COURT FILE NO.	2503 11512	Clerk's Stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
PLAINTIFF	BUSINESS DEVELOPMENT BANK OF CANADA	
DEFENDANTS	2358573 ALBERTA LTD., 2004736 ALBERTA LTD., 2004736 ALBERTA LTD. operating as CATCH OF THE WEEK, THOMAS YOK CHEUNG CHIU also known as THOMAS CHIU, ALLAN YOK LEN CHIU also known as ALLAN CHIU, MICHELLE HONG XIA TIAN also known as MICHELLE TIAN, and LUC GUY NOEL also known as LUC NOEL	
DOCUMENT	BOOK OF AUTHORITIES **OF THE PLAINTIFF, BUSINESS DEVELOPMENT BANK OF CANADA**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Ryan Trainer Telephone: 780.482.9153 Fax: 780.733.9716 Email: ryan.trainer@mross.com File No.: 20251935

TABLE OF AUTHORITIES

Bankruptcy and Insolvency Act, RSC 1985, c B-3 ..... Tab 1

Judicature Act, RSA 2000, c J-2 ..... Tab 2

Law of Property Act, RSA 2000, c L-7 ..... Tab 3

Personal Property Security Act, RSA 2000, c P-7 ..... Tab 4

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co., 2002 ABQB 430 ..... Tab 5

Textron Financial Canada Limited v. Chetwynd Motels Ltd., 2010 BCSC 477 ..... Tab 6

Affinity Credit Union 2013 v Vortex Drilling Ltd., 2017 SKQB 228 ..... Tab 7

Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2022 ONSC 6186 ..... Tab 8

Vancouver Coastal Health Authority v Seymour Health Centre Inc., 2023 BCSC 1158 ..... Tab 9

Pillar Capital Corp. v Harmon International Industries Inc., 2020 SKQB 19 ..... Tab 10

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to June 9, 2025

Last amended on December 12, 2024

À jour au 9 juin 2025

Dernière modification le 12 décembre 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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aircraft objects [Repealed, 2012, c. 31, s. 414]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

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

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

Loi concernant la faillite et l'insolvabilité

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l'insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

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; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

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

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

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

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

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

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

Audit of proceedings

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

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

Vérification des comptes

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

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

Application of this Part

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

Automatic application

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

PARTIE XI

Créanciers garantis et séquestres

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

Nomination d'un séquestre

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

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

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

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

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).

Trustee to be appointed

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

Définition de *séquestre*

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

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

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

Définition de *séquestre* — paragraphe 248(2)

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

Syndic

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

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

General jurisdiction

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

RSA 1980 cJ-1 s8

Province-wide jurisdiction

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

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

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

RSA 1980 cJ-1 s10

Declaration judgment

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

RSA 1980 cJ-1 s11

Canadian law

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

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

TAB 3

Province of Alberta

LAW OF PROPERTY ACT

Revised Statutes of Alberta 2000
Chapter L-7

Current as of December 15, 2022

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

(e) "registered owner" includes an individual purchasing the land under an agreement for sale;

(f) "residential land" means

(i) a parcel on which a single-family detached unit or duplex unit is located, or

(ii) a residential unit under the *Condominium Property Act*,

that is or was used as a residence.

RSA 2000 cL-7 s47;2002 cA-4.5 s50;2003 c26 s19; 2011 c12 s33

Order of foreclosure

48(1) The effect of an order of foreclosure of a mortgage or encumbrance is to vest the title of the land affected by it in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under the owner, mortgagor or encumbrancer subsequent to the mortgage or encumbrance, and

(a) the order operates as full satisfaction of the debt secured by the mortgage or encumbrance, and

(b) the mortgagee or encumbrancee is deemed a transferee of the land and becomes the owner of it and is entitled to receive a certificate of title for it.

(2) An order nisi may at any time prior to the sale of the mortgaged land under an order for sale or to the granting of a final order for foreclosure, whichever first happens, be relieved against by a postponement of the day fixed for redemption.

(3) When a judge has postponed the day fixed for redemption no appeal lies except on the ground that the discretion of the judge was not exercised judicially.

(4) No order of absolute foreclosure made in an action is deemed to deprive any court of any power that the court had immediately before May 17, 1919, to reopen the foreclosure.

RSA 1980 cL-8 s44;1982 c23 s31

Appointment of receiver

49(1) Notwithstanding section 40, after the commencement of an action on

(a) a mortgage of land other than farm land, or

(b) an agreement for sale of land other than farm land,

to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:

(c) appoint, with or without security, a receiver to collect rents or profits arising from the land;

(d) empower the receiver to exercise the powers of a receiver and manager.

(2) If

(a) a mortgage of land or an agreement for sale referred to in subsection (1) is in default, and

(b) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,

the Court shall, on application by the mortgagee or vendor, appoint a receiver where the Court considers it just and equitable to do so.

(3) Notwithstanding subsections (1) and (2), an application to appoint a receiver may be made ex parte if

(a) in the case of a mortgage, the land is transferred or sold

(i) while the mortgage is in default, or

(ii) within 4 months before the mortgage goes into default,

or

(b) in the case of an agreement for sale, the purchaser's interest in the land is assigned or sold

(i) while the agreement for sale is in default, or

(ii) within 4 months before the agreement for sale goes into default.

(4) The proceeds of rents or profits collected by the receiver, less any fee or disbursements, which may be allowed by the Court to the receiver by way of remuneration, shall be applied

(a) in payment of taxes accruing due or owing on the land in receivership, and

(b) in reduction of the claims of the mortgagee or vendor against the land in receivership.

(5) A receiver appointed pursuant to this section may distrain for rent in arrears in the same manner and with the same right of recovery as a landlord.

(6) On default of the mortgagor or purchaser of the land other than farm land that is in receivership to pay the rents or profits from it, the Court may order possession of the land to be delivered up to the receiver and leased by the receiver, on any terms and conditions that the Court considers fit.

(7) The Court may, on application by the receiver, give the receiver further directions from time to time as the circumstances require.

(8) An order appointing a receiver may be discharged by the Court at any time, but the order shall only be discharged on application after notice.

(9) When and so often as the circumstances require, the Court may, without discharging the order appointing the receiver, substitute another person for the person originally appointed by the order appointing a receiver, and the substituted receiver shall perform all the duties and has all the powers given by the order or this section to the person originally appointed.

(10) When an order appointing a receiver is made under this section, then, unless the Court otherwise directs in that order or in a subsequent order, proceedings in the action on the mortgage or on the agreement for sale shall be stayed until the time that the order appointing a receiver is discharged.

(11) Subsection (10) does not apply when the mortgagor or purchaser is a corporation.

(12) In this section, "farm land" means farm land as defined in section 47(4).

RSA 1980 cL-8 s45;1983 c97 s2;1984 c24 s5

Assignments

50 An assignment in writing for a lease or rent given by a mortgagor or by a purchaser under an agreement for sale in favour of a mortgagee or vendor of it and not being an assignment of the mortgage or agreement for sale itself may be enforced notwithstanding the restrictions contained in section 40.

RSA 1980 cL-8 s46

TAB 4

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

1988 cP-4.05 s63

Application to Court

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

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

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

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

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

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

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

Receiver

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

(2) A receiver shall

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

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

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

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

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

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

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

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

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

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

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

(a) appoint a receiver;

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

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

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

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

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

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

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

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

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

TAB 5

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, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 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, 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] 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] 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.

_____

J.C.Q.B.A.

TAB 6

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477

Date: 20100409
Docket: S100268
Registry: Vancouver

Between:

Textron Financial Canada Limited

Plaintiff

And

Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth

Defendants

Before: The Honourable Mr. Justice Willcock

Reasons for Judgment In Chambers

Counsel for the plaintiff:	W.E.J. Skelly B. La Borie
Counsel for Defendants:	A. Brown
Place and Date of Hearing:	Vancouver, B.C. February 10, 2010
Place and Date of Judgment:	Vancouver, B.C. April 9, 2010

INTRODUCTION

[1] Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

BACKGROUND

[2] Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

[3] Chetwynd and NHLP built, own and operate the Hotel.

[4] Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

(c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

[5] On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of $7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

(a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");

(b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;

(c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;

(d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");

(e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

[6] By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

[7] The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

[8] For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

[9] On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of $7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

[10] The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise

over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

[11] On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

(1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

[12] William Pomeroy describes himself as the president of a group of companies referred to as the “Pomeroy Group”. The group operates and manages hotels and

restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

[13] It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

[14] Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

[15] Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

[16] The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel

generating net operating income of $457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

[17] Chetwynd proposes to make an immediate payment to Textron in the amount of $20,000, and to pay all interest accruing to Textron on a monthly basis, approximately $20,000 per month, while the Pomeroy Group is pursuing restructuring.

[18] Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

ISSUES

[19] The following issues arise on this application:

1. whether a receiver should be appointed; and, if so
2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

[20] The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application

of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

APPLICABLE LAW

Court-Appointed Receivers

[21] Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

> 39 (1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager 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.

[22] Section 66 of *The Personal Property Security Act,* in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act.*

[23] The *Rules of Court* provide the appointment may be on terms:

> 47 (1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

[24] In *Red Burrito Ltd. v. Hussain***,** 2007 BCSC 1277, D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

[25] The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

[26] This judgment was cited with approval by Burnyeat J. in *United Saving Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[27] In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it

unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

[28] The Court was of the view the English line of authorities, of which in *Re Crompton & Co.*, [1914] 1 Ch. 954; *Truman v. Redgrave* (1881), 18 Ch. 547; and *Prachett v. Drew* [1924] 1 Ch. 280 were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (S.C.), where receivers were appointed without proof of jeopardy.

[29] Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (S.C.), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

[30] Mr. Justice Burnyeat held, at paras. 15-17:

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be

> made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.
>
> A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[31] The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

> In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978),pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co*.,[1914] 1 Ch. 954).

[32] The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

[33] As Taylor J. noted in *Royal Bank of Canada v. Cal Glass Ltd. et al.* (1978), 94 D.L.R. (3d) 84 (B.C.S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

[34] The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: *Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527; *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95; and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.).

[35] As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. *Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

[36] In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd*., (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd*. (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

[37] The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

[38] The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

[39] The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly

interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

[40] In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was $5.7 million. The defendant did not dispute the default. It was prepared to make payments of $4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

[41] The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

[42] the parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

[43] the defendant owed a significant sum of money;

[44] there appeared not to be a dispute with the fact of the size of the indebtedness;

[45] the defendant was in default;

[46] the resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

[47] there were concerns with respect to the financial statements of the defendant; and

[48] the defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

[49] The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

[50] Mr. Justice Masuhara held:

> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> 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.

[51] Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

[52] The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek,* [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> ...
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*., [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always

> causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

[53] The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International,* at para. 17, the Court held:

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act,* it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[54] In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

[55] In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling

commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in *Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

[56] Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
>
> (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

[57] A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Montreal v. Mrazek* (1985), 64 B.C.L.R. 282 (C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (S.C.) and *Canlan Investments Ltd. v. Gibbons* (1983), 42 B.C.L.R. 199 (S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount

of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

[58] In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

> That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

[59] With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

[60] The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

[61] The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (S.C.).

[62] In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

> In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.

[63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

[64] The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

[65] There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank Of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.) at para. 21; *Royal Bank of Canada v. Astor Hotel* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 [*Astor Hotel*], at

para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (C.A.).

