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PLAINTIFF/APPLICANT	ACES CANADA SPV III ULC
DEFENDANT/RESPONDENT	BLUE SKY RESOURCES LTD.
DOCUMENT	**BENCH BRIEF OF THE PLAINTIFF/ APPLICANT, ACES CANADA SPV III ULC**

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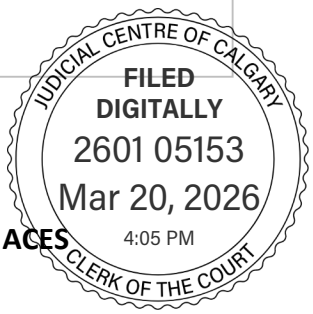

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BENCH BRIEF OF ACES CANADA SPV III ULC

APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE LITTLE

MARCH 23, 2026 at 2:30 P.M. (Commercial List)

TABLE OF CONTENTS

I. INTRODUCTION

1. This Bench Brief is submitted by the Plaintiff/Applicant, ACES Canada SPV III ULC ("**ACES**") in support of an application (the "**Application**") for the appointment of KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacity, the "**Receiver**") of Blue Sky Resources Ltd. ("**Blue Sky**").

2. Blue Sky is the borrower under the Agreements (as defined below) with ACES, whereby ACES advanced certain Loans (as defined below) to Blue Sky. As security for the Loans, RBC holds the Security (as defined below) charging Blue Sky's assets.

3. The Loans are in default and, as of March 18, 2026, there is approximately USD$13,849,420 due and owing pursuant to the Term Loan (as defined below), and approximately CAD$2,044,964 pursuant to the DIP Loan (as defined below), respectively.

4. ACES has determined that the appointment of the Receiver is necessary to prevent further loss, prejudice and damage to its position and security. Among other things, a Receiver will improve the management of the Blue Sky's business, protect the interests of creditors and facilitate an efficient realization process of the Security. The proposed appointment of KSV is, therefore just and convenient, and should be granted.

II. ISSUES

5. The issue before this Honourable Court is whether it is just and convenient to appoint KSV as Receiver over Blue Sky.

III. FACTUAL BACKGROUND

6. The relevant factual background is set out in detail in the Affidavit of David O'Driscoll sworn on March 20, 2026 (the "**O'Driscoll Affidavit**"),[1] which provides a summary of the relationship between ACES and Blue Sky. A summary of these facts are set out below.

7. Unless otherwise indicated, capitalized terms used herein but not otherwise defined have the meanings given to them in the O'Driscoll Affidavit.

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[1] Affidavit of David O'Driscoll sworn on March 20, 2026 **[O'Driscoll Affidavit]**.

The Credit Agreement and the Credit Agreement Security

8. Pursuant to a credit agreement dated July 24, 2024 (the "**Credit Agreement**"), ACES, as administrative agent for a group of lenders (collectively, the "**Lenders**"), advanced a loan in the aggregate principal amount of USD$16,250,000 (the "**Term Loan**") to Blue Sky.[2]

9. The Term Loan was secured by, among other things, the following security granted by Blue Sky in favour of ACES (as agent on behalf of the Lenders):

   (a) a general security agreement dated July 24, 2024 (the "**Security Agreement**"), granted by Blue Sky in favour of ACES with respect to certain Subject Properties (as defined in the Credit Agreement);

   (b) a fixed and floating charge demand debenture dated July 24, 2024 (the "**Debenture**"), granted by Blue Sky in favour of ACES, with respect to the Subject Properties;

   (c) a debenture pledge agreement dated July 24, 2024, granted by Blue Sky in favour of ACES; and

   (d) an amended and restated direct pay agreement dated September 12, 2024, granted by Blue Sky in favour of ACES and Macquarie Energy Canada Ltd.,

   (collectively, the "**Credit Agreement Security**").[3]

10. Upon a default under the Security Agreement and the Debenture, ACES has the right to, among other things, appoint a receiver over Blue Sky.[4]

The Insolvency Proceedings

11. On September 24, 2025, Blue Sky commenced insolvency proceedings (the "**Insolvency Proceedings**") by filing a Notice of Intention to Make a Proposal under Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***"). KSV was appointed as the Licensed Insolvency Trustee in the Insolvency Proceedings.[5]

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[2] O'Driscoll Affidavit at para 6.
[3] O'Driscoll Affidavit at para 7.
[4] O'Driscoll Affidavit at para 8.
[5] O'Driscoll Affidavit at para 12.

12. Pursuant to the express provisions of the BIA, the Insolvency Proceedings expire on March 24, 2026. To date, Blue Sky has failed to put forward a proposal to creditors in connection with the Insolvency Proceedings. It is the position of ACES that the Insolvency Proceedings are doomed to fail.[6]

13. Pursuant to an Interim Financing Term Sheet dated October 30, 2025 (the "**Interim Credit Agreement**" and, together with the Credit Agreement, the "**Agreements**"), ACES granted to Blue Sky an interim financing loan of up to CAD $2,500,000 (the "**DIP Loan**" and, together with the Term Loan, the "**Loans**").[7]

14. Pursuant to an Order granted by Justice J. T. Nielson on November 7, 2025, and as security for the DIP Loan, ACES was granted a priority charge over all present and after-acquired property, assets and undertakings of Blue Sky, real and personal, tangible and intangible, whether now owned or hereafter acquired, and the proceeds thereof (together with the Credit Agreement Security, the "**Security**").[8]

Events of Default

15. Blue Sky has breached and defaulted on the Agreements and the Security (collectively, the "**Defaults**").[9]

16. On March 18, 2026, ACES issued a demand, which was served upon Blue Sky, demanding repayment of the Loans, plus costs, disbursements and interest that continue to accrue (the "**Demand Letter**"). Enclosed in the Demand Letter was a Notice of Intention to Enforce Security pursuant to Section 244 of the *BIA*.

17. As of March 18, 2026, the amounts outstanding and owing by Blue Sky to ACES under the Agreements, as applicable, are set out below, plus costs, disbursements and interest, which continue to accrue thereon:

    (a) approximately USD$13,849,420 pursuant to the Term Loan; and

[6] O'Driscoll Affidavit at para 15.
[7] O'Driscoll Affidavit at para 13.
[8] O'Driscoll Affidavit at para 14.
[9] O'Driscoll Affidavit at para 16.

(b) approximately CAD$2,044,964 pursuant to the DIP Loan.[10]

IV. LAW AND ARGUMENT

(a) This Court has Discretion to Appoint a Receiver Where Just and Convenient

18. Under section 243(1) of the *BIA*, on the application of a "secured creditor" who has complied with the statutory notice period, the Court may appoint a receiver over the property of an "insolvent person". The Court may authorize the appointment of a receiver where it considers that it is "just or convenient" to do so.[11]

19. Alberta's Provincial legislation contemplates a similar test for the appointment of a receiver. Under section 13(2) of the *Judicature Act*, the Court may appoint a receiver where it is "just or convenient".[12]

20. This inquiry requires the Court "to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required".[13] The ultimate question is, "what are the relative risks to the parties of granting or withholding the remedy?"[14]

21. In *Paragon Capital Corp v Merchants & Traders Assurance Co*[15] ("***Paragon***"), Justice Romaine of this Court held that, in analyzing whether a receiver is "just or convenient", the Court may consider various factors enumerated in *Bennett on Receiverships*. The applicability of those factors depends on the particular factual matrix. The factors include:[16]

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

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[10] O'Driscoll Affidavit at para 19.
[11] The *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 at s 243(1) - (1.1) **[*BIA*] [TAB 1]**.
[12] *Judicature Act,* RSA 2000, c J-2, s 13(2) **[*Judicature Act*] [TAB 2]**.
[13] *MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB 647 at para 11 [***MTM***] [**TAB 3**]; *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at para 209 **[*CWB*] [TAB 4]**.
[14] *MTM* at para 11 **[TAB 3]**; *CWB* at para 209 **[TAB 4]**.
[15] *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 **[*Paragon*] [TAB 5]**.
[16] *Paragon* at para 27, citing Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada, 1995) at 130.

(b) the risk to the security holder taking into consideration the size of Blue Sky'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 Blue Sky'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 Blue Sky 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; and

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

22. Notably, while some authority indicates that the Court should apply the tripartite test for injunctive relief when considering a receivership application, those requirements are not required

where the applicant is a security holder.[17] Similarly, where the security documents authorize the appointment of a receiver, the inquiry should be whether the Court appointment of a receiver is "preferable", not whether it is "essential".[18]

(b) The Appointment of KSV as Receiver of Blue Sky is Just and Convenient

23. To begin, ACES has satisfied the requirements for the appointment of a Receiver, including certain Bennett factors (as applied in *Paragon* and other jurisprudence of this Court). Specifically,

(a) ACES is a secured creditor of Blue Sky and has a contractual right pursuant to the Security Agreement and the Debenture to appoint a receiver. This contractual entitlement is a significant factor supporting the appointment of the proposed Receiver in the present case;[19]

(b) Blue Sky is insolvent, by having ceased to pay their current obligations in the ordinary course of business as they generally become due, including payment of the indebtedness owed under the Agreements;[20]

(c) ACES has satisfied the notice requirement under Section 244 of the BIA by, among other things, having delivered the Demand Letters to Blue Sky on or about March 18, 2026;[21]

(d) pursuant to the express provisions of the BIA, the Insolvency Proceedings expire on March 24, 2026. To date, Blue Sky has failed to put forward a proposal to creditors in connection with the Insolvency Proceedings and it is ACES' position that the Insolvency Proceedings are doomed to fail;

(e) if a Receiver is not appointed over Blue Sky, there is a real risk of substantial loss and prejudice to ACES;[22]

(f) in any event, ACES has lost confidence in the management of Blue Sky to protect ACES' security position;[23]

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[17] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at para 17 **[TAB 6]**.
[18] *Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19 at para 37 **[TAB 7]**.
[19] O'Driscoll Affidavit at para 22.
[20] O'Driscoll Affidavit at para 22.
[21] O'Driscoll Affidavit at para 18.
[22] O'Driscoll Affidavit at para 22.
[23] O'Driscoll Affidavit at para 22.

(g) the appointment of a receiver will be the most effective and efficient way to realize on the value of the Security, minimize the costs associated with that process and protect the interest of stakeholders;

(h) the balance of convenience favours the appointment of the proposed Receiver; and

(i) KSV is a licensed insolvency trustee with considerable experience in such matters, and has consented to act as Receiver.[24]

24. In all the circumstances, and based on the record before the Court, ACES submits that a Court-appointed receiver and manager is the fairest, balanced, just, and reasonable remedy, and ought to be granted.

V. RELIEF REQUESTED

25. In light of the foregoing, ACES respectfully request that this Honourable Court grant the relief set out in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 20th day of March, 2026.

BORDEN LADNER GERVAIS LLP

Per: _____

Kevin Barr / Miles Pittman

Counsel for the Plaintiff/Applicant,
ACES Canada SPV III ULC

[24] O'Driscoll Affidavit at para 23.

VI. LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3
2.	*Judicature Act*, RSA 2000, c J-2
3.	*MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB.
4.	*CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137
5.	*Paragon Capital Corp v Merchants & Traders Assurance Co,* 2002 ABQB
6.	*Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43.
7.	*Pillar Capital Corp v Harmon International Industries Inc,* 2020 SKQB 19.

TAB 1

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Bankruptcy and Insolvency Act

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

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

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

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

Definition of *receiver*

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

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

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

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

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

Definition of *receiver* — subsection 248(2)

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

TAB 2

Judicature Act, RSA 2000, c J-2

JUDICATURE ACT

Chapter J-2

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "Court" means, except in Part 2.1, the Court of King's Bench or, on appeal, the Court of Appeal;

(b) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act.

RSA 2000 cJ-2 s1;2013 c23 s8;AR 217/2022;2022 c21 s45

Part 1
Jurisdiction of the Court

Powers, etc., of Court

2(1) The Court has generally all the jurisdiction, powers and authority that before its organization were by any law, order or regulation vested in, or capable of being exercised within, Alberta by the Supreme Court of the North-West Territories.

(2) The Court has all the jurisdiction, powers and authority that were by any law, order or regulation vested in, or capable of being exercised by, The Surrogate Court of Alberta immediately before the coming into force of this subsection.

RSA 2000 cJ-2 s2;RSA 2000 c16(Supp) s36

Jurisdiction of Court of Appeal

3 The Court of Appeal

(a) has all the jurisdiction and powers possessed by the Supreme Court of the North-West Territories en banc immediately before the Court's organization, and

(b) has jurisdiction and power, subject to the Rules of Court, to hear and determine

(i) all applications for new trials,

(ii) all questions or issues of law,

(iii) all questions or points in civil or criminal cases,

(iv) all appeals or applications in the nature of appeals respecting a judgment, order or decision of

(A) a judge of the Court of King's Bench, or

(B) a judge of a court of inferior jurisdiction when an appeal is given by any other Act,

and

(v) all other petitions, applications, matters or things whatsoever that might be brought in England before a Divisional Court of the High Court of Justice or before the Court of Appeal.

RSA 2000 cJ-2 s3;2014 c13 s29;AR 217/2022

Powers of judges

4 The judges of the Court have and shall use, exercise and enjoy all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities as amply and as fully to all intents and purposes as they were on and before July 15, 1870, had, used, exercised and enjoyed in England by any of the judges of the following courts:

(a) the Superior Courts of Law or Equity;

(b) the Court of Exchequer as a court of revenue;

(c) the Court of Probate;

(d) the Courts created by Commissions of Assize, of Oyer and Terminer and of Gaol Delivery, or any of those commissions;

(e) any other superior court or court of record.

RSA 1980 cJ-1 s4

Additional powers of Court

5(1) For the administration of the law, the Court possesses, in addition to any other jurisdiction, powers, rights, incidents, privileges and authorities that immediately before the organization of the Supreme Court of Alberta were vested in, or capable of being exercised within, Alberta by the Supreme Court of the North-West Territories, the jurisdiction that on July 15, 1870, was in England vested in

(a) the High Court of Chancery, as a common law court as well as a court of equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery, and any jurisdiction exercised by the Master of the Rolls in relation to the Court of Chancery as a common law court,

(b) the Court of Queen's Bench,

(c) the Court of Common Pleas at Westminster,

(d) the Court of Exchequer as a court of revenue as well as a common law court,

(e) the Court of Probate,

(f) the courts created by Commission of Assize, of Oyer and Terminer and of Gaol Delivery, or any of those commissions, and

(g) any other superior court or court of record.

(2) The jurisdiction mentioned in subsection (1) includes

(a) the jurisdiction that at any time before the organization of the Court was vested in or capable of being exercised by all or any one or more of the judges of the courts mentioned in subsection (1), sitting in court or chambers or elsewhere, when acting as judges or a judge pursuant to a statute, law or custom,

(b) all the powers given to any such court or to any judges or judge by a statute, and

(c) all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so conferred.

(3) For the purpose of removing any doubt, but not so as to restrict the generality of subsections (1) and (2), it is declared that the Court has the like jurisdiction and powers that by the laws of England were, on July 15, 1870, possessed and exercised by the Court of Chancery in England in respect of

(a) fraud, mistake and accident,

(b) all matters relating to trusts, executors and administrators, partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and to the estates of infants, idiots or lunatics,

(c) the staying of waste,

(d) compelling specific performance of agreements and contracts,

(e) compelling discovery of concealed papers or evidence, or such as might be wrongfully withheld from the party claiming the benefit of them,

(f) preventing the multiplicity of actions,

(g) decreeing the issue of letters patent from the Crown to rightful claimants,

(h) decreeing the repeal of and making void letters patent issued by mistake or improvidently or through fraud,

(i) the administration of justice where there exists no adequate remedy at law, and

(j) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

(4) The rules of decision in matters mentioned in subsection (3), except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on July 15, 1870.

RSA 1980 cJ-1 s5

Pronouncement on wills, etc.

6(1) The Court has jurisdiction

(a) to try the validity of last wills and testaments, whether relating to real or personal estate and whether probate has been granted or not, and

(b) to pronounce the wills and testaments to be void for fraud and undue influence or otherwise,

in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

(2) The Court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870, with regard to

(a) leases and sales of settled estates,

(b) enabling infants with the approbation of the Court to make binding settlements of their real and personal estates on marriage, and

(c) questions submitted for the opinion of the Court in the form of special cases on the part of those persons that by themselves, their committees or guardians, or otherwise, concur therein.

RSA 1980 cJ-1 s6

Jurisdiction regarding lunatics

7 In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that in England is conferred on the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

RSA 1980 cJ-1 s7

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so

that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

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

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

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

RSA 1980 cJ-1 s10

Declaration judgment

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

RSA 1980 cJ-1 s11

Canadian law

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

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

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

(ii) against a right, title or claim asserted by a plaintiff in the proceeding,

the Court shall give to each equitable defence so alleged the same effect by way of defence against the claim of the plaintiff that the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in a proceeding for the same or like purpose.

(3) The Court may grant to a defendant respecting an equitable estate or right or other matter of equity and also respecting a legal estate, right or title claimed or asserted by the defendant, all such relief against a plaintiff that the defendant has properly claimed by the defendant's pleading.

(4) The Court shall recognize and take notice

(a) of all equitable estates, titles and rights, and

(b) of equitable duties and liabilities,

appearing incidentally in the course of a proceeding, in the same manner in which the High Court of Justice in England would recognize and take notice of them in a proceeding instituted in that Court.

RSA 1980 cJ-1 s17;1991 c21 s15

Stay of proceedings

17(1) In a proceeding

(a) for the recovery of a debt or liquidated demand,

(b) for the enforcement of a security or charge on land,

(c) for the determination or specific performance of an agreement for the sale of land, or

(d) for the possession of land,

the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

(2) In a proceeding

(a) for the enforcement of a security or charge on farm land,

(b) for the determination or specific performance of an agreement for the sale of farm land, or

(c) for the possession of farm land,

the Court, notwithstanding the terms of an order or judgment previously made, shall grant a stay of proceedings when it appears that the default of the mortgagor, purchaser or other person is in whole or in part caused by the inability of the mortgagor, purchaser or other person to market grain by reason of lack of elevator space or by reason of the restrictions as to delivery of grain imposed under the *Canadian Wheat Board Act* (Canada) and the regulations under that Act.

(3) A stay granted under subsection (2) remains in force until set aside by the Court, but shall be set aside only on application after notice and on the Court being satisfied that the conditions existing at the time of the granting of the stay and by reason of which it was granted no longer exist.

(4) Nothing in this section limits the authority of the Court, at or after the time that a judgment is granted, to stay the enforcement of the judgment or to remove or extend any stay already granted in respect of the judgment.

RSA 2000 cJ-2 s17;2009 c53 s1

Restraint by prohibition, injunction

18(1) No proceeding at any time pending in the Court shall be restrained by prohibition or injunction, but each matter of equity on which an injunction against the prosecution of the proceeding might formerly have been obtained either unconditionally or on any terms or conditions may be relied on by way of defence in the proceeding.

(2) Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending before it, and any person, whether a party or not to any proceeding at any time pending in the Court

(a) who would have been entitled formerly to apply to a court to restrain the prosecution of it, or

(b) who may be entitled to enforce by attachment or otherwise a judgment, decree, rule or order contrary to which all or part of the proceedings may be taken,

may apply to the Court for a stay of proceedings in the proceeding either generally or so far as might be necessary for the purposes of justice, and the Court shall on that application make any order that will be just.

RSA 2000 cJ-2 s18;2009 c53 s1

Damages instead of injunction, specific performance

19 In all cases in which the Court has jurisdiction to entertain an application

(a) for an injunction against

(i) a breach of a covenant, contract or agreement, or

(ii) the commission or continuance of a wrongful act,

or

(b) for the specific performance of a covenant, contract or agreement,

the Court if it thinks fit may award damages to the injured party either in addition to or in substitution for the injunction or specific performance, and the damages may be ascertained in any manner the Court may direct, or the Court may grant any other relief that it considers just.

RSA 1980 cJ-1 s20

Periodic payment of damages

19.1(1) In this section,

(a) "damages" means damages

(i) for personal injuries or for the death of a person, or

(ii) provided for under the *Fatal Accidents Act*;

(b) "judgment" means a judgment under which damages are to be paid in whole or in part by periodic payments;

(c) "judgment creditor" means a person who is entitled to receive periodic payments under a judgment;

(d) "periodic payment termination date" means the date or event on which periodic payments are to cease being paid;

(e) "proceeding" means a proceeding under which damages are claimed.

(2) On application by any party to a proceeding, the Court may order that damages awarded be paid in whole or in part by periodic payments, and where no party to a proceeding has made an application for periodic payments, the Court nevertheless

(a) may, in the Court's discretion and on the terms that the Court thinks just, order that an award for damages be paid by periodic payments if the Court considers it to be in the best interests of the plaintiff, and

(b) shall order that an award for damages be paid by periodic payments if the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award.

(2.1) Notwithstanding subsection (2), the Court shall not make an order under this section

(a) if all the parties agree otherwise,

(b) if one or more of the parties in respect of whom the order would be made satisfies the Court that the parties do not have sufficient means to fund the order, or

(c) if the Court, on considering all the circumstances, including but not limited to considering whether an order for periodic payments would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages awarded, is satisfied that such an order would not be in the best interests of the plaintiff.

(3) Where the Court orders that damages are to be paid by periodic payments, the Court in its judgment

(a) must identify the specific damages for which periodic payments are to be made and, with respect to each of those specific damages, set out

(i) the amount of each periodic payment,

(ii) the date of each periodic payment or the interval between periodic payments,

(iii) the recipient of each periodic payment,

(iv) the annual percentage increase, if any, in the amount of each periodic payment, and

(v) the periodic payment termination date,

and

(b) in addition to any matter referred to in clause (a), may make any direction and include any material that the Court considers appropriate.

(4) The Court may, for the purposes of assuring payment of a judgment, order any party liable under the judgment to provide security in the form of an annuity contract that complies with the requirements of the *Income Tax Act* (Canada) regarding the tax-free status of the payments, issued by a life insurer satisfactory to the Court and irrevocably payable to the plaintiff, subject to any terms or conditions the Court considers appropriate.

(5) and **(6)** Repealed 2006 c4 s2.

(7) Periodic payments of damages for loss of future earnings are exempt from civil enforcement proceedings to the same extent that wages or earnings are exempt from civil enforcement proceedings.

(8) Periodic payment of damages that are for the cost of future care of the judgment creditor are not assignable to another person unless

(a) the person who is to be the assignee is a provider of care to the judgment creditor and the assignment is to pay for the costs of products, services and accommodation, or any one or more of those items, in respect of the judgment creditor, and

(b) the Court, on application, approves the assignment.

(9) This section applies to any proceeding, whether the proceeding was commenced before or after this section comes into force.

2004 c11 s3;2006 c4 s2;2017 c22 s30

Assignment of chose in action

20(1) When a debt or other legal chose in action is assigned by an absolute assignment made in writing under the hand of the assignor and not purporting to be by way of charge only, if express notice in writing of the assignment has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, the absolute assignment is effectual in law to pass and transfer

(a) the legal right to the debt or chose in action from the date of the notice of the assignment,

(b) all legal and other remedies for the debt or chose in action, and

(c) power to give a good discharge for the debt or chose in action without concurrence of the assignor,

and is subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted.

(2) In the case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action has had notice

(a) that the assignment is disputed by the assignor or anyone claiming under the assignor, or

(b) of any other opposing or conflicting claims to the debt or chose in action,

the debtor, trustee or other person is entitled, if the debtor, trustee or other person thinks fit, to call on the several persons making claim to the debt or chose in action to interplead concerning it.

RSA 1980 cJ-1 s21

Time of essence

21 Stipulations in contracts, as to time or otherwise, that would not heretofore have been deemed to be or have become of the essence of the contracts in a court of equity shall receive the same construction and effect as they would receive in equity.

RSA 1980 cJ-1 s22

Validity of orders

22 No order of the Court under any statutory or other jurisdiction may, as against a purchaser, and whether with or without notice, be invalidated on the ground

(a) of want of jurisdiction, or

(b) of want of concurrence, consent, notice or service.

RSA 1980 cJ-1 s23

Part 2.1
Vexatious Proceedings

Definitions

23(1) In this Part,

(a) “clerk of the Court” means

(i) in the case of the Court of Appeal, the Registrar or Deputy Registrar of the Court,

(ii) in the case of the Court of King's Bench, a clerk, deputy clerk or acting clerk of the court of the judicial centre in which the proceeding is being instituted, and

(iii) in the case of the Court of Justice, a clerk or deputy clerk of the Court;

(b) "Court" means

(i) the Court of Appeal,

(ii) the Court of King's Bench, or

(iii) the Court of Justice.

