Clerk's Stamp:

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Justice Jones
COM
July 30, 2021

COURT FILE NUMBER	2101 - 08877
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	**732482 ALBERTA LTD., HAN SEUNG YOO, JAI HYUN YOO, HYE YOUNG YEO, JIN OK YEO, GAB BUN KIM, OK SOON KIM, SE JIN KIM, SUNG YEON KIM, YOUNG OK KIM** and **YO SUP KIM**
DOCUMENT	**BRIEF OF LAW OF THE PLAINTIFF IN SUPPORT OF THE RECEIVERSHIP OF 732482 ALBERTA LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Burnet, Duckworth & Palmer LLP**	
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	File No.	38795-2792

Hearing via Webex before the Honourable Justice C.M. Jones
on the Commercial List, on July 30, 2021, commencing at 2:00 P.M.

TABLE OF CONTENTS

I. INTRODUCTION

1. This is the Brief of Law of the ATB Financial ("**ATB**" or the "**Lender**"), in support of its application (the "**Application**") to appoint BDO Canada Limited ("**BDO**") as the receiver and manager (the "**Receiver**") of all of the current and future assets, undertakings and property (collectively, the "**Property**") of 732482 Alberta Ltd. ("**732 AB Ltd.**").

2. ATB extended credit facilities and related services to 732 AB Ltd. pursuant to a Credit Agreement dated July 26, 2016 (the "**Credit Agreement**").[1]

3. As at July 16, 2021, 732 AB Ltd. was indebted to ATB for at least $5,202,943.23 in respect of funds borrowed pursuant to the Credit Agreement, plus interest and costs, which continue to accrue (the "**Indebtedness**").[2]

4. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.[3]

5. BDO is qualified, prepared and has consented to act as Receiver.[4]

6. 732 AB Ltd. is in default of its obligations to ATB and has failed to repay the amounts owing under Credit Agreement following ATB's demand, ATB seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

II. ISSUE

7. The issue in this application is whether it is just and convenient for this Honourable Court appoint a receiver over the Property.

III. ATB'S POSITION

8. ATB respectfully submits that appointing a Receiver over 732 AB Ltd. is a remedy that is available to ATB, that it is just and convenient to appoint a Receiver of the Property of 732 AB Ltd. in the present circumstances.

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[1] Affidavit of Brian Spilchen, sworn July 19, 2021 (the "**Spilchen Affidavit**") at para 6.
[2] Spilchen Affidavit, at para 7.
[3] The GSA expressly provides in Clause 8(d) for the appointment of a receiver upon a Debtor's default - Spilchen Affidavit, at para 32.
[4] Spilchen Affidavit, at para 36; Spilchen Affidavit, Exhibit "J".

IV. FACTUAL BACKGROUND

9. The facts in support of ATB's application are set forth in the Spilchen Affidavit.[5]

10. 732 AB Ltd. is a corporation incorporated under the laws of Alberta, with a registered office and records office located in Whitecourt, Alberta.[6]

A. Security

11. 723 AB Ltd. granted security to ATB in respect of all of its obligations, indebtedness and liabilities to ATB under the Credit Agreement, including:

(a) a commercial mortgage dated December 9, 2014 with a principal amount of $5,800,000.00 constituting a first charge on 723 AB Ltd.'s interest in the lands legally described as:

PLAN 4847NY
BLOCK 49
LOT 38
EXCEPTING THEREOUT ALL MINES AND MINERALS (the "**Property**")

(the "**Mortgage**");

(b) an Assignment of Leases and Rents dated December 9, 2014 made by 732 AB Ltd. in favour of ATB, whereby 732 AB Ltd. assigned to ATB all leases now or in the future to be entered into by 732 AB Ltd. and all and any renewals thereof, and all rents reserved and payable and to become payable thereunder (including without limitation the right to distress contained therein) (the "**Assignment of Leases and Rents**"); and

(c) a general security agreement dated November 26, 2014 wherein as security for payment and performance of any and all obligation, indebtedness and liability of 723 AB Ltd. to ATB, 723 AB Ltd. granted to ATB a security interest in all of the Debtor's present and after-acquired property, assets and undertaking, including without limitation all present and after-acquired Personal Property, and all present and after-acquired real, immoveable and leasehold property (in which the Debtor at any time has an interest or to which the Debtor is or at any time may become entitled) and in all Proceeds and renewals thereof, Accessions thereto and substitutions therefor (the "**GSA**").