[66] There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

[67] At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

[68] Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

[69] In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes v. Taplow Financial Ltd.* (1985) 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225; and *Astor Hotel*.

[70] In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to

> prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

[71] At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

[72] In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union* [citation omitted].

[73] In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific, Vista Homes, Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank of Canada v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.). The

latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

[74] In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

DISCUSSION

Appointment of a Receiver

[75] The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

[76] The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

[77] There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

[78] There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

[79] The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

[80] If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

[81] In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

[82] The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

[83] The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.,* that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

[84] The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the

plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

[85] Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

[86] The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

[87] The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

[88] It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

[89] I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income

is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

[90] The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

[91] The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

[92] The parties have leave to apply for further directions if necessary.

"Willcock J."
The Honourable Mr. Justice Willcock

TAB 7

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 228**

Date: **2017 07 24**
Docket: QBG 783 of 2017
Judicial Centre: Saskatoon

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

BETWEEN:

AFFINITY CREDIT UNION 2013

PLAINTIFF

- and –

VORTEX DRILLING LTD.

DEFENDANT

Docket: QBG 1030 of 2017
Judicial Centre: Saskatoon

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

- and -

IN THE MATTER OF *THE* SASKATCHEWAN *BUSINESS CORPORATIONS ACT*, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

Counsel:

Jeffrey M. Lee, Q.C., and Paul D. Olfert	for the Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery and Jared Enns	for Vortex Drilling
Ian A. Sutherland and Jordan F. Richards	for the Receiver
Brent Warga	Representative of Interim Receiver (via phone)
P. Koliaskis	for the Proposed Monitor (via phone)

DECISION SCHERMAN J.
July 24, 2017

Introduction

[1] Affinity Credit Union 2013 [Affinity], a secured lender to Vortex Drilling Ltd. [Vortex], is owed in excess of $8,350,000 and has applied for the appointment of a Receiver of all of the assets and properties of Vortex under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and s. 64 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

[2] Vortex has applied under s. 11.02(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], for an initial order granting various relief including a stay of all proceedings against Vortex for a period of time to permit it to pursue a successful arrangement or reorganization.

[3] Vortex is insolvent. The other statutory requirements to permit Affinity to pursue the appointment of a Receiver under the *BIA* and for Vortex to seek an initial order and stay under the *CCAA* have been met or established.

[4] Affinity has since early 2015 accommodated financial difficulties being faced by Vortex and agreed, under the terms of various agreements, to interest only

payments for periods of time in return for various undertakings of Vortex. It says Vortex has breached those undertakings, has ceased making even interest payments and since April of 2017 has been in default under the terms of its credit agreements. Affinity has demanded payment in full of the indebtedness owed to it, and Vortex has failed to pay what it is contractually obligated to pay.

[5] Vortex is in the business of drilling oil wells. It says that its financial difficulties are the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. This has caused a related reduction in the demand for drilling rigs to drill new wells. Oil prices peaked well in excess of $100 U.S. per barrel and since 2014 have fallen to $50 U.S. or less per barrel.

[6] Vortex argues the economic climate in the Western Canadian oil industry is improving, it is expecting a substantial improvement in its cash flow, Affinity is fully secured for the indebtedness owed and the initial *CCAA* order it seeks should be granted so as to give it an opportunity to seek refinancing from other lenders or to facilitate the making of a compromise or arrangements with its existing creditors so as to permit it to be able to continue in business.

[7] The issue to be decided in the context of the competing applications is whether the appropriate order to make is to grant an initial order and stay of proceedings under the *CCAA* or to grant Affinity's application for the appointment of a Receiver.

Background Facts

[8] Vortex was created in November of 2010 and subsequently purchased and/or constructed three drilling rigs largely utilizing borrowed funds. Under the

terms of an August 12, 2013 Offer to Finance from Affinity [Credit Agreement] accepted and agreed to by Vortex, Affinity advanced Vortex, under three separate loan facilities, a total of $14,910,711 to pay out existing loans in respect of two rigs and to finance the construction of a third drilling rig. The individual loan facilities were each payable on demand, but before demand were to be paid by combined monthly principal and interest payments totalling $325,257. The Credit Agreement expressly provided that any material change in risk or adverse change in the financial condition of Vortex or failure to comply with any condition of the Offer to Finance would constitute an event of default entitling Affinity to demand payment of all sums owing and to realize on the security taken for the loan.

[9] As required by the Credit Agreement, Vortex granted to Affinity, under the terms of a general security agreement registered in the personal property registries of each of Manitoba, Saskatchewan and Alberta [GSA], a security interest in all of its present and after acquired property. The terms of the GSA included the right of Affinity, upon the occurrence of an event of default as therein defined, to seize and sell any of Vortex's property or to appoint a Receiver (see paragraphs 9 to 13 of the GSA). Events of default were widely defined and include the insolvency of Vortex.

[10] With the collapse of oil prices and the resulting downturn in the oil industry Vortex was unable to make the monthly payments contemplated by the Credit Agreement and sought accommodations from Affinity. By a series of agreements Affinity provided principal repayment deferrals to Vortex, which resulted in Vortex paying only interest for most of the months of 2016. Vortex failed to fulfil its commitments to make balloon principal payments and to resume principal and interest payments by dates and in amounts contemplated by these accommodations or deferral agreements.

[11] As of January 2017 regular monthly principal and interest payments of $325,257 were again to resume but Vortex failed to make such payments. In March of 2017 Vortex informed Affinity that it could only afford to make monthly payments of $100,000 rather than the $325,257 per month then required by the Credit Agreement. Affinity prepared an amendment to the Credit Agreement which would have permitted such reduced payments on condition that Vortex approach its shareholders to obtain an injection of equity capital to finance its business operations and reduce the indebtedness owing to Affinity. Vortex did not sign that amending agreement, has not made the required monthly payments, nor remedied the defaults that have occurred under the Credit Agreement, as amended from time to time.

[12] By letter of May 1, 2017 Affinity gave Vortex notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded that the full outstanding obligations (stated to be $8,422,061.01 as at April 28, 2017) be repaid within 30 days, failing which Affinity would proceed to avail itself of its legal remedies including enforcing its security. On June 6, 2017 Affinity filed with this Court its notice of application, returnable June 9, 2017, seeking the appointment of a receiver. By agreement between counsel for Affinity and Vortex this application was adjourned to June 23, 2017.

[13] During this adjournment negotiations continued between the parties with Vortex seeking continuing accommodations or forbearance on the part of Affinity. Vortex was representing it had prospects to refinance the indebtedness with other lenders.

[14] Affinity takes that position that these negotiations resulted in a concluded agreement under which Affinity was to provide an additional two-week period of forbearance so as to give Vortex additional time to pursue refinancing and

would fund current payroll obligations of Vortex, in return for which Vortex would consent to the appointment of a receiver should its refinancing efforts fail. Vortex takes the position that no such agreement was ever concluded.

[15] Affinity's application for the appointment of a receiver came before me on June 23, 2017. Vortex sought an adjournment of that application, advancing the position that it needed time to respond to the affidavits filed by Affinity and to bring its own application for *CCAA* relief. In the circumstances I ordered the appointment of an interim receiver for a period ending July 23, 2017 under which the interim receiver could investigate, monitor and facilitate Vortex's continuing operation so as to give Vortex an opportunity to file opposition affidavits and make its *CCAA* application.

[16] That application and the affidavit evidence of both Vortex and Affinity on both applications are before me. As stated above, Vortex is insolvent, in the sense of being unable to pay its debts as they become due. The issue to be decided is whether in the circumstances the appointment of a Receiver or an initial order under the *CCAA* is most appropriate in the circumstances.

The Law Respecting *CCAA* Applications

[17] Jurisprudence establishes that the following principles are applicable to *CCAA* applications:

a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 15, [2010] 3 SCR 379 [*Century*].

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Chef Ready Foods Ltd. v Hongkong Bank of Canada* [1991] 2 WWR 136.

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate…

[18] I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

The Law Respecting Receivership Applications

[19] In a previous unreported decision in *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.* (25 February 2016) Saskatoon, QB 1639 of 2015 (Sask QB), I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

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), 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), 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, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> See also, *Lindsey Estate v. Strategic Metals Co*rp., 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.

[20] Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

The Parties' Positions in Brief

[21] Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

[22] Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to

avoid the social and economic costs of liquidation. It says that the security that Affinity holds has a value significantly beyond the debt owed by it, and there will be no real prejudice to Affinity by granting an initial order and granting a stay.

[23] Affinity says the proper and appropriate order in the circumstances is the receivership order it seeks. It says that Vortex is insolvent, it has the contractual right to appoint a receiver or seize and sell the rigs upon an event of default (which both insolvency and failure to pay the debt owed are), it has already provided Vortex with lengthy and significant accommodations and for good and sufficient cause it has lost trust in Vortex. Affinity says Vortex has repeatedly failed to honour contractual commitments made to Affinity in return for the deferrals granted and that the evidence demonstrates that Vortex has not acted in good faith.

[24] Beyond these factors Affinity's position is that, given the realities of the oil industry and Vortex's financial position, the business is unviable now and into the foreseeable future. Over nearly 2 ½ years Affinity has accepted deferral in payments totalling some $4,500,000, but notwithstanding this accommodation Vortex has been unable to generate cash flow that permitted it to cover its variable operating costs, much less make a contribution to fixed costs. The application made by Vortex does not contain even the germ of a reorganization plan that has any prospect of succeeding. It relies on purported, but unverified, refinancing possibilities. Vortex has had many months' opportunity to obtain refinancing and has not been able to do so.

[25] Affinity says that continuing to operate the rigs without generating revenue sufficient to cover the fixed costs (which includes repayment of the loans) means the rigs will continue to depreciate and Affinity's security position will be eroded.

[26] For all of these reasons it says to issue an initial order and grant a stay of proceedings under the *CCAA* would be inappropriate and that is just and convenient to appoint a receiver.

Analysis of Vortex's Position that *CCAA* Relief is Appropriate

i. Evidentiary Concerns

[27] At paragraphs 20 to 22 of the Vortex Brief of Law counsel argues as follows:

> 20. A stay of proceedings would fulfill the legislative objective of the CCAA by permitting Vortex to carry on its business operations during the reorganization process. The evidence in support of this application clearly demonstrates that such an order is appropriate in these circumstances:
>
> (a) the industry within which Vortex operates is seasonal, and Vortex's Rigs are generally deployed from the month of June onwards (Twietmeyer Affidavit, at para 18);
>
> (b) as the industry itself is seasonal, so too is Vortex's cash flow (Twietmeyer Affidavit, at para 18);
>
> (c) Vortex's assets are worth significantly more than its debts (Twietmeyer Affidavit, at paras 2 and 17);
>
> (d) two of Vortex's three Rigs are currently deployed and operational for the 2017 season, one for Crescent Point Energy Cop. (sic), which is one of Canada's largest light and medium oil producers, and the second Rig is currently in operation for Aldon Oil Ltd. (Twietmeyer Affidavit, at para 19);
>
> (e) Vortex's general manager and sales consultant are currently deploying significant efforts in order to secure a contract in respect of its third Rig. The evidence before this court is that these efforts have successfully generated new business for Vortex, including its most recent contract with Aldon Oil Ltd. Accordingly, and through these ongoing efforts, it is

> believed that it is highly likely that Vortex will secure a contract for its third Rig (Twietmeyer Affidavit, at para 20); and
>
> (f) assuming all of the relief sought in this application is granted, Vortex's cash-flow projections indicate that, if DIP Financing is approved, Vortex will have enough liquidity to meet its cash flow needs through to the end of the 13-week forecast period (Twietmeyer Affidavit, at para 61).

