificate. Mayfield took the benefit of the bargain and, in its Application, seeks to resile from it. While I have held that Mayfield is not legally barred by issue estoppel to make the Application, Mayfield attempts to effectively unwind its consent and agreement, which was relied on by Mayfield and the Court, and it seeks to do so mere days after the consequences of its consent and agreement are brought to bear. While not technically attempting to relitigate precisely the same issue, as a practical matter it is doing just that because it has not (in my view) established a favourable material change in its circumstances since the Consent Receivership Order was granted. These are significant factors against Mayfield's position when considering the balance of convenience. As noted above, parties must expect courts to enforce their bargains, and I am satisfied it is appropriate to do so in this case.

[62] Finally, the Stay has been terminated, the Receiver has already been appointed and activated, and the Receiver has been diligently pursuing its mandate since October 24, 2024. It has already communicated with employees about the receivership, terminated Mayfield's President, taken possession and control of Mayfield's assets, and started working on financial and interim borrowing plans. ATB argues that the egg cannot be unscrambled now. I find that, while the egg may not be fully scrambled at this point, it has been cracked and is already bubbling on the griddle. It would be inconvenient, and may cause confusion and unintended consequences, to try to put the egg back together by granting the relief Mayfield seeks.

[63] In all the circumstances, the balance of convenience does not support a stay of the Consent Receivership Order.

4. Conclusion re Tripartite Test

[64] Mayfield has failed to establish the elements of the tripartite test.

[65] I note that both parties also referred to ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27, which outlines factors a court may consider in determining whether it is appropriate to appoint a receiver. Although not technically applicable in this case because the Receiver has already been appointed, I found many of the ***Paragon*** factors relevant to the application of the tripartite test for a stay in this receivership context. I considered the ***Paragon*** factors and find that, to the extent they could be applicable in this situation, they support my conclusion not to grant the requested stay.

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5. No Exercise of Any Residual Discretion

[66] In the event I have residual discretion to grant a stay notwithstanding that Mayfield has failed to establish the elements of the tripartite test, on the basis that "the interests of justice so require", I find that the interests of justice do not support granting a stay and I would decline to do so in this case, including for the reasons noted above.

V. Conclusion

[67] Mayfield's Application is dismissed.

Heard on the 28th day of October, 2024.
Dated at the City of Calgary, Alberta, this 30th day of October 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Chuck Russell, K.C., and Jared Lane, McLennan Ross LLP
for Mayfield Investments Ltd.

Pantelis Kyriakakis and Nathan Stewart, McCarthy Tétrault LLP
for ATB Financial

Darren Bieganek, K.C., Duncan Craig LLP
for Howard Pechet

Kelly Bourassa, Blake, Cassels & Graydon LLP
for Ernst & Young Inc. in its capacity as court-appointed receiver of Mayfield Investments Ltd.

Susy Trace, Miller Thomson LLP
for Agriculture Financial Services Corporation

David Archibold, Sharek Logan & Van Leenen LLP
for Camrose Regional Exhibition & Agricultural Society

Terry Czechowskyj, K.C., Miles Davison LLP
for Albert Stark

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TAB 15

Court of King's Bench of Alberta

Citation: Bank of Nova Scotia v Smiling Simba Learning Academy Inc, 2025 ABKB 11

Date: 20250110
Docket: 2401 04463
Registry: Calgary

2025 ABKB 11 (CanLII)

Between:

Bank of Nova Scotia

Plaintiff/Applicant

- and -

Smiling Simba Learning Academy Inc.,
Uma Pujari and Prince Chahal

Defendants/Respondents

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

[2] For the reasons set out below, the receivership order requested is granted.

II. Background

[3] BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as

"Special Purpose – Community Service (S-CS)", which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

[4] BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of $8.2 million.

[5] From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal's involvement in the potential childcare operator in March 2023.

[6] SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

[7] The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the "**Loans**".

[8] By March 31, 2024, the amount outstanding on the Loans was over $9 million.

[9] The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS's security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

[10] SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

[11] On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[12] On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to "collateralized debt" in the amount of approximately $900,000. SSLA did not obtain BNS' consent to this registration.

[13] On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of $200,000. SSLA did not obtain BNS' consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was $164,487.56 (based on Mortgagequote's Statement of Claim against SSLA).

[14] In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

[15] On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

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[16] On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024.[1] Chahal's evidence is that the tenant is currently paying monthly rent of $28,200[2]. SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

[17] On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

[18] On April 2, 2024, BNS filed a receivership application in respect of SSLA.

[19] The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

[20] In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of $9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

[21] SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

[22] SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

[23] On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

---

[1] The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

[2] The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

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[24] As of December 30, 2024, the amount outstanding under the Loans was $10,170,652.26.

[25] The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

[26] The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

[27] The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

[28] The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24.

[29] As noted in ***Higgerty***, at para 25, which I adopt:

> [25] A receivership order "should not be lightly granted": ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[30] Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd***, 2024 ABKB 635 at para 65 [***Mayfield***]; ***Worth Ventures Ltd v MegaSys Enterprises Ltd***, 2024 ABKB 385 at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd***, 2023 ABKB 718 at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at para 33; ***Schendel Management Ltd***, 2019 ABQB 545 at paras 44-45; ***Murphy v Cahill***, 2013 ABQB 335 at para

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71; ***Kasten*** at para 13; ***Romspen Investment Corporation v Hargate Properties Inc***, 2011 ABQB 759 at para 20; ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27. Those factors include:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver; and

(q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

[31] In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: ***Mayfield*** at para 40. The applicable principles were summarized by Justice Lema in ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 60-63 (footnotes omitted):

> [60] On how to approach a consent order, the guiding principles are as follows:
>
> • the Court is not obliged, from the mere fact of consent, to grant a consent order; and

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- the Court must be satisfied (at minimum) that:
  - it has the jurisdiction to grant the order;
  - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
  - consent has actually been provided;
  - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
  - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
  - the proposed relief does not exceed that consented to; and
  - consent aside, the ordered relief is warranted in the circumstances.

> [61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.
>
> [62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.
>
> [63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

[32] In assessing the effect of a debtor's consent to a receivership order, Justice Lema went on to point out in ***Servus***, at para 66 (emphasis in original): "by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*". In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

[33] No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what

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should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

[35] I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

[36] BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in ***Paragon***, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

[37] Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 1953 at para 43; ***Murphy*** at para 72.

b. Risk to Security

[38] SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

[39] SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

[40] I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: ***Braile v Calgary (Police Service)***, 2018 ABCA 109 at para 23; ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2005 ABCA 46 at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was $6,790,000 (and the Property is in tax arrears of $359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

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[41] While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

[42] It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

c. Nature of the Property

[43] BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

[44] SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

[45] Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): ***Mayfield*** at para 40; ***Servus*** at paras 42-50; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

[46] I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

[47] This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

[48] SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

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[49] SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

[50] A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

[51] SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

[52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: ***Bank of Montreal v Haro-Thurlow Street Project Limited Partnership***, 2024 BCSC 47 ***[Haro-Thurlow Street Project***]at para 95.