[5] Capitalized terms not otherwise defined herein have the meaning set forth in the Spilchen Affidavit, ATB's Statement of Claim or ATB's Application.
[6] Spilchen Affidavit, Exhibit "A".

12. ATB duly registered the GSA in the Alberta Personal Property Registry.[7]

13. In addition to the foregoing security granted to ATB under the Credit Agreement, 732 AB Ltd. granted security to ATB pursuant to a collateral mortgage on 732 AB Ltd.'s interest in the lands legally described as:

> CONDOMINIUM PLAN 0721242
> UNIT 10
> AND 132 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY
> EXCEPTING THEREOUT ALL MINES AND MINERALS
>
> (the "**Collateral Mortgage**").[8]

14. The Mortgage, Collateral Mortgage and the Assignment of Leases and Rents are duly registered with the Alberta Land Titles Office. [9]

15. The Mortgage, the Assignment of Leases and Rents, the GSA and the Collateral Mortgage are collectively referred to herein as the "**Security**".

B. Demands and Failure to Make Payment

16. On or about March 4, 2020, and again on or about October 29, 2020, ATB demanded repayment of the Indebtedness from 732 AB Ltd. and concurrently therewith served upon 732 AB Ltd. a Notice of Intention to Enforce Security in accordance with section 244 of the *Bankruptcy and Insolvency Act* (the "***BIA***")[10] (collectively, the "**732 Demand**").[11]

17. 732 AB Ltd. has failed, refused or neglected to repay all of the Indebtedness.[12]

18. After 732 AB Ltd.'s failure to repay the Indebtedness, ATB and 732 AB Ltd. entered into a forbearance agreement on or about April 30, 2020 (the "**Forbearance Agreement**").[13] 732 AB Ltd.'s obligations under the Forbearance Agreement included, but were not limited to:

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[7] Spilchen Affidavit, at para 15; Spilchen Affidavit, Exhibit "F".
[8] Spilchen Affidavit, at para 11.
[9] Spilchen Affidavit, at paras 13-14; Spilchen Affidavit, Exhibits "D" and "E".
[10] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "***BIA***") [**Book of Authorities** ("**Authorities**") **Tab 1**].
[11] Spilchen Affidavit, at para 19; Spilchen Affidavit, Exhibit "H".
[12] Spilchen Affidavit, at para 20.
[13] Spilchen Affidavit, at para 24; Spilchen Affidavit, Exhibit "I".

(a) remitting, in accordance with legal requirements, all taxes owing by the Borrower to any municipality (as that term is defined in the *Municipal Government Act* (Alberta)) with respect to any real property subject to the Security;

(b) making monthly interest payments towards the Indebtedness, effective August 31, 2020; and

(c) reducing the Indebtedness to $0.00 on or before October 31, 2020.

C. Defaults and Eroding Security

19. 732 AB Ltd. is in default of its covenants and obligations under the Credit Agreement and the Forbearance Agreement.[14]

20. Property Tax Certificates from the City of Lloydminster indicate that as of July 7, 2021, there is $53,803.51 in property taxes owing to the City of Lloydminster pursuant to 732 AB Ltd.'s 2020 tax assessments in respect of the Property. As such unpaid taxes continue to accrue, ATB's security will erode further (the "**Unpaid Taxes**").[15]

21. As a result of 732 AB Ltd.'s continuing defaults, including the Unpaid Taxes, ATB's security in respect of 732 AB Ltd. has eroded significantly, and continues to erode.

V. LAW AND ARGUMENT

A. ATB is entitled to appoint a receiver

22. ATB satisfied the procedural prerequisite to seeking appointment of the Receiver on or about March 4, 2020 when it served the 244 Notice on 732 AB Ltd.