[28] It should be noted that for each of the points in paragraph 20 (a) to (f) counsel references supporting evidence from affidavits of one Tina Twietmeyer. I have concluded that it is not appropriate for me to rely on much of the affidavit evidence of Tina Twietmeyer for the reasons that follow:

a. In paragraph 1 of her affidavit she describes herself as the Administrative Director of Vortex without providing any information or details as to what that job function involves and how it would give her the personal knowledge she claims to have. The evidence establishes she is not and has never been a corporate director of Vortex.

b. Notwithstanding her statement that she has personal knowledge of matters in question, on a close read of her affidavits it is apparent much of her evidence is based on information and belief without the basis for her information and belief being provided.

c. Rule 13-30 of *The Queen's Bench Rules* requires that an affidavit must be confined to facts within the personal knowledge of the person swearing the affidavit except that on an interlocutory application affidavit evidence based on information and belief is permissible provided the basis for the claimed information and belief is disclosed.

d. Applying the test in *Verlaan v Lang Estate*, 2004 SKQB 376, that an application is interlocutory where the decision in respect of it given in one way would finally dispose of the matter but if given in another way would allow the action to go on, I am of the opinion that an application for an initial order and stay of proceedings under the *CCAA* is not an interlocutory application. I fully appreciate that if the initial order is granted a further application approving a restructuring plan would be required. While the current application may lie close to the tipping point between what is a final application and an interlocutory application, it is my conclusion that Vortex's *CCAA* application has more of the characteristics of a final application than of an interlocutory application and thus I find the application to not be an interlocutory application. The result is that affidavit evidence based on information and belief is not admissible and should not be considered.

e. If I am wrong in my conclusion that the application is not interlocutory, then nonetheless, in various instances where Ms. Twietmeyer is giving evidence based upon information and belief for which the basis is not provided, the weight and reliability to be given to much of her evidence cannot be assessed.

f. Beyond these concerns, the Rules applicable to affidavit evidence do not permit opinion, argument, irrelevant matters or hearsay on either an interlocutory or final application. Much of Ms. Twietmeyer's affidavit evidence consists of opinion, argument and hearsay or irrelevant matters and thus should not be considered on those grounds.

g. An example of this is her evidence at paragraph 3 of her referenced affidavit that "the economic climate in the Western Canadian oil industry is improving. As a result, Vortex is experiencing significant growth in its business and is expecting a substantial improvement in its cash flow". This evidence includes inadmissible opinion, speculation and argument.

h. On the basis of all of the evidence, I conclude it is wrong to say that Vortex is experiencing significant growth. Rather it is limping along drilling wells on a "one-off" basis as and when such contracts come available. This work is done at depressed prices that cover the variable costs of operation, if that, and the bulk of its capacity is unused.

i. Ms. Twietmeyer is in no position to provide opinion evidence that the economic climate in the Western Canadian oil industry is improving, and her statement that Vortex is expecting a substantial improvement in its cash flow can at best be viewed as her hope, but in the context of affidavit evidence is inadmissible speculation.

[29] With reference to the points made in paragraph 20 of the Vortex Brief of Law above:

i. The facts stated in paragraphs 20 (a) and (b) that the industry in which Vortex operates and thus its cash flow is seasonal is of no or little relevance. The fact that the oil well drilling industry cash flow is seasonal is simply a fact of the business that should be accommodated in the budgeting. The evidence establishes that over a continuous 2 ½ years this business has been unviable.

ii. The statement at paragraph 20 (c) that Vortex's assets are worth significantly more that its debts is either or both inadmissible hearsay evidence or inadmissible opinion evidence. Paragraph 17 of Ms. Twietmeyer's affidavit indicated that an appraisal of the equipment had been obtained valuing it at $17,146,000, but Vortex has not filed this appraisal claiming confidentiality. This is not an acceptable reason for not filing an appraisal relied upon. Where appropriate, evidence with confidentiality concerns can be filed on a basis that protects the confidentiality.

iii. Opinion evidence can only be given by an individual found to be qualified to give such opinion evidence. To attempt to bootstrap opinion evidence of value into the record in this way is an attempt to introduce hearsay evidence. It denies Affinity any ability to test the opinion evidence or respond. Opinion evidence of value should be provided directly by the person expressing the opinion accompanied by the details of qualifications and the opinion so as to give the party opposite and this Court an opportunity to assess its reliability.

iv. Given no evidence that establishes the expertise of the provider of such appraisal and other evidence that the daily rates for drilling rigs have declined from in excess of $16,000 per day to under $7,000 per day and that only one out of three of Vortex's rigs has been operating on any regular basis gives significant basis to be concerned about the reliability of such evidence.

v. Paragraph 20 (d) of the Vortex brief argues, based on paragraph 19 of the Twietmeyer affidavit**,** that two of Vortex's three rigs are operational for the 2017 season. This is misleading as to the true

state of affairs. The current evidence, as of the date this matter was heard, was that the second rig had drilled one well for Aldon, over a period of approximately one week, and has since been idle. While there may be two rigs which are in operating condition, the relevant fact is that these two rigs are far from fully engaged.

vi. The argument advanced at paragraph 20(e) of the Vortex brief that "it is believed that it is highly likely that Vortex will secure a contract for its third Rig" is based on an expressed "belief" in paragraph 20 of the Twietmeyer affidavit without Twietmeyer having provided any basis for such belief other than reference to efforts on the part of a Messrs. Geysen and Rae. If there is relevant evidence on efforts and prospects for future work it should be given by these individuals rather than in the second-hand, hearsay manner here attempted. Reduced to its essence this is speculation and argument, not evidence.

[30] An applicant seeking relief under the *CCAA* should be placing before the Court the best evidence available. Section 11.02(3) of the *CCAA* requires the applicant to satisfy the Court that circumstances exist that make the order sought appropriate. It is a concern to me that I have a number of affidavits from Ms. Twietmeyer but no affidavit on this application from Mr. Geysen, who is the President and General Manager of Vortex, and thus presumably the responsible person within the company who has the requisite personal knowledge.

[31] Counsel for Vortex argues that I should have similar or enhanced concerns with respect to the affidavit evidence filed on behalf of Affinity and says I need to consider Ms. Spencer's affidavits with great care. I do not find reason for overall concern. While Ms. Spencer has expressed opinions or beliefs with regard to

the impact on the viability of Vortex given Mr. Big Eagle is no longer on the Board or the Chief Executive Officer of Vortex, I have not relied on that evidence for the decisions I have made.

[32] Ms. Spencer's affidavits make it clear that she has had day-to-day responsibility for administration of Affinity's account relating to Vortex and that she has conducted a detailed review of the books, records, files and correspondence of Affinity relating to that account. To the extent to which she provides factual evidence based upon the knowledge of the books, records, files and correspondence of Affinity, I find the factual evidence provided by Ms. Spencer in her affidavits to be appropriate and reliable. To the extent to which she engaged in measures of speculation, argument or providing evidence that she did not have personal knowledge of, I have not relied on such evidence.

ii. Good Faith Considerations in *CCAA* Applications

[33] I find on the basis of the evidence before me that there have been elements of bad faith in Vortex's dealings with Affinity. Vortex had, arising from both the nature of their relationship and by virtue of express contractual provisions, an obligation to provide complete and accurate financial information to Affinity and to not hide or misrepresent matters relevant to their relationship. Good faith of the applicant is a baseline consideration for a Court when considering *CCAA* applications.

[34] As of June 20, 2017, with Affinity's receivership application before this Court, but adjourned while the parties were negotiating a potential forbearance agreement, Vortex represented to Radius Credit Union (a member of the Affinity lending syndicate and independently providing an operating line of credit to Vortex) it had no accounts payable. This it did by writing cheques purporting to pay various

accounts payable, but then holding those cheques totalling some $235,548 and not delivering them to the payees. This accounting fiction that accounts payable had been paid was used by Vortex to access, under the Radius margining formula, some $121,000 in operating credits that would not have been available had the facts been accurately disclosed. I find this to be a breach of Vortex's contractual covenants to Affinity to provide honest and accurate financial information to Affinity notwithstanding that the misrepresentation was made to Radius in the first instance. Given the circumstances and Affinity's concerns with respect to Vortex's financial position, this action was a failure to act in good faith. It only came to light by reason of investigations by the Interim Receiver.

[35] In a June 30, 2016 revision to the Credit Agreement, which allowed Vortex's request to pay interest only from July through November, Vortex agreed that any financial settlement with one Harvey Turcotte would be funded from outside sources and not from Vortex's cash flow. Notwithstanding this agreement, in February of 2017 Vortex made a payment of $525,000 to Harvey Turcotte from its cash flow in breach of this agreement. This fact was not disclosed by Vortex to Affinity and only came to light by reason of investigations by the Interim Receiver. This I find to be a failure on the part of Vortex to act in good faith.

iii. Is *CCAA* Relief Appropriate or the Appointment of a Receiver Just and Convenient?

[36] On the basis of the totality of the evidence before me, I have concluded that it is not appropriate to make an initial order nor grant a stay of proceedings as requested by Vortex in its *CCAA* application. For reasons that overlap, I find it is just

and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

[37] Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 ½ years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to suggestions that there are real prospects of refinancing that do not involve either substantial write-off of

current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 ½ years. No statistical evidence has

been provided that establishes the number of rigs available in Western Canada and their current utilization rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available

to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

[38] The contractual agreement between Affinity and Vortex clearly contemplated loans payable on demand, with specified principal and interest payments before demand. Affinity has provided significant relief from the contractual terms over a two-year period. In a practical sense, Affinity has already effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*. Vortex has had the benefit of two years of debt repayment accommodations and forbearance and the opportunity to seek alternate financing. During this period Vortex has failed to honour undertakings it gave in exchange of the deferral relief provided. Affinity is contractually entitled, following its demand, to either seize and sell the rigs or to have a Receiver appointed. Having regard to the relevant factors I outlined in paragraph 19 above, I conclude that it is just and convenient to appoint a Receiver as sought by Affinity.

iv. Other Considerations

[39] Affinity argued that there was a concluded agreement in which Vortex had agreed to consent to the appointment of a Receiver. Vortex disputes that such an agreement was concluded and took exception to evidence Affinity wished to rely on as being without prejudice communications. In light of the conclusions I have reached above, I do not find it necessary to address these arguments and the related argument relating to settlement privilege. My decision is made without regard to the evidence and argument submitted surrounding these issues.

Conclusion

[40] For the reasons set forth above:

a. I dismiss Vortex's application for relief under the *CCAA*.

b. I order that Deloitte Restructuring Inc. be appointed Receiver of Vortex effective immediately.

c. I contemplate that the form of that order will be substantially in the form of the draft order filed by counsel for Affinity on July 6, 2017. However, at the hearing of the applications counsel for Affinity and Vortex asked that the final form of the order not be settled until after counsel had reviewed my decision and had discussion on the final form of order. I ask counsel to consult promptly. If they are able to agree on the form of order they shall file same for my approval. If they cannot agree on the form of the order, a conference call with me shall be arranged to settle this matter.

c. I approve the actions of the Interim Receiver since the date of appointment as Interim Receiver to the termination of that order.