(2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

2007 c21 s2;AR 217/2022;AR 75/2023

Application

23.1(1) Where on application or on its own motion, with notice to the Minister, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that

(a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or

(b) a proceeding instituted by the person may not be continued,

without the permission of the Court.

(2) An application under subsection (1) may be made by a party against whom vexatious proceedings are being instituted or conducted, a clerk of the Court or the Minister or, with the permission of the Court, any other person.

(3) The Minister has the right to appear and be heard in person or by counsel on an application or a Court's motion under subsection (1) or (4).

(4) The Court may at any time on application or on its own motion, with notice to the Minister, make an order under subsection (1) applicable to any other individual or entity specified by the Court who in the opinion of the Court is associated with the person against whom an order under subsection (1) is made.

(5) An order under subsection (1) or (4) may not be made against a member of The Law Society of Alberta or a person authorized under section 48 of the *Legal Profession Act* when acting as legal counsel for another person.

(5.1) Subject to the *Alberta Rules of Court*, any party to a proceeding under subsection (1) or (4) before the Court of Justice, the Court of King's Bench or a single justice of the Court of Appeal may appeal an order under subsection (1) or (4) to the Court of Appeal.

(6) Subject to the right to appeal an order made under subsection (1) or (4), the Court of Appeal or the Court of King's Bench may make an order made under subsection (1) or (4) binding on any one or more of the other Courts referred to in section 23(1)(b), but an order under subsection (1) or (4) made by the Court of Justice is binding only on that Court.

(7) A person against whom an order has been made under subsection (1) or (4) may apply to a Court for permission to institute or continue a proceeding in that Court and the Court may, subject to any terms or conditions it may impose, grant permission if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

(8) With respect to an application under this section before the Court of Appeal, the matter may be heard by a single justice.

(9) Nothing in this section limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground.

RSA 2000 cJ-2 s23;2007 c21 s2;2013 c10 s20;2013 c23 s8;
2014 c13 s29;AR 217/2022;2022 c21 s45;AR 75/2023

Part 3
Constitutional Questions

Validity of enactment

24(1) If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister.

(2) When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister.

(3) The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.

(4) The Attorney General of Canada and the Minister are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.

(5) No person other than the Minister or counsel designated by the Minister shall, on behalf of His Majesty in right of Alberta or on behalf of an agent of His Majesty in right of Alberta, appear and

participate in any proceeding within or outside Alberta in respect of a question referred to in subsection (1) or (2).

(6) If the Minister or counsel designated by the Minister appears in a proceeding within Alberta in respect of a question referred to in subsection (1) or (2), the Minister is deemed to be a party to the proceeding for the purpose of an appeal from an adjudication in respect of that question and has the same rights with respect to an appeal as any other party to the proceeding.

RSA 2000 cJ-2 s24;2013 c10 s20;AR 217/2022;
2022 c21 s45

Action by Attorney General or Minister

25(1) The Court has jurisdiction to entertain an action at the instance of either

(a) the Attorney General of Canada, or

(b) the Minister,

for a declaration as to the validity of an enactment of the Legislature though no further relief is prayed or sought.

(2) An action under this section for a declaration as to the validity of an enactment is deemed sufficiently constituted if the Attorney General of Canada and the Minister are parties to it.

(3) A judgment in an action under this section may be appealed against as other judgments of the Court.

RSA 2000 cJ-2 s25;2013 c10 s20;2022 c21 s45

Reference of questions for consideration

26(1) The Lieutenant Governor in Council may refer to the Court of Appeal for hearing or consideration any matter the Lieutenant Governor in Council thinks fit to refer, and the Court of Appeal shall hear or consider the matter that is referred.

(2) If the matter referred to the Court of Appeal relates to the constitutional validity of an enactment of Alberta, the Attorney General of Canada shall be notified of the hearing in order that the Attorney General of Canada may be heard if the Attorney General of Canada sees fit.

(3) If any matter relating to a tax collection agreement between the Government of Canada and the Government of Alberta and entered into pursuant to the *Alberta Personal Income Tax Act* is referred to the Court, the Attorney General of any province or territory of Canada that has entered into a tax collection agreement of a like nature and having like purposes to the tax collection agreement entered into by the Government of Alberta may appear before the Court of Appeal, and is entitled to be heard as a party on the reference.

(4) The Court of Appeal or the Chief Justice of Alberta may direct

(a) that a person interested, or

(b) if there is a class of persons interested, that any one or more persons as representatives of that class

be notified of the hearing and those persons are entitled to be heard at the hearing.

(5) When any interest affected is not represented by counsel, the Court of Appeal may in its discretion request counsel to argue the case in that interest, and the reasonable expenses of it shall be paid out of the General Revenue Fund.

(6) The Court of Appeal shall certify its opinion on the matter referred to it with the reasons for its opinion to the Lieutenant Governor in Council and the opinion shall be given in like manner as in the case of a judgment in an ordinary action, and a judge who differs from the opinion of the majority may in like manner certify that judge's opinion with that judge's reasons for it to the Lieutenant Governor in Council.

(7) The opinion of the Court is deemed a judgment of the Court, and an appeal lies from it as in the case of a judgment in an action.

RSA 2000 cJ-2 s26;RSA 2000 cA-30 s91;2013 c11 s2

Part 4
Federal Courts Jurisdiction

Jurisdiction of federal courts

27 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction

(a) in controversies between Canada and Alberta;

(b) in controversies between Alberta and any other province or territory of Canada in which an Act similar to this Act is in force;

(c) in proceedings in which the parties by their pleadings have raised the question of the validity of an Act of the Parliament of Canada or of an Act of the Legislature of Alberta, when in the opinion of a judge of the court in which they are pending the question is material, and in that case the judge shall, at the request of the parties, and may without request if the judge thinks fit, order the case to be removed to the Supreme Court of Canada in order that the question may be decided.

RSA 1980 cJ-1 s28

Use of courthouse facilities

28 Where sittings of a court created by the Parliament of Canada, or of a judge of such a court, are appointed to be held in a place in which a courthouse is situated, that court or judge has in all respects the same authority as a judge of the Court of King's Bench in regard to the use of the courthouse and other buildings or apartments set apart in that place for the administration of justice.

RSA 2000 cJ-2 s28;AR 217/2022

Part 4.1
Rules of Court

Rules of Court

28.1(1) The Lieutenant Governor in Council may by regulation make rules governing

(a) for the Court of King's Bench and the Court of Appeal,

(i) practice and procedure in the Court,

(ii) the duties of officers of the Court,

(iii) costs in matters before the Court,

(iv) the fees to be collected by officers of the Court, and

(v) the rates of fees, expenses and allowances payable to interpreters and witnesses,

and

(b) for the Court of King's Bench,

(i) surrogate matters, and

(ii) judicial review in civil matters.

(2) The rules made by the Lieutenant Governor in Council under subsection (1) in relation to the practice and procedure in the Court may, subject to subsection (3), alter or conform to the substantive law.

(3) Subsection (2) does not authorize the making of rules that conflict with an Act of the Legislature or of the Parliament of Canada, or regulations made under those Acts, but the rules may supplement the provisions of an Act or regulation in respect of practice and procedure.

2009 c53 s1;AR 217/2022

Rules of Court Committee

28.2(1) The Rules of Court Committee established by the *Court of King's Bench Act* is continued and consists of the following members:

(a) the Chief Justice of Alberta or a judge of the Court of Appeal designated by the Chief Justice of Alberta;

(b) the Chief Justice of the Court of King's Bench of Alberta or a judge of the Court of King's Bench designated by the Chief Justice of the Court of King's Bench of Alberta;

(c) the Chief Justice of the Alberta Court of Justice or a judge of the Court of Justice designated by the Chief Justice of the Alberta Court of Justice;

(d) 2 persons who are members of the Law Society of Alberta appointed by the Minister from among those recommended by the Benchers of the Law Society of Alberta;

(e) one other person appointed by the Minister.

(2) The Committee shall elect one of its members as chair.

(3) The Committee shall meet as occasion requires to consider the rules of court made under this Act and any other Act and may make recommendations respecting those rules of court to the Minister.

(4) The Committee may create, amend or delete information notes and other informational guides for the assistance of users of the *Alberta Rules of Court*.

(5) A person appointed by the Minister under subsection (1)(d) or (e) serves for a term not to exceed 7 years and may be reappointed for one additional term.

(6) The members of the Committee shall serve without remuneration, but the Minister may pay the reasonable travel and living expenses incurred by the members in the performance of their duties under this section.

(7) The Minister shall provide to the Committee those legal, secretarial and other services that the Minister considers appropriate.

2009 c53 s1;AR 217/2022;AR 75/2023

Consistency amendments to regulations

28.21(1) The Lieutenant Governor in Council may, by regulation, amend other regulations

(a) for consistency with the *Alberta Rules of Court* (AR 124/2010) as amended from time to time;

(b) as the result of the repeal of the *Alberta Rules of Court* (AR 390/68) or any provision or part of those Rules.

(2) An amendment under subsection (1) may be made notwithstanding that the regulation being amended was made by a member of the Executive Council or some other person or body.

2014 c13 s29

Ministerial regulations

28.3 The Minister may make regulations respecting court-annexed dispute resolution processes.

2009 c53 s1

Part 5
Extra-curial Orders

Special jurisdiction

29(1) When special jurisdiction is given by an Act to a judge as persona designata, the judge is deemed to have that special jurisdiction as a judge of the court to which the judge belongs, and

(a) for enforcing the judge's orders and judgments,

(b) as to proceedings generally, and

(c) as to costs and otherwise,

the judge has the same jurisdiction as in matters under the judge's ordinary jurisdiction as a judge of that court, so far as that jurisdiction is not varied or it is not otherwise directed by the Act conferring the special jurisdiction.

(2) No appeal lies from the judgment, order or decision of a judge made under subsection (1) unless

(a) an appeal is expressly authorized by the Act giving the jurisdiction, or

(b) permission is granted by the judge or by a judge of the Court.

(3) An order of a judge of the Court made under statutory authority as mentioned in subsection (1) may be filed with the court clerk at the judicial centre at which the matter is heard.

(4) On an order being so filed it becomes an order of the Court, and may be enforced in the same manner and by the same process as if made in ordinary proceedings in the Court.

(5) The like fees as would be payable on the issue of an order made by a judge of the Court, in the exercise of the judge's ordinary jurisdiction, are payable at the time of filing the order.

(6) Every order filed under this section shall be entered in the same manner as a judgment of the Court.

RSA 2000 cJ-2 s29;2009 c53 s1;2014 c13 s29

Part 6
Functions of Judicial Council and Complaints Procedure

Definitions

30 In this Part,

(a) "applications judge" means an applications judge as defined in the *Court of King's Bench Act*;

(a.1) "complaint" means a complaint under section 9.4 of the *Court of Justice Act*, section 15 of the *Court of King's Bench Act* or section 10 of the *Justice of the Peace Act*;

(b) "judge" means a judge as defined in the *Court of Justice Act*;

(c) "Judicial Council" means the Judicial Council established under section 31(1);

(d) "judicial inquiry" means a judicial inquiry conducted under section 35;

(e) "justice of the peace" means a justice of the peace appointed under the *Justice of the Peace Act* but does not include a justice of the peace designated as a non-presiding justice of the peace;

(f) repealed AR 137/2022;

(g) "respondent" means the judge, applications judge or justice of the peace against whom a complaint has been made.

RSA 2000 cJ-2 s30;RSA 2000 c16(Supp) s27;2008 c13 s14;
2011 c20 s8;AR 137/2022;AR 217/2022;AR 75/2023

Judicial Council

31(1) The Judicial Council is established and shall consist of

(a) the Chief Justice of Alberta or a designate of the Chief Justice,

(b) the Chief Justice of the Court of King's Bench or a designate of the Chief Justice,

(c) the Chief Justice of the Alberta Court of Justice or a designate of the Chief Justice,

(d) the President of The Law Society of Alberta or a designate of the President, and

(e) not more than 2 other persons appointed by the Minister.

(2) The Judicial Council shall designate one of its members as the chair of the Judicial Council.

(3) The Judicial Council may make rules of procedure governing its proceedings.

(4) Repealed RSA 2000 c16(Supp) s27.

RSA 2000 cJ-2 s31;RSA 2000 c16(Supp) s27;2013 c10 s20;
AR 217/2022;2022 c21 s45;AR 75/2023

Powers of Judicial Council

32 The Judicial Council may

(a) consider proposed appointments of persons as applications judges, judges and justices of the peace and report its recommendations to the Minister,

(b) receive complaints about applications judges, judges and justices of the peace and deal with them in accordance with this Part,

(c) establish rules relating to conflicts of interest and a code of ethics for applications judges, judges and justices of the peace, and

(d) carry out any other function authorized by an enactment.

RSA 2000 cJ-2 s32;2013 c10 s20;AR 137/2022;
2022 c21 s45

Staff

33 In accordance with the *Public Service Act*, there may be appointed officers and employees required to conduct the business of the Judicial Council.

1998 c18 s2

Complaints

34(1) A complaint may be made

(a) to the Chief Justice of the Court of Justice in the case of a complaint about a judge or justice of the peace or to the Chief Justice of the Court of King's Bench in the case of a complaint about an applications judge, or

(b) to the Judicial Council.

(2) The Chief Justice of the Court of Justice or the Chief Justice of the Court of King's Bench, as the case may be, shall review any complaints made under subsection (1)(a) and shall review any matter regarding the conduct of a judge, justice of the peace or applications judge that comes to the attention of the applicable Chief Justice, whether or not a complaint has been made, and may do one or more of the following:

(a) reprimand the judge, justice of the peace or applications judge, as the case may be;

(b) take corrective measures;

(c) refer the matter to the Judicial Council;

(d) determine that no further action need be taken.

(3) The Chief Justice of the Court of Justice may delegate the function of reviewing a matter or complaint in respect of a justice of the peace referred to in subsection (2) to the person referred to in section 9(1)(b) of the *Justice of the Peace Act*.

(4) The Judicial Council shall receive and informally inquire into a complaint received by it under subsection (1) or referred to it under subsection (2)(c) and may do one or more of the following:

(a) reprimand the judge, justice of the peace or applications judge, as the case may be;

(b) take corrective measures;

(c) refer the complaint for a judicial inquiry;

(d) dismiss the complaint if it is frivolous or vexatious or is not about a matter in respect of which a complaint may be made;

(e) determine that no further action need be taken.

(5) The proceedings under this section are not public.

(6) Where

(a) the Judicial Council finds that a complaint is frivolous or vexatious or is not about a matter in respect of which a complaint may be made, or

(b) the Chief Justice of the Court of Justice determines that no further action need be taken,

the Judicial Council or the applicable Chief Justice, as the case may be, shall in writing advise the complainant as to why that conclusion was reached.

RSA 2000 cJ-2 s34;2011 c20 s8;AR 137/2022;
AR 217/2022;AR 75/2023

Judicial inquiries

35(1) Where a complaint is referred for a judicial inquiry, the Judicial Council shall establish a judicial inquiry board consisting of one or more judges of any court in Alberta or may, if it is in the public interest to do so, appoint one or more judges from any other court in Canada.

(2) If more than one person is appointed to conduct the judicial inquiry, a decision by a majority of the members constitutes a decision by the judicial inquiry board.

(3) The judicial inquiry board has, in conducting an inquiry under this section, all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*.

(4) The respondent shall be given

(a) reasonable notice of the time and place of the inquiry and the matter to be investigated, and

(b) the opportunity for the respondent or the respondent's counsel to be heard and to cross-examine witnesses and adduce evidence.

1998 c18 s2

Inquiry in private

36(1) The proceedings of the judicial inquiry are not public, but the judicial inquiry board may make public the fact that an investigation is being undertaken.

(2) The judicial inquiry board may order that information or documents relating to its proceedings not be published or disclosed.

1998 c18 s2

Report of recommendations

37(1) After investigating a complaint under this section, the judicial inquiry board shall prepare a report, which must set out

(a) the facts found by the judicial inquiry board, and

(b) the findings of the judicial inquiry board as to whether there was a basis for the complaint and if there was, the recommendations of the judicial inquiry board, if any, for a sanction.

(2) The judicial inquiry board may recommend any one or more of the following sanctions:

(a) that the respondent be warned;

(b) that the respondent be reprimanded;

(c) that, as a condition of continuing to sit as a judge, justice of the peace or applications judge, as the case may be, the respondent apologize to the complainant or to any other person;

(d) that, as a condition of continuing to sit as a judge, justice of the peace or applications judge, as the case may be, the respondent take specified measures, such as receiving education or treatment with or without taking a leave of absence and with or without pay;

(e) that the respondent be suspended with pay for any period;

(f) that the respondent be suspended without pay for a period of up to 90 days;

(g) that the respondent be retired from office;

(h) that the respondent be removed from office.

(3) A sanction referred to in subsection (2)(g) or (h) may be recommended only if there was a finding of misbehaviour, neglect of duty or inability to perform duties.

(4) The report of the judicial inquiry board shall be made public, and a copy shall be given to the Judicial Council, the Minister, the respondent and the complainant.

RSA 2000 cJ-2 s37;2013 c10 s20;AR 137/2022;2022 c21 s45

Sanctions

38(1) On receipt of a report of the judicial inquiry board, the Judicial Council shall review the report of the judicial inquiry board and,

(a) if the judicial inquiry board has determined that there was a basis for the complaint, impose, subject to subsection (2), the sanction recommended by the judicial inquiry board or any other sanction referred to in section 37(2) that it considers appropriate, except a sanction referred to in section 37(2)(g) or (h), or

(b) if the inquiry board had determined that the complaint was unfounded, dismiss the complaint.

(2) Where the sanction to be imposed on the respondent is a sanction referred to in section 37(2)(g) or (h), the Judicial Council may recommend to the Lieutenant Governor in Council that the sanction be imposed.

(3) When the Judicial Council has dealt with a complaint regarding a respondent, it shall inform the complainant and the respondent of its disposition.

1998 c18 s2

Costs

39 The Judicial Council, on the conclusion of any hearing, may make an order regarding costs as it considers just, including costs relating to the judicial inquiry board.

1998 c18 s2

Decisions final

40 The findings and recommendations of the judicial inquiry board and the decisions of the Judicial Council are final, and no appeal lies from the findings, recommendations and decisions.

1998 c18 s2

Order to retire or remove

41 If a sanction under section 37(2)(g) or (h) is recommended by the Judicial Council, the Lieutenant Governor in Council may make an order to retire or remove, as the case may be, the respondent from

office, and to revoke the appointment.

1998 c18 s2

Complaints

41.1(1) In this section,

(a) "administrative decision" means a decision made,

(i) in the case of a judge, by a supervisory judge that relates to administrative or supervisory matters in respect of the judge, including any decision made pursuant to section 9.1(5) or (6) or 9.42 of the *Court of Justice Act*;

(i.1) in the case of a judge, by the Chief Justice that relates to a request for reappointment of the judge made pursuant to section 9.23(2) or (4)(a) of the *Court of Justice Act*;

(i.2) in the case of a judge, by the Chief Justice that relates to a request for appointment or reappointment of the judge as a part-time judge made pursuant to section 9.24 of the *Court of Justice Act*;

(ii) in the case of a justice of the peace, by a supervisory judge that relates to administrative or supervisory matters in respect of the justice of the peace, including any decision made pursuant to section 9 of the *Justice of the Peace Act*;

(b) "complaint" means a complaint made about an administrative decision;

(c) "supervisory judge" means

(i) in respect of a judge, the Chief Justice, the Deputy Chief Justice or an Assistant Chief Justice of the Alberta Court of Justice;

(ii) in respect of a justice of the peace, the Chief Justice of the Alberta Court of Justice or another judge to whom a delegation is made under section 9(1)(b) or 9(2) of the *Justice of the Peace Act*.

(2) Subject to this section and section 9.1(7) of the *Court of Justice Act*, an administrative decision is final and no appeal lies from that decision.

(3) Where a judge or a justice of the peace wishes to make a complaint, that person shall make the complaint to the Judicial Council.

(4) The Judicial Council shall not consider a complaint unless

(a) the complaint is made in writing,

(b) the supervisory judge in respect of whom the complaint is made is given written notification of the complaint prior to or at the time that the complaint is made to the Judicial Council, and

(c) the complaint is made to the Judicial Council within 30 days from the day that the complainant is notified in writing of the administrative decision in respect of which the complaint is made.

(5) The Judicial Council shall, subject to subsection (4), receive and informally inquire into a complaint made to it and may do one or more of the following:

(a) confirm, rescind or vary the administrative decision;

(b) rescind the administrative decision and make any administrative decision that the supervisory judge is entitled to make;

(c) return the matter to the supervisory judge for reconsideration and make any recommendations that the Judicial Council considers appropriate;

(d) grant any interim relief that the Judicial Council considers appropriate.

(6) The proceedings under this section are not public.

(7) The Minister may by order establish or otherwise provide for a tariff of fees and expenses that may be paid by the Government to parties to proceedings conducted under this section to reimburse them, to the extent of the tariff, for their costs of legal representation in respect of those proceedings.

(8) Where the Minister establishes or otherwise provides for a tariff of fees and expenses under subsection (7), the Government is not liable for nor can it be compelled to pay an amount that is greater than that established or otherwise provided for under that tariff.

RSA 2000 c16(Supp) s73;2001 c24 s9;2003 c42 s11;
2005 c15 s7;2011 c20 s8;AR 75/2023

No judicial review

41.2(1) In this section, "complaint proceedings" means

(a) any decision made or any proceedings or actions taken under this Part in respect of or arising out of a complaint as defined in section 30;

(b) any decision, finding or recommendation by or proceedings before a judicial inquiry board established under section 35;

(c) any administrative decision as defined in section 41.1 and any decision made or any proceedings or actions taken under section 41.1 in respect of a complaint as defined in section 41.1.

(2) Subject to section 9.1(7) of the *Court of Justice Act*,

(a) no complaint proceedings shall be questioned or reviewed in any court by application for judicial review or otherwise, and

(b) no order shall be made, process entered or proceedings taken in any court, whether by way of certiorari, injunction, declaratory judgment, prohibition, quo warranto, application to quash or set aside or otherwise, to question, review, prohibit or restrain any complaint proceedings or the person, the Judicial Council or a judicial inquiry board that presided or is presiding over the complaint proceedings.

RSA 2000 c16(Supp) s73;AR 75/2023

Part 7
Compensation Commissions

Compensation commissions

42(1) One or more commissions must be established in accordance with the regulations under subsection (3) to review the remuneration and benefits to be paid to judges, justices of the peace and applications judges as defined in Part 6 and to make recommendations with respect to any changes in remuneration and benefits.

(2) The commission or commissions must be established on or before April 1 in 2006 and 2009 and every 4 years thereafter.

(3) The Lieutenant Governor in Council, on the recommendation of the Minister, may make regulations

(a) establishing a commission for the purposes of this section;

(b) respecting the procedure of the commission;

(c) respecting appointments to the commission, including persons or categories of persons who are not eligible to be appointed to the commission;

(d) respecting the criteria on which the commission must base its review and recommendations;

(e) respecting the time within which the commission must complete its review and make recommendations;

(f) respecting the implementation of any recommendations of the commission;

(g) respecting the costs of the commission;

(h) respecting any other matter the Lieutenant Governor in Council considers necessary to carry out the purposes of this Part.

RSA 2000 cJ-2 s42;2004 c11 s3;2013 c10 s20;AR 137/2022;
2022 c21 s45

Part 8
Service of Documents During Postal Interruptions

Definitions

43 In this Part,

(a) "authorizing instrument" means

(i) a law, contract or instrument that requires, provides for or permits service by mail, and

(ii) if the common law requires or permits service by mail, the common law;

(b) "offer" includes an option that the optionor is required to hold open until accepted or rejected by the optionee within a specified time limit;

(c) "postal interruption" means a cessation of normal public postal service in Canada or in any part of Canada that is or may reasonably be expected to be of more than 48 hours' duration;

(d) "service by mail" means service by ordinary mail, registered mail, double registered mail, certified mail and any other form of delivery by a public postal service.

1980 c88 s1

Application of Part

44(1) This Part applies if

(a) an authorizing instrument provides for, requires or permits service by mail,

(b) the authorizing instrument does not require an alternative mode of service during a postal interruption, and

(c) a postal interruption causes or may reasonably be expected to cause delay in the service by mail.

(2) Subject to section 45(2), this Part applies to the acceptance of an offer by service by mail.