23. Each of section 243 of the *BIA*[16] and section 13(2) of the *Judicature Act* [17] vest in this Honourable Court the authority to appoint a Receiver where it is just and convenient to do so.

24. ATB respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver of the Property, because it is just, convenient and otherwise appropriate and would be in

[14] Spilchen Affidavit, at para 30.
[15] Spilchen Affidavit, at para 17; Spilchen Affidavit, Exhibit "G".
[16] *BIA*, at s. 243 [**Authorities, Tab 1**].
[17] *Judicature Act*, RSA 2000 c J-2, as amended (the "***Judicature Act***") at s. 13(2) [**Authorities, Tab 2**].

accordance with the contractual terms agreed upon by ATB and 732 AB Ltd. under the Security and the Forbearance Agreement.

B. Considerations when Appointing a Receiver

25. When considering an application to appoint a receiver, this Court has used the same test as Courts use to determine if an interlocutory injunction is appropriate,[18] but loosened the test in cases where "the dictates of fairness are so overwhelming".[19] In *Murphy*, Justice Veit found that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Test are not met.[20]

26. In *Canadian Imperial*,[21] the British Columbia Supreme Court, concluded that where a secured creditor has sought a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.[22]

27. This approach was also adopted by the Ontario Superior Court in *RMB*:

> …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.[23]

28. In *Lindsey*, the Alberta Court of Appeal affirmed the decision of the trial judge, which set out a blended, non-exhaustive list of factors for determining whether appointing a receiver is just and convenient.[24]

29. In *Schendel*,[25] this Court affirmed the non-exhaustive list of factors set forth in *Bennett on Receiverships* to be considered in Courts' decision to appoint a receiver, originally consolidated in *Paragon* (the "***Paragon* Factors**").[26] Among the *Paragon* Factors are two of the three elements of

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[18] 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 (the "**Injunction Test**")[18] *RJR — MacDonald Inc v Canada (Attorney General)* [1994]1 SCR 311 at paras 83-85 [**Authorities, Tab 3**].
[19] *Murphy v Cahill*, 2013 ABQB 335 ("***Murphy***") at para 8 [**Authorities, Tab 4**].
[20] *Murphy* at para 62 [**Authorities, Tab 4**].
[21] *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc*., 2012 BCSC 437 ("***Canadian Imperial***") [**Authorities, Tab 5**].
[22] *Canadian Imperial* at para 14 [**Authorities, Tab 5**].
[23] *RMB Australia Holdings Ltd. v Seafield Resources Ltd*., 2014 ONSC 5202 ("***RMB***") at para 29 [**Authorities, Tab 6**].
[24] *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("***Lindsey***") at para 32 [**Authorities, Tab 7**].
[25] *Re Schendel Management Ltd.*, 2019 ABQB 545 ("***Schendel***") at para 44 [**Authorities, Tab 8**].
[26] *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("***Paragon***") at para 27 [**Authorities, Tab 9]**.

the Injunction Test, with the "serious issue to be tried" question omitted. The five factors from *Lindsey* are also captured in the *Paragon* Factors.

30. A relevant instance of customization is found in *Paragon*, where Justice Romaine confirmed that parties' contractual interests should be honored above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm if a Court does not appoint a receiver:

> 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.[27]

31. In *Kasten*, a secured creditor brought an application to appoint a receiver pursuant to the terms of its security documentation, and this Honourable Court held:

> The security documentation in the present case authorizes the appointment of a Receiver […]. Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not 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.[28]

32. Having regard for the *Paragon* Factors, ATB respectfully submits that it is just and convenient to appoint BDO as receiver over the Property for, among others, the following reasons:

(a) it is not necessary for ATB to provide the existence of irreparable harm in the event a receiver is not appointed;

(b) it is an express term of the Security that, upon default, one of the remedies available to ATB is the appointment of a receiver;[29]

(c) pursuant to the terms of the Forbearance Agreement, 732 AB Ltd. has consented to BDO's appointment as receiver; and

(d) there are no compelling commercial or other reasons to not appoint BDO as receiver.