J.
B. SCHERMAN

TAB 8

CITATION: Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, 2022 ONSC 6186
COURT FILE NO.: CV-22-678808-00CL
DATE: 20221028

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Canadian Equipment Finance and Leasing Inc., Applicant

AND:

The Hypoint Company Limited, 2618905 Ontario Limited, 1618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, Respondents

BEFORE: Osborne J.

COUNSEL: *R. Brendan Bissell and Joel Turgeon*, for the Applicant

Jonathan Rosenstein, for the Mortgagees
Domenico Magisano, for the Proposed Receiver, Albert Gelman Inc.

HEARD: September 2, 2022

ENDORSEMENT

The Issue

[1] What happens when rights under the *Mortgages Act* and the *Personal Property Security Act* intersect? As is often the case, a business is carried on through two related entities. One owns the real estate and one operates the business. One creditor finances the purchase of equipment and has a security interest. Another creditor finances the purchase of the real property and has conventional mortgage security. The security of each is over a different asset, and the result is generally straightforward. However, when the purchased equipment is affixed to the property, and there is a dispute about whether and how it can be removed and whether such removal will cause a diminution in the value of both the equipment and the real property, the question is more complex: who has rights of enforcement, and over what assets?

[2] The Applicant, Canadian Equipment Finance and Leasing Inc. ["CEF"] brings this Application for a receivership order, judgment and interest. On this motion within the Application, it seeks only the appointment of a receiver as more particularly described below.

[3] CEF seeks the appointment of Albert Gelman Inc. as receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* ["CJA"], over all of the assets and property of the Respondents, The Hypoint Company Limited ["Hypoint"] and 2618909 Ontario Limited ["909"] that was used in relation to a business carried on by either or both of them.

[4] The Mortgagees [as defined below] do not oppose the appointment of a receiver over the assets of Hypoint pledged as collateral for CEF's equipment loan, but oppose the appointment of a receiver over the assets of 909, the related entity that owns the real estate against title to which they hold mortgage security.

[5] The mortgagees do however concede that this Court has the discretion to appoint a receiver over the assets of both entities pursuant to section 101 of the CJA and submit in the alternative that if a receiver is appointed, that receiver be the firm nominated by them, MSI Spergel Inc. Each proposed receiver has filed a consent to act in that court-appointed capacity.

[6] Having reviewed all of the evidence filed by the parties and having heard the submissions of their counsel, I have concluded that it is just and convenient to appoint a receiver over all of the assets of both related debtors, being Hypoint and 909 pursuant to section 101 of the CJA. I appoint the firm nominated by the mortgagees, MSI Spergel Inc., as that Court-appointed receiver.

The Business, The Loans and The Security

[7] The assets and property of Hypoint include HVAC equipment installed at the premises from which the business of the Respondents was conducted at 25 Morrow Ave., Toronto [the "Premises"]. The Premises was essentially a custom-built cannabis production facility.

[8] CEF and the Respondent, Hypoint, entered into a loan and security agreement [the "Agreement"] made as of June 1, 2020. There is no dispute that CEF has first ranking security over that HVAC equipment [the "Collateral"] and, in the circumstances, is entitled to the appointment of a receiver over same.

[9] There is, however, a corollary dispute between the parties over whether the equipment pledged as Collateral includes, in addition to the physical HVAC units affixed to the exterior of the building on the Premises, electronic control units located within the building.

[10] The main dispute arises because CEF is seeking the appointment over the Premises as well as the Collateral, with the intent to sell the Premises with the HVAC equipment still installed, through a single sales process approved and overseen by a receiver under the direction of this Court.

[11] While all parties are in agreement that the Premises ought to be sold, the mortgagees who hold registered mortgage security against title to the Premises argue that the real estate itself is owned by the Respondent 909. Those mortgagees, including the first mortgagee Bruce Lubelsky and the second mortgagees Delrin Investments Inc. and three other individuals, [collectively, the "Mortgagees"] hold registered mortgage interests against title to the Premises.

[12] Those Mortgagees argue that, while 909 is a related entity to Hypoint, it is not a party to the loan and security agreement with CEF, and that only the HVAC equipment was pledged as Collateral, all with the result that CEF has no legal right to the appointment of a receiver of property owned by any party other than that belonging to the debtor, Hypoint.

[13] The Mortgagees do not oppose the appointment of a receiver over the HVAC equipment only, nor do they oppose CEF or a receiver acting on its behalf entering onto the premises to remove the HVAC equipment [in accordance with section 35 of the PPSA], subject to determination or resolution of the ancillary dispute referred to above about whether the control units inside the Premises are properly considered to be part of the Collateral.

[14] I observe that 909 guaranteed the debt of Hypoint to CEF, although CEF does not seek in its Notice of Application judgment on that guarantee. Accordingly, for the purposes of this motion, that guarantee is of less relevance since judgment based on that guarantee is not the basis relied upon for the appointment of a receiver.

[15] While Hypoint defaulted on the equipment loan in respect of the HVAC to CEF, 909 defaulted on the mortgages. The equipment loan was in the approximate amount of $780,000. The mortgages were in the approximate amount of $5.3 million.

[16] CEF argues that the practical effect of the position of the Mortgagees is that if CEF enforces its rights only as against the Collateral, it will have to remove and sell separately that Collateral which will devalue both the Collateral itself as well as the Premises, to the detriment of all stakeholders, since proceeds and recovery will be maximized for all only if the Premises are sold as a turnkey cannabis production facility, with the HVAC still installed.

[17] CEF argues that a receiver can then resolve disputes over competing priorities and/or entitlement to proceeds of sale, with the later assistance of this Court if necessary, none of which needs to be decided on this motion. CEF notes that the Mortgagees originally cooperated with the Applicant regarding a potential sale transaction, but have now advised that that potential sale was not completed, and the Mortgagees are not prepared to cooperate in an *en masse* sale now.

[18] The Mortgagees take the position that they are entitled, by the terms of their mortgage security and the *Mortgages Act*, to enforce their mortgages by selling the premises under power of sale. That is precisely the fragmented sales process to which CEF objects.

[19] This matter was before the Court on June 29, 2022, on which date Justice Gilmore authorized the appointment of a receiver over the HVAC equipment, although CEF has not proceeded to have a receiver appointed pursuant to that order. The Mortgagees have now delivered notices of sale following on the mortgage defaults. There were discussions and, for a time, some level of cooperation between and among the parties with respect to a potential sale of the Premises, including the affixed Collateral.

[20] When that potential sales transaction collapsed, however, the Mortgagees decided to proceed with a more conventional sale by way of obtaining fair market value appraisals and

retaining a commercial real estate brokerage to market the properties. They have begun that process.

[21] While they maintain their primary position that no receiver should be appointed over the property of 909, the Mortgagees do concede that the Court has the discretionary ability to appoint such a receiver pursuant to section 101 of the *Courts of Justice Act*. If the Court determines to exercise that discretion in appoint a receiver, the Mortgagees take the position that the receiver should be the firm nominated by them.

Analysis

[22] The test for appointing a receiver, whether under the BIA or the CJA, is whether it is just and convenient to do so. The overarching objective is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors.

[23] In making a determination about whether it is, in the circumstances of a particular case, just and convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek,* 1996 CanLII 8258).

[24] Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 7101 at para. 27).

[25] In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

(a) whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment 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 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 a right to appointment under the loan documentation;

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

(i) the principle that the appointment of a receiver should be granted cautiously;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties 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.

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

[27] In the present case, CEF's submission that this Court should appoint its proposed receiver over the assets of 909 pursuant to section 243 of the BIA fails, in my view, for the simple fact that, as submitted by the Mortgagees, 909 is not a party to the CEF credit agreement and nor is CEF a creditor of 909, contingent or otherwise.

[28] CEF is not a secured creditor of 909. CEF has no contractual right to the appointment of a receiver over the assets of 909 pursuant to any agreement as it does with respect to Hypoint. As noted above, it similarly lacks any rights as a judgment creditor of 909, since it has not commenced any claim to recover under the guarantee, let alone obtained a judgment.

[29] I am satisfied, however, that it is just and convenient to appoint a receiver under section 101 of the CJA.

[30] 909 and Hypoint are related entities operating the same business out of the same Premises. The Premises, including the Collateral, was custom-built for the operation of a cannabis production facility.

[31] Both CEF and the Mortgagees agree that the Premises and the Collateral should be sold. There is a dispute about whether the Collateral is technically a “fixture” to the Premises, and the factual dispute about the cost of removing the Collateral and the extent of any consequent physical damage to, or diminution in the value of, either or both of the Premises and the Collateral itself. Those issues are for another day. Whether, how, and on what terms [i.e., together or separately] those assets should be sold can and should be determined by this Court following on a report from the receiver with respect to a proposed sales process and if the process gets that far, a sale approval motion.

[32] However, in circumstances where all parties agreed that all of the assets of both Hypoint and 909 should be sold to maximize recovery for all creditors, but cannot agree on the process pursuant to which that should be undertaken with the result that the entire process is stalled, I am satisfied that this represents a classic example of a situation in which it is just and convenient to appoint a receiver.

[33] The receiver is a court-appointed officer. It has the obligation to design and run a process with a view to monetizing the assets of the debtor for the benefit of all creditors. Further delay is in the interest of no one. There is no activity at the Premises, electricity has been cut off for a significant period of time, and winter is coming. Proof of insurance was requested by CEF and has not been provided.

[34] I am concerned about the real and immediate risk of dissipation of assets and diminution in value of those assets, with the result that I am satisfied that it is important and beneficial to all creditors to accelerate the process. The fair and transparent way to do that is to have a court-appointed receiver run the process. Order needs to be brought to the chaos, and the status quo of competing processes cannot continue unsupervised.

[35] To do otherwise would be to permit CEF to enforce against the Collateral only and the Mortgagees to enforce as against the real property. This has the potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value.

[36] Moreover, nothing in the appointment of a receiver now, over the assets of Hypoint and 909 together, affects or diminishes the ability of the receiver appointed to consider whether in fact recovery will be maximized by a sale of the Collateral and the Premises separately as opposed to together. Even if that were to occur, however, it can occur under a Court-supervised process, by a court-appointed receiver with obligations to all stakeholders, in an orderly and efficient manner.

[37] I should be clear that in appointing a receiver, I am not concluding that the rights of CEF defeat or somehow rank in priority to the rights of the Mortgagees. Rather, I am expressly reserving those rights for another day. In my view, that is the time for a determination if necessary of the relative priority of the competing interests here and whether, for example, the interests of CEF as a secured party of the Collateral are subordinated to the rights of the Mortgagees as a result of the Collateral having become a Fixture to real property [i.e., the Premises].

[38] As the Mortgagees concede in their factum [see paragraph 86], these conflicting interests will be academic in the event that the proceeds of sale of the "Premises" - whenever and however that occurs - are sufficient to satisfy both the Mortgagees and CEF.

[39] I also observe that there are other unsecured creditors whose rights may be affected by the manner in which a sale is undertaken. I am satisfied that their interests also, are best protected by a fair and transparent process run by a court-appointed receiver rather than any one party individually.

[40] The objective of the appointment of the receiver is to maximize proceeds. If, as all parties agree should occur, the assets of Hypoint and 909 are sold, Court approval of that sale as well, presumably, as the relative rights and priorities over the net proceeds, can be determined. All other issues, including costs of the receivership and who should bear those costs or any proportion thereof, can also be determined.