1980 c88 s2

Effective service by mail

45(1) Notwithstanding anything contained in the authorizing instrument, if service by mail is attempted

(a) during a postal interruption,

(b) during the 5 days preceding the day on which a postal interruption commences, or

(c) during the 5 days following the day on which the postal interruption terminates,

that service is effective only on actual receipt of the thing to be served.

(2) This section does not apply to the acceptance of an offer by service by mail.

1980 c88 s3

Alternative forms of service

46 The service by mail required, provided for or permitted in an authorizing instrument may be effected by the alternative mode of service provided for or permitted in the authorizing instrument, or, if the authorizing instrument does not provide for or permit an alternative mode and notwithstanding the provisions of the authorizing instrument, by

(a) personal service,

(b) delivery to an address for service given by the person to be served as an address for service unless that address is or is at a Post Office,

(c) delivery to the registered office of a company or a society,

(d) delivery to or to the office of the attorney of an extra-provincial company, or

(e) a mode of service directed by the Court under section 47.

1980 c88 s4

Application to Court

47(1) The Court may, notwithstanding the provisions of an authorizing instrument but before the expiration of the period of time for service of anything prescribed in the authorizing instrument,

(a) give directions for a mode of service not specified in section 46(b) to (e),

(b) if the authorizing instrument is a law, substitute a new time requirement or limitation period in place of that provided by the authorizing instrument, and

(c) impose terms and conditions on the mode of service, time requirement or limitation period.

(2) An application under subsection (1) may be made ex parte.

(3) A copy of the order shall be served with the thing to be served.

(4) The Court of Justice may exercise the powers of the Court under this section in respect of a notice or document filed in or authorized by the Court of Justice.

RSA 2000 cJ-2 s47;AR 75/2023

Interpretation Act

48 This Part operates notwithstanding section 23 of the *Interpretation Act*.

1981 c50 s4

Part 9
Court Security

Definitions

49 In this Part,

(a) "courthouse" means a building in which a courtroom is located;

(b) "courtroom" means any place where a judge of the Court of Appeal or Court of King's Bench or Court of Justice or a justice of the peace holds court;

(c) repealed 2022 c21 s45;

(d) "restricted area" means any portion of a courthouse to which access by the public is restricted and that is identified as a restricted area by a sign;

(e) "security officer" means a person, or a member of a class of persons, appointed by the Minister under section 50;

(f) "weapon" means any substance or thing that in the opinion of a security officer could be used to threaten or harm any person or cause damage to property and includes, without limitation, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition and an explosive device, within the meaning of the *Criminal Code* (Canada).

RSA 2000 cJ-2 s49;RSA 2000 c16(Supp) s36;2002 c32 s9;
2003 c41 s1;AR 217/2022;2022 c21 s45;AR 75/2023

Security officers

50(1) The Minister may appoint persons or a class of persons as security officers for the purpose of providing security in a courthouse.

(2) Every security officer has, for the purposes of this Part, the powers of a peace officer.

RSA 2000 cJ-2 s50;2003 c41 s1

Identity checks and weapon screening

51(1) Before a person enters a courtroom or courthouse a security officer may

(a) require the person to satisfy the security officer as to the person's identity, and

(b) screen the person for weapons.

(2) If the security officer is not satisfied as to the person's identity, the person refuses to be screened for weapons or the person has possession of a weapon, the security officer may refuse the person entry to the courthouse or a courtroom and use as much force as is reasonably necessary to prevent the person from entering.

(3) A security officer may at any time require a person, other than a peace officer or a person authorized by the regulations to have possession of a weapon in a courthouse, who the security officer reasonably believes has possession of a weapon to leave the courthouse and may use as much force as is reasonably necessary to force the person to leave.

RSA 2000 cJ-2 s51;2002 c32 s9

Offences

52(1) Every person who enters or attempts to enter or remains in a courthouse or a restricted area after having been refused entry or after having been requested to leave by a security officer is guilty of an offence and liable to a fine of not more than $10 000 or to imprisonment for a period not exceeding one year or to both fine and imprisonment.

(2) Every person who has possession of a weapon in a courthouse, other than a peace officer or a person authorized by the regulations to have possession of a weapon in a courthouse, is guilty of an offence and liable to a fine of not more than $10 000 or to imprisonment for a period not exceeding one year or to both fine and imprisonment.

1997 c13 s2

Non-derogation of judges' powers

53 Nothing in this Part derogates from or is intended to replace the power of a judge, whether established by common law or otherwise, to control proceedings in a courtroom.

1997 c13 s2

Regulations

54 The Lieutenant Governor in Council may make regulations

(a) providing for the organization, co-ordination, supervision, discipline and control of security officers;

(b) designating persons authorized to have possession of weapons in a courthouse.

1997 c13 s2

Part 10
Miscellaneous

Misuse of court forms, etc.

55 Any person using any court process or form or any process or form similar to it in any manner likely or intended to deceive any other person is guilty of an offence and liable to a fine of not less than $100 and not more than $500 or to a term of imprisonment not exceeding 6 months, or to both.

RSA 1980 cJ-1 s38

Demise of the Crown

56(1) The holding of an office under the Crown in right of Alberta is not affected by nor is a fresh appointment to it necessary on the demise of the Crown.

(2) The right or capacity of a person in Alberta to practise, engage in or pursue a profession, occupation or calling is not affected by the demise of the Crown.

(3) On the demise of the Crown, it is not necessary for a person again to take an oath of allegiance or an oath of office in respect of an office, profession, occupation or calling.

(4) The Legislature is not dissolved by the demise of the Crown and continues as if the demise had not occurred.

RSA 1980 cJ-1 s39;1983 cL-10.1 s57

Regulations regarding the demise of the Crown

56.1(1) The Lieutenant Governor in Council may, by regulation, amend any Act or regulation to make any necessary changes as a result of the demise of the Crown.

(2) The regulations authorized by this section may be made notwithstanding that a regulation being amended was made by a member of the Executive Council or some other person or body.

2018 c20 s9

Removal of sex disqualification

57 A person is not to be disqualified by sex or marriage

(a) from the exercise of a public function,

(b) from being appointed to or holding a civil or judicial office or post,

(c) from entering or assuming or carrying on a civil profession or vocation, or

(d) for admission to an incorporated society.

RSA 1980 cJ-1 s40

Time of attaining particular age

58(1) The time at which a person attains a particular age expressed in years shall be on the commencement of the relevant anniversary of the date of the person's birth.

(2) This section applies only where the relevant anniversary falls on a date after July 1, 1971, and in relation to any enactment, deed, will or other instrument, has effect subject to any provision in it.

RSA 1980 cJ-1 s41

Minor's wages

59 Minors may sue for wages in the same way as if they were of full age.

RSA 1980 cJ-1 s42

Defence of common employment

60 It is not a good defence in law by an employer or the successor or legal representative of an employer to an action for damages for the injury or death of an employee of the employer that the injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, notwithstanding a contract or agreement to the contrary.

RSA 1980 cJ-1 s43

Crown costs

61 In any proceeding to which His Majesty is a party, either as represented by the Minister or otherwise, costs adjudged to His Majesty shall not be disallowed or reduced on assessment merely because the solicitor or the counsel who earned the costs or in respect of whose services the costs are charged

(a) was a salaried officer of the Crown performing those services in the discharge of the officer's duty and remunerated for it by the officer's salary, or

(b) was for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered,

and the costs recovered by or on behalf of His Majesty in any such case must be paid into the General Revenue Fund.

RSA 2000 cJ-2 s61;2009 c53 s1;2013 c10 s20;
AR 217/2022;2022 c21 s45

Contingent fees

62(1) No agreement between a barrister and solicitor and a client respecting the barrister's and solicitor's fees is invalid or unenforceable solely by reason of the fact that the amount of the fee is contingent or dependent, in whole or in part, on the successful accomplishment or disposition of the matter to which the fee relates, if the agreement is made in compliance with the rules made under this section.

(2) The Lieutenant Governor in Council may by the Rules of Court make rules prescribing conditions, restrictions and prohibitions to which any such agreement shall be subject.

RSA 1980 cJ-1 s46

Validation of Alberta Rules of Court

63(1) In this section, "Alberta Rules of Court" means the *Alberta Rules of Court* (AR 390/68) as amended prior to the coming into force of this section.

(2) The Alberta Rules of Court are validated notwithstanding that any provision in the Rules may affect substantive rights.

RSA 2000 cJ-2 s63;2004 c11 s3

TAB 3

MTM Commercial Trust v. Statesman Riverside Quays Ltd., 2010 ABQB 647 (CanLII)

Court of Queen's Bench of Alberta

Citation: MTM Commercial Trust v. Statesman Riverside Quays Ltd., 2010 ABQB 647

Date:20101012
Docket: 1001 09828
Registry: Calgary

Between:

MTM Commercial Trust and Matco Investments Ltd.

Applicants

- and -

Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Mas ter Builders Inc.

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

(a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");

(b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");

(c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;

(d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

[2] By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

(a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and

(b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

[3] The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

[4] By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

[5] After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

[6] Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

[7] Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

[8] Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act,* R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act,* R.S.A. 2000, c.J-2.

[9] Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.,* 2009 ABCA 127 (CanLII), [2009] CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v. Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

[10] While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

[11] As has been noted in *Anderson v. Hunking* 2010 ONSC 4008 (CanLII), [2010] O.J. No. 3042 at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate

question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

[12] The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385, as follows:

> (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;
> (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."

(i) *Strength of the Applicant's Case*

Breach of Agreements

[13] Matco and Statesman set up a structure and entered into a series of agreements in order to develop the Project, which is to be a residential project in the Inglewood area of Calgary. In total, the Project is to include 615 apartments and 71 townhouses in six phases. Matco owned the land and Statesman was to provide the development services.

[14] The Partnership was created, the units of which are held by a trust. Other investors invested in the trust, but Matco and Statesman hold the largest interests through corporate, individual, family and employee investments. The General Partner is SRQL, a corporation that Matco and Statesman own equally.

[15] The USA provides that Matco and Statesman have equal representation on the board of directors of the General Partner and that all major decisions require unanimous directors' approval. Such decisions include approving related party transactions, executing any contract more than $100,000 and requiring capital contributions. The USA also provides that, to the extent development financing is available on reasonable market terms, it would be obtained rather than utilizing shareholders' equity. Matco submits that the result is that, while Statesman has day-to-day control of the General Partner's operations, Matco retains the ability to restrain the pace of development, to fund it through borrowing rather than equity and to oversee Statesman's management of the Project.

[16] Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development, any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The

amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

[17] Under the Limited Partnership Agreement, SRQL as General Partner agrees to discharge its duties honestly, in good faith, and in the best interests of the Partnership. If the General Partner breaches its obligations in such a way as would have a materially adverse effect on the business, assets or financial condition of the Partnership, the Limited Partner (being the trust) is entitled to remove and replace the General Partner by resolution.

[18] While there is some confusion over terminology, it is clear that development of the Project was planned in phases. Subject to conditions for each phase, bank financing was obtained for land acquisition and infrastructure, and for construction of the first two phases of residential units (the Bank of Montreal Credit Agreement dated April 21, 2008).

[19] Land acquisition and infrastructure (including a parkade for Phases 1 and 2) were funded by the Bank and are complete. Phase 1 of the residential unit construction was also funded and is essentially complete. Phase 1 is comprised of 124 residential condominium units and an amenities centre.

[20] Phase 2 is to consist of a second building of 122 residential condominium units, plus two townhouses.

[21] Only nine units in Phase 1 remained unsold as of July 20, 2010, although 14 sales were pending. As of that date, 57 units in Phase 2 had been pre-sold. The Credit Agreement was revised on June 9, 2010 to provide that, as a condition precedent to the Bank providing financing for Phase 2, there must be satisfactory evidence of not less than 166 eligible purchase agreements under Phase 1 and Phase 2. Statesman submits that sales agreements for 169 units have been submitted to the Bank for review.

[22] Matco submits that Statesman has begun to disregard its obligations under the agreements. It asserts breaches of various agreements, some of which it submits amount to misappropriation and misapplication of funds. It alleges that, without seeking the necessary directors' or Management Committee approval, Statesman or one of its affiliates executed more than $12.5 million worth of construction contracts in excess of $100,000 each, and commenced Phase 2 of the development. Matco also alleges that Statesman instructed trades to carry out more than $2 million of Phase 2 construction work without first having met the Bank's funding requirements.

[23] Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

[24] Initially, Statesman submitted that the construction that was the subject of Matco's complaints was part of Phase 1 and that there had been no improper commencement of Phase 2 construction. It was now clear, from evidence from the architects, the City, the banking documents, the Statesman Project Manager, tradespeople, the Statesman Chief Financial Officer and even cross-examination of the President of Statesman, that Phase 2 construction has commenced and that more than $12.5 million of contracts that relate to Phase 2 have been executed by Statesman.

[25] Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2

budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

[26] Statesman does not deny that it did this. It submits, however, that, since the construction of Phase 2 of the Project is not an event outside the ordinary business of the General Partner or the Partnership, consent of all the directors of SRQL to the commencement of construction on Phase 2 is not required under the USA.

[27] Statesman argues that under the USA, the development of the Project as a whole has been approved and that there is therefore no need to obtain approval of each phase. These submissions do not deal with the alleged breaches of specific terms of the DMA and the USA.

[28] Statesman submits that, at any rate, Matco's failure to give consent is not commercially reasonable. That is not within the province of this court to decide: Matco is not under any contractual obligation to act in a commercially reasonable manner in giving or withholding its consent, and Matco's motives or judgments in respect of its decision are not properly at issue before me, except to the extent that they may relate to considerations of irreparable harm or balance of convenience.

[29] Statesman submits that, pursuant to the by-laws of SRQL's board of directors, the President of Statesman, Garth Mann, has a casting vote as Chairman of the board, and therefore effectively a determining vote with respect to construction matters.

[30] However, Section 3.5 of the USA provides that each shareholder shall use its best efforts to cause its nominees to the SRQL board to act in such a way to ensure that the provisions of the USA shall govern the affairs of the corporation, and provides that if there is any conflict between the provisions of the USA and the articles or by-laws of SRQL, the articles or by-laws will be amended. The nature of a USA does not allow its provisions to be trumped by a procedural by-law, and the provisions of the USA that require approval by all directors of certain major decisions cannot in effect be vitiated by such a by-law.

[31] Statesman also submits that Matco has no entitlement to halt construction until shareholders' loans are repaid (which it submits is the reason for Matco's reluctance to agree to the next stage of construction), citing section 8.1(d) of the USA which provides for equity injections by shareholders in certain circumstances. Matco rightly points out that additional capital contributions to the Partnership require the unanimous consent of the directors of SRQL.

[32] Statesman submits that Matco was aware that construction had commenced on Phase 2. It appears from the evidence that Matco had begun to suspect that construction on Phase 2 had commenced in May of 2010, although there may have been general discussion of Phase 2 requirements in the months leading up to May. It also appears that Matco became aware of what it asserts are other breaches and misconduct of Statesman at about the same time. The Originating Notice was filed on July 8, 2010. Matco therefore acted with reasonable dispatch once it became suspicious that breaches had occurred.

[33] Matco also submits that Statesman has beached the DMA in other ways. By the terms of the DMA, the Manager is a fiduciary to the Partnership, and the DMA "shall terminate upon any of" certain events. One such event is said to occur when the "Manager misappropriates any amounts or defrauds the Partnership in any manner whatsoever".

[34] The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager

used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

[35] Matco submits that, in breach of the express terms of Clause 5.06 of the DMA, SMBI misapplied Partnership funds to pay unauthorized sales commissions, salaries and fees to its staff. The amounts improperly taken appear to total about $51,328 not including an additional $6,000 of what Matco asserts are improper referral fees.

[36] Statesman does not deny that SMBI paid such amounts to its sales staff, nor does it assert that it had Matco's approval or consent, but it claims that its actions represented good and necessary business decisions. Statesman also submits that the amounts paid are reasonable out-of-pocket costs and expenses under Clause 5.09 of the DMA and thus do not require Matco's consent.

[37] Statesman says that these payments have been disclosed to Matco or its representatives in the Construction Superintendent Reports, and that, in any event, these issues should be dealt with by arbitration. Statesman submits that if the amounts paid are not permitted under the DMA, it will reimburse the Partnership.

[38] The June 9, 2010 Management Committee Meeting minutes state the following with respect to this issue:

> Mr. Mathison queried commission payments apparently made contrary to the agreed formula and in excess of budget. Mr. Mann acknowledged that higher commission payments had been made to Statesman salespeople. He stated that MLS Resale Listing fees were forgiven to stimulate sales where a purchaser had a product to sell, therefore, offset the higher commission payments with a zero net result. Mr. Mathison repeated that this decision was again made unilaterally without notice or the approval of Matco.

[39] It therefore appears that Matco did not agree to this alleged breach, by silence or otherwise.

[40] Matco also submits that Statesman breached the provision of the USA that requires approval by the SRQL directors of the execution of any contract involving more that $100,000.

[41] Statesman submits that the DMA gives the Manager the responsibility of awarding construction contracts. That responsibility, however, is subject to the specific terms of the DMA agreement, which includes the provision that the Manager shall submit construction contracts to the Management Committee for approval, provided that in any disagreement Statesman has the determining vote. There is no evidence that these contracts were submitted to the Management Committee for approval. Statesman points out, however, that Phase 1 construction contracts were not all submitted to the Management Committee.

[42] There is a certain amount of ambiguity in the agreements with respect to the concept of a Management Committee. The DMA does not define the structure of the Management Committee, but merely states it shall be "as constituted and subject to the Partnership Agreement" (Section 1.03). The Limited Partnership Agreement does not reference a Management Committee. The recitals to the DMA provide that the Partnership wishes to engage the Manager and Matco as to certain strategic management decisions and Section 1.15 of the DMA engages Matco as a "strategic manager" for the Project. However, the DMA clearly requires Management Committee oversight and approval of numerous matters, and the parties have operated with a Management

Committee with equal representation from Matco and Statesman. Whether the Management Committee is a committee of the directors of SRQL or of SRQL as Manager and Matco as "strategic manager" is not entirely clear.

[43] While this ambiguity exists, the issue is less the conduct of Statesman in entering into individual contracts, and more the complaint that it commenced construction on Phase 2 without Management Committee approval.

[44] Section 4.4(f) of the USA provides that all directors of SRQL must approve "related party transactions and major decisions with regard to those transactions".

[45] There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

[46] Matco also submits that Statesman is guilty of misconduct that amounts to fraud and dishonesty, apart from alleged breaches that simply relate to breach of contractual provisions.

[47] Matco submits that Mr. Mann committed the Partnership to a US $732,600 promissory note to pay an unrelated debt of an American affiliate of Statesman. It also submits that Statesman signed up a number of tradespeople to agreements to purchase residential units on the understanding that they would not be required to close such purchases.

[48] There is conflicting affidavit and cross-examination on affidavit evidence with respect to these serious allegations. With respect to the allegation that Mr. Mann on behalf of Statesman used SRQL to guarantee a settlement obligation of a Statesman affiliate that had nothing to do with the Project, Matco alleges Statesman did not just commit SRQL as a co-promissary on a promissory note that had nothing to do with the Project, but attempted to block the Applicants from obtaining information about this.

[49] Statesman asserts that this was an innocent and inadvertent clerical error that was remedied within a few days, but at any rate by June 16, 2010. There are serious issues of credibility that arise from the documentation and the evidence of Mr. Mann and others on this issue. Given the serious nature of the allegation and the conflicting evidence, this issue requires *viva voce* evidence before a determination can be made.

[50] With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called

"investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

[51] Matco complains of a number of other breaches and irregularities in the management of the Project. Given the conclusion I have reached on the alleged breaches described, it is not necessary to review all of these allegations.

[52] While the first factor of the test set out in *RJR-MacDonald* only requires a serious issue to be tried, the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial. I am satisfied that in this case Matco has established a strong *prima facie* case of breach of contract with respect to the question of whether Statesman proceeded with the construction of Phase 2 of the Project without the necessary approvals of Matco as required under the various agreements.

[53] I am also satisfied that these breaches amount to a breach of a negative obligation, which is in substance the obligation not to proceed to the next phase of construction without obtaining Management Committee approval or the approval of all of directors of SRQL under the USA.

[54] The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

[55] The contractual interpretations that Statesman submits would lead to the conclusion that approval of construction of Phase 2 of the Project is not necessary or that Mr. Mann has a casting vote that would allow Statesman to make the decision to proceed in the face of Matco's opposition do not address the structure of the development agreements as a whole, and ignore or fail to give effect to specific provisions to the contrary.

(ii) Irreparable Harm

[56] While there are authorities that suggest that it is unnecessary to establish irreparable harm or that less emphasis will be placed on this factor in the context of an injunction application involving a negative context (see John D. McCamus, *The Law of Contracts*, Irwin Law Inc., 2005 at page 995, note 197), I have considered the application with reference to this factor. To show that it would suffer irreparable harm, Matco must establish either that failure to enjoin Statesman's continued breach of contract would give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured.

[57] Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk. If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that

may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

[58] In the usual case of an application for injunctive relief, the moving party would provide an undertaking in damages in the event it is not ultimately successful. Given the manner in which this application has proceeded, Matco has not had an opportunity to address this requirement. If Matco is unwilling to supply the usual undertaking as to damages, it has leave to apply to be relieved from such an obligation. Such an undertaking should be supplied or an application to relieve from the undertaking should be made within two weeks, and Statesman will of course be allowed an opportunity to respond to the application.

(iii) Balance of Convenience

[59] This factor requires the Court to consider which of the parties would suffer the greater harm from the granting or refusal of an interlocutory injunction.

[60] It is clear that failure to enjoin Statesman from continuing to breach the agreements by continuing construction on Phase 2 of the Project would nullify Matco's right to a say in whether construction on the Project should continue at this time. As noted by Matco, Statesman has indicated no commitment to discontinue the alleged breaches: rather, by its response to the application, it asserts its right to proceed without consultation or approval and applies to be relieved of its voluntary undertaking to stop construction and for confirmation of what it says is its right to proceed.

[61] The enforcement of the negative obligation not to continue construction on Phase 2 without Matco's consent would not required Court supervision and has in fact already been effected through the voluntary shut-down of the Project. It is possible to readily define what Statesman should be enjoined from doing. There is no issue that permanent injunctive relief may not have been an available remedy to Matco after trial, given the nature of the obligation as a negative obligation.

[62] Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

[63] It is noteworthy that Matco does not propose that the Project be abandoned or that development cease on a permanent basis: what is involved is a difference of opinion between two experienced partners to a development with respect to the timing of development, the structure and availability of financing and the use of funds. Whether Matco or Statesman is correct with respect to these matters is not a question to be decided by this Court. What the Bank may do in the face of a failure to recommence construction on Phase 2, what various tradespeople or purchasers who have entered into pre-sale agreements may do is only speculative at this point, and does not tip the balance of convenience in favour of one party or the other.

[64] It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's

contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

[65] I find that the balance of convenience favours Matco in this case, as failure to grant the injunction would nullify its contractual right to be part of the decision to proceed. If the remedy was withheld, that right would be so impaired by the time the issues could be ultimately determined on their merits by unilateral action by Statesman that it would be too late to afford Matco complete relief.

C. *Should there be an order confirming the termination of SMBI as Manager of the Project?*

[66] As previously indicated, the DMA provides that it shall terminate if the Manger "misappropriates any monies or defrauds the Partnership in any manner whatsoever." Matco submits that misappropriation does not require fraud or even dishonesty and that it is sufficient if there is a failure by a fiduciary to meet an obligation, even where the fiduciary believes the reasons for his failure to be valid, citing *Re: Kitnikone (1999)*, 1999 CanLII 5821 (BC SC), 13 C.B.R. (4th) 76 (B.C.S.C.) at 77-78 and *Janco (Huppe) v. Vereecken* (1982), 1982 CanLII 487 (BC CA), 44 C.B.R. (N.S.) 211 (B.C.C.A.) at 213-214.

[67] Matco submits that the alleged misappropriation by SMBI of partnership funds to pay unauthorized sales commissions to its staff is a misappropriation that has terminated the DMA. Statesman's response to this submission has been set out previously in these reasons. While Matco has established a strong *prima facie* case of contractual breach, the issue of whether this alleged breach is a misappropriation is not entirely without doubt.

[68] It will also not be clear until the issue of whether SRQL remains the General Partner of the Partnership who has authority to act for the Partnership in order to instigate termination of the DMA.

[69] For these reasons, and since the issue of the removal and replacement of the General Partner remains to be determined on its merits for the reasons set out later in this decision, I make no final determination of this issue at this time.

