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PLAINTIFF	LANYARD CAPITAL CORPORATION
DEFENDANTS	LT CAPITAL LIMITED and XIU LING CAI
DOCUMENT	**BENCH BRIEF OF THE PLAINTIFF/APPLICANT**

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BENCH BRIEF IN SUPPORT OF APPLICATION TO APPOINT A RECEIVER AND MANAGER

TO BE HEARD BY THE HONOURABLE JUSTICE C.C.J. FEASBY (Commercial List)
November 5, 2026 at 2:00 P.M.

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I. OVERVIEW

1. This Bench Brief is submitted by the Plaintiff/Applicant, Lanyard Capital Corporation ("**Lanyard**" or the "**Plaintiff**"), in support of an application (the "**Application**") for the appointment of D. Manning & Associates Inc. ("**D Manning**") as receiver and manager (the "**Receiver**") over certain "**Property**" (as defined in the proposed Receivership Order).

2. The Property comprises an office building located at 9650 20 Avenue NW in Edmonton, Alberta known as the "**Advanced Technology Centre**", and vacant development lands located at 9660 20 Avenue NW, together with all related rents, leases, personal property and bank accounts. The Property is owned by the Defendant/Respondent, LT Capital Limited ("**LT Capital**").

3. The within proceedings began on May 22, 2026, when the Plaintiff filed its Statement of Claim against LT Capital and its principal, Xiu Ling Cai ("**Ms. Cai**", and together with LT Capital, the "**Defendants**"), due to the Defendants having defaulted on the terms of the Loan Agreement and Lanyard's first-ranking security. The Defendants did not defend the Action and were noted in default.

4. Subsequently, the Plaintiff filed an application for a redemption order in respect of the mortgaged lands that are the subject of this Action. Applications Judge L.R. Birkett of this Honourable Court granted the redemption order on August 11, 2026 (the "**Redemption Order**"). The redemption period contemplated by the Redemption Order expired on September 11, 2026.

5. Since then, as is more fully described below and in the Second Chelin Affidavit (as defined below), the Plaintiff has learned of certain facts and circumstances making a court-appointed Receiver necessary, just and convenient, in order to protect and preserve the Property while the judicial listing is carried out. For greater clarity, the proposed receivership is limited in scope, in that it would not empower the Receiver to market or sell the Property, the latter of which will continue under the Redemption Order.

6. Among other things, the Defendants' (i) lack of equity in the Property, (ii) failure to prevent or fix physical damage to the Property, (iii) apparent lack of insurance, (iv) defaults to their various other creditors, and (v) failure to pay property taxes when due, raise serious concerns over the Defendants' ability to protect and preserve the Property pending a Court sale. A court-appointed Receiver is therefore needed to protect the interests of Lanyard, as first-secured lender of the Property.

7. Additionally, Lanyard's efforts to exercise its rights under the Redemption Order have been interfered with by the Defendants, due to their failure to cooperate in a timely manner. The appointment of the Receiver will allow the judicial listing agent to effectively and efficiently market the Property without further delay or disruption, and by extension, to enable Lanyard to realize on its first-ranking security in a value maximizing manner.

II. FACTUAL BACKGROUND

8. The background for the Application is set out in the Affidavit of Default of Brian Chelin sworn on June 30, 2026 and filed on July 2, 2026 (the "**First Chelin Affidavit**"), and in the Affidavit for Appointment of Receiver sworn and filed on October 28, 2026 (the "**Second Chelin Affidavit**", and together with the First Chelin Affidavit, the "**Chelin Affidavits**").

9. The Plaintiff relies on, and incorporates by reference, the facts as set out in the Chelin Affidavits.[1]

III. ISSUE

10. The sole issue before this Honourable Court is whether the appointment of D. Manning & Associates Inc. as Receiver of the Property is just or convenient?

IV. LAW AND ARGUMENT

a) LEGAL PRINCIPLES GOVERNING THE COURT-APPOINTMENT OF A RECEIVER

This Court Has Discretion to Appoint a Receiver Where Just or Convenient

11. Under Subsection 243(1) of the *BIA*, on the application of a "secured creditor" who has complied with the statutory notice period, the Court may appoint a receiver over the property of an "insolvent person". The Court may grant the appointment of a receiver where it considers that it is "just or convenient" to do so.[2]

12. Provincial legislation contemplates a similar test for the appointment of a receiver. Under Subsection 13(2) of the *Judicature Act* (Alberta) the Court may appoint a receiver where it is "just or convenient".[3]

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[1] Unless otherwise indicated, capitalized terms used herein have the meanings given to them in the Chelin Affidavits, as applicable.
[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1)-(1.1) (the "***BIA***") **[TAB 1]**.
[3] *Judicature Act,* RSA 2000, c J-2, s 13(2) (the "***Judicature Act***") **[TAB 2]**.

13. In the leading decision of *Paragon Capital Corp v Merchants & Traders Assurance Co*,[4] Justice Romaine of this Court held that in analyzing whether a receiver is "just or convenient" the Court may consider the list of non-exhaustive factors enumerated in *Bennett on Receiverships*. The *Bennett* factors include:[5]

(a) 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;

(b) the preservation and protection of the property pending judicial resolution;

(c) the balance of convenience to the parties;

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

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

(f) the conduct of the parties; and

(g) the likelihood of maximizing return to the parties.