[41] As to who the court-appointed receiver should be, both firms nominated here are well-known to this Court, and are respected in this area. There is no reason that either would not be appropriate. On balance, however, and given all of the circumstances, including the practical fact that the appointment of a receiver will deprive the Mortgagees of their right to power of sale, as well as the relative debts owed to the Mortgagees and CEF, I appoint MSI Spergel as nominated by the Mortgagees.

[42] Counsel for the Mortgagees is directed to provide to the Court a form of receivership order consistent with these Reasons. If the parties cannot agree on the form of that order, they may schedule a brief attendance before me to settle the terms of that order.

[43] Costs of this motion are reserved to the judge ultimately determining, if necessary, the relative priority to net proceeds of sale of the assets.

_____

Osborne J.

Date: October 28, 2022

TAB 9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.,* 2023 BCSC 1158

Date: 20230626
Docket: S234171
Registry: Vancouver

Between:

Vancouver Coastal Health Authority

Petitioner

And

Seymour Health Centre Inc.

Respondent

Before: The Honourable Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Petitioner:	P. Reardon K. Strong
Counsel for the Respondent:	H. Poulus, K.C. K. Thompson
Counsel for Business Development Bank:	P. Roberts, K.C.
Counsel for the Proposed Receiver Manager, Ernst & Young Inc.:	J. Bradshaw L. Huang, A/S
Place and Dates of Hearing:	Vancouver, B.C. June 23 and 26, 2023
Place and Date of Judgment:	Vancouver, B.C. June 26, 2023

INTRODUCTION

[1] The petitioner, Vancouver Coastal Health Authority ("VCH"), applies for the appointment of a receiver manager over the assets of the respondent, Seymour Health Centre Inc. ("Seymour Health"). The central facts, from VCH's point of view, concern the approximately $6.8 million that it advanced to Seymour Health which is secured against Seymour Health's assets.

[2] Seymour Health is adamantly opposed to a receivership. Seymour Health acknowledges that VCH advanced the monies and that, on the face of the documentation, the amounts are due and payable. However, Seymour Health has recently commenced an action against VCH and others seeking millions of dollars in damages arising from previous dealings concerning Seymour Health's operations, which it says will entirely offset the amounts claimed by VCH.

[3] The overarching circumstances of this dispute are unique. In addition to the immediate interests of the parties, broader and significant community interests are engaged. Those interests are in respect of the many British Columbians—said to be between 70,000–100,000 persons—who rely on Seymour Health for the availability and delivery of urgent and primary health care services.

[4] Both parties seek a remedy that would see the continuation of the delivery of these very important health care services to British Columbians. In that respect, the ability of Seymour Health to continue operations is very much in dispute in the face of VCH's position that another entity must assume control of Seymour Health's operations as soon as possible to ensure continuity of care for patients and protection of the assets which secure its loans.

BACKGROUND FACTS

[5] There are many disputed facts on this application. The following facts are either not controversial or, as I will indicate, the facts I have found as necessary for the purposes of this application.

The Parties

[6] VCH is a regional health board created pursuant to the *Health Authorities Act,* R.S.B.C. 1996, c. 180 [*HA Act*] and the *Regional Health Boards Regulation,* B.C. Reg. 293/2001. The purposes of VCH as a regional board include the delivery of health services through its employees or by entering into agreements with the government or other public or private bodies for the delivery of those services: *HA Act*, s. 5(1)(d).

[7] VCH's evidence on this application is primarily from Fernando Pica, who is VCH's Chief Financial Officer and VP Strategic Business Services.

[8] Seymour Health has been in the business of operating health clinics in the Vancouver area for many decades. Some time ago, it was purchased by Gursahib Bining and his spouse, Sandeep Kaur Parmar (collectively, the "Binings"). Mr. Bining is the Chief Executive Officer and a director of Seymour Health.

[9] Seymour Health's evidence on this application is from Mr. Bining and another director of Seymour Health, Dr. Eric Cadesky, who is also Seymour Health's Chief Medical Officer.

[10] Seymour Health is wholly owned by 13995526 Canada Inc. ("139"). 139 is owned one-third by BDC Capital Inc. ("BDC"). 139 is also owned two-thirds by 1016740 B.C. Ltd., whose shares are held by the Binings. In May 2022, BDC acquired its shares in 139 for $10 million, which notionally valued Seymour Health at $30 million. Seymour Health used the proceeds of that transaction primarily to repay existing debt, improve its balance sheet and reduce interest payments.

[11] Although not parties to this litigation, other government entities are indirectly involved to a degree.

[12] The Medical Services Commission ("Commission") is a nine-member statutory body established under the *Medical Services Act,* S.B.C. 1967, c. 24, as

repealed and continued pursuant to the *Medicare Protection Act,* R.S.B.C. 1996, c. 286 [*MP Act*]. The Commission reports to the Minister of Health: *MP Act*, s. 3(2).

[13] Section 5 of the *MP Act* sets out the extensive responsibilities and powers of the Commission and, as is generally known, it administers the Medical Services Plan ("MSP") which pays for medical services delivered by BC health care professionals. As relevant here, s. 33(1) of the *MP Act* allows the Commission to approve a "diagnostic facility" for the delivery of diagnostic services or procedures to patients while also, critically, allowing that facility to obtain payment for those services or procedures under the MSP.

Clinic Operations

[14] In 2018, Seymour Health was operating a medical clinic on West 7th Avenue in Vancouver, offering what are described as "primary care" services (the "West 7th Clinic"). Physicians are either employees or independent contractors of Seymour Health. The doctors assign their MSP billings to Seymour Health, who in turn bills the Commission for payment. Seymour Health handles all of the administrative matters for the West 7th Clinic.

[15] At the West 7th Clinic, any diagnostic services required for patients are delivered off-site by other facilities not owned by Seymour Health.

[16] In 2018, Seymour Health was in the process of setting up a second primary care clinic on Hornby Street in downtown Vancouver. Around that same time, and in accordance with its mandate under the *HA Act*, VCH approached Seymour Health about expanding that clinic to include an "urgent and primary care centre" or "UPCC" as part of its operations.

[17] UPCCs are intended to provide primary care to patients, who do not have a family doctor or nurse practitioner or cannot access their family doctor, who have an urgent health issue and need weekend or after-hours care. UPCCs can be paired with on-site diagnostic services or be in close proximity to them.

[18] The parties agreed to this partnership of sorts in the eventual clinic, which the parties describe as the "City Centre Clinic". As a result, in 2018, Seymour Health established the City Centre Clinic, offering primary care, the UPCC facilities and specialist care. The UPCC facilities were provided by Seymour Health under an Urgent Primary Care Services Agreement executed by it and VCH on November 26, 2018, which was renewed in April 1, 2021 (the "Services Agreement").

[19] The City Centre Clinic is located on leased premises on Hornby Street. VCH is the tenant of the premises under the lease. In May 2018, Seymour Health entered into a sub-lease with VCH for an annual basic rent of $604,016 ($50,334 per month) plus triple net costs as are payable under the head lease (the "Sub-Lease").

[20] Central to the dispute between the parties is the fact that, in establishing the City Centre Clinic, Seymour Health included facilities for what it describes as "Ancillary Services", meaning diagnostic and laboratory services (such as radiology and ultrasound). Those Ancillary Services were fully accredited and operational by early 2019. Mr. Bining says that having the Ancillary Services on site was consistent with Seymour Health providing services to patients based on a team-based approach and, in relation to the City Centre Clinic, the "Patient's Medical Home" model.

[21] In late 2019, Seymour Health also agreed with VCH on the opening of another clinic in North Vancouver on Esplanade West to operate as a UPCC (the "North Shore Clinic"). Seymour Health signed a further services agreement for the North Shore Clinic. This Clinic was operated on a "hybrid" model, with some staff being VCH unionized employees. I understand that some limited diagnostic facilities are also on site, but other diagnostic services are nearby and are used by the North Shore Clinic.

[22] From the patients' perspectives at least, Seymour Health's operation of all three clinics (collectively, the "Clinics") have been very successful in providing access to medical care. Seymour Health describes itself as BC's largest medical clinic operator. As of April 2023, some 166 medical professionals worked at the

Clinics. The West 7th Clinic and the City Centre Clinic alone currently provide health services to between 70,000–100,000 people in Vancouver, representing about 15% of that population. In 2022, there were about 265,000 patient interactions at the Clinics.

Financial Difficulties

[23] Mr. Bining says that the underlying dispute with VCH arises from the fact that Seymour Health never obtained the licenses and exemptions that would allow it to profitably operate the Ancillary Services at the City Centre Clinic. Although many details are not in evidence, Mr. Bining refers to various rejection letters from the Commission and the Ministry of Health (the "Ministry") in response to various applications by Seymour Health.

[24] Mr. Bining says that, without being able to offer the Ancillary Services and to receive payment for those services under the MSP, Seymour Health suffered with poorer margins and had a negative cash flow of approximately $200,000 per month. He says that this negative cash flow arose from the fact that, despite the lack of approvals and lack of payment from the Commission, Seymour Health continued to operate and provide the Ancillary Services.

[25] Mr. Bining has been attempting for years now to address Seymour Health's ongoing financial problems and losses. After Seymour Health exhausted its own resources to cover the losses, the Binings advanced their own monies to Seymour Health in the amount of approximately $3.4 million.

[26] The financial difficulties arose quickly.

[27] In July 2019, Seymour Health stopped paying rent to VCH under the Sub-Lease.

[28] In January 2021, VCH and Seymour Health entered into a Letter of Agreement dated November 27, 2020 (the "LOA"). The LOA provided Seymour Health with a repayment plan for the rental arrears under the Sub-Lease, which at

that time amounted to $1,732,487 for the months leading to November 2020. Under the LOA, Seymour Health agreed to make equal monthly instalments to VCH over three years which was to be offset against the monthly payments by VCH under the Services Agreement. Around this time, Mr. Bining guaranteed payments of amounts due to VCH under the Sub-Lease.

[29] The LOA did not modify Seymour Health's obligations to continue to make monthly rental payments under the Sub-Lease for the months after November 2020. Rent payments appear to have re-started; however, Seymour Health ceased making monthly rental payments entirely after March 2022.

[30] By Mr. Bining's own account, by mid-2022, Seymour Health was in a "state of financial crisis" and had been brought to the "edge of insolvency". In addition to not paying its rent under the Sub-Lease, Seymour Health was having difficulty paying physicians, suppliers and staff. By this time, some suppliers were refusing to provide necessary supplies for the Clinics.

[31] To address this "crisis", Seymour Health considered its options for reducing costs, including shutting down the West 7th Clinic. In May 2022, when the Binings had exhausted their personal resources, they turned to BDC who, as before, invested $10 million in exchange for shares. This equity injection was used to partially repay bank indebtedness and legal fees and later, the Binings borrowed more money against their residence to fully repay the bank.

[32] In addition, around this time, Mr. Bining became aware that VCH may be able to provide financial assistance.

VCH's Financial Assistance

[33] VCH did provide Seymour Health with a "support package". Between June–September 2022, VCH advanced almost $2 million to Seymour Health. These funds were used to pay physician compensation, staff, rent arrears and also, arrears owed to suppliers.