D. *Should there be an order confirming the removal of SRQL as General Partner?*

[70] By the terms of the Limited Partnership Agreement, SRQL was appointed as initial General Partner. Statesman has had day to day authority over the operation of SRQL, but the USA provides that all "Major Decisions", including the approval of related party transactions and the execution of any contract involving more than $100,000, require the approval of all directors. SRQL itself specifically committed to act exclusively as General Partner of the Partnership and to comply with these approval requirements. By the Limited Partnership Agreement, SRQL covenanted to discharge its duties honestly, in good faith and in the best interests of the Partnership.

[71] The Limited Partnership Agreement provides that "the Limited Partners may remove the General Partner and appoint a successor by Extraordinary Resolution" where the "General Partner has breached its obligations under this Agreement in such a manner as would have a material adverse effect on the Business, assets or financial condition of the Limited Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010,

the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

[72] Matco submits that SRQL's actions in commencing over $2 million of Phase 2 construction and committing the Partnership to over $12.5 million of Phase 2 construction contracts without the approval of the directors of SRQL as required by the USA and without meeting the Bank's requirements for funding of the Phase 2 credit facility, SRQL's involvement in the alleged "dummy trades" scheme and the use of SRQL as a co-signatory on a promissory note unrelated to the Project all justify the removal of SRQL as General Partner of the Partnership.

[73] While the Limited Partner of the Partnership, being MTM Commercial Trust, may remove the General Partner and appoint a successor by Extraordinary Resolution, Section 15.1(b) provides that if a breach is capable of being cured, the General Partner can only be removed if such breach continues unremedied for a period of twenty business days after the General Partner has received written notice of such breach from any Limited Partner, which in this case means MTM Commercial Trust.

[74] The alleged breaches with respect to the "dummy trades" and the promissory note problem have been addressed by the General Partner, although it may be an issue whether a fiduciary may cure a breach of trust of this kind. As indicated previously, these allegations, however, raise issues of credibility that cannot be determined in an application of this kind. The alleged breach of proceeding with construction of Phase 2 without required approval is less subject to credibility issues, and the question is whether it is appropriate to made a final determination of the issues of whether Statesman has breached the agreements in this respect, whether such breaches have had a material adverse effect on the business or financial condition of the Partnership, whether such breaches are capable of being cured and it so, whether proper notice has been given and thus whether the Limited Partner was justified in removing the General Partner as part of this summary application.

[75] The interlocutory injunction granted in this application achieves the purpose of enjoining further alleged breaches while preserving Statesman's rights to fully present evidence and argument on these issues of contractual authority. While Matco has established a strong *prima facie* case, there are ambiguities in the agreements and submissions made with respect to contractual interpretation that do not make the matter entirely without doubt. I therefore decline to confirm the removal of SRQL as General Partner of the Partnership at this stage of the proceedings. It follows that confirmation of the appointment and confirmation of 1358846 Alberta Ltd. as new General Partner is premature.

[76] For the same reasons that I decline to make a final order with respect to SRQL as General Partner and SMBI as Manager of the Project on the motion by the Applicants, I decline to confirm SRQL as General Partner and SMBI as Manager of the Project in accordance with Statesman's counter motions.

E. ***Should the SMBI issue be stayed and an arbitrator appointed pursuant to the terms of the DMA?***

[77] I agree that the parties have gone too far down the litigation trail for some of the inter-related issues to be now referred to arbitration.

[78] While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA . It would be undesirable to have a multiplicity of proceedings where there is

clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.* [1997] A.J. No. 67 (Q.B.) at paras. 6-9.

Conclusion

[79] Statesman is enjoined from continuing construction on the Project until the issues of alleged breach of contract and other misconduct can be resolved on their merits or until the parties agree otherwise. I will remain seized of the matter as case management judge to hear applications to have the matters in issue proceed to a full hearing on an expedited basis and to hear any other related motions.

[80] If the parties are unable to agree on costs of these applications, they may be addressed.

Dated at the City of Calgary, Alberta this 12th day of October, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Blair C. Yorke-Slader, Q.C. and Kelsey J. Drozdowski
for the Applicants

Robert W. Calvert, Q.C. Larry B. Robinson Q.C. and Sharilyn C. Nagina
for the Respondents

TAB 4

CWB Maxium Financial Inc v 2026998 Alberta Ltd, 2021 ABQB 137 (CanLII)

Court of Queen's Bench of Alberta

Citation: CWB Maxium Financial Inc v 2026998 Alberta Ltd, 2021 ABQB 137

Date: 20210223
Docket: 2003 04457
Registry: Edmonton

Between:

CWB Maxium Financial Inc. and Canadian Western Bank

Plaintiffs

- and -

2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987 Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder

Defendants

Reasons for Decision
of the
Honourable Mr. Justice Douglas R. Mah

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A. Background

[1] The plaintiff lenders seek a final order of receivership against the defendant debtors. An interim receivership order has been in place since March 2, 2020 and extended several times, pending a final determination. MNP Ltd was appointed as Interim Receiver under that order.

[2] The hearing of this matter was delayed for two primary reasons. The first was this Court's response to the COVID pandemic, which resulted in a temporary suspension of some Court proceedings, including this one. The second was my direction that this matter proceed by way of summary trial, in light of the defences to the receivership action raised by the debtors. My oral reasons delivered October 6, 2020 fully set out my thinking in this regard and, in particular, how I felt the record at that time was insufficient to decide the case fairly.

[3] The defendants collectively own and operate a pharmacy in St. Albert, Alberta, although Grandin Prescription Centre is the operating entity and 202 is the main borrower. The pharmacy has continued to conduct business under the watchful auspices of MNP Ltd as Court-appointed Interim Receiver of the corporate defendants.

[4] In the meantime, Mr. Loder, the principal of the corporate defendants and the personal defendant and guarantor, has been actively trying to sell the pharmacy as a going concern. He deposed in his September 29, 2020 affidavit of his efforts of in that regard. The possibility of sale was mentioned in my October 6, 2020 reasons and discussed at the conclusion of the summary trial on January 12, 2021. A collateral consequence of the delay in the final determination of the receivership has been to give Mr. Loder more time to sell the business.

[5] As of the completion of this decision on the evening of February 18, 2021, I have not been advised that he was successful in doing so.

B. A Brief History of the Plaintiffs

[6] In these reasons, I refer to the plaintiff CWB Maxium Financial Inc as Maxium and the plaintiff Canadian Western Bank as CWB.

[7] Maxium is a wholly owned subsidiary of CWB.

[8] Maxium was incorporated in Ontario in February 2016 in conjunction with CWB's acquisition of certain assets of Maxium Financial Services Inc (MFSI) and DeSante Financial Services (DFS).

[9] MFSI and DFS were related companies but operated as one larger enterprise. DFS was the specialty healthcare lender, and MFSI did the other business.

[10] Following the partial divestiture to CWB, MFSI and DFS were amalgamated and continued as 195. DFS had a portfolio of accounts not acquired by CWB. However, DFS's former staff and infrastructure were absorbed by CWB and, by agreement, shared with 195 so that 195's accounts could be serviced.

[11] Mr. Gilchrist and Mr. Wyett, both Maxium vice-presidents, stated during questioning that 195's accounts were in "run-off mode", which meant that the loans were being serviced and collected but that no new loans were initiated.

[12] Mr. Gilchrist, Maxium's vice-president of sales, related in his questioning that following the acquisition by CWB, Maxium had a loan approval limit. Maxium's local credit committee (in Toronto) would vet the loan proposal and could approve it if it fell within the limit. If a proposed loan exceeded that limit, the credit committee could recommend support but the proposal then had to be sent to CWB's head office in Edmonton for review and final approval.

C. The Defendants

[13] Each of the defendants had these roles in the operation of the pharmacy and its relationship with its lenders:

- 202 is the primary debtor for two loans: the first is a debt, in the form of two promissory notes in favour of Maxium, with a current balance of slightly more than $3.4 million and relates to the purchase of the pharmacy, and the second is comprised of a series of operating loans for the pharmacy made by CWB in an aggregate amount slightly exceeding $251,000;
- Grandin Pharmacy Centre owns the pharmacy assets, operates the pharmacy, and is a guarantor of both loans;
- the other numbered companies are related to 202 through the ownership structure and each are also guarantors of both loans;
- Mr. Loder is the principal of all the corporate defendants and a personal guarantor of both loans;
- Mr. Loder was also part of the management of the pharmacy business (although not a pharmacist himself) and did the deliveries, receiving a salary of $180,000 per annum from the pharmacy;
- 202 and each of the guarantors, among other security, provided a general security agreement to each lender to support their obligations in respect of the two loans.

[14] The form of GSA in each case contractually provides for the appointment of a receiver in the event of default, as a remedy.

[15] Mr. Loder was 67 years old when he swore his March 2, 2020 affidavit. He has 25 years of experience in the pharmacy industry on both the wholesale and retail sides. Mr. Loder operated the business of Grandin in conjunction with a licensed pharmacist.

D. Background related to the Loder Group

1. Mr. Loder's history and founding of the Loder Group

[16] Mr. Loder's 25 years of experience in the pharmacy business includes:

- 14 years with McKesson Canada, a national pharmaceutical distributer, ultimately becoming the director of sales and marketing for western Canada;
- founding the Loder Group of pharmacies in 2008, and operating it until its receivership in 2016;
- acquiring Grandin in 2017 and operating it until the interim receivership in March 2020.

[17] The Loder Group owned and operated a series of pharmacies in Alberta, including one in Consort. DFS financed all of the Loder Group stores except for the two locations in Sundre, Alberta, which were financed by CIT.

2. Loder Group moves to BMO

[18] In 2014, Mr. Loder was persuaded to move the entirety of the Loder Group's loan portfolio to BMO. Mr. Loder acknowledges having granted personal guarantees to BMO, guaranteeing the Loder Group's indebtedness to BMO.

[19] Within a few months of this move, Mr. Loder described how a confluence of negative events conspired to reduce the Loder Group's cash flow, prompting him to request that BMO consider refinancing. BMO was not agreeable and commenced recovery action against the various corporate debtors and Mr. Loder personally.

[20] Mr. Loder entered into a forbearance agreement with BMO and engaged a consultant to assist in finding a lender willing to refinance the Loder Group loans, but was unsuccessful. On the eve of BMO's receivership application, 195 acquired BMO's debt and security.

3. Proper nomenclature for Maxium entities

[21] 195, at the time, was operating under the name Maxium Financial Services. Mr. Loder testified that he did not appreciate that there is a distinction between 195 (which also called itself Maxium) and CWB Maxium, one of the present plaintiffs. The use of the name "Maxium" to describe several different entities involved in this case has been a source of confusion.

[22] During the proceedings, 195 operating as Maxium Financial Services was referred to as "old Maxium" and CWB Maxium (which I refer to as simply "Maxium" in these reasons) was referred to as "new Maxium".

[23] They are different entities but related by the fact that CWB owns new Maxium and by virtue of CWB's sharing agreement with 195.

4. Missed Balloon Payment on Consort Pharmacy

[24] One of the DFS loans acquired by BMO related to the purchase by the Loder Group of the Consort pharmacy. When BMO refinanced the Loder Group portfolio, DFS provided a payout figure that included an amount owed in respect of the Consort pharmacy but, through oversight (only discovered by way of later audit), had quoted only the remaining monthly payments and had omitted a balloon payment of $751,504.

[25] As explained in Mr. Gilchrist's October 15, 2020 affidavit, rather than have Mr. Loder request BMO for further funds or reverse the entire transaction with BMO, it was agreed between DFS and Mr. Loder that 114 (the Loder Group company that owned the Consort pharmacy) would execute a new promissory note for $741,501 (the amount owed less $10,000 for legal and administrative costs), which would be guaranteed by Mr. Loder personally. The promissory note and guarantee were in fact executed and delivered and due to be paid on the original due date in July 2014.

[26] When the amount owing was not paid, DFS brought separate proceedings against 114 and Mr. Loder. Those proceedings were subsumed into the receivership proceedings that 195 would later bring.

5. McKesson Indemnity

[27] Mr. Loder explained that the drug supplier, McKesson, was concerned about independent pharmacies being bought up by the Shoppers Drug Mart chain, which would cause McKesson to lose business. As an incentive to pharmacies to remain independent, McKesson initiated an indemnity program whereby it would provide loan guarantees to the lenders of independent pharmacy owners. He stated that he himself, while a McKesson employee, had been partially responsible for setting up the program.

[28] Mr. Loder testified that at the time BMO called its loans, McKesson had only one outstanding loan guarantee to BMO in respect of only one Loder Group pharmacy, that being the North East Pharmacy. That McKesson guarantee was part of BMO's security for the Loder Group indebtedness, and was assigned to 195.

6. Receivership of Loder Group and Residual Indebtedness

[29] Having acquired BMO's debt and security, 195 carried on with BMO's receivership application, causing PwC to be Court-appointed as Receiver over the Loder Group on August 26, 2016.

[30] In its second and final report to the Court on November 14, 2017, PwC reported that at the conclusion of the receivership, the shortfall to 195 was $2.37 million. Maxium says the amount remaining unpaid from the Consort Pharmacy, that had been converted to the unpaid new promissory note, was part of the shortfall.

[31] That amount was reduced to $970,000, after 195 reached a settlement of $1.4 million with McKesson in respect of its $2.0 million guarantee of the Loder Group in November 2017.

E. The Plaintiffs' Application for a Final Receivership Order

[32] The plaintiffs say that the defendants have defaulted on their loans. They base their application on these events:

- Maxium issued demands for payment of its loans on both the principal debtor, 202, and the guarantors on October 18, 2019 and concurrently served Notices of Intention to Enforce Security under section 244 of the *BIA*. CWB served its demands, through counsel, on 202 as debtor and on Grandin as guarantor on February 26, 2020, concurrently serving section 244 Notices of Intention to Enforce Security.
- Neither or Maxium nor CWB have been paid.
- On February 27, 2020 CWB received a Requirement to Pay from Canada Revenue Agency with respect to 202's unremitted source deductions to July 31, 2019 for the sum of $301,188.69. On February 28, 2020, Maxium received an RTP for 202's unpaid income taxes for the sum of $14,074.59. Maxium says that the effect of receipt of these RTPs was to freeze the operating accounts of the corporate defendants, thereby depriving 202 of operating funds.
- The Second Report of the Interim Receiver (MNP Ltd), covering the period March 2, 2020 to August 25, 2020, shows the Grandin Pharmacy would have an unfunded operating loss of $277,515.96 if it had been required to pay the Maxium loan payments for that period, even after the costs of the Interim Receiver and its legal counsel are factored out.
- The loss does not include amounts payable to CWB during the period nor any of the pre-interim receivership arrears to either Maxium or CRA.
- Despite his efforts, Mr. Loder, as of this writing, has been unable to find a buyer for the pharmacy as a going concern.

[33] The plaintiffs contend that the pharmacy's operation is unsustainable and that, in the absence of receivership or a sale of the pharmacy, Mr. Loder has no plan for dealing with defendants' obligations to any of Maxium, CWB and CRA. They say that not placing the pharmacy in receivership would put their security in grave jeopardy, that a Receiver is best positioned to sell the pharmacy at the most advantageous price and that, having regard to the factors set out in ***Paragon Capital Corp v Merchants & Traders Assurance*** Co, 2002 ABQB 430 at para 27, it is "just and convenient" for the Court to exercise its discretion in favour of granting the receivership order.

F. The Defendants' Position

[34] For the defendants, this case is about misrepresentation by or on behalf of the plaintiffs, whether deliberate or reckless, which:

- with respect to entering into the Maxium loans in the first place, induced the defendants to take on liability which they say was already paid;
- with respect to restructuring of the loans, lulled Mr. Loder into a false sense of security and prevented him from taking steps by which the defendants could have avoided the current predicament of this litigation; and
- finally, with respect to what was said in Court when the Interim Receiver was appointed on March 2, 2020, caused Nielsen ACJ to make the Interim Receivership Order.

[35] In my October 6, 2020 oral reasons, I summarized the allegations as follows:

- First, that Maxium mischaracterized to Mr. Loder the purpose of the $500,000 promissory note signed by 202 on June 29, 2017, saying it was to settle Mr. Loder's indebtedness to McKesson related to his former Loder Group enterprise. In reality, Maxium was recovering what it calls a residual liability related to the receivership of the Loder Group which had been originally financed by DFS, then taken over by BMO and then assigned to 195.
- Second, Mr. Loder says that, even so, the so-called residual indebtedness did not exist. It had been paid off in the previous receivership by specific allocation made by the previous Receiver.
- Third, Mr. Loder says that Maxium represented to him in 2019 and into 2020 that his entire loan portfolio would be restructured. Such a restructuring contemplated re-amortization of the $5000,000 loan segment from a three-year to a ten-year term and increase of the LOC with CWB from $75,000 to $150,000, along with an overall restructuring of the main debt and funds to cover CRA. Mr. Loder contends that he relied upon these representations by not seeking alternative financing elsewhere.
- Fourth, he says that Maxium told him the first set of demands of October 18, 2019 were a mere formality and would not be acted upon, which of course turned out not to be the case, as evidenced by these proceedings.
- Fifth, Mr. Loder alleges that the forbearance agreement he was asked to sign in February 2020 was sprung on him out of the blue, presented to him as a *fait accompli* and he had no opportunity to negotiate its terms.
- Sixth, Mr. Loder says there is a discrepancy between what was said in Court on March 2, 2020 as part of the plaintiffs' counsel's submissions as to what would happen in the interim receivership and what actually happened. The representation made by counsel that current management would remain in place during the interim receivership is wholly contradicted, Mr. Loder contends, by the fact that he (Mr. Loder) was terminated as the pharmacy's manager by the Interim Receiver.

[36] Counsel were unable to agree to the language of an Order emanating from my October 6, 2020 decision, and no Order was entered. As a result, submissions during the summary trial were not restricted to the matters outlined above. Mr. Loder's counsel also argued:

- Seventh, Maxium's failure to disclose to Mr. Loder that it did not have the authority on its own to approve the restructuring of 202's loans in 2019-2020, but had to obtain approval from CWB's head office in Edmonton, was a material omission that is also indicative of bad faith.

[37] Legally, Mr. Loder contends that:

- Maxium's promises to re-amortize the smaller loan, increase the LOC and restructure 202's overall financing lulled him into a false sense of security. Had Maxium not made those commitments, or had he known they would not be honoured, he would have taken steps to refinance the pharmacy operation elsewhere and would not currently be staring down this receivership application. In other words, the defendants have established an estoppel by words or conduct that precludes the plaintiffs from relying upon their strict legal rights under their security: ***Vision West Development Ltd v McIvor Properties Ltd***, 2012 BCSC 302 at paras 63-65.
- Maxium's conduct, in the form of misrepresentations and material omissions, disentitle the plaintiffs from the remedy of a final order of receivership because of lack of good faith, invoking section 4.2 of the *BIA* and section 66(1) of the *PPSA*.
- Finally, because receivership is an equitable remedy, having regard to the equities, it would not be just and convenient to grant the remedy in this case.

G. What does 'Good Faith' mean in this case?

1. Section 4.2 of the *BIA*

[38] The defendants invoke section 4.2 of the *BIA* to say a receivership order should not be granted. This recently enacted provision has two components:

- first, any interested person in any proceedings under the *BIA* shall act in good faith with respect to those proceedings; and
- second, if the Court is satisfied that an interested person fails to act in good faith, on application by any interested person, the Court may make any order that it considers appropriate in the circumstances.

[39] Here, the defendants say that the plaintiffs have through misrepresentation, mistruth or omission not acted in good faith and that the remedy that flows should be a denial of the receivership order.

[40] As a new provision, there is a dearth of case law to guide its application. However, it is obvious that the debtors and the secured creditors here are interested parties within the meaning of the section and that "with respect to" means invoking and conducting insolvency proceedings under the *BIA*.

[41] It is less obvious what is meant by "good faith" itself. There is no statutory definition. In the insolvency context, the Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para 70 said that good faith, along with appropriateness and due diligence, are "baseline considerations" for the Court when exercising authority under the *CCAA*, without elaborating on the nature of good faith.

[42] More specifically, the duty to act in good faith in Court-supervised proceedings under Quebec's Civil Code, was recently considered by the Supreme Court of Canada in ***9354-9186 Québec Inc. v Callidus Capital Corp***, 2020 SCC 10. In that case, the Court held a secured creditor's refusal to value its security before a proposal vote, so as to enable it to vote as an

unsecured creditor and control the outcome of the vote, was done for an improper purpose and therefore in bad faith. The result in ***Callidus*** is consistent with the earlier decision of the Court of Appeal of Quebec in ***Uniforêt Inc, Re*** (2002), 119 ACWS (3d) 185, another restructuring case, to deny special status to a debenture-holder's group due to self-serving motives.

[43] In both of these Quebec cases, it can be fairly said that the respective Courts in impugning the motives of the unsuccessful parties were concerned with upholding the intent and policy objectives of the *CCAA*: ***Callidus*** at paras 78 and 79; ***Uniforêt Inc, Re*** (2002), QJ No. 5457 (Quebec Superior Court) at para 95 aff'd by Quebec CA.

[44] The Quebec cases shed some light on acceptable creditor behaviour during the course of restructuring proceedings. Overall, given the comments of the Supreme Court of Canada in ***Callidus***, I am prepared to say that the intent and policy objectives of the *BIA* should inform the Court's consideration of the propriety of creditor behaviour in invoking and during receivership proceedings.

[45] I need to comment on one further Quebec case concerning *when* the good faith requirement arises. The addition of section 4.2 to the *BIA* was concurrent with insertion of the identically-worded section 18.6 in the *CCAA*. In ***Arrangement Relating to Nemaska Lithium Inc***, 2020 QCCS 1884, Gouin JCS held at paras 23-25 that the good faith requirement in section 18.6 arises only *after* the proceedings (in this case, restructuring) are initiated. This runs counter to my statement above that the good faith requirement in the section 4.2 covers previous conduct where it involves events precipitating Court involvement.

[46] Importantly, in ***Nemaska***, Gouin JCS was dealing with an application by an unsecured creditor for payment of an unpaid account for the manufacture of custom equipment, incurred prior to the granting of the initial Order under the *CCAA*, which Order included the usual stay provision. The applicant alleged that Nemaska's representatives had engaged in bad faith during the negotiations for the manufacturing contract and relied on section 18.6 to avoid operation of the stay and get paid before any other creditors.

[47] Gouin CJS, in my view, rightly rejected the application on the basis that awarding payment to the creditor at this stage would seriously thwart the reorganization effort and was antithetical to the purpose of the *CCAA*. The creditor's remedy was to file a claim in the proceedings, not to skirt the proceedings by means of section 18.6.

[48] In ***Nemaska***, the conduct of Nemaska alleged by the creditor was unconnected to the *CCAA* proceedings. Here, the defendants are saying, in effect, that the *bringing* of a receivership application, in the circumstances they allege, lacks good faith. Within this context, I am prepared to say that section 4.2 of the *BIA* applies.

[49] Still, the effect of section 4.2 should not reach back into time indefinitely. The conduct in question must be connected to the proceedings. The prospect of receivership proceedings first materialized with the sending of the first set of demand letters in October 2019. The sending of the demand letters and Maxium's conduct in relation to the loans thereafter, when receivership loomed, can be said factually and temporally to be connected to or "in respect of" the proceedings.

[50] The next question is: where does one look to find the content of this good faith requirement?

[51] In the contractual context, in ***Bhasin v Hrynew***, 2014 SCC 71 at para 33, the Court recognized good faith as a general organizing principle under the common law of contract, which (at para 66):

> … manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed …

[52] In this context (at para 65), the Supreme Court of Canada comments that the duty of good faith does not require one party to serve the interests of the other but rather not to undermine the other's interests in bad faith. It is not elevated to a fiduciary duty. Then at para 73, the Court imposes a duty of honesty in contractual performance as a key aspect of the duty of good faith:

> … I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; ***Greenberg v. Meffert*** (1985), 1985 CanLII 1975 (ON CA), 50 O.R. (2d) 755 (C.A.), at p. 764; Gateway Realty, at para. 38, *per* Kelly J.; ***Shelanu Inc. v. Print Three Franchising Corp***. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: ***Wallace***, at para. 98; ***Honda Canada*****,** at para. 58.