[53] In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: ***Haro-Thurlow Street Project*** at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

[54] SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

[55] SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

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3. Conclusion re: Receivership

[56] For those reasons, I find the appointment of a receiver is just and convenient.

[57] Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

[58] I grant the receivership order as proposed by BNS.

Heard on the January 6th and 9th, 2025.
Dated at Calgary, Alberta this 10th day of January, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Natalie Thompson
for Bank of Nova Scotia

Randolph W. Mitchell
for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal

Cale W. Ellis Toddington (January 9, 2025 only) and Madona Markaj (student-at-law)
for Mortgagequote Canada Corp.

Anthony Merah
for 2499311 Alberta Ltd

Derek Pontin (January 9, 2025 only)
for the proposed receiver

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TAB 16

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Proform Management Inc, 2020 ABQB 316

Date: 20200511
Docket: 2003 06374
Registry: Edmonton

2020 ABQB 316 (CanLII)

Between:

Servus Credit Union Ltd.

Plaintiff/Applicant

- and -

Proform Management Inc., Proform Concrete Services Inc.,
and Proform Construction Products Inc.,
formerly known as Proform Precast Products Inc.

Defendants/Respondents

Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] Servus Credit Union Ltd. (Servus) seeks the appointment of a receiver of a group of related companies collectively indebted to it for approximately $12 million. This follows two forbearance periods of approximately six months and three more months, respectively, and an additional month of interim monitoring. It holds a consent receivership order granted at the onset of forbearance and submits that the debtors' ongoing defaults allow Servus to submit it for entry.

[2] The debtor companies, supported by a guarantor, seek a further 30 days of monitoring, during which they believe they can make material headway on paying down their debt to Servus and in arranging refinancing to pay it out entirely. They acknowledge having provided the consent receivership order but submit (in part) that the emergence of the Covid-19 pandemic deprived it of the full benefit of the second forbearance period and that, accordingly, the order should not be entered now.

[3] I find that the debtors are in state of default, that Servus's enforcement rights are engaged, that the gateway for entering the consent receivership order has been opened, that the Covid-19 pandemic did not cast a material shadow here, that the debtors' available arguments do not extend beyond those issues, that the interim-monitoring period should not be extended, and that it is just and convenient that a receiver be appointed.

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B. Issues

[4] The issues are:

1. the preconditions to Servus submitting the consent receivership order (CRO) for filing;
2. the impact (if any) on Servus's enforcement position of the emergence of the Covid-19 pandemic – in particular, its impact on the debtors' businesses and refinancing and asset-sale efforts, and whether it deprived the debtors of the full benefit of the combined forbearance and stay period;
3. whether the debtors are entitled, in the face of the CRO, to raise any arguments bearing on whether granting a receivership order is "just or convenient" or otherwise appropriate i.e. aside from arguments bearing on the enforceability and state of the forbearance arrangements, including the satisfaction of the triggering conditions for the entry of the CRO;
4. the Court's duty when presented with a consent order generally and in these circumstances; and
5. whether the CRO should be granted.

C. Analysis

Preconditions to Servus seeking entry of the consent receivership order

[5] Servus and the debtors entered into a forbearance agreement, following default by the debtors under certain credit arrangements, which included a guarantee from a third party, anchored by real property mortgages against properties owned by that party.

[6] In that agreement, the debtors and the guarantor acknowledged owing approximately $12.4 million to Servus and that various events of default had occurred.

[7] Here is the heart of the forbearance agreement:

> 2.1 **Forbearance period.** Subject to compliance by Borrowers and Guarantor with the terms and conditions of this Agreement, the Lender hereby agrees to forbear from exercising its right and remedies against the Borrowers and guarantor under the Loan Documents and otherwise with respect to the Existing

> Defaults during the period (the "**Forbearance Period**") commencing on the Effective Date [defined elsewhere] and ending on the earlier of (i) 2:00 p.m. (Edmonton Time) Friday, November 9, 2019 and (ii) the date that any Forbearance Default [defined elsewhere] occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to me under the Loan Documents, the Consent Documents (as hereinafter defined [and discussed further below]) or otherwise available to the Lender at Law.*
>
> 2.2 **Scope of Forbearance.** During the Forbearance Period, the Lender will not initiate or continue proceedings to collect or enforce the Obligations, including by repossessing, foreclosing upon, or disposing of any of the Collateral, through judicial proceedings or otherwise. [emphasis added]

[8] Article 3 outlined various conditions precedent to the Forbearance Agreement taking effect, including the provision of "a duty executed consent receivership order with respect to the Borrowers and the Guarantor [limited, for the latter, in certain respects], in the form attached hereto as Schedule '**B**.'" The debtors and the guarantor signed the draft order in the required form, reflecting their consent to it.

[9] In a parenthetical note tucked between subparagraphs (i) and (j), s. 3.1 defines "**Consent Documents**" as meaning various documents including the consent receivership order.

[10] The application proceeded on the basis that the various condition precedents were satisfied, including the provision of the CRO, and that the initial forbearance period took effect thereafter.

[11] The debtors did not clear their collective debt to Servus by the November deadline. On November 22, 2019, counsel for Servus wrote counsel for the debtors:

> Pursuant to the Forbearance Agreement … we confirm that the Borrowers have not repaid the Lender in full … its outstanding indebtedness prior to the [November 2019] expiration of the Forbearance Period as required by … the Forbearance Agreement. This constitutes an Event of Default under … the Forbearance Agreement.
>
> As you know, the Lender is currently reviewing the Borrowers' request for a further extension of the Forbearance Agreement.
>
> Notwithstanding this Notice of Default and, without in any way waiving the Event of Default or waiving any other rights of the Lender in relation to the Event of Default, the Lender acknowledges receipt of the Borrowers' request for a further extension and will advise of its decision in respect of that request in due course.

[12] As it turned out, Servus decided to extend the forbearance period, via a Forbearance Amendment / Extension Agreement made with the debtors and the guarantor on December 30, 2019. One preamble of that agreement states: "The Borrowers have advised the Lender that they anticipate being able to *repay the Loans in full by March 12, 2020*, if an extension is granted" (emphasis added).