[34] By September 2022, VCH had agreed to advance total loans of $2.5 million to Seymour Health. This amount included the initial advances of almost $2 million and further funds to pay certain “Designated Services” to be advanced up to October 2022. These arrangements were set out in a Loan Agreement dated September 16, 2022 (the “Loan Agreement”). The terms of the financial arrangements in the Loan Agreement are not unusual. The loans are repayable with interest and the due date for payment of all of the amounts outstanding is June 30, 2023.

[35] To secure the amounts owing under the Loan Agreement, Seymour Health executed a general security agreement (“GSA”) granting VCH security over all of its personal property, which has been properly registered at the Personal Property Registry. In addition, the Binings guaranteed repayment of the loans under the Loan Agreement.

[36] Between October 2022–April 2023, VCH provided further advances to Seymour Health. These funds were used to pay Seymour Health’s payroll and suppliers who had refused to supply Seymour Health directly.

[37] In February 2023, the further advances were incorporated into the Loan Agreement to increase the principal amount owing to $3.7 million. In March 2023, further advances were incorporated into the Loan Agreement to increase the principal amount owing to $4.9 million. VCH’s last advance was in April 2023.

[38] Despite these substantial loans from VCH, Seymour Health’s financial difficulties continued.

[39] In spring 2023, VCH and Seymour Health entered into discussions toward a sale of Seymour Health’s assets at all three Clinics, including goodwill and going concern value, to VCH. On February 14, 2023, the parties signed a Letter of Intent (“LOI”). Under the LOI, VCH provided Seymour Health with an Advance Payment of $350,000, which was to be repaid in the event that the LOI was terminated.

[40] In late March 2023, VCH terminated the LOI. VCH demanded repayment of the Advance Payment of $350,000 but it has not been paid.

Defaults

[41] There is no dispute that Seymour Health is in default under the Loan Agreement, principally arising from its failure to repay the loans to VCH which are due. In addition, various defaults have arisen under the terms of the GSA.

[42] In the March/April 2023 timeframe, VCH and Seymour Health engaged in a number of discussions, if not negotiations, to determine if there was a consensual path forward that would allow Seymour Health to continue to operate. These discussions also related to proposals as to how the debt owing to VCH would be repaid.

[43] Unfortunately, no agreement resulted from these discussions.

[44] Accordingly, on May 2, 2023, VCH demanded repayment by May 15, 2023 of the amounts owed, being approximately $6.8 million. In addition, VCH served the requisite Notice of Intention to Enforce Security. The amounts owing were:

a) $4,699,439.12, plus accruing interest after May 1, 2023, fees, costs and expenses under the Loan Agreement;

b) $1,746,307.46, inclusive of GST and interest to May 1, 2023, under the Sub-Lease; and

c) $350,000 advanced under the LOI.

[45] Finally, on May 2–3, 2023, VCH demanded payment from the Binings under their guarantees of the amounts under the Sub-Lease and/or the Loan Agreement.

[46] In addition to the mounting debt owing to VCH, Seymour Health is facing other financial and operational changes and challenges. The Services Agreement has now expired and VCH is scheduled to assume the UPCC at the City Centre Clinic in August 2023. Similarly, the UPCC services agreement relating to the North Shore Clinic expired and VCH will assume all operations at the North Shore Clinic in August 2023.

RELEVANT LEGAL PRINCIPLES

[47] The relevant legal bases and principles that apply are not in dispute.

[48] VCH applies for the appointment of a receiver under s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], s. 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 [*BIA*], s. 66 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 and *Supreme Court Civil Rules*, R. 10-2.

[49] Under s. 39 of the *LEA*, the central question is whether it appears to the court that the appointment is "just or convenient" in the circumstances.

[50] As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte,* 2013 BCSC 263 [*Cascade Divide*] at para. 81, the granting of a receivership order is "extraordinary relief which should be granted cautiously and sparingly."

[51] The governing authorities have invariably endorsed the Court's consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in *Bennett on Receiverships, 2nd ed.* (Toronto: Carswell, 1999), at p. 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 [*Maple Trade*] at para. 25, *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 [*Textron Financial*] at para. 50 and many other cases.

[52] The *Maple Trade* factors include:

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

[53] Justice Gomery has recently confirmed that the above factors are not a checklist but are to be viewed holistically: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc.*, 2023 BCSC 514 at para. 9.

[54] Recently, the approach of this Court in considering and applying the above factors on an application to appoint a receiver was discussed in *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32 [*Ward Western BCCA*] at para. 49, affirming this Court's reasons indexed at 2021 BCSC 919 [*Ward Western BCSC*].

DISCUSSION

[55] The onus remains on VCH to establish that the appointment is just and convenient, having regard to the overall circumstances.

[56] I do not propose to address each of the *Maple Trade* factors separately, as they may be considered within broader categories that address the issues raised by the evidence and the parties. Embedded within those broader categories, I have considered factor (f) as it concerns the balance of convenience.

Interests at Issue

[57] The interests and motivations of both VCH and Seymour Health are clear

[58] VCH says that it seeks the appointment of a receiver manager over Seymour Health's property to enforce and protect its security interest, given the defaults under the Loan Agreement and GSA. VCH says that Seymour Health has been relying on VCH to meet its liabilities to suppliers, staff and employees, and has consistently sought rent deferrals. Finally, VCH says that the loans have increased to a level that seriously jeopardizes its collateral and Seymour Health's ability to repay the loans.

[59] In essence, VCH says that Seymour Health's financial ability to continue in operation is tenuous at best without ongoing financial support from VCH. VHC also questions the ability of Seymour Health to retain its relationships with its suppliers and landlords without further financial support. No other financial "white knight" has emerged to put Seymour Health on a solid financial footing.

[60] Seymour Health argues that the $6.8 million owing to VCH is insignificant compared to VCH's overall budget. That is unquestionably the case. However, all of those funds come from taxes paid by hardworking British Columbians who expect, and rightly so, that those funds be used in a fiscally responsible manner. That would include the collection of amounts loaned by VCH.

[61] Turning to Seymour Health's interests, I accept that the impact of a receivership to Seymour Health would be significant and negatively so (factor (k)). The result will be a replacement of current management with those of a receiver manager. In *Cascade Divide*, I stated:

> [81] ... Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.

[62] The ultimate impact on Seymour Health from any receivership remains to be seen. Initially, VCH sought an order that the receiver immediately implement a sales and solicitation process toward arranging a sale of the business in short order. That relief has now been withdrawn although the proposed order would still approve the receiver manager seeking a sale, with court approval.

[63] Prior to any sale being considered and possibly approved, Seymour Health would have the opportunity to seek other forms of financing or equity participation or some form of restructuring that might see some or all of its financial woes addressed, or least those relating to VCH. As stated above, to the extent that efforts were previously made to engage in discussions with VCH, nothing materialized and I am advised that Seymour Health is not making ongoing efforts to secure further financial support elsewhere.

[64] In addition, if any sale application is brought forward by a receiver manager, Seymour Health would have notice and be able to respond, including in relation to whether a sale is appropriate and, if so, what value can be achieved.

[65] To a large degree, and subject to my comments below about the litigation underway, Seymour Health's position in relation to VCH is that it wishes to be left alone to continue to operate as best it can for the time being, without repaying any amounts to VCH.

[66] I agree with VCH that such a position is untenable in the circumstances.

[67] The one—and significant—area of consensus between the parties is their concern for the BC citizens who rely on Seymour Health to provide necessary and urgent health care to them.

[68] Consideration of the interests of other persons, who have been described as "social stakeholders", in insolvency matters is a not new concept. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court stated:

> [60] … the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and

> creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).
>
> [Emphasis added.]

[69] In Virginia Torrie & Vern W. DaRe's article "The Participation of Social Stakeholders in CCAA Proceedings" (2019) Annual Review of Insolvency Law 9 (WL), the authors discuss circumstances where the court found consideration of such broader societal interests to be appropriate. I will mention a few examples taken from that article and from my own experience.

[70] In cases involving operations that raise environmental concerns, such as mines and pulp mills, Canadian courts have often considered the interests of the community in relation to such operations and their impact or potential impact on the environment, where the insolvency may raise risk factors. In *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. S.C.J.), the court stated:

> [9] … In a receivership such as this one, which reaches well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

[71] In the restructuring of a major Canadian airline, the interests of the public in having access to air travel as part of the Canadian transportation infrastructure were considered: *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 174.

[72] In *TLC (Re)*, 2015 BCSC 656 at paras. 63–65, I considered the broader public interests at play in light of the debtor's role in the protection or conservation of properties with significant historical, cultural, scientific or scenic value.

[73] Closer to the medical context here, in *Canadian Red Cross Society (Re),* [1998] O.J. No. 3306 (Ont. Gen. Div.) [Commercial List] at para. 50, the court considered the public interest that required a Canadian blood supply that operated with integrity and the need for a continuation of various humanitarian efforts.

[74] Consistent with its statutory mandate under the *HA Act*, VCH states that, in addition to seeking repayment of its loans, it has brought this proceeding given its concern that Seymour Health will be unable to continue to provide primary care services to patients, clients and residents in VCH's geographical region. Similarly, Seymour Health, and the medical professionals who work there remain committed to the well-being of their patients and recognize the need to operate on a basis that will provide the care that those patients need.

[75] I have no hesitation finding that the broader community interests engaged here are an appropriate additional consideration in terms of the health care needs of thousands of British Columbians.

Contractual Right to Appoint a Receiver

[76] Factor (g) considers whether the secured creditor has the right to appoint a receiver under the loan documentation. Here, VCH clearly has that contractual right. In addition, given the opposition mounted here by Seymour Health, VCH has properly sought to involve the Court in terms of the enforcement of its contractual right, in terms of factor (h).

[77] In *Textron Financial* at para. 55, Justice Willcock, as he then was, stated that a court may, where appropriate, place "considerable weight" on this factor. Further, at para. 75, the Court stated that such a term ameliorates the extraordinary nature of the remedy.

[78] Similarly, in *Maple Trade* at para. 26, the Court described that this can be a "strong factor" in support of imposing a receiver.

[79] The most recent discussion on this issue is found in *Ward Western BCCA* at paras. 56–67. The court confirms the general approach in that this factor is but one factor to be considered with the others and that it remains within the discretion of the judge to assign the weight that will be given to that factor, given the circumstances. See also *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Ltd.*, 2021 BCSC 2449 at para. 24.

[80] As Justice Macintosh concluded in *Ward Western BCSC*, I consider that the contractual right of VCH to appoint a receiver is only one factor to be considered. It is not by any means an overwhelming factor that takes significance over the other *Maple Trade* factors in these overall circumstances.

Seymour Health's Financial Picture

[81] Factors (a)–(e) require the court to consider the nature of the assets, the risks that are at play and the potential consequences of those risks materializing if a receiver manager is not appointed.

[82] In April 2023, Seymour Health presented a "Business Update and Action Plan" to VCH containing various financial information and proposals toward seeking consensus on a path forward that would allow it to continue operating, including a section entitled "Stabilization Plan" (the "Action Plan"). The Stabilization Plan is extensive and includes the curtailment of services and personnel, addressing landlord issues and pursuing other operations to generate more revenue.

[83] This is followed by a section entitled "Next Steps" in the Action Plan, being:

a) the continuation of the stabilization measures;

b) renewal of the Services Agreement to continue the UPCC at the City Centre Clinic;

c) the need for VCH to continue to fund an estimated $500,000 for two months until the “stabilization plan can be executed”; and

d) a restructuring of the outstanding amounts owing to VCH to a five-year term loan, along with a commitment to subordinate its security to a new capital provider and consider converting half of that amount to equity in lieu thereof.