33. As detailed in the Spilchen Affidavit, ATB has essentially lost confidence in 732 AB Ltd.[30]

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[27] *Paragon* at para 27 [**Authorities, Tab 9**].
[28] *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* ("***Kasten***") 2013 ABQB 63 at para 21 [**Authorities, Tab 10**].
[29] The GSA expressly provides in Clause 8(d) for the appointment of a receiver upon a Debtor's default - Spilchen Affidavit, at para 32.
[30] Spilchen Affidavit, para 29.

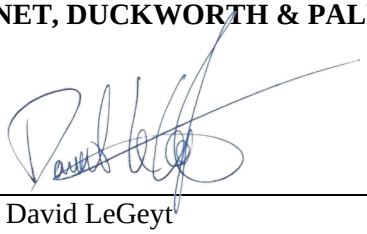
34. ATB respectfully submits that in the circumstances it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over 732 AB Ltd.'s business and to maximize recovery for stakeholders.

VI. CONCLUSION

35. For the reasons set forth above, ATB seeks a Receivership Order, substantially in the form appended to as Schedule "A" to the Application in order to permit the Property to be sold in an orderly manner and to preserve any funds realized in the disposition of the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19TH DAY OF JULY, 2021

BURNET, DUCKWORTH & PALMER LLP

Per: 

David LeGeyt
Solicitors for ATB Financial

BOOK OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2.	*Judicature Act*, RSA 2000, c J-2.
3.	*RJR — MacDonald Inc. v Canada (Attorney General)* [1994] 1 SCR 311 (SCC).
4.	*Murphy v Cahill*, 2013 ABQB 335.
5.	*Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.*, 2012 BCSC 437.
6.	*RMB Australia Holdings Ltd. v Seafield Resources Ltd.*, 2014 ONSC 5202.
7.	*Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242.
8.	*Re Schendel Management Ltd.*, 2019 ABQB 545.
9.	*Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430.
10.	*Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63.

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

243(1.1)Restriction on appointment of receiver

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.

243(2)Definition of "receiver"

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.

243(3)Definition of "receiver" — subsection 248(2)
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).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to November 19, 2020
Federal English Regulations are current to Gazette Vol. 154:21 (October 14, 2020)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

244.

244(1)Advance notice

A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

244(2)Period of notice

Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

244(2.1)No advance consent

For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

244(3)Exception

This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

244(4)Idem

This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History

1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency

Federal English Statutes reflect amendments current to November 19, 2020
Federal English Regulations are current to Gazette Vol. 154:21 (October 14, 2020)

End of Document

TAB 2

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

Most Recently Cited in: Bruno v. Samson Cree Nation, 2020 ABQB 504, 2020 CarswellAlta 1554 | (Alta. Q.B., Aug 31, 2020)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.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.

13(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.

Currency

Alberta Current to Gazette Vol. 116:20 (October 30, 2020)

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Leger v. Canadian National Railway | 1999 CarswellNat 3824, 1999 CarswellNat 3825, [1999] C.H.R.D. No. 6, [1999] D.C.D.P. No. 6 | (Can. Human Rights Trib., Nov 26, 1999)

1994 SCC 117
Supreme Court of Canada

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

1994 CarswellQue 120F, 1994 CarswellQue 120, 1994 SCC 117, [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 the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for 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.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.e Stay pending appeal
Remedies
II Injunctions
II.1 Principles relating to availability of injunctions
II.1.e Public interest
Remedies
II Injunctions

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.

77 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.

78 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 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 .

79 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 tax into court pending the disposition of the main action.

2. The Status Quo

80 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 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

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

82 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.

83 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.

84 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.

85 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.

86 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

87 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 jurisprudence 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 on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated 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

88 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.

89 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

90 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.

91 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,

TAB 4

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
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
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.

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.

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.

(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.);

(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)

TAB 5

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

***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.

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 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.

TAB 6

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

***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.

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.

> 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.

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.

TAB 7

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
Related Abridgment Classifications
Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
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

$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 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

TAB 8

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
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
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

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.

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).

TAB 9

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
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
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.
Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders.

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;

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, 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.

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

***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.

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.

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 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