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[13] The extension agreement also included the debtors and guarantor acknowledging indebtedness to Servus, as of December 10, 2019, of approximately $13.6 million and the existence of various ongoing defaults under the credit arrangements.

[14] The purpose of the agreement was described (in s. 1.4) as "to provide [the] Borrowers with a further period of time to restructure and refinance to *pay out the Obligations in full*…" (emphasis added).

[15] The heart of the extension agreement is here:

> 2.1 **Forbearance Period.** The Forbearance Period, as defined in s. 2.1 of the Forbearance Agreement, is amended to end on the earlier of (i) 2:00 p.m. (Edmonton Time), Thursday, March 12, 2020 and (ii) the date that any Forbearance Default (as defined in the Forbearance Agreement) occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to it under the Loan Documents, the Consent Documents (as hereinafter defined) or otherwise available to the Lender at law.* [emphasis added]

[16] Article 3 outlined various conditions precedent to the extension agreement taking effect. At the application, the parties proceeded on the basis that the agreement indeed took effect.

[17] The extension agreement did not provide a particular definition for Consent Documents. However, s. 1.1 (Definitions) stated that:

> Capitalized terms [e.g. "Consent Documents" in s. 2.1] not otherwise defined herein shall have the meaning ascribed thereto in the Forbearance Agreement. … [As noted above, s. 3.1 of the first agreement defined "Consent Documents" as including the consent receivership order.]

[18] The extension agreement also included "entire agreement" and "full force and effect" terms:

> The Forbearance Agreement, this Amendment Agreement and the Loan Documents constitute the sole and entire agreement of the parties to this Amendment Agreement with respect to the subject matter contained herein and therein and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such matter.
>
> The Forbearance Agreement and the Loan Documents shall remain unchanged, in full force and effect, and continue to govern and control the relationship between the parties hereto, except to the extent they are inconsistent with, superseded or explicitly modified herein. To the extent of any inconsistency, amendment or superseding provision, this Amendment Agreement shall govern and control

[19] On March 3, 2020, counsel for Servus wrote the debtors to advise (or confirm) that certain financial reporting by the debtors was overdue per the credit arrangements and the Forbearance Agreement, and that it regarded this as an event of default under the Forbearance Agreement. It gave three days' notice to rectify, failing which it reserved its right to enforce its security and use the Consent Documents.

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[20] On March 10, 2020, counsel for Servus wrote counsel for the debtors reviewing certain information provided by the debtors and providing its assessment that the borrowers and the guarantor were in breach of certain margining requirements and that they continued "to be in default under the terms of the Forbearance Agreement." Servus also advised:

> [We are] not willing to discuss a further extension of the forbearance period beyond the current March 12, 2020 expiry date without having unconditional commitment letters from reputable lenders in place, and which are accepted by the Borrowers and the Guarantor, in an amount sufficient to promptly pay Servus in full. Further Servus also requires the margining deficiency to be resolved to Servus' satisfaction, before it is willing to discuss any extension to the forbearance period.
>
> Nothing in this matter constitutes a commitment from Servus with respect to any extension to the Forbearance Agreement. Servus continues to reserve al of its rights and remedies, including those under the Forbearance Agreement.

[21] On March 13, 2020, counsel for Servus wrote the debtors again (stating in part):

> Further to our March 3, 2020 correspondence, this letter confirms that the Forbearance Period as set out in the Forbearance Agreement has now terminated, in accordance with its terms.
>
> Pursuant to the terms of the Forbearance Agreement, the Lender is entitled to exercise all of its rights and remedies available to it under the Loan Documents, the Consent Documents, and otherwise available to the Lender at law.
>
> We are also advised by the Lender that the Borrowers and Guarantor remain in breach of their margining requirements, and that the Borrowers and Guarantor are aware of this breach.
>
> Please take this as notice of the Lender's intention to enforce its "Servus Security" as set out in the August 8, 2019 Priority Agreement made between [various parties.]"

[22] On March 31, 2020, ACJ Nielsen granted an interim monitoring order on the consent of Servus and the debtors, installing PWC Inc as the monitor. Section 4 of the order stated:

> The Interim Monitoring [Order] shall terminate on the earliest of:
>
> (a) The taking of possession by a receiver, within the meaning of subsection 243(2) [*BIA*], of the Debtor's property over which the Interim Monitor was appointed; and
>
> (b) May 5, 2020, unless renewed by further Order of this Court prior to the expiry date.

[23] The Interim Monitoring Order had the same general effect as the forbearance agreements, freezing Servus's enforcement rights, albeit temporarily:

> 15. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Monitor or with leave of this Court[,] and any and all Proceedings currently under way

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> against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court ….
>
> 16. All rights and remedies of any Person … against or in respect of the Debtor … or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court …

[24] I also note the "material adverse change" provision:

> 10. Upon:
>
> (a) the Interim Monitor filing with the Court a Material Adverse Change Report;
> (b) the Debtor failing to pay when due any Employee-related Obligations; or
> (c) the Debtor otherwise being in default of any of its obligations in this Order;
>
> then Servus is at liberty to immediately apply to Court, on 3 days' notice, for a Receivership Order to appointed [PWC] as receiver in respect of the Debtor and Property.

[25] On April 27, 2020, Sean Fleming of PWC Inc prepared a report of PWC's interim-monitoring activities and a snapshot of the debtors' financial picture as of that date. It also included an update on the debtors' refinancing efforts. In a nutshell, it noted that, of nine lenders they had connected with, "only one lender has provided a commitment letter to [them]", namely, a certain lender providing a commitment letter for the lending of $6.5 million against a particular property owned by the guarantor, which (in light of other borrowing against it) would yield about $5 million for application against the debtors' debts.

[26] As of April 21, 2020, the debtors' debts to Servus stood at approximately $12.6 million, "plus further amounts owed in respect of costs and expenses incurred by Servus, plus further accruing interest."

[27] The debtors remained in default under their credit arrangements with Servus as of that date and as of the application heard on May 6, 2020.

[28] The debtors did not dispute the state of default. Neither did they assert that the forbearance period was still in effect, that the Interim Monitoring Order was still in effect, or that Servus was not otherwise in a position to enforce its security, including seeking the entry of the consent receivership order.

[29] Their position, instead, was that, in light of significant progress in their refinancing efforts and also in separate efforts to liquidate certain properties, and considering the impact of the current pandemic and the partially related turmoil in the Alberta economy, they should be given another month, through to June 4, 2020, to continue those efforts, which would very likely produce substantial paydowns – as much as $9 or $10 million – against their debts to Servus and very possibly a refinancing package to clear those debts completely.