[84] The picture that clearly emerges from the April 2023 materials is that Seymour Health’s only real option toward solving its financial difficulties lay in seeking concessions from VCH in terms of the collection of the outstanding amounts and even providing further funding. It is of some significance that Seymour Health had approached an entity about a capital raise, but Mr. Bining stated that would only be an option after the Action Plan had been implemented and Seymour Health had *returned* to profitability.

[85] Mr. Bining in his Affidavit #1 states that the filing of VCH’s petition seeking the appointment of a receiver manager signalled to him and his wife that they needed to urgently restructure the operations of Seymour Health to ensure that it is “viable without revenue from diagnostic services and from the UPCCs”. He indicates that he has now taken the “first step” in the restructuring efforts, by laying off staff.

[86] To my mind, this is a puzzling statement. The lack of revenue and losses arising from the Ancillary Services has been happening since 2019, many years ago.

[87] In addition, the mid-2022 “financial crisis” described by Mr. Bining and the later need for VCH’s “support package” from mid-2022 which still led to ongoing defaults, and the May 2023 demand letter would clearly have signalled then, if not before, the urgent need to restructure operations. Seymour Health’s approach to these circumstances, along with others that have recently arisen, as detailed below, are indicative of a reactive posture to ongoing financial problems that are only really addressed in a crisis mode.

[88] At this hearing, somewhat consistent with the Action Plan, Seymour Health indicates that it has taken the following recent steps to improve its financial status:

a) The North Shore Clinic UPCC services agreement with VCH expired some time ago and has been extended on a month-to-month basis. VCH is set to take over the UPCC and the entire North Shore Clinic in August 2023;

b) Seymour Health expects to receive increased revenue from MSP for primary care physician services, given changes implemented in February 2023;

c) New physicians are being recruited;

d) New services are being added, being podiatric surgery services and a sleep lab, although I understand that those facilities are not yet open. They are estimated to generate annual profits of $80,000–230,000;

e) Operational changes have been implemented, being staff layoffs; and

f) Seymour Health closed the Ancillary Services on June 7, 2023.

[89] I would first observe that the above operational changes have only recently been introduced and implemented and what effect, if any, they will have on Seymour Health's overall finances remains to be seen.

[90] Given the circumstances leading up to this application, it would have been helpful to have a fulsome understanding of the current finances of Seymour Health. Some financial information as of April 2023 is contained the Action Plan. Unfortunately, the information provided by Mr. Bining as to the *present status* of Seymour Health can only be described, to use his counsel's expression, as "thin".

[91] Mr. Bining states that he has now prepared a "restructuring plan" with the assistance of Fernando Ong Tsutiya, an Associate Principal, Growth Equity Partners at BDC. It is not clear to me why Seymour Health's own accountants were not

involved in developing a financial plan. This document was based on Mr. Bining's business decisions, and the financial data was then input by Mr. Tsutiya, using the program that BDC relied on in making its $10 million equity injection. It appears to have been created in June 2023.

[92] However, this document is not a "restructuring plan"; rather, it is more accurately described as a very "high-level" cash flow showing anticipated cash inflows and outflows on both a "with primary care and UPCC" scenario and a "no UPCC" basis (the "Cash Flow").

[93] The Cash Flow, as it relates to the "no UPCC" scenario (which is set to occur in August 2023), reveals the following:

a) Projected monthly revenue of $1,399,827;

b) Mandatory monthly cash outflows total about $1.1 million, for physician compensation, payroll, management expenses and pre-authorized debit expenses;

c) Curiously, what are described as "discretionary" cash outflows include ongoing rent at the West 7th Clinic and City Centre Clinic, although rent can hardly be described as discretionary from the landlord's point of view;

d) No amounts are to be paid to VCH toward the amounts owing under the Sub-Lease for the City Centre Clinic (which has since increased to include the June 2023 rent amounts, which were also not paid);

e) Monthly "vendor payments" of $107,341 are budgeted for June 2022. Yet, there is no information about whether this is just for ongoing expenses and if so, what they are;

f) There is no indication that the suppliers who refused to supply to Seymour Health in the not too distant past have now agreed to do so and, if so, on what terms; and

g) No contingency amounts have been budgeted.

[94] The Cash Flow reveals a cash surplus of $11,326 per month. While there is a reference to further income being generated by other ventures, such as the sleep lab and podiatric surgery, no details are provided.

[95] Unfortunately, the Cash Flow is silent on many issues that would have given a more accurate picture of Seymour Health's finances. The document raises more questions than it yields answers. No balance sheet has been produced that would indicate values for both assets and liabilities. For example, in the Action Plan (p. 36), Seymour Health refers to its accounts payable. Those amounts were not insignificant, totalling almost $3 million. Of more concern is that over $2 million of those payables were owing in excess of 120 days. This includes a large amount owing to VCH but also includes over $570,000 of "operating payables". There is no evidence as to what vendor amounts are currently outstanding. There is no information as to whether Seymour Health is up to date in respect of its employee remittances to Canada Revenue Agency. There is no information as to whether GST remittances are up to date.

[96] In an operating business, cash resources are important. I have no information as to the cash held by Seymour Health in terms of meeting its day-to-day financing needs. This is particularly concerning as I understand that Seymour Health does not have a line of credit to allow payments in the ordinary course that are not timed exactly with revenue.

[97] Other serious issues also arise with respect to the lease of the West 7th Clinic.

[98] In June 2022, the landlord's statements indicated that Seymour Health owed almost $305,000, which included rental amounts for May/June 2022. Payments were later made to "catch up" on the arrears. In June 2023, those statements indicated amounts owing of approximately $609,000.

[99] On the very eve of this application, June 15, 2023, the West 7th Clinic landlord served a demand for payment on Seymour Health, indicating that failing payment, it would possibly terminate the lease. By June 19, 2023, the matter had not resolved and the landlord advised VCH that if the rent was not paid, an eviction on June 21, 2023 would result. The landlord later told Mr. Pica that no action would be taken pending the outcome of this application.

[100] It would have been obvious to Mr. Bining that the potential scenario of being evicted by the West 7th Clinic landlord would not have assisted him in opposing the appointment of a receiver. I am now told that some very late in the day negotiations with the landlord have staved off any action. Apparently, there is an issue regarding the renewal of the lease and a large portion of the amount owing is said to relate to "overholding" charges which may or may not be payable. The landlord has agreed to a 30-day grace period in order to enter into "good faith" negotiations relating to a possible lease renewal and the amounts claimed by the landlord. This reprieve was only available to Seymour Health if it delivered payment to the landlord in the amount of $276,654, which was the amount not in dispute. That amount was paid on the first day of the hearing but I have no information as to where that money came from and what effect, if any, it has had on the overall financial picture.

[101] It remains to be seen what might happen in Seymour Health's negotiations with the West 7th Clinic landlord. However, what is manifestly clear from these events is that Seymour Health faces serious financial issues that are unresolved at this time and those issues are such that any actions by creditors against Seymour Health will affect its ability to continue to operate, failing timely if not urgent action and a resolution. The very late manner in which Mr. Bining addressed these issues can perhaps be taken as indicative of the precarious nature of the options that are available to Seymour Health at this time.

[102] All of this is to say that, from the limited financial information before me, it appears that Seymour Health's "financial crisis" in mid-2022 has continued and is very much an accurate description of its current state. I conclude that the only

reason why that crisis has not fully materialized into financial collapse since then is the funding that VCH provided, which has now decidedly come to an end and only recently in April 2023. I do not accept Seymour Health's contention that it can now continue operating "indefinitely", even without funding from VCH.

[103] In other words, I conclude that Seymour Health is back to being, not just on the edge of solvency, but in the thick of an insolvency.

[104] Although not strictly necessary given VCH's right to appoint a receiver, I consider that this financial picture gives rise to a serious risk of non-recovery of its loans if a receiver is not appointed to safeguard the assets and business operations.

[105] Despite Mr. Bining's very recent efforts to address certain aspects of Seymour Health's financial situation, the reality is that significant questions remain as to how—or more importantly, if—Seymour Health can continue to operate in the ordinary course. To some degree, the evidence indicates that Mr. Bining's very recent efforts may be, as the saying goes, "too little, too late".

[106] I agree that the path forward is tenuous at best and the precarious nature of the operations very much militates in favour of the appointment to avoid the manifestation of the risks that would result in serious repercussions to VCH and also, to the patients who rely on critical health services from the Clinics.

Dispute over Ancillary Services

[107] The major plank of Seymour Health's defence to the receivership relates to a dispute with VCH that has only recently emerged, at least on the face of the evidentiary record here. This engages factor (l), being the conduct of the parties.

[108] In his Affidavit #1, Mr. Bining refers to various communications from the Commission and the Ministry denying Seymour Health's requests for various approvals and exemptions with respect to the operations. These began in May 2019 and continue into 2020, and even into May 2023. In all of these cases, the Commission and the Ministry indicated that Seymour Health had not demonstrated

the necessary “urgent health or safety needs” and other criteria to justify what was sought.

[109] On June 8, 2023, Seymour Health filed a notice of civil claim (“NOCC”) in BCSC Action No. S234193 (Vancouver Registry). The named defendants include VCH, the Commission, and the Provincial government (the “Province”). As I have discussed above, Seymour Health stated that its “economic viability” in relation to the operation of the UPCCs was “critically dependent” on it being able to operate the Ancillary Services. Mr. Bining states that, if Seymour Health was not to be paid for the Ancillary Services, it would not have installed them in the first place.

[110] Seymour Health alleges in its NOCC: that VCH and the Province had a duty to warn Seymour Health that it would not get the Commission’s approval to bill for the Ancillary Services; that VCH and the Province breached their duty of honest contractual performance in failing to direct the Commission to grant the approvals or advise that such approvals would not be forthcoming; that the Province and Commission committed the tort of inducement of breach of contract when the Commission failed to approve the Ancillary Services; that the Commission has been unjustly enriched and owes Seymour Health restitution; and, finally, that all of defendants conspired to withhold the approvals with the intention of causing Seymour Health to suffer financial distress and create conditions for VCH’s “hostile takeover” of Seymour Health’s operations.

[111] In the relief sought in the NOCC, Seymour Health seeks damages. At this hearing, counsel suggested that the cost of building the Ancillary Services facility and feeding the negative cash flow was about $16 million. Counsel also referred to the possibility of seeking expectation damages which were estimated at $30 million, being the suggested value of the business (per BDC’s investment in 2022).

[112] Specifically in relation to this application, the NOCC seeks an injunction to restrain VCH from seeking the appointment of a receiver. At this hearing, Seymour Health seeks an order dismissing VCH’s petition or alternatively, converting this proceeding to an action and referring the matter to the trial list.

[113] The litigation is obviously in its early days and no responses to civil claim have been filed.

[114] Yasmin Jetha, VCH's Vice President of Community Services, has responded to the allegations in her Affidavit #1. She states that VCH did not require that Seymour Health establish the Ancillary Services at the City Centre Clinic as a prerequisite to providing either the primary care services or the UPCCs. VCH confirmed this to Mr. Bining in a further Letter of Agreement between the parties dated March 23, 2021.