[53] A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in ***CM Callow Inc v Zollinger***, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

[54] In ***Callow***, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

[55] In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., ***Yam Seng Pte Ltd. v. International Trade Corp. Ltd***., [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. …

[56] The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in

respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

[57] The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the *BIA* may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

[58] At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in ***Bhasin*** and developed in ***Callow***[1], as cited above, to give content to the notion of "good faith" as found in section 4.2 of the *BIA*. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

[59] I summarize and conclude on this point as follows:

- Interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings.
- A secured creditor seeking a Receivership Order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings, i.e. such conduct is "with respect to" *BIA* proceedings.
- Based on previous caselaw, the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.
- Further, since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the *BIA* in the present circumstances, that is, the relationship between lender and borrower being essentially contractual in nature and, in this case, the contract includes a right on the lender's part to appoint a receiver or to seek such appointment.
- The duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.
- Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.
- A remedy, at least in this case and given the broad discretion of the Court under s. 4.2, may include denial of the Receivership Order.
- The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*.

[60] I emphasize that I am dealing here only with a situation of allegations of lack of good faith in respect of a secured lender's conduct in the events that precipitated the bringing of an application to appoint a receiver. The content or degree of the good faith requirement will necessarily vary with different *BIA* actors and different facts.

2. Section 66(1) of the *PPSA*

[61] The defendants also cite and rely on section 66(1) of *PPSA*, which provides that all rights, duties or obligations arising under a security agreement must be exercised or discharged in good faith and in a commercially reasonable manner. Again, there is no statutory guidance as to what is meant by "good faith". The authorities have considered the good faith requirement in section 66(1) of Alberta's *PPSA* in these contexts:

- Whether a supposed *bona fide* purchaser for value had a role in improperly discharging a true secured creditor's security interest registration, so as to acquire clear title to stolen trucks, was a question of good faith for determination at trial: ***E Dehr Delivery Ltd v Dehr***, 2018 ABQB 846 at para 71;
- The duty informs the exercise of a secured party's manner of disposing of the collateral: ***Edmonton Kenworth Ltd v Kos***, 2018 ABQB 439 at paras 80-81; and whether such realization is provident or improvident: ***Farm Credit Canada v Fenton***, 2008 ABQB 268 at paras 11-16;
- The good faith requirement applies to the way a Court-appointed Receiver conducts a bid process: ***Cobrico Developments Inc v Tucker Industries Inc***, 2000 ABQB 766 at para 35;
- Professor Rod Wood gives this example in his 2017 paper "A Guide to the Alberta Personal Property Act"[2] at para 8.2.3:

> Subsection 66(1) imposes an obligation on parties to act in good faith and in a commercially reasonable manner. A failure to meet the good faith standard might occur where the secured party misled the other secured party into thinking that its security interest was properly perfected (by misrepresenting the name of the debtor) or by performing some act which had the effect of delaying the perfection of the other party's security interest. In such a case, the failure to act in good faith will preclude the secured party from relying upon the priority that would otherwise be available to it.

[62] I note that the requirement of good faith here is joined with a concurrent duty to act in a commercially reasonable manner. The latter seems particularly apt for cases where improvident realization is alleged. Apart from that, the specific examples relating to good faith in ***E Dehr*** and by Professor Wood lead me to conclude that the requirement as it appears in section 66(1) of the *PPSA*, with regard to a secured creditor acquiring or discharging a right as described in that section, would not be different than the good faith requirement in section 4.2 of the *BIA*, as it pertains to the conduct of creditors, i.e. it prohibits dishonesty and misrepresentation in the acquisition or exercise of a right.

[63] Since the standards of good faith and commercial reasonableness are conjunctive, the breach of one of them is enough to attract consequences. In this case, I am concerned only with the good faith standard.

H. Evidentiary Objections

[64] As part of its case at the summary trial, the defendants took the position that some of the evidence relied upon by the plaintiffs was inadmissible, and therefore the submissions based on that evidence should be given no weight.

[65] The objections broadly took two forms:

- First, that certain documents relied on were not part of the record before the Court; and

- Second, that some of the conclusions urged upon the Court with respect to Mr. Loder's state of mind should be disregarded because he was not cross-examined on those specific points as required by the rule in ***Browne v Dunn*** (1893), 6 R 67 at 70 (UK HL).

1. Documents Not in the Record

[66] In the first respect, the objection is valid with regard to some of the documents. The hearing of this matter was cast as a summary trial. Although the Rules set out in some detail the process for applying for summary trial (see Rules 7.5 through 7.11), there is nothing that dictates precisely what is to happen at a summary trial.

[67] At one point in the lead-up to the summary trial, I ruled that *viva voce* evidence was not necessary and that the trial would be on the record. In fact, the very reason for ordering a summary trial was so that a more robust record could be produced.

[68] Mr. Schmidt argued that a summary trial is still a trial, and only admissible evidence should be entered. Evidence that is extraneous to the record should not be entered. In a summary trial of this nature the record consists of the various affidavits filed by the parties, the transcripts of the questioning that occurred on those affidavits, the exhibits entered or referred to during the questioning and responses to undertakings, if any.

[69] I agree with Mr. Schmidt that the Court is confined to the record. Mr. Warner, on behalf of the plaintiffs, appeared to mostly agree with that proposition and conceded that some of the documents included in the plaintiff's evidence book were not part of the record and therefore not properly before the Court.

2. The Rule in *Browne v Dunn*

[70] With regard to the second class of objections based on the rule in ***Browne v Dunn***, I acknowledge that a witness should generally be confronted during cross-examination, with the contrary version of the facts, if the adverse party intends to rely on that contrary version. The intent behind the rule is to give notice to a witness of cross-examining counsel's intention to later impeach. The Supreme Court of Canada says in ***R v Lyttle***, 2004 SCC 5 at para 64:

> The rule in ***Browne v Dunn*** requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:
>
> > Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination,

> and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

[71] In this regard, as revealed in the transcript, Mr. Loder was cross-examined on the core contradictory matters, namely:

- The origin of the residual indebtedness (whether it stemmed from his McKesson guarantee or not);
- Whether he had been misled in 2019-2020 about whether a restructuring would occur, including his version of the discussion about the re-amortization of the $500,000 debt and the increase to the LOC;
- Whether Mr. Loder had been told the October 2019 demands would not be acted upon;
- The circumstances of the tendering of the draft forbearance agreement;
- What he knew about the roles of Maxium and CWB in approving the restructuring;

[72] Here, counsel for the plaintiffs submits that Mr. Loder is not telling the truth about his state of mind on certain points. The cross-examination of Mr. Loder was directed at the plaintiffs' contrary factual theory of the main points listed just above.

[73] Another important aspect is whether the point is core or merely detail. Ontario Court of Appeal Justice David Paciocco and his co-author Dean Lee Stuesser in their text ***The Law of Evidence*** (Toronto, Irwin Law:2015) at page 473 say:

> In order to comply with the rule, counsel is not required to slog through every single detail to be contradicted. The necessary unfairness that triggers the rule only arises where there is a failure to cross-examine on central features or significant matters. Arguably all of the examples above concern "central" issues. The fundamental question is whether the witness was given an opportunity to respond to the cross examiner's contrary position and not necessarily all the details.

[74] The objection on this score was premised on the lack of cross-examination, or the perceived lack of adequate cross-examination, on certain factual points in dispute, and then plaintiffs' counsel's reliance upon contrary evidence advanced by the plaintiff and making of submissions based on that contrary evidence. However, the trier of fact is not required by any rule of law to accept a party's evidence on which there has been no (or no adequate cross-examination). The Court of Appeal of Appeal observes in ***R v Nielson***, 2019 ABCA 403 at para 37:

> [37] Choosing not to cross-examine a witness, but instead asking the trier of fact to disbelieve a witness based on other evidence adduced in the trial, is a valid exercise and does not invoke the rule from ***Browne v Dunn***. It is illogical for a trier of fact to be expected to accept evidence which they disbelieve just because it has not been subject to cross-examination: ***R v Mete*** (1971), [1973] 3 WWR 709 at 712, 1971 CanLII 1422 (BCCA).

[75] Further, at para 38, the Court of Appeal notes that the rule in ***Browne v Dunn*** has its limitations:

> [38] This was not a case where Crown counsel "ambushed" the appellant by impeaching his credibility in closing argument. As stated in ***R v Quansah***, 2015 ONCA 237 at para 82, 125 OR (3d) 81:
>
> > [i]n some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining party does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the

> contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

[76] As acknowledged in ***R v Neilson*** at para 53, the rule in ***Browne v Dunn*** can also apply to final argument. The Court of Appeal noted in ***R v Sawatzky***, 2017 ABCA 179(at paras 26 and 69), the Court has many options to deal with a breach of ***Browne v Dunne*** and the trial judge is left with discretion as to remedy. The nature of the remedy depends on the severity of the breach and the degree to which it prejudices the witness or the opposing party: ***R v Quansah***, 2015 ONCA 237at para 117.

[77] The Court's discretion includes whether to weigh the failure to cross-examine against the cross-examining party. It may, but as a matter of law, is not obliged to do so: Pacciocco and Stusser at pp 473-474, citing ***R v McKinnon*** (1992), 1992 CanLII 488 (BC CA), 72 CCC (3d) 113 (BCCA). The discretion inherent in the rule is described by the Supreme Court of Canada at para 65 of ***R v Lyttle*** as follows:

> The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. See ***Palmer v The Queen***, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at pp. 781-82; J. Soyinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 954-57.

[78] By far the bulk of the evidentiary objections related to ***Browne v Dunn***, can be answered on these grounds:

- Mr. Loder was cross-examined on the core contradictory matters;
- Much of the objection relates to a detail, not necessarily a central issue;
- Plaintiffs' counsel chose not to cross-examine but rather to challenge Mr. Loder's evidence with reference to other evidence (both documentary and other witness evidence);
- Mr. Loder's view on contradictory matters was generally known (from his affidavits);
- Mr. Loder was not ambushed or surprised by plaintiffs' counsel final argument, since the plaintiffs' position on the contradictory matters was clearly set out in their evidence; and
- Uncontradicted evidence does not necessarily mean that it must be accepted for its truth.

[79] Finally, when encountering a breach of the rule in ***Browne v Dunn*** on a central issue, I will exercise discretion in weighing the evidence against the plaintiffs or not.

I. Credibility

[80] Both sides say that this case will be decided on its facts and the facts rest on the credibility of the individuals involved.

[81] The plaintiffs say that Mr. Loder, for himself and on behalf of the corporate defendants, as an experienced businessman could not have misapprehended the basis for the $500,000 promissory note, nor the state of his relationship with Maxium as it approached the initiation of the receivership application, as Maxium and CWB were as open and transparent with him as required. The plaintiffs say that the evidence put forward by their representatives should be preferred.

[82] Mr. Loder and the other defendants contend (through counsel) that the affidavit evidence of the plaintiffs' representatives does not align with their actual recollection of the events as shown in cross-examination. The defendants also say that the plaintiffs' representatives attempt to gloss over or minimize what they did or said to mislead Mr. Loder. Much of their evidence, says Mr. Loder, therefore cannot safely be relied upon by the Court.

[83] In considering credibility in a commercial case, the trier of fact may have regard to factors such as:

- what reasonable commercial parties acting in good faith might do or say;
- whether a person's words or actions align with what the Court knows about the individuals and institutions in question, and the way the world works;
- whether the evidence is internally consistent, that is, whether the evidence changes or evolves from one telling to the next;
- whether the evidence is externally consistent, that is, whether the evidence aligns with other witness evidence or facts that are accepted;
- whether there has been an embellishment or tailoring, or whether the evidence sounds convenient or coincidental;
- whether the witness can adequately explain things that are or should be within that witness's knowledge.

[84] It is an exercise in determining what is more likely than not to have happened, based on the documents presented to the Court and the testimony of witnesses. The factors named above are generally applicable to a credibility inquiry in any case, with regard paid in a commercial case to the knowledge and experience of the particular commercial actors, their relationship with one another and what is overall plausible in terms of to how reasonable commercial parties would act.

J. Factual Findings

1. Was Mr. Loder told by Maxium that the $500,000 promissory note was to pay back the McKesson indebtedness?

[85] The gist of Mr. Loder's position on this issue is that the $500,000 promissory note was extracted from 202 (and guaranteed by him) based on false pretenses. In effect, he says, Maxium misrepresented to him that he was required to resolve some pre-existing indebtedness to McKesson (by way of this $500,000 promissory note in favour of Maxium) as a condition of the $3 million loan for the acquisition of Grandin.

[86] Maxium is clear that the $500,000 promissory note was proposed in compromise of Mr. Loder's pre-existing debt to 195, in relation to the residual indebtedness remaining from the previous receivership, and by virtue of his guarantees to 195 and BMO.

[87] Mr. Loder's own evidence evolves on this point. At para 10 of his March 2, 2020 affidavit, Mr. Loder deposes:

> However, quite late in the process, CWB-Maxium told me that, in order for the financing to go forward, I needed to pay out $500,000 CWB-Maxium alleged was owing by me in the context of a previous pharmacy business I operated. It was put to me that CWB would loan the $500,000 to discharge what was allegedly owed to Maxium, and this amount would be "tacked on" to what was owed in connection with the financing of the purchase of the Pharmacy.

[88] This is Mr. Loder's evidence about his telephone conversation with Mr. Gilchrist in June 2017 concerning resolution of the residual indebtedness as part of the financing transaction for Grandin. What is notable about this evidence is that it aligns exactly with Maxium's position, that is, the current lender required the promissory note to deal with indebtedness to the previous lender in relation to the previous business. Earlier in that same affidavit (at para 4), Mr. Loder correctly distinguishes between the current lender and the previous lender and comments that they are related. This affidavit shows that Mr. Loder, by his own words, clearly differentiated between old Maxium and new Maxium and understood the origin of the $500,000 loan. It also shows he was not mistaken, as has been argued on his behalf, about to whom the residual indebtedness was owed.

[89] In his subsequent affidavit of September 29, 2020, Mr. Loder makes the transition to his McKesson indebtedness as the reason given by Maxium for requiring the $500,000 promissory

note. He says at para 11:

> In fact, in 2017 I was told by Dan Gilchrist, Maxium's representative dealing with the financing of the Pharmacy (i.e. the Grandin Prescription Centre), that the Secondary Loan was related to Maxium's take-out of all or part of a debt allegedly owing by me, as guarantor, to the McKesson organization ("McKesson").

[90] In his November 24, 2020 questioning on affidavit, Mr. Loder was asked whether it made sense to him that Maxium would be seeking payment on a guarantee that Mr. Loder had given to a third party. He responded that he did not make a judgment and made no further inquiries. He said he simply accepted it, and was more concerned about the amortization period than anything.

[91] McKesson's guarantee to BMO was assigned to 195. Mr. Loder's guarantee to McKesson was not assigned. We know that because McKesson still held Mr. Loder's guarantee and later tried to collect on it.

[92] The defendants' theory is that Maxium, on behalf of 195, was collecting the shortfall on the guarantee that McKesson had given to BMO (and then assigned to 195). Since 195 had settled with McKesson for $1.4 million on a $2.0 million guarantee, it was seeking the balance form Mr. Loder. The problem with this theory is that Mr. Loder agreed to the $500,000 promissory note in June 2017, some five months before 195 settled with McKesson and before 195 knew there would be a shortfall and what amount it would be.

[93] Further, Mr. Loder knew that 195 had reached a settlement with McKesson with regard to the indemnity which McKesson had given to BMO in respect of the Loder Group's former North East Pharmacy. He knew this because he was provided with a copy of the settlement details in an email from Tracy Babiuk of McKesson on November 16, 2017 (which date was, incidentally, prior to the date of the issuance of the promissory note). Ms. Babiuk's email indicates that McKesson sustained a $1.4 million loss and reminded him that he had given personal guarantees to McKesson, including for the store in question that had generated the loss. The subject line of that email was: "Doug Loder personal gtee recovery."

[94] One would expect that Mr. Loder would have contacted either Maxium or McKesson to say that he had already agreed to pay $500,000 to Maxium to retire that personal guarantee indebtedness. There is no such communication in evidence. Certainly, there should also have been hesitancy on Mr. Loder's part to sign the promissory note (which he did on December 1, 2017) since McKesson itself, around the same point in time, had signalled that it was looking to him to pay on his guarantee for that store.

[95] As it turns out, McKesson and Mr. Loder are now engaged in litigation on that guarantee.

[96] The June 8, 2017 credit application submitted by Mr. Gilchrist to Maxium states that

> CWB Maxium Financial ("CM") has been requested to provide (i) $3,000M in loan financing to assist with the share purchase of Grandin Prescription Centre Inc. and 517751 Alberta Inc. located in St Albert, AB and (ii) $500,000 to clear personal obligations of the principal of the Borrower owing to Maxium Financial Services.

[97] Both Mr. Gilchrist's affidavit and the credit application contain calculations indicating that Grandin's proposed cash flow was sufficient to service both the $3 million facility and the $500,000 facility. Mr. Gilchrist says in his affidavit that he made it clear to Mr. Loder since June 2017 that dealing with the previous indebtedness stemming from the Loder group was part of the financing of the acquisition of Grandin. Maxium's documents bear out this position.

[98] Mr. Loder recalls only one conversation about the $500,000 indebtedness. He says that it took place on June 20, 2017 and it was with Mr. Gilchrist. It is quite possible that one party or the other mentioned McKesson since 195 was still looking to McKesson on its guarantee to reduce the Loder Group shortfall. However, I cannot and do not conclude that Mr. Gilchrist mistakenly or deliberately told Mr. Loder that Maxium required another $500,000 commitment from him on account of his guarantee to McKesson, for the following reasons:

- The first iteration of the conversation as recounted in Mr. Loder's first affidavit aligns with Maxium's position. Mr. Loder's evidence then changes as he provides a second and different version, now invoking McKesson, in the second affidavit.
- Why Maxium would call on Mr. Loder to pay on a liability he had to a third party does not make sense. This is particularly so because Mr. Loder, besides being an experienced businessman in the retail drug sector, was himself in part responsible for designing McKesson's indemnity program for independent pharmacies. He understood the program well. He also understood what a personal guarantee is and how it works. In this regard, 195 did not hold Mr. Loder's guarantee to McKesson. It was retained by McKesson. It is totally unclear why he thought Maxium could collect on his guarantee to McKesson. His only response is that he didn't question it. That is not a plausible answer to me.
- The defendants' theory that Maxium was attempting to collect the shortfall from the McKesson guarantee to BMO by making Mr. Loder sign the promissory note does not work because the timing does not line up. Maxium asked Mr. Loder for the promissory note in June 2017. It did not know until November 2017 that there would be a shortfall.
- He was notified by McKesson on November 16, 2017, about two weeks before he signed the promissory note, that McKesson still held his personal guarantee. In the very least, this should have prompted some inquiry on his part to ensure he was not being asked to pay the same debt twice.
- Furthermore, Mr. Loder was represented by counsel at Bishop & McKenzie LLP in respect of the acquisition and financing of Grandin. He had access to legal counsel with regard to the promissory note at the relevant time. After learning on November 16, 2017 of McKesson's settlement with Maxium and McKesson's interest in looking to his McKesson guarantee, Mr. Loder still signed the promissory note on December 1, 2017, without apparently raising any alarm.
- Maxium's documents support Maxium's position.

[99] To be sure, in terms of customer service, Maxium could have done more to document the transaction with Mr. Loder by, for example, sending him a letter in or after June 2017 confirming the purpose of the loan. Nonetheless, it cannot be said that factually Maxium misled Mr. Loder as to the purpose of the loan.

2. Did the residual indebtedness actually exist?

[100] Mr. Loder takes exception to the notion, first expressed in Mr. Wyett's affidavit of March 16, 2020, that he owed any money in respect of the Consort pharmacy that could comprise the residual indebtedness. He notes in his own affidavit of September 29, 2020 that a purchase price $994,964 was allocated to the Consort pharmacy. Mr. Loder asserts that this amount extinguishes any debt owing in respect of that pharmacy.

[101] In response, the plaintiff's counsel points out that the allocation figure comes from the purchaser of the Consort pharmacy, in the form of a schedule attached to the purchase and sale agreement. Counsel says there is no evidence before the Court as to the actual allocation made by the Receiver (PwC) in respect of that pharmacy.

[102] The remaining shortfall of $2.4 million from that receivership, as said, was reduced by the $1.4 million payment by McKesson under its guarantee in November 2017, leaving a final shortfall of $970,000.

[103] Maxium's evidence concerning the residual indebtedness also underwent somewhat of an evolution. In Mr. Wyett's affidavit of March 16, 2020, it was deposed that the residual indebtedness stemmed from the missed balloon payment. Mr. Gilchrist expanded on that evidence in his affidavit, indicating that Mr. Wyett's evidence was not quite accurate. While the missed

balloon payment (via the new promissory note for $741,500 and Loder guarantee) was folded into the Loder Group receivership, the resulting shortfall was an overall shortfall in the receivership, attributable in some measure but not in total to the missed Consort balloon payment.

[104] Mr. Wyett came on the scene in the latter part of 2019 and his evidence about the residual indebtedness came from a review of historical credit files, and discussions with Mr. Gilchrist and Mr. MacLellan. Mr. Gilchrist, on the other hand, had worked for Maxium or its predecessors for all the relevant years and had first-hand knowledge of all of Mr. Loder's accounts through the years.

[105] While it requires some digging through the evidence, I accept that on December 1, 2017 when Mr. Loder issued the promissory note for $500,000 to Maxium, that there was a shortfall of $970,000 to 195. Although the money did not pass through Mr. Loder's or 202's hands, I accept that by way of direction to pay, the sum of $500,000 was in fact advanced and paid to retire residual indebtedness of $970,000.

[106] I do not think that Mr. Loder can deny the fact that the balloon payment on the Consort pharmacy had been missed because he had that debtor company sign a further promissory note and he signed a new guarantee, both in favour of 195, to cover that indebtedness. As the director of the Loder Group of companies, he should have been aware of the state of the Loder Group receivership and the final amount that remained unpaid. That would have been the reason for providing him with information about 195's settlement with McKesson.

[107] There are some small points that can be argued. For example, Mr. Schmidt disputes that there was ever a "negotiation" by Maxium with Mr. Loder. I do note that $500,000 was deemed sufficient by Maxium to settle a remaining debt of what eventually turned out to be $970,000. Further, Mr. Loder had requested a certain amount of financing so he could acquire the Grandin pharmacy. In the course of those discussions, the question of residual indebtedness was raised and the $500,00 loan proposed by Maxium. Mr. Loder was free to walk away at any time before making a commitment. There may have been no course of negotiations but no-one forced him either.

[108] Mr. Schmidt also disputes that Mr. Loder was informed about the residual indebtedness from the outset. He notes that Mr. Loder first contacted Mr. McGillivray in January 2017 about financing the purchase of Grandin, and that the residual indebtedness was not raised until June 2017. This is semantical. It depends on what one means by "outset". Mr. Gilchrist was brought into the discussions in June 2017. Mr. McGillivray had told Mr. Loder that Mr. Gilchrist wanted to talk to him. When the two were finally able to connect, Mr. Gilchrist raised the matter of the residual indebtedness. I accept that Mr. McGillivray may not have discussed the residual indebtedness with Mr. Loder and that Mr. Gilchrist raised it in his first encounter with Mr. Loder concerning the Grandin acquisition. Neither of these points causes me to question the veracity of Maxium's position that it required the $500,000 promissory note to retire the residual indebtedness from the previous receivership.

[109] Although Mr. Schmidt chose not to pursue the duress line of argument at the summary trial, it was nonetheless urged upon me that Mr. Loder was pressured into agreeing to the $500,000 promissory note in June 2017 because of the deadline for making a commitment to the vendors of the Grandin Pharmacy. There may well have been pressure on Mr. Loder to make a commitment, or lose the deal, but that was not placed on him by Maxium. Further, the transaction did not close until November 2017 and he did not sign the promissory note until December 1, 2017. I do not know what other options, if any, apart from Maxium that Mr. Loader may have had to finance this transaction, but certainly if he thought the $500,000 was of suspect validity, he did not have to go through with the transaction. In fact, he says at para 11 of his September 29, 2020 affidavit that regardless of any pressure he might have felt, he would never have signed a document obligating him to pay money that he did not owe.

[110] It may well be that Mr. Gilchrist did not specifically mention the Consort pharmacy to Mr. Loder in their June 2017 telephone conversation. However, from Mr. Loder's own recounting of

that conversation at para 10 of his March 2, 2020 affidavit, he clearly understood why the request for the additional $500,000 obligation was made.

[111] Mr. Wyett's not completely accurate rendition of the origin of the $500,000 obligation should not have occurred and the history should have been more definitively researched before being put in an affidavit before the Court. With Mr. Gilchrist's additional information, the picture is complete. The deficiency in Mr. Wyett's affidavit in 2020 does not mean that Mr. Loder was misled in 2017 or that the residual indebtedness did not exist.