[30] In other words, as of May 6, 2020:

- Servus was still owed over $12.5 million;
- the debtors continued to be in default under their credit arrangements;
- the forbearance period (per the first and second agreements) had expired;

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- no additional forbearance agreement had been put in place;
- the Interim Monitoring Order stay and suspension had expired;
- Servus had reserved its rights to enforce its security and to use the Consent Documents, including the consent receivership order;
- the debtors did not assert that any new forbearance period was in place or otherwise that Servus was not entitled to take enforcement steps, including seeking the entry of the consent receivership order;
- the debtors did not disavow that order in any fashion; and
- the debtors instead asked the Court to find it was not "just or convenient" that the consent receivership order be entered now.

[31] I find, on the first issue, that the express "trigger conditions" – i.e. for Servus to seek the entry of the consent receivership order – were satisfied here: the forbearance period was over, and the debtors continued to be in default.

Impact of Covid-19 pandemic

[32] The debtors argued that they did not get the benefit of the full second forbearance period, invoking the onset of the Covid-19 pandemic.

[33] I do not accept this argument:

1. the debtors went into default in June 2019;
2. Servus issued notices of default to the debtors on June 4, 2019;
3. the debtors had the benefit of the first forbearance period (mid-July 2019 to mid-November 2019);
4. they received the benefit of a *de facto* forbearance period from mid-November 2019 to the end of December 2019), while the parties negotiated the second forbearance period;
5. the second forbearance period ran from December 30, 2019 to March 12, 2020;
6. the debtors defaulted on the second forbearance agreement as early as March 3, 2020;
7. Covid-19's now-massive impact was only beginning to emerge in the week of March 9-13. I take judicial notice that no provincially ordered "restrictions on gatherings" were in place by that week. (I was sitting in Grande Prairie that week; it was "business as usual" at the Court through March 13, at minimum.) The Alberta Government's Covid-19 case statistics[1] only start as of March 8, 2020. The bar-graphs are not calibrated to allow perfect counts, but, from a baseline of zero confirmed cases as of March 8, 2020, the collective number of probable and confirmed cases in those early days (March 8-12) appears to be approximately 25 people. That compares to 6,017 cases as of May 7, 2020. Another chart shows

[1] https://covid19stats.alberta.ca. I am using these statistics as a proxy for the general state of the Covid-19 pandemic in Alberta in the first part of March.

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total hospitalized cases, in those same days, at under 10 people, with one or two in intensive care; that compares to 255 "hospitalized ever" and 52 "ICU ever" cases as of May 7, 2020; and

8. in any case, the debtors' Covid-19-related evidence is silent or vague about the pandemic having any impact on their businesses before March 13. In one of his March 30, 2020 affidavits, Shaun Peesker stated (in part):

> 6. … the Companies are seeking an adjournment of the Receivership Application for the following reasons, among others:
>
> a. The Companies have been making substantial progress in their refinancing efforts, but the COVID-19 pandemic has temporarily prevented such efforts from being advanced to a conclusion …
>
> …
>
> 22. The majority of the Companies' customers have either temporarily shut down operations or have delayed their projects pending the resolution of the COVID-19 pandemic. [no information about when that started]
>
> 23. *As a result of the foregoing, the business operations and employee numbers of the Companies are different than they would normally be at this time of year*. A summary of the current operations and employee numbers for [one debtor company] and [another one] are summarized below:
>
> > a. [neutral employment information for one debtor company]
> >
> > b. Prior to last week [i.e. the week of March 23-27, 2020] [another debtor company] had approximately 110 employees that had been retained throughout the winter season. However, *last Thursday [i.e. March 26, 2020], the decision was made to cease all operations all [two certain plants], other than those operations that are required to fill ongoing orders from current customers. As such, as of last Thursday, the workforce of [that company] has been further reduced to approximately 30 employees.* [major changes but no detailed indication of any Covid-19 impact before late March]

[34] In his other affidavit of the same date, Mr. Peesker describes the status of various refinancing possibilities. Of the total number described, two include a Covid-19 dimension: one indicated a delay "as a result of the COVID-19 pandemic." However, that lender had only been approached around March 23. Another prospect is described as retreating from a possible commitment on account of Covid-19 concerns; however, no evidence is given of when that prospect emerged and when the retreat occurred.

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[35] In Mr. Peesker's follow-up affidavits sworn May 1, 2020, while updates are provided on various fronts, no mention is made of Covid-19, let alone any impact on the debtors' efforts to attract refinancing and sell assets.

[36] This evidence is insufficient to show the pandemic having any material impact on the debtors' businesses, refinancing efforts, or asset-sale efforts through March 12, 2020, when the second forbearance period ended.

[37] In any case, the debtors received the benefit of a further 19 days of no enforcement (between March 12 and March 31, when the Interim Monitoring Order was granted) and a further five-week stay of proceedings (March 31 to May 5) under that order i.e. almost two more months combined.

[38] For all its devastating impact to date, the pandemic did not impair the debtors in any material way through March 12.

[39] As for the stay period from March 31 to May 5 (i.e. the lifespan of the Interim Monitoring Order), the debtors and Servus negotiated that arrangement (and obtained the Court's blessing of it, via the March 31 consent order) with their collective eyes opened wider to the Covid-19 phenomenon. And (as noted above re their May 1 affidavits), the debtors produced no evidence about Covid-19 having any particular effect on their activities or efforts from March 31 through May 1, or thereafter.

Whether the debtors are generally blocked from contesting the receivership order

[40] The debtors made various other arguments, not akin to the unexpected circumstance of Covid-19, about why no receivership order should be granted. They focused on the "just or convenient" requirement in ss. 13(2) of the *Judicature Act*[2], addressing progress made to date in reducing their indebtedness to Servus, the state of various financing "irons in the fire", the sale of certain properties, and the overall prospect of making major headway against the debt if more time is given to them. They also point to evidence that Servus is over-secured and will or should recover its entire claim eventually i.e. even if more time (up to June 4, 2020, at minimum) is given to them.

[41] This raises a question: was it open to the debtors to make such (substantive) arguments in the face of the consent receivership order? I examine this question next.