[115] Further, Ms. Jetha states that, contrary to the allegations, VCH expressly warned Seymour Health that they would not likely obtain the approvals sought to operate and bill the Ancillary Services, leaving aside the fact that it was not even a VCH decision (it was the decision of either the Commission or other BC government agencies and VCH says that it had no involvement in those decisions).

[116] I agree with VCH that Mr. Bining's evidence as to the allegations is somewhat vague. He does not refer to any written or email communication from VCH that would suggest anything contrary to what Ms. Jetha states. Similarly, Dr. Cadesky's assertions that Seymour Health was "promised" the approvals is not supported by any documentation. Nevertheless, I am aware of the summary nature of this application and I will consider this evidence, such as it is.

[117] In any event, various questions come to mind in relation to Seymour Health's allegations.

[118] For example, Seymour Health operated the Ancillary Services without any corresponding payment from the Commission for years following their establishment in 2019. It only ultimately approached VCH for funding in mid-2022. In addition, in the NOCC, Seymour Health asserts that it had no other option but to accept VCH's funding and corresponding loan and security documentation on a "take or leave it" basis, resulting in it being coerced into entering into those contracts under

"economic distress". However, this is perhaps inconsistent with Seymour Health's current position that it can operate without further funding from VCH.

[119] The timing of the NOCC's filing also raises questions. Despite years in dealing with the lack of approvals and dealing with VCH and the Commission in relation to these matters, the NOCC was only filed on June 8, 2023. The lateness of the filing would strongly suggest that it was more of a defensive move in relation to VCH's enforcement actions, rather than a proactive move to advance a legitimate claim.

[120] I do not mean to suggest that I have made any determinations about the merit or lack of merit of Seymour Health's allegations. I agree with its counsel that serious and substantial questions are raised. The legal and factual issues include those relating to duties within the parties' relationships, conspiracy, set-off (both legal and equitable) and unjust enrichment. As VCH's counsel points out, both the Loan Agreement and GSA expressly prohibit any set-off; however, any unconscionability may negate such provisions: *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 at para. 45.

[121] Seymour Health's counsel also refers to issues of duress and unconscionability, although those are not raised specifically in the NOCC. I accept that the reference to "economic duress" in the "Statement of Facts" portion of the NOCC could be said to raise those issues, albeit very obliquely.

[122] When significant issues are raised, it will generally be the case that it is not possible to resolve the conflicts on an application such as this where there is a limited evidentiary record: see, for example, *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 at para. 40.

[123] I am certainly not in a position to decide any of these issues on the basis of the limited record before me; nor would it be appropriate for me to speculate on the merits of those issues on this application.

[124] Germane to the issue before me is the substantial documentation that Seymour Health executed in favour of VCH acknowledging the advances as loans to be repaid, and giving VCH the right to enforce collection against Seymour Health's assets. In argument, Seymour Health stated that the documentation is challenged as being unenforceable on the basis that the inability to bill for the Ancillary Services negatively affected its finances to the point that they were "forced to" sign the loan and security documentation in order to obtain the much-needed loans. It alleges that VCH obtained the signed agreements by putting more than "legitimate commercial pressure" on Seymour Health. Again, Seymour Health asserts that it had no alternative course of action and that it was "coerced" into signing the agreements under "economic duress".

[125] Yet, the relief sought in the NOCC does not attack the validity of the loan and security documentation; nor is the amount of the debt and loans put in dispute. The NOCC only seeks a *stay* of any enforcement proceeding. What I take from this pleading and counsel's submissions is that Seymour Health's overall strategy appears to be that it hopes to prosecute its claim against the defendants and, assuming the petition is converted to a trial, file a counterclaim to this proceeding. From there, if and when Seymour Health is successful in proving its allegations, the damage award will be offset against the amounts owing to VCH.

[126] As was discussed by Justice Wilson in *Yu Yue Construction & Development Ltd. v. 1098686 B.C. Ltd.*, 2022 BCSC 248 at para. 21, citing *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 (S.C.), it is important to distinguish between a defence and a counterclaim. What the defendant seeks is not really a defence to the debt or contractual claim to security; rather, it is an entirely separate cause of action that may give rise to a counterclaim to set off against the debt owing.

[127] Further, in *Ward Western BCCA*, the court confirmed that even the existence of a *bona fide* dispute concerning the debt and/or security is not determinative as to whether a receiver may be appointed. Justice Voith stated:

> [82] The appellants do not contest this assertion and it aligns with their own acknowledgement that even when an underlying debt is in dispute, a

> receiver manager may be appointed if there is evidence of serious potential prejudice or jeopardy to a creditor's rights to recover under its claim and security interests.
>
> [83] This proposition is also supported by several of the considerations that are identified in *Bennett on Receiverships*. For ease of reference I have repeated some of these factors, each of which was addressed by the judge:
>
> 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;

[128] Seymour Health cites *M & K Construction Limited et al. v. Kingdom Covenant International*, 2015 ONSC 2241. In that case, Justice McEwen refused to appoint a receiver where there was ongoing litigation between the parties involving triable issues. However, that case is distinguishable in that the property in issue was not diminishing and the value of the property greatly exceeded the outstanding debt (para. 6). A similar result and reasoning can be found in *Visser v. Godspeed Aviation Ltd.*, 2020 BCSC 1241 at paras. 46–47.

[129] On this point, I have also considered other authorities referred to by Seymour Health, where a *bona fide* dispute had arisen between the parties: *Canned Heat Marketing Inc. (Re) (Trustee of)* (1995), 36 C.B.R. (3d) 257 (B.C.S.C.) at paras. 14–19 and *Concept Marketing Ltd. (Re)*, [1975] O.J. No. 1625 at paras. 7–8.

[130] The scenarios in those cases that justified the court refusing or adjourning the appointment of a receiver pending a resolution of a *bona fide* dispute are not akin to the situation before me, as I have discussed above. I have found that the property in issue is in jeopardy and that important interests are at risk, being not only those of VCH but others. In essence, the ability of Seymour Health to even survive to prosecute its claim is very much in issue given its financial picture.

[131] That concern is also further heightened by the obvious question that arises, even assuming that Seymour Health is able to continue operations until the issues in

the NOCC are resolved. It goes without saying that the prosecution of Seymour Health's claim will be no easy task and the cost will not be insubstantial. I have no doubt that the defendants will vigorously defend the litigation and they obviously have substantial financial resources to mount any defence. I have no doubt that long and complex litigation will be required to resolve the issues.

[132] No answer is readily available to the question of financing the costs of the litigation, beyond counsel's suggestion in argument that Seymour Health might seek a funding partner to finance the litigation under what is commonly referred to as a litigation funding agreement.

[133] What I conclude from the overall circumstances is that, even assuming that a *bona fide* issue is present and VCH is not repaid in the meantime, Seymour Health's ability to prosecute its claims in the NOCC is highly questionable.

[134] I have considered the outstanding litigation in the NOCC as a factor in coming to my conclusion. However, I do not see it as a controlling factor given the circumstances. In fact, I conclude that the other circumstances very much attenuate Seymour Health's concerns that a receivership will prejudice, if not eliminate, its ability to advance its claims.

Role / Duties of a Receiver

[135] Factors (j), and (m)–(p), address what might be accomplished through a receivership, taking into account the powers that could be assigned to a receiver manager and the cost of that step in a proceeding.

[136] Seymour Health says that patient and physician outcomes will be worsened if an insolvency professional takes over. However, I have no doubt that the professionals at Ernst & Young Inc. ("E&Y") will obtain whatever assistance they need to perform their duties as a receiver manager. This situation is not unlike any other receivership where the insolvency professional is unfamiliar with the specific business involved. To some degree, this concern, if valid at all, is attenuated by the

fact that E&Y is already familiar with Seymour Health's operations and finances by reason of having conducted a "look-see" engagement for VCH in August 2022.

[137] Seymour Health states that VCH's own clinics are not well-run, and states that the "hybrid" model at the North Shore Clinic with VCH's unionized staff has not resulted in the success of the other Clinics that are operated by Seymour Health only. Seymour Health points to various examples of stresses and strains in BC's health care system, as has been discussed in public forums for some time. Dr. Cadesky states in his affidavit that he expects that significant physician attrition will occur if a receiver takes over the Clinics.

[138] For obvious reasons, this is a very contentious subject and VCH strenuously objects to any such accusation or inference that would suggest that its delivery of health care services to patients is wanting.

[139] In my view, it is neither necessary nor desirable to wade into the issue of quality of care as between Seymour Health and VCH, even assuming that any difference exists, upon which I make no comment. I need not address this issue for the purpose of reaching a decision here.

[140] In addition, what changes, if any, that may arise in the operation of the Clinics arising from any receivership are, in my view, entirely speculative.

[141] The primary purpose of any receivership is to stabilize the situation for the benefit of all stakeholders. These stakeholders would include the physicians and other staff. The stabilization is accomplished in part by imposing a stay of proceeding against a debtor and its property. A stay of proceeding avoids creditors taking unilateral action against the debtor and its assets to the detriment of the overall estate. It also allows for an orderly continuation of operations toward maximizing the value of the estate for all stakeholders to ensure a fair distribution, if a sale ultimately results and proceeds are realized.

[142] I see that as a significant benefit here in that the receiver manager is to be granted the power to borrow funds to ensure a continuation of Seymour Health's

operations. The proposed order at para. 25 would authorize borrowings of up to $2.5 million. I am advised that VCH has committed to providing that funding, which will be in priority to its present secured loans.

[143] I accept that there will be a cost to the estate by a receivership and that, in this case, that cost may be substantial. However, this is not unusual and unfortunately, it is simply an inevitable expense in these circumstances where the involvement of an insolvency professional is required to address these urgent concerns.

[144] Before I leave the discussion of issues concerning the receiver manager, I acknowledge that Seymour Health objected to the Court's consideration of E&Y's Proposed Receiver's Report dated June 7, 2023. I have not relied on that report, save as it relates to E&Y's qualifications (which are not in dispute) and also as to the fact of its prior involvement in August 2022, as set out above.

CONCLUSION

[145] I find that the appointment of a receiver manager is just and convenient. The order appointing E&Y as receiver manager is granted.

[146] I accept the changes to the proposed order, as discussed by BDC's counsel, to remove the receiver's power to assign Seymour Health into bankruptcy and another unnecessary provision regarding subsidiaries. Otherwise, BDC takes no position on the application.

[147] I also agree that it is appropriate to amend para. 3(j) of the proposed order that allows the receiver to manage and direct all legal proceedings in respect of Seymour Health and its property. Given the concerns raised by Seymour Health in relation to its NOCC, the receiver is authorized to take any steps in relation to that claim only with the agreement of Seymour Health or as approved by this Court.

[148] Seymour Health's application filed June 21, 2023 to convert this petition proceeding to an action and refer the matter to the trial list pursuant to R. 22-1(7) is dismissed.

[149] VCH is entitled to its solicitor-client costs in accordance with the terms of the Loan Agreement (s. 16.1) and the GSA (Article 8.7(b)). I see no basis upon which I would exercise my discretion to deny those costs in that event: *Rozdilsky v. Kokanee Mortgage M.I.C. Ltd.,* 2020 SKCA 1 at paras. 8–13; *Cardero Coal Ltd. v. Carbon Creek Partnership,* 2022 BCSC 1103 at paras. 41–43.

"Fitzpatrick J."

TAB 10

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), 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), 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), 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