[112] Overall, I do not find that there was misrepresentation, misstatement or dishonesty on Maxium's part so as to constitute bad faith under section 66 (1) of the *PPSA* in the acquisition of its rights in the assets of the corporate debtors in this action. I further conclude that what happened in June 2017 is too remote in time to constitute lack of good faith for the purposes of section 4.2 of the *BIA***,** but even if not, is insufficient to be bad faith.

[113] Mr. Wyett's affidavit evidence about the Consort pharmacy is an example of mistaken or incomplete research but is not an attempt to mislead the Court in these proceedings. It has been corrected by Mr. Gilchrist.

[114] Finally, 202 and Mr. Loder did receive value for the promissory note, namely the advance of $500,000 to 195 to retire Mr. Loder's personal obligation to 195. Whether it was the guarantee given to BMO or the guarantee given to 195 for the balloon payment, or more likely some combination, Mr. Loder was still indebted to 195 for the whole of the residual indebtedness. As Mr. Loder rightly points out, but for executing this promissory note of $500,000, 202 would not have been granted the $3 million in financing to buy Grandin.

3. Did Maxium mislead Mr. Loder regarding the restructuring of the loan portfolio?

[115] It is clear from the evidence that Mr. Loder and Maxium (first, through Mr. McGillivray, and then subsequently through Mr. Wyett) held serious discussions regarding a restructuring of 202's entire loan portfolio.

[116] By 2019, Mr. Loder perceived that the servicing of the $500,000 loan was an undue drag on the pharmacy's cash flow, confirming his earlier fears. He says the burden of this loan was the proximate cause of the business' default on its CRA obligations. Mr. Loder did his own calculations and suggested that a re-amortization of the $500,000 segment from a 3-year term to a 10-year term would reduce the pharmacy's finance costs by more than $10,000 per month. By way of illustration, Mr. Loder said the business paid over $318,000 in respect of this loan since its exception, exceeding what was owed to CRA.

Line of Credit

[117] A series of emails were exchanged between Mr. Loder and Mr. McGillivray in the latter half of 2019 in pursuance of this restructuring. From the tenor of these emails, it is apparent that both sides were serious about a restructuring. Mr. Loder had made Mr. McGillivray aware that the pharmacy owed some $200,000 in source reductions to CRA. Mr. McGillivray in turn created a restructuring proposal that included the main acquisition loan, the secondary loan for the previous indebtedness, the CRA liability and an increase in the LOC to $300,000, the latter facility to be carried by CWB not Maxium. The entirety of this restructured indebtedness would be amortized over 10 years. All of this is contained in an email from Mr. McGillivray to Mr. Loder of October 21, 2019.

[118] As this email discussion was carried out, Maxium required further and better information from Mr. Loder concerning the pharmacy's financial situation. Maxium submits that Mr. Loder was reticent in providing this information which resulted in delay in getting the restructuring proposal approved. Mr. Loder says he provided all the information that was requested. It does appear that there was some delay in getting accountant-prepared financial information to Maxium but in the end, a restructuring was approved.

[119] Email communication does show that Mr. Loder was told that the proposal would be considered by Maxium's credit committee and that the increase to the LOC had been approved. Mr. McGillivray's email of February 1, 2019 to Mr. Loder is clear that the increase to the LOC had been approved. I do not find the email to be cryptic as Maxium's counsel and representatives have suggested.

[120] Mr. Thomas, a CWB senior manager at the virtual branch who was in charge of the LOC account, contacted Mr. Loder later in February 2019 and advised that finalization of the increase required receipt of further financial information. Mr. Thomas sent Mr. Loder emails on February 22, 2019 and then March 5, 2019. The first of the February 22 emails is an introductory email. The second of the February 22 emails states:

> Hi Doug, I forgot to remind you in my introductory email that I will require the April 30, 2018 financial statements for the pharmacy. Thanks, Neil Thomas.

[121] The March 5, 2019 email requests even further information about the pharmacy business and 202.

[122] Over the course of the next few months, Mr. Thomas continued to request further information in support of the request for increase. These emails are exhibited to Mr. Thomas's affidavit of October 15, 2020. It is clear that as late as May 2019, CWB was still not satisfied with the state of the information provided. Mr. Thomas says that it was never fully provided.

[123] Mr. Thomas was cross-examined closely about the February 2019 telephone conversation and the emails sent on February 22, 2019 and March 5, 2019. Mr. Schmidt submits that Mr. Thomas' evidence that he told Mr. Loder the LOC increase approval was conditional upon receipt of other information should be rejected outright. He says that Mr. Thomas is simply not believable.

[124] Logically, the two February 22 emails could only have been sent after an earlier telephone conversation between Mr. Loder and Mr. Thomas. In the first of the emails, described as an introductory email, no mention is made of additional information. In the second of the emails, Mr. Thomas says that he forgot to remind Mr. Loder that the financial statements for the pharmacy were required to be submitted. From that use of language, the two of them had obviously discussed this requirement before. Since there was only one telephone conversation prior to February 22, the discussion about the need to produce the financial statements must have occurred in that conversation.

[125] Mr. Loder responded with some financial information on February 25 but it led to further questions. The March 5 email shows that Mr. Thomas was seeking further information about 202, the actual borrower, including why corporate filings were not up-to-date. Mr. Loder would have known from his previous application for the original amount of $75,000 in LOC that CWB goes through a due diligence process.

[126] It therefore seems to me, more likely than not, although not robustly documented, that Mr. Thomas did make Mr. Loder aware that there were certain informational requirements. It also seems that as Mr. Loder provided some information, additional questions arose for which CWB required answers.

[127] The evidence shows that the LOC at its $75,000 level began to operate in significant overdraft, starting February 2019. In fact, for the period from April 30, 2019 to March 31, 2020, there were several months where the overdraft position exceeded $150,000, in some months significantly. A June 21, 2019 email from Mr. McGillivray to Mr. Thomas stated that the requested LOC increase was still "pending" but there was concern that the overdraft was trending in the wrong direction.

[128] Mr. Thomas noted that for periods in 2018, CWB granted temporary increases to the LOC.

[129] It seems that Mr. McGillivray jumped the gun in proclaiming on February 1, 2019 that the requested LOC increase had been granted. However, it should have been obvious to Mr. Loder from the content of the subsequent contact and emails from Mr. Thomas and Mr. McGillivray, and

his previous experience with CWB, that final and formal approval was still pending because of the outstanding financial information and the overdraft situation.

[130] After Mr. Thomas' involvement, it appears that the issue of an LOC increase merged with the discussions between Mr. Loder and Maxium regarding the overall restructuring.

Restructuring first rejected

[131] Starting in June 2019, Mr. Loder engaged with Mr. McGillivray in what he (Mr. Loder) thought were good faith discussions regarding an overall restructuring. Mr. Loder alleges that he was led to believe that the restructuring would occur, that Maxium would take no steps to enforce its security and that Maxium itself (through its credit committee) had the authority to approve the restructuring. This latter allegation takes the form of Mr. Loder's assertion that Maxium failed to tell him that final approval for the restructuring proposal had to be exercised by CWB's head office in Edmonton.

[132] Two things are apparent from the various emails that are attached as exhibits D and F to Mr. McGillivray's affidavit of October 15, 2020. The first is that Mr. McGillivray had to make a submission to the credit committee and the second is that Maxium throughout was pressing Mr. Loder for information required to complete the proposal. In a November 29, 2019 email Mr. McGillivray advised Mr. Loder that "finally things are going to the credit committee to get the restructure done."

[133] Mr. Loder then deposes at paragraph 27 of his March 2, 2020 affidavit:

> However, the restructuring never happened. Instead, earlier this month, I received, through my solicitor, a demand from CWB-Maximum that I enter into a forbearance agreement. I had no warning of this and was astonished considering what had been told to me about the anticipated restructuring. To put it bluntly, I considered that CWB-Maxium had led me down the garden path, with no intention of actually restructuring the indebtedness. Unfortunately, I believed what CWB-Maxium had told me. Had I known differently, I would have sought refinancing of the indebtedness many months ago and I am confident I would have obtained it.

[134] On October 3, 2019, Mr. Loder formed the view that Mr. Gilchrist and Mr. MacLellan, who were higher-ups in the Maxium hierarchy, had decided not to support his restructuring request. Alarmed, he contacted Mr. McGillivray who was the Maxium salesperson or agent with whom he had been dealing. Mr. McGillivray's job was to generate and compile applications for financing. Mr. Loder wrote in an email on that date:

> I only wish you had told me sooner that Darrell and Dan have no intention of refinancing the loan so that I could have moved sooner locally.

[135] Mr. McGillivray responded later that day:

> Just found out last couple of days. Came as a surprise.

[136] In his questioning on affidavit, Mr. McGillivray was not sure whether he had had any discussions with Mr. Gilchrist and Mr. McClellan concerning their intent, or whether it was a specific refinancing proposal that had been rejected. This turned out to be a temporary setback, as later in October 2019, discussions between Mr. McGillivray and Mr. Loder concerning the refinancing resumed.

[137] In the midst of these resumed discussions, Mr. Wyett caused Maxium to send demands to 202 and its guarantors on the two loans. I will discuss the demands further in the section after next.

Restructuring then approved

[138] It turns out that Maxium eventually did, in fact, approve a restructuring. It was just not on the terms that Mr. Loder wanted. In particular, in the end Mr. Loder rejected the concept of using a forbearance agreement as the framework for the restructuring.

[139] In order to place Mr. Loder's reaction in context, it is necessary to examine three documents relating to the approval of the restructuring. The first is the risk assessment summary dated December 12, 2019, prepared by Mr. Gilchrist and others, and which is exhibit Q to Mr. Gilchrist's affidavit of October 15, 2020. The second is the credit submission addendum, found at tab 42 of the defendants' book of evidence, and referred to at page 79 of Mr. Gilchrist questioning on affidavit of November 17, 2020. The third is the actual CWB approval document, entitled CRM review of CWB Maxium Financial Inc Finance Request, dated February 24, 2020 and found at exhibit R of Mr. Gilchrist's October 15, 2020 affidavit.

[140] The risk assessment summary recommends:

- restructuring the existing debt by recapitalizing the sum of $3.1 million to cover the balance of the main loan ($2.6 million), the balance owing on the secondary loan ($200,000) and the balance owing to CRA ($300,000), and amortizing that that sum over 96 months (8 years);
- replacing the then existing LOC of $75,000 with a LOC of up to $250,000 through CWB's virtual bank.

[141] At page 2 of the risk assessment summary, the authors note the pharmacy's cash flow problems, stemming from:

- The maintenance of an employment contract with the vendor at $180,000 per year representing a premium of $70,000 per year (contract ended in November 2019); and
- The required cash to service the $500,000 loan on a short 36 month amortization.

[142] The analysis of cash flow in the summary addresses how the pharmacy's cash flow can sufficiently handle debt service and other cash requirements.

[143] The addendum, prepared by Mr. Wyett and another, contains these entries as the first two bullet points under the heading "December 29, 2019 call with Ben Wyett, Mike McGillivray and Loder":

- Loder is receptive to a restructure of his CM debt, pursuant to an FA (subject to CRM approval).
- Loder agrees to pledge his personal residence (wholly owned by him) as security.

[144] CM refers to Maxium and FA refers to a forbearance agreement.

[145] Mr. Loder was cross-examined on this point of when he first learned of the prospect of a forbearance agreement. He says it was not in a telephone conversation in December 2019 but rather in an email on January 29, 2020. Mr. Wyett testified in his cross-examination that the forbearance agreement was raised in the December 2019 telephone call.

[146] I conclude that Mr. Wyett discussed the forthcoming forbearance agreement with Mr. Loder during the December 2019 telephone conversation. I have been given no reason to believe that Mr. Wyett completely fabricated this statement and put it in the addendum.

[147] Based on the recommendation of December 12, 2019 and the addendum of January 9, 2020, CWB Senior VP Dave Thomson formally approved the restructuring. The recapitalized amount was $3,117,690, amortized over 8 years. The funds were to be used to pay out the existing Maxium indebtedness and the existing LOC. No new LOC was to be extended and no payment was specifically earmarked for CRA, although there was an expectation that the CRA indebtedness would be stabilized or reduced. This restructuring was premised on the borrower and guarantors providing a forbearance agreement.

[148] Clearly, this final restructuring that was approved by CWB was not as favourable to Mr. Loder as the terms that had been proposed by Mr. McGillivray. The internal Maxium email exhibited at N, O and P of Mr. Gilchrist's October 15, 2020 affidavit reveal:

- there were some concerns about Grandin's viability as a business, to the extent that appointing a monitor was suggested as an option;
- as late as December 2, 2019, Maxium was still seeking financial information from Mr. Loder to inform its decision; and
- notwithstanding the concerns about viability, Maxium was still willing to consider different restructuring scenarios to assist Mr. Loder.

[149] The final determination at the CWB level was that Grandin's risk profile was such that a forbearance agreement had to form the framework for restructuring on the revised terms.

[150] In the end, Maxium was prepared to refinance 202's existing debt and provide a longer-term horizon for repayment of what owing on the $500,000 promissory note, which was Mr. Loder's major complaint. Mr. Loder was not prepared to accept the terms.

[151] I do not see anywhere in the evidence where Mr. Loder was promised a particular form of restructuring. The evidence shows that Maxium throughout the fall of 2019 and into early 2020 was working assiduously toward the restructuring that Mr. Loder was seeking. It is also apparent that there were concerns expressed at Maxium about the pharmacy's ongoing viability which resulted in the ultimate decision-maker at CWB approving a revised form of restructuring premised on an executed forbearance agreement. Mr. McGillivray was also clear that any refinancing proposal required higher approval. While Mr. McGillivray certainly made a recommendation to the credit committee, I do not see where either Maxium or Mr. McGillivray promised a specific outcome to the refinancing request.

[152] CWB, as the final approving authority, was entitled to modify the terms of refinancing in accordance with what it felt was in the lender's best interest. Neither CWB nor Maxium were required to subordinate their interests to Mr. Loder by approving a form of restructuring that they felt would jeopardize their security.

[153] I find that Maxium did not engage in misrepresentation or dishonesty in dealing with Mr. Loder's refinancing request.

4. Did Maxium represent that it would not enforce its demand?

[154] As noted, Maxium sent its demands for payment to 202 and its guarantors on October 18, 2019 with respect to the main loan. This was done at the instance of Mr. Wyett. He testified that 202 had defaulted on both loan segments in that there were insufficient funds in 202's bank accounts to make the payments. Further, Mr. Wyett indicated that Maxium was concerned about the CRA indebtedness that Mr. Loder had disclosed.

[155] Mr. Loder contacted Mr. McGillivray upon receipt of the demands. Mr. McGillivray did make a representation at that time that Maxium was not seeking to enforce those demands. He is not sure that he told Mr. Loder "not to worry" and that the demands were only required for Maxium's file, but does not deny that he may have done so. Mr. McGillivray said his intent at the time was to assure Mr. Loder that Maxium was still interested in pursuing a restructuring and working toward that end, although by the demands it was signalling that it was keeping its options open.

[156] Mr. Loder argues that this was a false assurance that prejudiced him.

[157] Maxium did not act immediately on the demands following the expiry of the payment deadline. Rather, it waited until Mr. Loder decided not to sign the forbearance agreement, which meant that he was rejecting the revised refinancing proposal put forward by Maxium. On February 27, 2020, Mr. Loder's then counsel advised Maxium's counsel by email that the forbearance agreement would not be signed, and provided directions about where the statement of claim could be sent.

[158] February 27, 2020 was also the same day that CWB received the RTP from CRA for a sum in excess of $300,000 in respect of 202's unremitted source deductions. Maxium received the other

RTP for 202's unpaid income taxes the next day.

[159] From the above, it is clear that Maxium did not act on its demands for a period of four months after issuance, and only after it had reached an impasse with Mr. Loder following some eight to nine months of restructuring discussions. Maxium had done its due diligence on the restructuring proposal put forward by Mr. McGillivray, had it vetted by its credit committee and made a recommendation to the final decision-maker, CWB in Edmonton. The revised proposal coming from CWB's head office was premised on a forbearance agreement, which Mr. Loder was not prepared to sign.

[160] In the meantime, 202 had remained in default of its loans since November of the previous year. The information that Maxium had gathered posed concern about the pharmacy's sustainability. Then, the RTPs were served and prevented any payments from 202's bank account.

[161] Whatever Mr. McGillivray said to Mr. Loder back in October 2019, giving it the most generous reading in favour of Mr. Loder, could not be construed to mean that Maxium would never take enforcement action. Not ever taking enforcement steps on defaulting loans could not be within the contemplation of reasonable commercial parties.

[162] I find that Maxium did what it said it would do, that is, it did not take steps to enforce its October 18, 2019 demands until it had reached the end of the road with Mr. Loder with regard to the restructuring discussions. I find that when such discussions failed, both sides expected, as reasonable commercial parties would expect, that the suspension of enforcement action would end.

5. Was the forbearance agreement non-negotiable?

[163] Mr. Loder next contends that he and his then counsel were afforded no opportunity to provide input into the forbearance agreement and that it was presented to him on a take it or leave it basis. Foisting the forbearance agreement upon him in this manner is, Mr. Loder argues, further evidence of bad faith.

[164] This argument can be resolved by examining the communications exchange between Mr. Wyett and Mr. Loder (found at document 45 of the defendant's book of evidence) and between counsel concerning forbearance agreement (found at exhibit F of Mr. Loder September 29, 2020 affidavit), and some of the preceding events.

[165] As recounted earlier, Mr. Loder was alerted to Maxium's request for a forbearance agreement in a December 29, 2019 telephone conversation with Mr. Loder, documented in the February 24, 2020 addendum document. On January 29, 2020 Mr. Wyett wrote to Mr. Loder by email as follows:

> I do not believe I have heard back from you from this request below.
>
> I hope to have a draft forbearance agreement to you this week, so please give your counsel a heads up.

[166] The first sentence in the above email refers to financial statements requested but not provided. Mr. Loder testified in questioning that the second sentence was the very first mention to him of a forbearance agreement. If so, it seems quite an abrupt way to introduce the concept of a forbearance agreement. The language used here is more suggestive of the idea of a forbearance agreement having been previously discussed.

[167] Mr. Wyett followed up with Mr. Loder in a February 5, 2020 email:

> Further to my voicemail, please provide me with the contact information for your legal counsel. I am hoping to have our counsel send a draft forbearance agreement.

[168] Mr. Loder responded the same day with the contact information for Mr. Banack, his then legal counsel. One would think that if the forbearance agreement had been suddenly sprung on Mr. Loder, he might be asking questions about it.

[169] It appears that the draft forbearance agreement was sent by Maxium's counsel, Mr. Warner, to Mr. Loder's counsel, Mr. Banack, on February 6, 2020. On February 13, 2020, Mr. Warner was in contact with Mr. Banack by email, looking for a response:

> Jason, the forbearance agreements were sent you a week ago. There has been no response. That is not acceptable. The forbearance agreement has to be properly executed and returned to her office if your client wants to preserve his business. In the event we do not have the executed forbearance and related documents in our office by the close of business today, we will seek instructions to take the next step in this matter.

[170] Then another thirteen days went by. On February 26, 2020, Mr. Banack wrote back to Mr. Warner as follows:

> As Doug continues to actively market the Grandin pharmacy for sale and make efforts to bring the outstanding payments up to date, he (and I) have become much less comfortable with the forbearance agreement as presented.
>
> The stricter covenants combined with the various consent orders and absence of revolving credit, in our opinion, put Doug and his business at greater risk than a creditor enforcement proceeding initiated by CWB and/or Maxium (which Doug would contest). If you are instructed to send new demands and/or notices to enforce, I would ask that you copy Jim Schmidt and I.
>
> To reiterate, Doug is actively seeking an exit from the business and part of that sale transaction would necessarily involve a payout of the debt owed to CWB and Maxium (and, so I am told, a settlement offer for McKesson). I have been engaged to act for Doug on the sale and am instructed to make this happen as quickly as possible, and also to provide whatever reasonable assurances your client may request to show that the sale process is progressing.
>
> Let me know your thoughts?

[171] Mr. Warner responded on February 27, 2020 with this email:

> Jason, I have discussed your email with CWB Maxium and I have been instructed to advise you that the Forbearance Agreement, as drafted, must be signed and returned to our office by no later than noon tomorrow, failing which we will proceed with a Statement of Claim and proceed with enforcement. We are also in the process of issuing demands on behalf of Canadian Western Bank. While there may be a few minor nits with the documents, the essence of the documents is the basis upon which CWB Maxium is prepared to continue to do business with your client. Your client has a decision to make.

[172] As mentioned in the previous section, Mr. Banack advised Mr. Warner later on February 27, 2020 that the forbearance agreement as prepared would not be signed by Mr. Loder, and that litigation could ensue.

[173] From the foregoing, the following can be gleaned:

- first, the forbearance agreement as sent was intended as a draft, at least at first;
- second, Mr. Warner received no feedback from Mr. Banack for a period of 20 days;
- third, the "stricter covenants", along with the consent orders and lack of revolving credit were not acceptable to Mr. Loder; and
- last, Maxium was insisting on the "essence" of the forbearance agreement as drafted.

[174] Mr. Wyett in his affidavit suggested that the forbearance agreement was favourable to Mr. Loder and addressed his needs. The actual forbearance agreement is not in evidence before me so I

will not comment further on its content. It seems evident that Mr. Loder disagreed with some of the major features of the forbearance agreement and that Maxium was not prepared to relent on those points.

[175] I think it fair to say that, at the end of the day, when Maxium said it would not resile from those major components, Mr. Loder's signing of the forbearance agreement was left on a "take it or leave it" basis. From Maxium's perspective, Mr. Loder wanted Maxium to strip away some of the core components which, it seems, it felt was necessary to protect its interests.

[176] I do not think that Maxium, in failing to give in to Mr. Loder's objections to the forbearance agreement, engaged in bad faith. Maxium is entitled to do what it feels is reasonably necessary, such as insist on the "essence" of an agreement, to protect its interests. Mr. Loder is similarly entitled to do what he believes is necessary to protect his interests. Both did so, and that is why the matter is now in litigation.

6. Did Maxium's mislead the Court on March 2, 2020

[177] It is next asserted, on behalf of Mr. Loder, that comments made by Maxium's counsel before Nielsen ACJ on March 2, 2020, in procurement of the Interim Receivership order, were misleading and, at least in part, induced Nielsen ACJ to make the order. Here are counsel's comments:

> I mean, there's just too much left to speculation here that -- and the Interim Receiver, the only thing that the Interim Receiver is going to do is to ensure that this continues to run smoothly. As I said on Friday, and as is set out in Mr. Wyett's affidavit, the existing management will stay in place. The pharmacy will continue to run as it would, would normally in the ordinary course. All that will happen is that funding will be provided from a reliable source to deal with ongoing operations, and the payments that are being made from insurance companies will be intercepted and utilized to offset ongoing operations. That is not that intrusive, in my submission. The management stays there. They continue to operate as they are -- ordinarily would. It's just making allowance or making provisions for the preservation of the security of CWB Maxium.

[178] Mr. Loder points to the submission that "the existing management will stay in place" and that the pharmacy would continue to operate as it has, and says that is not the reality of what happened. Rather, Mr. Loder alleges that he was effectively fired as the manager of the pharmacy by the Interim Receiver. As evidence, he tenders this email from Mr. Sirrs of MNP Ltd dated March 6, 2020:

> Hello Doug,
>
> As we review the projected cashflows of the Pharmacy we wanted to advise you that amounts typically paid to you in the monthly payroll will not be distributed going forward due to the cash flow deficit the pharmacy is experiencing. We have also discussed with the pharmacists at the clinic and confirmed that they can manage the delivery of the prescriptions (something I understand you were assisting with).
>
> Should you require any further details on this please do not hesitate to contact me.

[179] In argument, Mr. Schmidt contended that counsel's statement at the hearing about existing management remaining in place was part of a course of conduct by or on behalf of Maxium that evinces bad faith. If not deliberately misleading, the comment is at best reckless as to its truth and ought not to have been made. Mr. Schmidt said that taking away someone's salary is the very hallmark of wrongful termination.

[180] Mr. Warner, in addressing this submission, took great umbrage with Mr. Schmidt's characterization of his comments before Nielsen ACJ, saying the comments were made in good faith. He pointed out that neither he nor Maxium had any control over the actions or decisions of

the Interim Receiver, an independent officer of the Court, and that the decision made in respect of Mr. Loder's salary was within the Interim Receiver's powers as conferred by the Court. Mr. Warner further stated that his comments were based on his experience as an insolvency practitioner with regard to Interim Receivership situations. Finally, Mr. Warner submitted that Mr. Loder continues to function at the pharmacy as he previously did. He simply no longer collects the salary.