Consent orders provided as part of forbearance or standstill agreements

[42] In ***Octa Hage Enterprises Ltd v Bank of Credit and Commerce Canada***[3], the Alberta Court of Appeal examined a consent-order-in-exchange-for-more-time scenario:

> [2] In this mortgage foreclosure action the defendants filed a statement of defence by a law firm. In response to the plaintiff's motion for an order nisi, *the defendants' solicitors negotiated a settlement agreement under which more time was purchased in return for a form of final order of foreclosure with the endorsed consent of the defendants' solicitors of record. The plaintiff held this form and in due course when the agreed time had elapsed, presented it to a Master in chambers, with notice to the defendants*. The Master granted a final order of foreclosure in the same terms but with a

[2] Servus also invoked s. 243 *BIA*, ss. 65(7) *PPSA*, and "Part A of the [*ABCA*]."
[3] 1988 ABCA 109

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> stay of execution for an additional six months. The defendants appealed that order to a Queen's Bench justice and now to us.
>
> …
>
> [4] The defendants also argue that section 41(2) of the Law of Property Act impliedly forbids going directly to final order without passing the previous step and collecting an order nisi. Two decisions to that effect were cited, the latter being Canada Trustco Mortgage Co. v. Coleman (M 1985) 1985 CanLII 1132 (AB QB), 59 A.R. 367. But neither involved a consent order, and in our view nothing in section 41 prevents such a consent. Subsection (5) on waivers or releases is referring only to the situation before suit or even before default. It is not necessary here to determine whether the consent operated under subsection (3) of section 41, or under subsection (4), or under the general law on consents to judgment. ***The most that could be said of any requirement for an order nisi (if there is one) is that it would a matter of substantive law, not jurisdiction. And consent judgments are expressly designed to bypass substantive defences***.
>
> [5] That in turn is an answer to a number of substantive defences which the defendants now suggest, including want of formal demand for payment and certain interpretations of the mortgages and the interaction of their amounts. That applies even more strongly to some suggested flaws in the wording of the statement of claim. ***A consent to judgment would be worthless if the plaintiff still had to prove his case in full and negative every defence. It might be (as the defendants argue) that the Master or judge is not always required to grant the order consented to and reserves some power to refuse or vary it. But we need not decide that, for the Master and chambers judge both decided to grant it***, except for the stay of which the defendants do not complain.
>
> [6] ***The defendants also sought to argue that later facts made the final order unjust. For example, they try to argue that their equity in the lands has risen substantially. Given the 16 months which have now elapsed since the consent was given, any injustice is hard to see. But in any event when more time is purchased by a consent judgment the defendant takes the risk of whether the future will be kinder to him or to the plaintiff.*** [emphasis added]

[43] The apparent matter-of-fact entry of a consent receivership order, after forbearance, is reflected in ***Smith v Pricewaterhousecoopers Inc***[4], where Rowbotham JA (in chambers) commented:

> [31] The draft statement of claim also alleged that Servus acted negligently or unreasonably and in bad faith in putting Caliber into receivership at the time that it did. The applicant failed to identify any evidence that could support his allegations. He acknowledged that Caliber was in "a cash flow crisis." *It was never seriously disputed that Caliber had been in a constant state of default for the nine-month period leading up to the receivership.* ***The terms of the final forebearance agreement executed between Caliber and Servus, which the***

[4] 2013 ABCA 288

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> ***applicant personally signed on behalf of Caliber, made it explicit in clauses 3.4 and 3.5 that Servus was at liberty to make immediate use of the Consent Receivership Order that had previously been signed by Caliber's legal counsel on the company's behalf.*** The applicant's counsel conceded that it would have been easy to undo the receivership order if any of Caliber's other creditors or another third party would have come forward to rescue the company. It was demonstrably false that the trustee and Servus refused to meet with the restructuring group as alleged in the proposed statement of claim. Accordingly, it was reasonable for the chambers judge to have concluded, as she did, that the negligence claim was spurious. [emphasis added]

[44] In ***714431 Alberta Ltd v Devon (Town)***[5], Watson J. (as he then was) kept a defaulting party to a consent-judgment-to-be-held arrangement:

> [40] Ultimately there was a settlement of the action reached which, in sum, provided that (a) the *Applicant would endorse a Consent Judgment to the Respondent's motion for Summary Judgment granting all relief sought*, and (b) the Applicant would provide Counsel for the Respondent with a suitable Transfer and (c) the Applicant would pay the legal costs of the Applicant to a maximum of $4,600.00.
>
> [41] *As part of this settlement,* ***the Respondent did agree that it would make no use of the Consent Judgment and Transfer unless the Applicant failed to reach the roof stage deadline by July 1, 2001 at which point the Respondent could proceed to use the Transfer and Consent Judgment.*** The Respondent also agreed, however, to discontinue its action if the Applicant reached the roof stage by that date. The Applicant would have to pay all fees related to the project promptly upon submission of its plans.
>
> [42] The Respondent's Counsel prepared the Consent Judgment and Transfer and forwarded it to Abbey for execution. Ultimately, *Abbey signed the Consent Judgment and returned it along with the Transfer to Counsel for the Respondent by letter dated December 29, 2000.* ***That letter imposed trust conditions as to the Respondent's holding off on use "unless 741431 Alberta Ltd. fails to meet the roof stage level of construction by July 1, 2001".***
>
> …
>
> [117] In the case at bar, the Applicant's Notice of Motion effectively sought an indefinite period of time within which to enable it to decide when to get on with this project. Its argument, in my view, came down to the proposal of a series of estoppels by acquiescence by the Respondent allowing the Applicant to evade the consequences of a series of separate promises, defaults, re-promises and re-defaults. This history does not persuade me of an entitlement of the Applicant on the equities of this case.
>
> …

[5] 2002 ABQB 870

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> [119] … the Applicant has failed to prove the existence of an alleged settlement contract overriding the Consent Judgment and Transfer agreement, such as to require this Court to enforce the latter.
>
> …
>
> [136] ***In my view, the Respondent is not acting punitively to enforce the old agreement as in the concept of the liquidated damages cases. The Respondent is seeking merely to enforce the terms of their agreement as to the Consent Judgment and Transfer.*** [emphasis added]

[45] As did Macklin J. in ***Mraiche v Sander***[6]:

> [27] In my view, this is simply a contractual matter and the Court needs only to review the facts and the agreements between the parties. All of the agreements were voluntarily entered into between sophisticated parties. The Defendant Shirley Sander describes herself as a businesswoman. She owns a number of properties in B.C. When Ms. Sander entered into the Purchase Contract, she utilized the services of a realtor. When she entered into the Affirming Agreement, she did so in the presence of her lawyer. The transfer back was signed by her in the presence of her lawyer. In Clause 10 of the Affirming Agreement, Ms. Sander acknowledged that "she has had the time to review, and has reviewed, this Agreement and that she has received independent legal advice prior to the execution and delivery of this Agreement".
>
> [28] *The agreements expressly contemplate remedies which were agreed to between the parties in the event either failed to complete the contract according to its terms. In the event that Ms. Sander, as the buyer, failed to complete, the agreements contemplated, among other things, a transfer back of the Edmonton property to the Plaintiff, and the filing of the Consent Order granting the Plaintiff immediate possession of the Edmonton property.*
>
> [29] There is no suggestion, nor on these facts could there be, of *non est factum*. Ms. Sander understood the terms of each agreement, she had the advice of a realtor, and, importantly, she had the advice of legal counsel.
>
> [30] ***It is not the function of this Court to rewrite Agreements negotiated and executed by sophisticated business people. It is also not the function of this Court to examine such Agreements to see whether the consideration flowing from one side to the other is appropriate. The parties made those decisions.***
>
> [31] *Ms. Sander has clearly defaulted on payment under the agreements. She has still not paid, or even tendered, the amounts due on the extended date of March 26*. Ms. Sanders' allegations concerning alleged interference by the Plaintiff in her efforts to obtain financing do not have the air of reality or accuracy. The lender advised Ms. Sander's representative that he was declining the loan and would not be providing financing three days before counsel for the Plaintiff spoke to the lender.

[6] 2010 ABQB 341

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[32] *Ms. Sander's lawyer executed a Consent Order in November of 2009 knowing of all of the terms and conditions set out in the various agreements. The Consent Order was entered after Ms. Sander had received an extension of one week by Justice Verville of this Court and after she had failed to make payment as required by that Order. The Consent Order was entered after Ms. Sander's representative had clearly been advised that the lender would not be providing financing.*

…

[35] At the commencement of the Appeal, counsel for Ms. Sander provided the Court with a new affidavit sworn by Ms. Sander and filed the same day (May 12, 2010). She now claims to have received a commitment for bridge financing from a company called Kennedy Financing, Inc. located in New Jersey. ***This new evidence does not impact on the fact that Ms. Sander is still in default and does not justify granting any further relief to her***. I would point out, however, that the supposed commitment appears to be conditional only, both as to the granting of a loan and as to amount. [emphasis added]

[46] And Morawetz J. (as he then was) in ***RBC v Walker Hall Winery Ltd***[7]:

[18] Counsel to the Receiver also points out that the receivership application was commenced in November 2009 and Walker Hall retained Mr. Duncan. Mr. Duncan and counsel to RBC reached agreement on a timetable to have the application heard on December 16, 2009, but the day before such hearing Mr. Duncan contacted counsel to RBC to request an adjournment. ***Counsel agreed that, in exchange for Walker Hall's consent to the Receivership Order, the hearing would be adjourned to December 23, 2009, to provide time for Walker Hall to obtain refinancing***. Mr. Lukezic signed the consent on behalf of Walker Hall. ***Walker Hall did not obtain refinancing and, acting on Mr. Lukezic's consent, counsel to RBC obtained the Receivership Order on December 23, 2009.***

…

[36] ***The central issue is whether circumstances exist that would make it appropriate to nullify or remove the Receivership Order***. A secondary issue is whether the damage claim against RBC is more properly pursued in CV-10-399090.

[37] The Receivership Order was made on consent.

[38] Mr. Macfarlane submits that a party who seeks to have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed. In this case, Mr. Macfarlane submits that there is no evidence of fraud. Further, the application was resolved when the respondents consented to the Receivership Order which they did not appeal.

[7] 2010 ONSC 4236 affd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC)

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> [39] Counsel also submits that, in the absence of fraud or collusion, a consent order cannot be set aside. See ***Houston v. Bousquet***, (1965) CarswellMan 20 (M.C.Q.B.) and Sjogren v. Lamson, (1922) CarswellMan 12.
>
> …
>
> [41] Mr. Lukezic has stated that his consent was premised on the $150,000 promised advance***. In my view, it follows that in order to succeed on this motion, the Court has to be satisfied that the consent was not a true consent***. The Court has to be satisfied that there was an agreement under which the Receiver or RBC would advance $150,000 to Walker Hall.
>
> …
>
> [46] *In my view, even overlooking evidentiary deficiencies, Mr. Lukezic has failed to persuade me that it is appropriate to set aside or vary the Receivership Order.*
>
> [47] ***Mr. Lukezic consented to the Receivership Order on December 23, 2009.***
>
> [48] ***In my view, there is no evidence of fraud or that there was an arrangement under which $150,000 would be advanced by the Receiver or RBC to Walker Hall***. [various evidence reviewed]
>
> …
>
> [63] ***Mr. Lukezic has failed to provide any basis to have the Receivership Order set aside or varied. He has alleged that the Receiver or BDO promised to advance $150,000 to Walker Hall at the time of the Receivership Order and that, in response to this promise, he consented to the Receivership Order. The allegations set out in his factum are, simply put, not supported by the evidence***. No credible alternative to the receivership has been put forth by Mr. Lukezic. [emphasis added]

[47] In contrast, see ***Western Surety Company v Hancon Holdings Ltd***[8], where a creditor had received a consent judgment as part of a work-out arrangement, but the trigger clause was found to be ambiguous. The clause was as follows:

> 4. As security for the performance and fulfillment of their respective obligations under the General Indemnity Agreement, Moh Creek and the Indemnitors will execute an Appearance and *Consent to Judgment* in an action under the General Indemnity Agreement in an amount which includes the anticipated Advances, Expenses and Interest *to be held by counsel for WSC on the basis that it will not be entered unless Moh Creek does not make payment of the Advances, Expenses and Interest in accordance with a payment schedule to be agreed upon by Moh Creek and WSC prior to September 30, 2000 and in any event payment in full shall be made by December 31, 2001 or make such other agreement to extend that period*. [emphasis added]

[48] The parties were unable to agree on a payment schedule; eventually, the creditor filed the consent to judgment and registered it against title to various properties. Per Gerow J.:

[8] 2007 BCSC 180

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> [20] On March 13, 2002, the defendants brought an application to have the Consent Judgment removed from the titles. In opposing the application, *Western Surety argued that it was entitled to file and register the Consent Judgment because the defendants were in default under the Agreement for failing to provide a payment schedule as required by paragraph 4 of the Agreement. However, Morrison J. set aside the Consent Judgment on the basis that it was premature. In her reasons, Morrison J. stated that paragraph 4 of the Agreement was uncertain and ambiguous.* [consent judgments were removed from the titles] [emphasis added][9]

[49] Similarly, in contrast, see ***Skagen v CIBC***[10], where Williams J. found that the trigger condition (default) did not exist:

> [6] The plaintiffs say the Bank has breached its agreement and that the Consent Judgment which was entered against both Skagen and the numbered company should be set aside.
>
> …
>
> [48] *With respect to the consent judgment that was provided to the Bank, it constitutes valuable consideration provided by the plaintiffs on the understanding that it would be entered in the event that the plaintiffs defaulted on their contractual obligations.* When the October payment was not received, the Bank entered the judgment. In my view, *that must be set aside, as the pre-condition for its entry, default by the plaintiffs of their obligations under the Agreement, did not occur*. When the consent judgment was entered, the repudiation had been accepted and there was no further obligation owing by the plaintiffs, hence there could be no default. The decision of Koenigsberg J. in ***Harbelah Enterprises Ltd. v. O'Neil*** (1994), 1994 CanLII 16671 (BC SC), 94 B.C.L.R. (2d), 26 C.P.C. (3d) 315, [1994] 9 W.W.R. 162 (paras. 22-25) establishes that a consent order can be set aside in circumstances such as these. [emphasis added]

Applying those principles here

[50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and *that the appointment of a receiver was warranted* i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.