[181] Mr. Schmidt, on Mr. Loder's behalf, takes no objection to anything done by the Interim Receiver.

[182] The Interim Receiver's second report to the Court, dated August 25, 2020 indicates that Mr. Cameron Santer is the pharmacy manager. The report also states that "Mr. Loder has continued daily involvement with the company through delivery of prescriptions to customers as required."

[183] I am satisfied from the above that the statement made by Mr. Warner to Nielsen ACJ concerning the retention of management during the period of Interim Receivership was not misleading, intended to mislead or recklessly made. It aligns with what happened with regard to the day-to-day management of the pharmacy. I acknowledge that Mr. Loder did lose his salary as a result of a business decision made by the Interim Receiver.

7. Did Maxium fail to disclose to that CWB was the final decision-maker on the restructuring?

[184] Here, Mr. Loder argues that Maxium's failure to advise him of CWB's ultimate authority is part of a pattern of conduct that amounts to a breach of statutory good-faith requirements.

[185] Mr. Loder knew about CWB's final authority in some aspects of 202's borrowings. For example, he knew that CWB in Edmonton had to grant final authority for the terms of the 2017 $500,000 secondary loan related to the residual indebtedness. During his questioning, Mr. Loder said at page 37, lines 20 to 24:

> … Also during that conversation in relation to the 500,000, Dan explained to me that there had been back and forth on this particular loan with CWB in Edmonton who had to sign off on this particular loan, and it was in relation to the term.

[186] He recounts that Mr. McGillivray had requested a 10 year term, then a 5 year term, but ultimately CWB wanted a 3 year term.

[187] In his attempt to obtain an increased LOC from CWB's virtual branch in Edmonton, Mr. Loder similarly understood by May 1, 2019 that CWB had the final sign-off (see transcript, page 78, lines 14 to 18).

[188] However, I do not find anywhere in the record of the summary trial where Mr. Loder was explicitly told by Mr. McGillivray or anyone else that the overall restructuring could only be approved by the CWB head office in Edmonton. Many of the emails between Mr. McGillivray and Mr. Loder indicate that Mr. McGillivray was making his submission to the credit committee of Maxium. Mr. Loder also testified to his belief that the Maxium office in Toronto was responsible for administering his loans.

[189] Maxium suggests that Mr. Loder, as a sophisticated businessman with extensive experience with banking institutions, would realize there are levels of authority within every lender. That may be so and that may be a reasonable assumption to make about Mr. Loder. However, based on the record, I agree that Mr. Loder was not told explicitly that CWB in Edmonton was the ultimate decision-maker.

[190] Having said that, it does not appear to me that this lack of disclosure had any sort of material consequence for Mr. Loder. From the whole course of communications between Mr. McGillivray and Mr. Loder, I think it fair to say that the restructuring proposal prepared by Mr. McGillivray had to be approved by a higher level authority of some sort. Whether was the credit committee in Toronto doing that approval, or the credit committee in Toronto making a

recommendation for approval and sending the request to a final decision-maker at CWB in Edmonton, would not have made a difference.

[191] Mr. Loder says that he would have conducted himself differently, that had he known it was CWB in Edmonton rather than the credit committee in Toronto, he would have sought earlier refinancing from a different source. How or why he would have done that is completely unknown or unexplained. Mr. Loder offers no evidence beyond the mere assertion. To me, that does not establish proof on a balance of probabilities that he would have obtained refinancing from another lender had he known about CWB.

[192] In these circumstances, I do not see how the failure to disclose the exact steps involved in an internal approval process or the levels of authority within an organization, in the case of the private lender, amounts to a breach of the good-faith requirement. Good faith in private commercial relations is not the same as a duty of fairness and transparency with regard to decision-making in the public law realm.

K. Application of Factual Findings to the Law

1. Summary of the Findings

[193] I have concluded the following on a balance of probabilities:

- Mr. Loder was not told that the purpose of the secondary loan of $500,000 (evidenced by promissory note) was to deal with his guarantee to McKesson Canada.
- The residual indebtedness actually existed, based on the shortfall of $970,000 left from the Loder Group receivership and, at least in part, remaining from the unpaid balloon payment in relation to the Consort pharmacy. Mr. Loder understood that the secondary loan was funded to eliminate the remaining debt from the previous receivership, which had been guaranteed by him.
- Maxium did not mislead Mr. Loder about whether a restructuring would materialize and did not promise a particular form of restructuring. In the end, Maxium offered a restructuring, but it was not on terms that Mr. Loder found acceptable (particularly as it did not involve any revolving credit, let alone an increase, and required a forbearance agreement).
- Maxium did represent to Mr. Loder (through Mr. McGillivray) that it would not enforce its October 2019 demands. This representation could not reasonably be construed to mean that Maxium would never enforce the demand. Once Mr. Loder and Maxium reached an impasse on the form of restructuring, it was reasonable for the parties to expect that Maxium would proceed with enforcement.
- The forbearance agreement was presented as a draft. The parties could not agree as to the critical elements, including the giving of consent orders. Only at the point when the parties reached impasse, the critical elements became non-negotiable.
- Maxium's counsel did not mislead the Court, deliberately or recklessly, on March 2, 2020 with the submission that the existing pharmacy management would remain in place.
- Maxium did not specifically disclose to Mr. Loder that, beyond Maxium's credit committee in Toronto, CWB's head office in Edmonton was required to give final approval to restructuring. However, Mr. Loder has not proven to the Court's satisfaction that anything would have been different had this fact been specifically disclosed.

2. Estoppel

[194] The parties are agreed on the elements of estoppel. The plaintiffs cite ***B & R Development Corporation Ltd v Trail South Developments Inc***, 2012 ABCA 351 at para 23 for this statement of the law:

> There are two components to an action in promissory estoppel: (1) the party invoking the doctrine must prove that the other party made, by virtue of word or deed, a promise or assurance intended to alter their existing legal relationship and to be acted upon by the party receiving the assurance; and (2) the recipient of the assurance acted upon it in a manner which changed his or her position.

[195] The defendants cited ***Vision West Development Ltd v McIvor Properties Ltd***, 2012 BCSC 302 at paras 63-65 for the same proposition.

[196] The defendants rely on Maxium's promise of restructuring and Mr. McGillivray's advice to Mr. Loder that the October 2019 demands would not be enforced as constituting the words and conduct that altered the existing legal relationship. Mr. Loder says that these words and conduct were interpreted by him to mean that the existing legal relationship was changed in that Maxium's legal rights of enforcement would not be relied upon. Detrimental reliance is shown, Mr. Loder says, when he did not pursue other refinancing options that surely would have been successful.

[197] As I found, Maxium did not go back on its word in this regard. It actually did offer a form of restructuring to Mr. Loder.

[198] Further, Mr. McGillivray's words that Maxium would not call the loan must be placed in context. That context was that the parties were in the midst of restructuring discussions and Mr. McGillivray was in the process of putting together a restructuring proposal. Those words could not possibly be construed by reasonable commercial persons as meaning that Maxium had forever relinquished its enforcement rights. It would be obvious to reasonable commercial parties that when the impasse was reached with regard to the forbearance agreement and Mr. Loder expressed a preference to litigate instead of sign the forbearance agreement as presented, any previous words regarding not enforcing remedies on Maxium's part no longer applied.

[199] Indeed, at para 38 of the defendants' January 8, 2021 brief, Mr. McGillivray's remarks were characterized as a "deferral of enforcement steps". That, to me, is an accurate description of what Mr. McGillivray said. It was a deferral not a relinquishment. The deferral lasted four months.

[200] Finally, as I stated above, Mr. Loder has not satisfied me that other successful refinancing options were forgone as a result of Maxium's words, conduct or omissions.

[201] In consequence, estoppel fails as a defence.

3. Lack of Good Faith

[202] I stated above that, for the purposes of a secured creditor's conduct in the circumstances at hand, the standard of good faith should be consonant with that expressed by the Supreme Court of Canada in pronouncing upon the organizing principle of good faith in contract law in cases such as ***Bhasin*** and ***Callow***. That standard requires the actor to avoid dishonesty or lying. It does not bind the actor to a duty of loyalty or disclosure. It does not require a party to subordinate its interests.

[203] As said, such a requirement of good faith as expressed in section 66 (1) of the *PPSA* relates to a secured creditor's acquisition of or exercise of rights under a security agreement. In relation to section 4.2 of the *BIA*, the good-faith requirement relates to a secured creditor's invoking and conduct of insolvency proceedings under the *BIA*.

[204] Given my factual findings above, I further find there has been no breach of the good-faith requirement in either context because neither Maxium nor its representatives engaged in dishonesty or lying in its dealings with Mr. Loder, either at the time of initiating the loans in 2017 or during the restructuring talks throughout 2019 and early into 2020.

[205] I did find that Maxium had failed to disclose that CWB had ultimate decision-making authority with regard to the restructuring. However, I also found that Mr. Loder would have some general understanding, as a business person of his experience, that there was an approval process beyond Mr. McGillivray. I also accept Mr. Warner's submission (see para 48 of reply brief dated January 20, 2021) that it is not industry practice to advise a customer exactly who within the organization has the authority to approve a particular credit submission, nor does the good faith requirement imply such an obligation.

[206] This is not a case like ***Callow*** where one party, through silence, misled the other about the state of relations between the two and thereby received the benefit of free services. In this case, Maxium was always engaged in a process of working toward a restructuring, but in the end, the parties could not reach consensus on what the restructuring should entail.

[207] Furthermore, some of events occurring between January 2019 and October 18, 2019 (the date on which the Maxium demands were sent) are too remote in time to be "with respect to" these proceedings within the meaning of section 4.2 of the *BIA*, but even if not, for the reasons stated above still fall short of bad faith. I do consider the course of events in 2017 to be too remote in time for the purposes of section 4.2 of the *BIA* and therefore confine my analysis of the good faith requirement in that timeframe to Maxium's acquisition of its security interest for the purposes of section 66(1) of the *PPSA*.

[208] In the result, there is no defence based on lack of good faith, and no remedy is available to the defendants under section 4.2 of the *BIA* or section 66(1) of the *PPSA*. My conclusion regarding section 4.2 takes into account the intent and policy objectives of the *BIA*. Here, the proceedings have not been invoked for some oblique or improper purpose but rather to subject the assets of an insolvent debtor to an orderly, Court-supervised process for the benefit of interested parties.

L. Should the Final Order of Receivership be granted on "just and convenient" grounds?

[209] Even though I have rejected the defendant's defences, the onus remains on the plaintiffs to establish that a final order of receivership is "just and convenient". Romaine J in ***MTM Commercial Trust v Statesmen and Riverside Quays Ltd***, 2010 ABQB 647 (CanLII), 2010 ABQ B647 at para 11 described the test in this manner:

> As has been noted in ***Anderson v. Hunking*** 2010 ONSC 4008 (CanLII), [2010] O.J. No. 3042 at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the Court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: ***BG International*** at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the Court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

[210] The factors to be considered are enumerated in the oft-cited ***Paragon*** case, at para 27, relying on the list assembled by Frank Bennett in *Bennett on Receiverships*, 2nd edition, (1995), Thomson Canada Ltd, page 130, from various cases:

> 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.

[211] Further, at para 28, Romaine J comments on the effect of a contractual right to 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: ***Bank of Nova Scotia v. Freure Village on Clair Creek***, 1996 CanLII 8258 (ON SC), [1996] O.J. No. 5088, paragraph 12.

[212] Having regard to the ***Paragon*** factors, I note:

- Service of the Requirements to Pay has effectively eliminated the pharmacy's cash flow. The receivables were intercepted. No new advances or draws are permissible unless the funds are sent to CRA to satisfy its indebtedness. There is no evidence before the Court as to how Mr. Loder intends to pay off the CRA indebtedness, in order to procure release of the bank accounts or any other receivables that may be payable.
- The pharmacy has only been able to operate during the Interim Receivership because the order stays the RTPs and allows operations to be financed through the Interim Receivers' borrowings.
- The information before the Court shows the prospects for the pharmacy's continuing viability are grim. As noted in the Interim Receiver's Second report, during the first six months of operation following the Interim Receivership order,

the pharmacy would have sustained an operating loss of $277,515.96 if it had been required to make monthly loan payments to Maxium, even after the Interim Receiver's costs and professional fees are backed out. This loss does not account for the arrears owed to Maxium or the CRA indebtedness.

- There is no information before the Court as to any plan on Mr. Loder's part to pay out either Maxium or CRA. Mr. Loder raised prospects for take out of Maxium and CWB by refinancing with another lender back on February 28, 2020. A year has gone by and there is no further information, let alone a feasible refinancing option on the table. In a September 29, 2020 affidavit, Mr. Loder adverted to his attempts to find a buyer for the pharmacy. In the ensuing five months, nothing has materialized before the Court as to a realistic sale.
- In the absence of any viable or realistic plan on Mr. Loder's part as to how he intends to extricate the pharmacy from its current predicament, and given the length of time that has elapsed since the Interim Receivership order, I am left with the conclusion that he has run out of options.
- No payments have been made on any of the Maxium loans or CWB indebtedness for a period of over a year.
- Maxium says, and it is not disputed by Mr. Loder, that the best avenue for maximizing recovery is a sale of the pharmacy as a going concern. Maxium's counsel suggests, and I accept, that the major asset is the goodwill associated with the pharmacy's business.
- The purpose of the Interim Receivership was to preserve the assets pending a final determination one way or the other. Based on the foregoing, I conclude that the pharmacy with its present indebtedness would have little or no chance of survival if the Interim Receiver were discharged and the pharmacy business turned back over to Mr. Loder. Maxium's security is therefore in jeopardy.
- Maxium's security documentation contractually provides for the appointment of receiver. The extraordinary nature of the receivership remedy is attenuated somewhat by such a provision.

[213] I find that Mr. Loder's allegations against Maxium, which I have dealt with at length above and even where supported, do not constitute grounds on which to refuse a final order of receivership based on the "just and convenient" test.

[214] I accept Maxium's argument that a transparent, Court-supervised process under which a Receiver uses its expertise and professional contacts provides the best option for selling the pharmacy as a going concern and maximizing recovery for all concerned, including Mr. Loder. I find that it is just and convenient to appoint a receiver over the assets of the corporate defendants.

M. Coda

[215] These reasons should not be read as a ringing endorsement of Maxium's conduct. I did find that Maxium did not engage in deception or dishonesty in its dealings with Mr. Loder but that is not to say that it achieved high levels of customer service in its handling of this account.

[216] First, Maxium could have saved itself a lot of grief by simply sending Mr. Loder a letter back in June 2017 to confirm the purpose of the $500,000 loan and promissory note, rather than only documenting it internally.

[217] Second, Maxium did itself no favours by having different individuals within the organization send him apparently mixed messages. Mr. Wyett sent Mr. Loder demand letters in October 2019 during the midst of Mr. McGillivray attempting to put together a restructuring proposal for the pharmacy business. While I realize that Maxium was "keeping its options open" by sending the demand letters when the loans were in default, it gave the impression that Maxium

was working at cross purposes with itself, or that one hand did not know what the other was doing. Maxium would have been better off telling Mr. Loder about the demand letters in advance and properly contextualizing them for him, so as to avoid any confusion on his part.

[218] Third, while I found there was no duty of disclosure and no industry established practice, the experience of this case might suggest to Maxium that, as a matter of practice not of law, it might well be beneficial for all to consider explaining to customers the limits and levels of authority for approval of credit submissions, if only to set and manage expectations.

[219] These gaps in communication no doubt contributed to Mr. Loder's suspicions and what now has been a year's worth of costly litigation.

[220] If the parties require a further brief hearing to settle the contents of the final order of receivership, they should contact the commercial coordinator to obtain a date.

[221] Mr. Quinlan, on behalf of the Interim Receiver, appeared briefly at the start of the first day of hearing and was excused for the balance of the two days.

Heard on the 11th day of January, 2021 to the 12th day of January, 2021.
Dated at the City of Edmonton, Alberta this 23rd day of February, 2021.

Douglas R. Mah
J.C.Q.B.A.

Appearances:

Terrence M. Warner & Spencer Norris
Miller Thomson LLP
for the Plaintiffs

Jim Schmidt
Bennett Jones LLP
for the Defendants

Ryan F. T. Quinlan
Duncan Craig LLP
for the Interim Receiver, MNP Ltd.

[1] Since the hearing of this matter, the Supreme Court of Canada delivered its decision in ***Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7, which further elaborates on the nature of the duty of good faith in exercising discretion conferred by the contract.
[2] Wood, Roderick J., A Guide to the Alberta Personal Property Security Act (February 22, 2017). Available at SSRN: https://ssrn.com/abstract=2922196.

TAB 5

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co., 2002 ABQB 430 (CanLII)

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

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

SUMMARY

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

FACTS

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

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

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

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

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

d) an assignment of mortgage-backed debentures;

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

Should the *ex parte* receivership order have been granted?

[12] Rule 387 of the ***Alberta Rules of Court*** provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: ***Metropolitan Life Insurance Company v. Hover***, 1999 ABCA 123 (CanLII), 1999, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 1994 CanLII 8922 (AB KB), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

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

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

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

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

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

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

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

[20] In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the

prerogative of a judge to do in Alberta under our rules": ***Canadian Urban Equities Ltd. v. Direct Action for Life et al***, [1990] A.J. No. 253 (Q.B.) at pages 7 and 8.

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

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

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

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

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

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

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993 CanLII 7234 (AB KB), 1993, 15 Alta. L.R. (3rd) 179 (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 CanLII 8258 (ON SC), [1996] O.J. No. 5088, 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 at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

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

Should the order be stayed?

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

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

R.J.R. McDonald Inc. v. Canada (A.G.), 1994 CanLII 117 (SCC), [1994] S.C.J. No. 17 (S.C.C.); ***Schacter v. National Park Services***, [1999] A.J. No. 599 (Q.B.).

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

[35] With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to

Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

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

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

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

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

DATED at Calgary, Alberta this 29th day of April, 2002.

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J.C.Q.B.A.

TAB 6

Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43 (CanLII)

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43

Date: 20160121
Docket: 1501 12220
Registry: Calgary

Between:

Alberta Treasury Branches

Applicant

- and -

COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Gro up Inc.

Respondents

Oral Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik

Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

[3] On November 10, 2015 Justice Jeffrey allowed expanded powers with respect to several subsidiaries and adjourned the claims with respect to Conserve 1st and POA to November 27, 2015 and ordered further information to be disclosed.

[4] Mr. Crombie, the President and sole director of POA, subsequently filed an Affidavit on November 23, 2015 and was cross-examined on it on November 24, 2015. A supplemental, correcting Affidavit was filed on November 26, 2015.

[5] The receiver filed a second report on November 27, 2015 outlining its concerns about the information that had been obtained including:

1) 100,000 shares had been issued and transferred to Arrow Point Oil and Gas Ltd. (Arrow Point) and then to Capital Asia Group Pte Ltd (CAGOM) thereby diluting Conserve's 1000 shares and sole ownership position in POA;

2) Some oil and gas wells had transferred from COGI (a subsidiary of Conserve) to POA but COGI still holds the assets' title and there were potential substantial abandonment liabilities in POA.

[6] Therefore, the receiver sought an adjournment of the application set for November 27, 2015 to investigate further. The adjournment application was allowed to January 14, 2016 by Justice Hawco, with deadlines about further material to be filed, and a standstill Order was granted wherein certain powers with respect to the assets, shares, and management of POA were detailed.

[7] The second application filed January 4, 2016 seeks a receivership order of POA, and alternatively an order seeking certain rights and powers over POA and an order that net proceeds from the operation of assets of POA be paid into court.

[8] The receiver seeks to be appointed pursuant to the oppression remedy under s.242 of the ***ABCA*** or s. 13(2) of the ***Judicature Act***.

[9] A third Affidavit was filed by Mr. Crombie, along with a supplemental brief of POA and a brief by CAGOM on January 7, 2016 opposing the relief sought by the receiver.

[10] Meantime, on January 6th, 2016, Justice Horner determined that the Conserve subsidiary Conserve 1st was bound by a guarantee of January 27, 2012, Debenture, Demand and Pledge Agreement and GSA in favour of ATB, and as such allowed the receiver to be appointed over Conserve 1st's assets etc. pursuant to s.243(1) of the ***Bankruptcy and Insolvency Act***.

The law

[11] The parties did not disagree on the law with respect to appointing a receiver in these circumstances but did disagree about its application on the facts as they have slowly and confusingly emerged over the last couple of months.

[12] As noted above, the receiver is bringing the application on the grounds of s 242 of the ***ABCA*** and s 13 (2) of the ***Judicature Act.*** The ***ABCA*** section reads as follows:

> 242 (1) A complainant may apply to the Court for an order under this section,
>
> (2) If, on application under subsection (1) the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) Any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

Analysis.

Serious issue to be tried

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.

1. Share transaction

[20] In my view, the transaction in questions does not violate what Conserve's reasonable expectations of corporate and financial behaviour of POA should have been at the time, for the following reasons.

[21] Conserve is a shareholder of POA wherein it paid $1000 for 1000 shares. It was the sole shareholder since its inception in 2012. There is no evidence that Conserve put any other funds into POA.

[22] POA's business involves the acquisition and operation of wells. In order to fund such acquisitions, POA uses funds raised and advanced by CAGOM. CAGOM has security in the nature of guarantees and GSAs on POA's assets. The funds are used to acquire properties, having those properties operated by third parties, including but not exclusively COGI, and receiving revenues from those properties which are then repaid to investors, who reside in Asia.

[23] Conserve and COGI did some administration duties for POA, including managing most of its wells. The terms of the administration and operating duties, and remuneration for such responsibilities, were not before me.

[24] POA has regularly scheduled payments to its secured creditor CAGOM for distribution to its Asian investors.

[25] Mr. David Crombie is the sole director of Conserve and POA and a shareholder of Conserve. He does not hold any personal shares in POA. Although Mr. Crombie suggested that he was a director and officer of Arrow Point in questioning, his lawyer advised at the hearing that this was in error and that he had no relationship to Arrow Point.

[26] The applicant ATB has security over Conserve and COGI's assets. The debt outstanding, as of October 20, 2015, was $300,000 and $34 M respectively.

[27] However, ATB confirmed at the hearing that, contrary to the receiver's belief, it did not have any security over any of POA's assets.

[28] In March 2015 POA entered into a secured demand loan agreement with Arrow Point wherein Arrow Point lent POA $7 M in return for 100,000 shares. Initially these shares were common shares but ultimately POA issued and transferred preferred shares to Arrow which could be redeemed into common shares. The cost of the shares in the agreement was initially suggested to be $1 per share but this was corrected by Mr. Crombie subsequently to be $1 for all of the shares.

[29] The loan was obtained since POA was required to make a substantial payment to investors in April 2015. Funds were advanced on the loan by way of a payment on March 12 2015 in the amount of $4,823,000 and March 27,2015 of $4,000,000.

[30] The receiver complains that there was not consideration for the shares, the issuance of the shares diluted Conserve's shareholding to 1 %, and certain corporate requirements were not conducted.

[31] The Affidavit filed by Mr. Crombie of January 7, 2016 answers many of the concerns. It is unfortunate that this detail was not forthcoming initially. POA's lawyer suggested that this was because oppression was not claimed by the receiver until the January 4 application so it did not know it needed this information. This excuse is somewhat hollow in my view considering that there is mention of this transaction in the initial Nov 23 affidavit and Mr. Crombie was questioned on this but gave incorrect and confusing answers, not out of malice, but likely confusion on his own part.

[32] The corporate structure in this case, which I've only outlined a small part which is relevant to these applications, is rather vast and convoluted, involves many of the same human players, and seems to be constantly changing. Accordingly, it is no surprise that the receiver has had difficulties figuring it out, and as an officer of the court he has raised many reasonable questions of concern.

[33] In my view, the evidence discloses that POA has its own separate financing structure in place which was in peril in early 2015. It is reasonable to understand that it would try to get further financing. The deal made with Arrow Point appears to have allowed POA to continue on with its operations. To the extent that this meant diluting the share value and diluting Conserve's position, this was likely a necessary evil.

[34] The receiver complains that these shares have since been converted into common shares and transferred to COGAM from Arrow Point. The deal between these parties was not in evidence. In any event this transfer was not done by POA. It is hardly surprising to me that COGAM, POA's major creditor, would want to solidify its position further by controlling POA via its shareholding position. In this regard, the receiver has now had a chance to review the five guarantees granted by POA to COGAM between November 1, 2013 and March 1, 2015 which total approximately $70 M. Other credit documents have not yet been reviewed but CAGOM suggested at the hearing that it was open to cooperate in this regard.