[51] The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."

[52] I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.

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[9] See also the judgment of Mahoney J. in ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2019 ABQB 732

[10] 2004 BCSC 602

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[53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

[54] Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.

[55] Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.

[56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

Court's duty when presented with a consent order

[57] What, then, is the Court's duty when presented with a consent order, as here? Many cases confirm it is not simply to act as a rubber stamp: see, for instance, ***CTG v RRG***[11], where Popescul CJQB held:

> [11] Where parties have had their agreement sanctioned by the court by incorporation of the child support terms into a judgment or order, a judicial determination has been made. The courts have a duty to scrutinize agreements and consent orders or consent judgments that are submitted by the parties in order to ensure that they comply with the law and are in accordance with the best interests of the child or children who are subject to the order or judgment. ***The process is more than just a "rubber stamp".*** See ***Hayes v Hayes*** (1987), 6 RFL (3d) 138 (Sask QB).

[58] In ***Fisher v Fisher***[12], McDonald J. (as he then was) held:

> [65] On June 23, 1993 Ostapowich [defendant in ***BMO v Ostapowich (Trustee of)*** (1996) 144 Sask R 207 (CA)] made an assignment into bankruptcy. Shortly thereafter the Bank brought an application by way of Notice of Motion seeking to set aside the vesting order and other portions of the consent judgment claiming it represented a settlement or fraudulent conveyance. Ostapowich opposed the application, claiming that it was in substance a collateral attack on a valid judgment of the Court. The Court agreed, holding at paras. 11-13:
>
>> *The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final determination by the Court of the rights and obligations of the parties. A consent*

[11] 2016 SKQB 387
[12] 2008 ABQB 170

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> *judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment*. See: The Hardy Lumber Co. v. The Pickerel River Improvement Co. (1899) 1898 CanLII 16 (SCC), 29 S.C.R. 211; City of Toronto v. Toronto R.W. Co. (1917) 39 O.L.R. 310 at p. 313. ***Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it.*** See Peterson v. Bishop et al., 1923 CanLII 356 (SK CA), [1923] 3 W.W.R. 25; Hope Hardware et al. V. Fields Stores Ltd. et al. (1978), 1978 CanLII 254 (BC SC), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement ***the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement.*** *The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.*
>
> …
>
> [66] While Georgette Fisher is proceeding pursuant to the provisions of Section 10 of the *Matrimonial Property Act* in advancing her claim to a larger interest in the Haysboro property than stipulated in the Hawco Order, the reasoning in *Ostapowich* is applicable. ***The Hawco Order is more than just a mere agreement between Suzanne Fisher and Morris Fisher; it represents a final determination of their respective interests in the Haysboro property as sanctioned by this Court.*** [emphasis added]

[59] For a supportive American perspective, see "Six Degrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation"[13], where Anthony DiSarro wrote:

> V. A CONSENT DECREE IS THE COURT'S DOCUMENT
>
> … a consent decree "contemplates judicial interests apart from those of the litigants." ***Courts have an interest in the contents of their orders***. Absent a statutory obligation to approve the terms of settlement, courts have no interest in the contents of private settlement agreements.
>
> *A. Consent Decree as Both Contract and Order: Entry of the Decree*
>
> A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree. A court should not unilaterally alter a proposed consent decree that has been submitted to it for entry." Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.

[13] (2010) 60 Am U L Rev 275 at 317-320

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However, a court does have the prerogative to at least make the "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree". A consent decree should bear some relationship to the case and pleadings that have invoked the federal court's jurisdiction in the first place'" and "further the objectives of the law upon which the complaint was based." The decree should not undermine judicial integrity.

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.

The court's role here is discretionary, not mandatory. A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry. As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions." Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement. [footnotes omitted] [emphasis added]

Distillation of principles

[60] On how to approach a consent order, the guiding principles are as follows:

- the Court is not obliged, from the mere fact of consent, to grant a consent order; and
- the Court must be satisfied (at minimum) that:
  - it has the jurisdiction to grant the order;
  - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
  - consent has actually been provided;

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- the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
- where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
- the proposed relief does not exceed that consented to; and
- consent aside, the ordered relief is warranted in the circumstances.

[61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.

[62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

[63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.[14]

Whether it is "just or convenient" to appoint a receiver in these circumstances

[64] The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

[65] The question becomes whether it is indeed "just or convenient" to appoint a receiver here.

[66] Here is where (as confirmed by the "consent-order-and-forbearance" cases) the debtors' consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

[67] The debtors' core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs – continuing default – in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

[14] See, for example, ***TEHK v CLS***, 2011 ABCA 252. See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 ("Judgments, Orders, and Settlements), R. ("Consent Orders or Judgments"), 7. ("Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 ("Consent Orders as Evidence of a Contract Between Parties" and "Binding Effect of Consent Orders") at p 303.

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[68] In other words, even acknowledging significant progress to date, and even acknowledging the likelihood of more such progress over the next month, the debtors have *already agreed* that, if and when Servus decided against further grace (i.e. after the expiry of the latest hold period), it could move for the order *with no "merits" objection by them*.

[69] Accordingly, on the "merits" review i.e. whether it is "just or convenient" to appoint a receiver here, I focus on the circumstances outlined by Servus.

[70] Here it cites Romaine J.'s decision in ***Paragon Capital Corp v Merchants & Traders Assurance Co***[15], in particular her helpful catalogue of appointment factors. I reproduce the ***Paragon***-factors review from Servus's application brief:

> (a) Servus is a secured creditor of the Debtors and holds a security interest in of all the present and after-acquired property of the Debtors, subject to certain provisions of priority agreements entered into by Servus. Servus holds a first- ranking security interest in the Alberta Lands and NWT Lands;
>
> (b) The Debtors have demonstrated losses for the past 3 years;
>
> (c) the nature of the Debtors' property includes mobile equipment potentially located across Alberta, the Northwest Territories, British Columbia, Saskatchewan. There is also a risk of these mobile assets being subject to unauthorized sale and removal. The Debtors' also own two parcels of land located in Alberta and one parcel of land located in the Northwest Territories subject to Servus' security;
>
> (d) given that the Debtors' property includes multiple parcels of land, and that the Debtors' property is located across multiple jurisdictions, a receiver is a cost effective mechanism to organize the sale of the property;
>
> (e) an organized sale by a Receiver is likely to maximize recovery for secured and unsecured creditors rather than secured creditors individually seeking to enforce their securities;
>
> (f) the balance of convenience is in favour of Servus. The most recent consolidated financial statements of the Debtors indicates a net loss of $1,137,511 for the month of January 2020. This is indicative of the serious financial distress facing the Debtors;
>
> (g) the conduct of the Debtors is supportive of the granting of the Order requested, as:
>
> > (i) Servus first demanded payment from the Debtors in June 2019, and Servus has since entered into a lengthy forbearance period between July 2019 and March 2020 to assist the Debtors in making alternative arrangements to pay Servus in full. To

[15] 2002 ABQB 430

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date, the Debtors have failed to pay their obligations to Servus in full, which includes the Indebtedness; and

(ii) the large net loss reported in the January 31, 2020 consolidated financial statements of the Debtors, the Debtors cannot sustain their current operations on an ongoing basis without a material injection of capital or refinancing. Such refinancing has not materialized, despite this additional time to obtain it; and

(iii) the Debtors have consented to the Consent Receivership Order;

(h) the Securities granted by the Debtors and Forbearance Agreement authorize Servus to appoint a Receiver over the Debtors upon default, which is further supported by the Consent Receivership Order provided for in the Forbearance Agreement;

(i) a court appointment is necessary to enable the Receiver to carry out its duties more effectively and efficiently given the nature of the Debtors' property and assets;

(j) a Receivership Order would place all creditors and stakeholders of the Debtors on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

(k) while there is a cost of appointing a Receiver, all indications to date indicate that the appointment of a Receiver will be the most cost effective means of dealing with the estates of the Debtors;

(l) it is likely that the value of the property of the Debtors will be maximized by establishing a level and transparent process administered by this Honourable Court; and

(m) Servus is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver, particularly in giving the Debtors since July 2019 to make arrangements to pay Servus in full.

[71] I also note the following comments by the interim monitor (from his April 27 report):

6. STATUS OF PROFORM'S REFINANCING EFFORTS

6.1 At paragraph 35 of the Peesker Affidavit and at paragraph 10 of the Confidential Peesker Affidavit, Mr. Peesker provides a summary of nine lenders the Company was pursuing for financing.

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6.2 The Interim Monitor understands that only one lender has provided a commitment letter to Proform:

> 6.2.1 Lender : Lender 2 has provided a commitment letter in the total amount of $6.5 million to be financed against the Old Brew Property owned by 285. This property has an existing mortgage registered by Servus to secure approximately $1.43 million due to Servus from 285. Therefore, the net amount that would be available to be applied against Proform's indebtedness to Servus is approximately $5.07 million.

6.3 With respect to the balance of the potential lenders identified in the Peesker Affidavit, the Company advised the Interim Monitor that many were not prepared to provide commitment letters due to the current economic environment, while one significant potential lender apparently advised Proform that it did not meet the lender's mandate to lend to businesses in rural communities.

6.4 In summary, as at April 27, 2020 the Company has secured only one financing commitment. This is not sufficient to repay Servus in hill as illustrated below.

	$
Estimated Proform indebtedness to Servus	(12,750,000)
Lender 2 - net ATB financing available to Servus on Old Brew	5,070,000
Remaining outstanding Proform indebtedness	(7,680,000)

6.5 On April 27, 2020, the Company provided the Interim Monitor with an executed real estate purchase contract with respect to the sale of the NWT Property ('NWT Sale Contract'). The NWT Sale Contract is included in the confidential appendix noted below. Management advise that the full amount of the sales proceeds would be applied against the Servus debt, of which approximately $790,000 relates to a Servus mortgage registered against the NWT Property. Regardless, there remains a significant shortfall to Servus.

6.6 The Company advised that it anticipates the receipt of a number of commitment letters in the next several days that will address this shortfall. While the Interim Monitor is hopeful, it should be noted that the Company has stated this on various occasions over the last several weeks and months. For various reasons, including those noted above, commitment letters have not been obtained.

EVALUATION OF THE ASSETS

7.1 As set out in paragraph 9 of the Interim Monitor Order, the Interim Monitor is to conduct a review and evaluation of the Property (as defined in the Interim Monitor Order) and file a report to the Court in respect of the same.

7.2 To assist in its evaluation of the Company's major assets and to assess Mr. Peeskers claim that 'the value of collateral held by Servus is several multiples in excess of the $12 million outstanding", the Interim Monitor immediately engaged the previous real estate appraisers utilized by the Company and 285 seeking the previous real estate appraisers utilized by the Company and 285 seeking updated

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appraisals for the Burnt Lake Property, the NW' Property, the Gasoline Alley Property and the Old Brew Property. In addition, the Interim Monitor sought a high—level valuation of the Company's major pieces of equipment, rolling stock and concrete plant assets from Century.

7.3 With respect to the real estate, on April i6, 2020, SWM delivered its NWT Property appraisal to the Interim Monitor. Subsequently, on April 21, 2020, Soderquist delivered to the Interim Monitor appraisals of the Burnt Lake Property, the 01(1 Brew Property and the Gasoline Alley Property.

7.4 With respect to the Company's equipment, rolling stock, and concrete plant assets, on April 23, 2020 Century provided the Interim Monitor with its estimated valuation on these assets.

7.5 It is the Interim Monitor's view that Proform's assets subject to the security of Servus are insufficient to repay Servus in full. The Interim Monitor estimates the shortfall to be in range of $1.94 million to $6.81 million. Accordingly, it will he necessary for Servus to look to the additional collateral pledged to Servus by 285 to address shortfall.

D. Conclusion

[72] In these circumstances, and emphasizing the debtor's consent to the proposed receivership order, it is "just *and* convenient" that it be entered and, accordingly, that the debtors' application to extend the interim-monitoring period to June 4, 2020 be dismissed.

Heard on the 5th day of May, 2020.
Dated at the City of Edmonton, Alberta this 11th day of May, 2020.

M. J. Lema
J.C.Q.B.A.

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