[35] Mr. Crombie advised that the value of POA at the time the shares were issued to Arrow Point was either $35 or $30 M (another example of rather careless testimony). In any event, on this evidence, the value of POA according to this testimony, and therefore of Conserve's shares, would have been nil.

[36] There has been far from forensic accounting dealing with the value of these shares, as pointed out by the solicitor of ATB, however, for this application's purposes the evidence sets out what could be considered to be a reasonable transaction in terms of the issuance of these shares even though there was dilution of Conserve's shareholding

[37] The receiver complains that Conserve was not given due notice of the transaction. However, Mr. Crombie, wearing dual hats for Conserve and POA was well aware of the transaction so notice was not necessary as the transaction was well known to Conserve through its director.

[38] POA admits that it did not comply with all of its statutory obligations required under the ***ABCA*** i.e.holding the requisite shareholder meetings etc. However, in the whole of the circumstances, I do not find this to be oppressive conduct at the time. Note that this transaction occurred well before the receiver was appointed in October.

[39] Finally, I asked the receiver if he had another suggestion about how Conserve's share position could have been better protected. The receiver suggested in its brief that Conserve was prevented from taking "preventative steps". No concrete solution was forthcoming from the receiver about what these steps could have been. He suggested that there was no need for Arrow Point to have a shareholder position at the time. However, it appears that this was the deal. Certainly if POA's credit had been called at that time, it appears that Conserve's shareholding may have been worthless in any event.

[40] In sum, I agree that there are many details with respect to this share transaction which are missing and the veracity of the evidence given by Mr. Crombie has not been thoroughly tested. The receiver and ATB want the power to examine this transaction with the powers of a receivership. There is a serious issue with respect to the dilution of the shares but there is also a very reasonable defence to this potentially oppressive conduct which, if found true, would answer the situation for the reasons I have outlined.

[41] The other serious issue is the asset sale which I will now turn to.

2. Asset sale

[42] POA purchased various well assets from COGI in 2015. A letter from COGI to ATB dated June 26, 2015 was put into evidence via Mr. Crombie's January 7, 2016 Affidavit. In it COGI advised ATB that POA was purchasing various interests for the purchase price of $3M, $5.7M and $11.9M approximately and that the funds received from POA would go to reduce COGI's credit facility with ATB. The closing dates were July 15, August 5, and October14, 2015 respectively for the various sales.

[43] The sale agreements were not put into evidence in this proceeding (although they were in evidence in the CCAA proceeding against COGI in late August 2015). In any event, I am to understand that the beneficial title to these wells were transferred to POA and that the wells continued to be operated by, and remain on legal title to, COGI. COGI collects the oil sale production proceeds and pays them to POA.

[44] The receiver was concerned that pursuant to the agreement, since COGI maintains legal title to the wells, it may face AER abandonment and reclamation liability if that were to occur to those wells. According to the operating manager the receiver has put into place since the receivership of COGI in October, Niven Fischer Energy Services Inc., the net potential liability is almost $15 M.

[45] The receiver argues that since COGI needs to pay the proceeds of these wells to POA and that these funds will be sent off to investors in Asia, COGI has a large liability from POA with no corresponding benefit. Accordingly, the receiver has been withholding payments to POA over the last few months. The gross revenue in September 2015 was $285,000 and in October it was $183,000. Operational expenses can be deducted from these amounts however, as noted above, it was not in evidence what these amounts are. The receiver wants an order that the net funds be paid into Court as an alternative to a receivership order.

[46] POA replies that the sale transactions represented full market value, they were approved by ATB, and that the revenue represents trust funds that the receiver is improperly withholding. This withholding is to the prejudice of POA which has obligations to its own creditors and investors.

[47] With respect to the potential AER liability, POA is attempting to deal with the problem. Indeed, contrary to Niven Fisher's opinion that this situation is unlikely to change in the near future, AER's counsel indicated at the hearing that they are working on solutions with Arrow Point and another purchaser of these wells.

[48] It is difficult, without the appropriate documents, to comment extensively on this issue at this time. However, for the purposes of the potential oppression claims as a basis to appoint a receiver, in my view, again, the transaction on the surface appears to have been made for a valid business purchase and for full market value. To the extent that the potential AER liability was not considered, ATB was notified of this transaction and could have stopped this transaction at the time. Instead it accepted payments (of gross $20.6 M approximately – the net amount was not disclosed) and consented to the deal by way of No Interest notices. It is hardly fair then to say that they have been oppressed or that POA acted in an oppressive manner towards Conserve in these circumstances.

[49] The suggestion that it is fair to hold the oil proceeds in this situation is problematic. It is not clear that a set off is appropriate in these circumstances considering that the production revenue may be trust funds and that this contingent AER liability is very far from being crystallised.

[50] In other words, there may be an issue to be tried about these sale transactions, however, on the limited evidence before me on this issue, it appears that POA may have a good defence that there is any oppression here.

Irreparable harm

[51] The receiver suggests that it will suffer irreparable harm if it is not appointed a receiver for POA so that it can control its management and avoid further dissipation of the shares and any of its assets. It further argues that if the proceeds from the wells are not paid into Court it will be paid to foreign investors and the money will not be easily recoverable.

[52] POA argues that loss of management control could have devastating effects on its business. Further, that the lack of payments from its wells jeopardises its ability to maintain its obligations to COGAM and its investors which may cause irreparable harm to POA. There is no irreparable harm to the receiver here as the wells are still located in Alberta and should POA face liability to COGI, these assets can be called upon. Further, it has no present plans to divest of further assets in any event.

[53] COGAM, the secured creditor of POA, points out that the standstill Order in place by Justice Hawco answers any concerns of divestiture.

[54] The Court's concern in this case is the complicated corporate structure in place and the difficulty the receiver has had to untangle the web of transactions between non- arms length corporations without the powers of a receiver over POA. However, considering the more recent informational disclosure by POA , and proposed cooperation by COGAM, and the standstill Order presently in place, at the present time, the receiver may well be able to get to the bottom of the issues without the powers of a receiver and therefore will not be irreparably harmed.

[55] With respect to the oil proceeds, I agree with POA that the wells are some security presently for the potential AER liability. In any event, on the evidence before me and the representations of the AER, the potential liability is legally uncertain and remote at this time so that the receiver has not met the onus to show that it will be irreparably harmed.

Balance of convenience

[56] As mentioned, appointing a receiver is an extraordinary relief and should be granted cautiously and sparingly – especially in circumstances such as these where there is no outstanding debt from POA to ATB, no security arrangements between them, and that POA has its own secured creditors who oppose the appointment of this receiver.

[57] I can understand the receiver's concerns that have arisen since it started investigating into the corporate structure and its belief that a receiver order over POA is just and convenient and will enable it to carry out its duties more efficiently.

[58] However, as I have analysed above, in my view, on the evidence as it stands, I am not presently "satisfied" as required under s 242 of the ***ABCA*** that the conduct in question can be considered to be oppressive. It did not breach the reasonable expectations of Conserve that some sort of further financing was necessary to keep POA from reneging on its creditor's obligations, and the wells sale agreements between COGI and POA appear to be reasonable business transactions.

[59] The receiver may still consider starting an oppression action against POA if it wants to pursue this further. Alternatively, if it turns out that the assumptions that I have had to make on the limited evidence before me are not accurate, a further application could be made at a later time.

[60] With respect to the wells, I note that they are presently already being managed under the control of the receiver. I would also ask that it reconsider the position it has been taking over the proceeds from the wells by reviewing the agreements that were put into place and are attached to an affidavit in the CCAA proceedings to which it has access. If these are indeed trust relationships that are being breached by the withholding of those funds, I recommend that this position be reconsidered by the receiver, failing which POA may bring a further application about this issue.

Having not looked at these agreements, I am not in a position to say further on this topic. But, to be clear, I will not order that the proceeds be paid into Court at this time.

[61] In balancing the interests of POA and its secured creditor, vs those of ATB and Conserve, the latter as a shareholder in POA, an unsecured position, it seems that the fairer answer to this application by the receiver is to dismiss it at this time. I would allow Justice Hawco's standstill Order to continue for the time being, but would reconsider its continuance once further answers to outstanding questions about the interrelationship between these companies is answered.

[62] Conserve continues to have its shareholdings in POA and so continues to enjoy those rights, even if it now is as a minority shareholder, which will have to be respected.

[63] It is expected that POA and COGAM will continue to cooperate with the receiver to determine certain rights and obligations, hopefully without formal litigation. I would also recommend in that regard that sensitive business documents can be kept confidential and if there are any issues in that regard you can seek further Court directions.

Conclusion

[64] There may be serious issues to be tried but the defences to an oppression action are also quite strong on the evidence before me. I am not satisfied that an oppression action would have success on the limited evidence presently before the Court. The receiver has also not convinced me that any harm would be irreparable if he was not appointed receiver over POA at this time. There are other Orders and measures in place that will protect the companies in question under receivership. Further, on the balance of convenience, fairness in my view dictates that POA's rights to self-determination and the secured creditor's interests to POA prevail over those of the unsecured shareholder and ATB.

[65] For these reasons, the applications of the receiver are dismissed.

Heard on the 14th and 15th days of January, 2016.
Dated at the City of Calgary, Alberta this 20th day of January, 2016.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

G.B. Davison, Q.C. for the Receiver
R. Algar
R. Zahara for ATB
for the Applicant

D. S. Nishimura for POA
C. E. Hanert for COGAM
A. C. Maerov
for the Respondents

TAB 7

Pillar Capital Corp. v Harmon International Industries Inc., 2020 SKQB 19 (CanLII)

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 19**

Date: **2020 01 22**
Docket: QBG 1401 of 2019
Judicial Centre: Saskatoon

BETWEEN:

PILLAR CAPITAL CORP.

APPLICANT

- and -

HARMON INTERNATIONAL INDUSTRIES INC.

RESPONDENT

Counsel:

Michael J. Russell and Kevin N. Hoy	for the applicant
Jared D. Epp	for the respondent

FIAT — ELSON J.
January 22, 2020

Introduction

[1] In a brief fiat, dated January 16, 2020, I directed the issue of an order for the appointment of a receiver of all assets, undertakings and property of Harmon International Industries Inc. [Harmon]. In that fiat, I stated that reasons would follow in a published decision. This fiat contains those reasons.

[2] Harmon is a Saskatoon company that has been engaged in the manufacture of various equipment, including light agricultural equipment. It stopped operating as a going concern on an undisclosed date, in late 2018 or early 2019. Before that, it had carried on business for almost 30 years.

[3] Pillar Capital Corp. [Pillar] is a company specializing in providing short/medium-term loans for companies that require "non-traditional debt financing". Pillar advanced a secured loan of $3.3 million to Harmon in the summer of 2018. Harmon defaulted on its payment against the debt. It now finds itself owing in excess of $3.7 million to Pillar.

[4] Pillar applies to this Court for the appointment of a receiver of all of the assets and properties of Harmon under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[5] For the reasons that follow, I am satisfied that: 1) Harmon is insolvent; and 2) it is both just and convenient for the Court to make the appointment requested.

Background Facts

[6] The facts relating to this application are drawn from a considerable volume of affidavit evidence and exhibits to those affidavits. The affidavit material includes two affidavits from Steven Dizep, Pillar's president, and three affidavits from Calvin Moneo, one of Harmon's principal officers.

[7] Harmon was incorporated in 1989. It carried on its manufacturing operations from the date of incorporation until its decision to cease operations, altogether. Its facilities and equipment have been idle since that time.

[8] Prior to its financing arrangement with Pillar, Harmon appears to have been experiencing debt and cash flow issues. In the summer of 2018, it decided it would consolidate its existing debt. To that end, it approached Pillar through a brokerage to explore refinancing possibilities. According to Mr. Dizep, Harmon had existing mortgages on six parcels of real property, in Saskatoon's north industrial district. The addresses of the land, consisting of almost seven acres, are at 2401 Millar Avenue and 821 - 47th Street East. Harmon told Pillar that the requested loan was to serve as bridge financing to pay out the existing mortgages. In turn, Harmon planned to sell all six parcels of land in order to extinguish any remaining debt then in place.

[9] Pillar agreed to provide the financing. Under a loan agreement, dated July 10, 2018, Pillar made available to Harmon a 12-month term facility in the maximum principal amount of $3.3 million. As consideration for the loan, Harmon executed a promissory note in favour of Pillar for the principal amount under the loan agreement plus interest.

[10] In further support of the loan agreement, Harmon granted security to Pillar under the following documents, all dated July 26, 2018:

a. a general security agreement, covering all present and after-acquired personal property of Harmon;

b. a collateral mortgage, over the six parcels of the land; and

c. a general assignment of rents in regard to the six parcels of land.

[11] The general security agreement provides Pillar with the right to pursue specific remedies in the event of Harmon's default. One such remedy, set out in para. 13(a), is the right to appoint a receiver by way of an instrument in writing. Subject to the provisions of the appointing instrument, para. 13(a) recognizes that the extra-judicially appointed receiver possesses broad powers, including: 1) taking possession of the collateral; 2) preserving the collateral or its value; 3) carrying on or concur in carrying on all or any part of Harmon's business; and 4) selling, leasing, licensing or otherwise disposing of the collateral, or concurring in same.

[12] Pillar also received security from Harmon's two principals, being Mr. Moneo and his brother, Victor. The Court was advised that no steps are being taken, in

this particular application, against that security. Accordingly, it is not necessary to describe the particulars of that security in this decision.

[13] The evidence shows that Pillar advanced to Harmon the full principal amount of the loan on August 10, 2018. Following the advance, Harmon made monthly payments, in accordance with the loan agreement, up to and including the month of April 2019. The monthly payment due on May 31, 2019 was not paid until June 14, 2019. Since then, Harmon has failed to make any payments to Pillar as they became due.

[14] By letter, dated August 19, 2019, Pillar's counsel wrote to Harmon and the other entities from whom security and/or guarantees had been provided, giving notice of the default and demanding payment of the outstanding indebtedness. According to the letter, the indebtedness under the loan agreement amounted to $3,430,483.52 as at July 10, 2018. The letter further noted that, pursuant to the loan agreement, interest was accruing on the outstanding amount at $1,678.50 per day. The notices, provided under cover of counsel's letter, included the notice of intention to enforce security pursuant to s. 244(1) of the *BIA*.

[15] Following the provision of the ten-day notice, Pillar endeavoured to facilitate the conclusion of an agreement between itself, Harmon, and a third-party auctioneer for the purpose of arranging for the voluntary liquidation of Harmon's personal property by way of auction. Notwithstanding Pillar's efforts to reach an agreement, no such contract was entered into and discussion concerning the voluntary liquidation of Harmon's assets have since broken down.

[16] The Court received oral submissions on this application in two separate hearings, one on October 8, 2019 and the other on January 10, 2020. When the application was filed in advance of the first hearing, Pillar expressed serious concern for the protection of its security. Pillar grounded its concerns on two circumstances. First, it presented considerable evidence that Harmon had neglected the buildings, equipment and inventory. The evidence included photographs which showed considerable clutter as well as disrepair of Harmon's two buildings.

[17] The second circumstance reflected, in Pillar's view, a much more urgent worry. In this regard, Pillar informed the Court that Harmon had accrued considerable arrears in its utility payments. This circumstance presented the real risk that the power and natural gas for its buildings would be shut off.

[18] By the date of the first hearing, this second circumstance became less worrisome. The Court was advised that, since the affidavit evidence was filed, Harmon had covered the utility payments. While Pillar continued to seek the appointment of a receiver, the risk to its security was not as dire as it was at the time the application was filed.

[19] Further, a few hours before the first hearing, the Court received an affidavit from Mr. Moneo. Aside from confirming the utility payments, Mr. Moneo deposed to the efforts he and his brother were taking to sell the parcels of land. He also exhibited an appraisal report, dated August 28, 2017, prepared by Brunsdon Lawrek & Associates [Brunsdon]. That report appraised the value of the five parcels of land, specifically located at 2401 Millar Avenue, at $5.5 million.

[20] In addition to the Brunsdon report, Mr. Moneo also exhibited a valuation opinion by the commercial realtors with whom Harmon had listed the same five parcels. That valuation, dated September 4, 2018, was estimated at $5,125,000. The Court also learned that the land is for sale at a list price of $5,290,000.

[21] Relying substantially on Mr. Moneo's evidence, Harmon vigorously argued that the court appointment of a receiver was premature. Aside from the absence of any immediate risk to Pillar's security, Harmon relied heavily on the prospect that it could pay out the debt in full if the land sold at a value approximating the valuations it had received.

[22] After the October hearing, I wrote a short fiat in which I adjourned Pillar's application to January 10, 2020. In doing so, I concluded that it was "fair, just and convenient" to give the dispute between the parties more time to sort out. In particular, I felt that the additional time might allow Harmon and its officers the opportunity to show how serious they were in addressing all of Pillar's concerns and, in particular, paying down the indebtedness.

[23] Unfortunately, when this application returned to court in the New Year, little had changed. The additional affidavit evidence, presented for the second hearing, disclosed that the indebtedness had increased to in excess of $3.7 million, as of January 6, 2020, with interest accruing at $1,835.55 per day. In the meantime, property taxes, which were in arrears at the time of the October hearing, remain unpaid and continue to accrue. The Court learned that the total tax arrears for both addresses now exceeds $100,000.

[24] The Court also received more illuminating evidence on the value of the land that Harmon "purportedly" intends to sell. First, Pillar obtained an appraisal report from its

own appraisers, Suncorp Valuations [Suncorp]. This appraisal, for the same five parcels of land described in the Brunsdon report, values the property within a range of $3.43 million to $3.65 million. Notably, Suncorp stipulates that its appraisal is based on "extraordinary assumptions". These assumptions are: 1) that the assessment of "deferred maintenance" issues presented to Suncorp are accurate; and 2) that the areas of the building unavailable to Suncorp during the site visit are of a similar condition to the remainder of the building. The author of the report took care in pointing out that the assumptions are "extraordinary" because they pertain to matters for which the appraiser did not have specialized knowledge or training, such as matters relating to the structural integrity of the building.

[25] As a footnote to this report, it should be noted that Harmon's principals were less than cooperative in providing Suncorp access to the Millar Avenue property. Despite representations that the appraiser would be accommodated at an earlier time, access was not permitted until January 6, 2020, leaving little time before the matter returned to court.

[26] As for efforts to sell the land, Harmon showed no interest or movement in this direction, at all. Specifically, the Court heard that Harmon maintained the list price of $5.295 million in place since the listing was issued. Secondly, and somewhat interestingly, the Court also received affidavit evidence from the commercial realtors with the listing of the land at 2401 Millar Avenue. One of the agents confirmed that he had provided Mr. Moneo with the market valuation he described in his earlier affidavit. The agent deposed that the valuation was based on an assumption that the interior of the industrial facility on the property was in a usable condition. Based on his personal inspection since that time, the realtor is of the view that the $5,125,000 list price is excessive. The realtor also deposed that, at Harmon's instruction, the listing agreement provided for a price of $5,290,000. He said that, in the course of the realtor's engagement with Harmon, he verbally advised Mr. Moneo that the list price was too high and should be reduced. Despite this advice, no such reduction was authorized.

[27] In passing, I should also note that, in his most recent affidavit, Mr. Moneo expressed some umbrage at the fact that Harmon's realtors deposed affidavit evidence in support of Pillar. He also said that Harmon intends to change listing agents and reduce the list price to $4.5 million as soon as a new listing agent is retained.

Relevant Legislation

[28] This application engages Part XI of the *BIA*, specifically s. 243, which reads as follows:

> **243(1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> **(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.
>
> **(2)** Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.
>
> **(3)** For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).
>
> **(4)** Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

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

(6) 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.

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

[29] This application also engages two specific definitions in s. 2 of the *BIA*. They are the definitions of the word "person" and the phrase "insolvent person", which read as follows:

2. In this Act

…

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

…

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Issues

[30] There are two issues for the Court to determine in this application. They are:

a. Is Harmon an insolvent person within the meaning of the *BIA*?

b. If Harmon is insolvent, is it just or convenient for the Court to appoint a receiver over its property, assets, and undertakings of Harmon?

Law

Insolvent Person

[31] The Court's authority to appoint a receiver under s. 243 first depends on a finding that the subject debtor is either a "bankrupt" or an "insolvent person" within the meaning of the respective definitions set out in s. 2. As Harmon is obviously not a bankrupt, the question is whether it is an insolvent person.

[32] The definition of an "insolvent person" in s. 2 contains three discrete circumstances. As the list of these circumstances is worded disjunctively, the applicant need only establish that the debtor fits within one listed circumstance. Consequently, a debtor, who has ceased to meet its obligations as they generally became due, as described in subparagraph (a), is insolvent even if the aggregate value of the debtor's property is sufficient to pay out all the debtor's obligations.

[33] In the present case, there has been an arguable dispute about the value of Harmon's property, and whether that value was sufficient for it to pay out all its obligations, and its obligation to Pillar, in particular. While the evidence in the most recent affidavits raises considerable doubt about the present state of the earlier property valuations, I am satisfied that there is more than enough evidence to establish insolvency through the circumstances listed in subparagraphs (a) and (b). Harmon's failure to pay Pillar, or to meet its property tax obligations, is sufficient to establish insolvency. Accordingly, I find that Harmon is an insolvent person within the meaning of s. 2 of the *BIA*.

Just or Convenient

[34] Having found insolvency, the Court's authority to make the requested appointment depends on whether it is "just or convenient" for the Court to do so. The burden in this regard lies with the party seeking the appointment.

[35] The jurisprudence relative to the "just or convenient" test is considerable. In *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228, 50 CBR (6th) 220 [*Vortex*], Scherman J. repeated his earlier summary of that jurisprudence from an unreported decision, *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.* (25 February 2016) Saskatoon, QB 1639 of 2015 (Sask QB). In the summary, two notable authorities were referenced, namely, *Bank of Montréal v Carnival National Leasing Ltd.*, 2011 ONSC 1007, 74 CBR (5th) 300 [*Carnival*], and *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 CBR (5th) 178 [*Kasten*]. The summary is recited at para. 19 of the *Vortex* decision:

> …
>
> 5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd.* 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.* 2013 ABQB 63.
>
> 6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:
>
> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CanLII 8258 (ON SC), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399*; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 1984 CanLII 2343 (SK KB), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;

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

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

[36] In the consideration of the non-exhaustive factors cited in *Kasten*, it is important to observe that, while the factors vary in their importance, no one factor is determinative. This includes the presence, or not, of irreparable harm to the applicant or the applicant's security. See *Swiss Bank Corp. (Canada) v Odyssey Industries Inc.* (1995), 30 CBR (3d) 49 (Ont Ct J). By and large, courts have taken a contextual approach to the consideration of these factors. A court is expected to have consideration for all attendant circumstances, including the interests of all concerned, in the "just or convenient" analysis.

[37] A question that often arises in the "just or convenient" analysis pertains to whether a court should appoint a receiver where the applicant's security provides for the private appointment of a receiver, as the security does in the present case. While the right to make such an appointment is a factor, the real inquiry is whether a court appointment is the "preferable" option – not the "essential" one. This point was also addressed in *Carnival*, where, at para. 27, Newbould J. recited the following passage from the decision of Blair J. in *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 1996 CanLII 8258 (ON SC), 40 CBR (3d) 274 (Ont Ct J):

27 …

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplate, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[38] Turning to the application at bar, I am satisfied that it is both just and convenient that the requested application be granted. In my view, most of the factors identified in *Kasten* favour court appointment of a receiver. Given that Harmon has not carried on active business for some time, with no stated intention of doing so, the balance of convenience clearly favours the application.

[39] More importantly, however, I am persuaded that the nature and condition of the property factors heavily in favour of a court appointed receiver – in preference to one appointed under the security agreement. It is now reasonably clear that the sanguine picture Mr. Moneo painted in his first affidavit does not bear up to the image now presented in the most recent evidence. In his most recent submission, Mr. Hoy described Harmon's property as a "catastrophe of an asset". As unfortunate as that description is, I am satisfied that it is apt.

Conclusion

[40] In the result, the Court appoints Hardie & Kelly Inc. as receiver, without security, of all assets, undertakings and properties of Harmon. The order may issue in the form of the draft order filed by Pillar, subject to one modification. That modification, which counsel for Pillar agreed to in chambers, is the removal of the reference to the assets of Harmon's principals, Victor Moneo and Calvin Moneo, in para. 2 of the draft. In all other respects, the order may issue in the form of the draft.

[41] In the event there are any matters related to the issuance of this order, or its terms, I shall consider myself seized with those matters.

_____ J.
R.W. ELSON