14. More recent authority of this Court adds the "secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity" as an additional potentially relevant factor.[6]

15. Further, while some authority indicates that the Court should apply the tripartite test for injunctive relief when considering a receivership application, those factors are not required where the applicant is a security holder.[7] Instead, where the security documents authorize the appointment of a receiver, the inquiry should be whether the court appointment of a receiver is "preferable".[8]

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[4] *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 ("***Paragon***") **[TAB 3]**; see also *Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11 at para 30 ("***Smiling Simba***") [**TAB 4**].
[5] *Paragon, supra* at para 27, citing Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada, 1995) at p 130 [**TAB 3**].
[6] *Smiling Simba, supra* at para 30(q) [**TAB 4**]
[7] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at paras 16-17 **[TAB 5]**; see also *Smiling Simba, supra* at para 30(a) [**TAB 4**].
[8] *Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19 at para 37 **[TAB 6]**.

b) THE APPOINTMENT OF D MANNING AS RECEIVER OF THE PROPERTY IS JUST AND CONVENIENT

The Statutory Requirements Under the BIA are Satisfied

16. To begin, Lanyard has satisfied the procedural requirements for the appointment of a Receiver under the *BIA*. In particular:

    (a) Lanyard is a secured creditor of LT Capital;

    (b) LT Capital is insolvent, including since it is unable to pay the Loan, which is now due and owing in its entirety, and since it appears to have failed to pay the second mortgagee, Pham, which has registered a Certificate of Lis Pendens against the Lands;[9] and

    (c) Lanyard has satisfied the notice requirement under Section 244 of the *BIA*, by having delivered the Demand and NITES to LT Capital on or about May 8, 2026.[10]

The Bennett Factors Demonstrate a Receiver is Just and Convenient

17. The following *Bennett* factors demonstrate that the appointment of D Manning as Receiver of the Property is just and convenient.

Risk to Lanyard as First Secured-Lender, and Preserving the Property

18. First, if a Receiver is not appointed over the Property, there is a real risk of prejudice to Lanyard. Based on the appraised values in Lanyard's Affidavit of Value, there is no equity in the Property for LT Capital, thereby significantly reducing the incentive on the part of LT Capital to preserve and protect the Property.[11] In fact, a recent viewing of the Property has revealed broken and damaged windows, broken ceiling tiles, water damage, and other damage, which demonstrate a lack of ongoing basic maintenance at the Advanced Technology Centre consistent with LT Capital's lack of residual economic interest in the Property.[12]

19. Beyond physical damage to the Advanced Technology Centre, Lanyard is concerned with the tax penalties that have been issued by the City of Edmonton against LT Capital, which Lanyard understands are due to a failure by LT Capital to pay 2026 property taxes for the Lands when due.[13]

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[9] Second Chelin Affidavit at paras 21, 25, and 39-40, and Exhibit "J"; and *BIA, supra* at s 2, "insolvent person" [**TAB 1**].
[10] Second Chelin Affidavit at para 20; and First Chelin Affidavit at para 16, and Exhibit "G".
[11] Second Chelin Affidavit at para 43(k), Exhibit "C", and Exhibit "E".
[12] Second Chelin Affidavit at paras 33-34, and Exhibit "H".
[13] Second Chelin Affidavit at para 35, and Exhibit "I".

Including the penalties, the outstanding balance owing to the City of Edmonton on the Lands totals approximately $190,000.[14]

20. Similarly, in April 2026, SGI Canada Insurance issued a notice advising that LT Capital's insurance policy for the Property would be cancelled in May 2026 for lack of payment. Lanyard has received no evidence that LT Capital obtained replacement coverage, and believes the Property is not currently insured by LT Capital; the only active coverage is Lanyard's mortgage impairment policy.[15]

21. Further, LT Capital is not currently making any payments on the Loan, despite the building being occupied by at least some commercial tenants who presumably pay rents on a periodic basis.[16] Pursuant to its mortgage and assignment of rents, Lanyard has a first-ranking security interest in rents, and Lanyard is entitled to have these rents collected, preserved and protected.[17] Relatedly, Lanyard understands that the Advanced Technology Centre is only about 30 percent occupied by commercial tenants, which raises the additional concern that LT Capital is not actively leasing the building—a Receiver over the Property, with leasing powers in the manner contemplated, would enhance and preserve the business and value of the Property pending its sale.

22. Viewed as a whole, the material facts depict that LT Capital is prepared to allow the Property to deteriorate and be placed at risk. Accordingly, a Receiver is necessary to prevent prejudice to Lanyard as the first secured creditor.

Difficulty Encountered with the Debtor, and Conduct of the Parties

23. Second, Lanyard has faced difficulty in obtaining LT Capital's cooperation in carrying out the judicial listing directed by the Redemption Order. In particular, it took five attempts of the Realtor, and further correspondence from Lanyard, simply to arrange the Realtor's initial visit of the Advanced Technology Centre. Lanyard's counsel was also required to send a demand letter.[18]

24. Such lack of cooperation and diligence has interfered with Lanyard's right to market and sell the Lands in an efficient way. Further, Ms. Cai's absence and apparent unreachability leads Lanyard to reasonably believe that this lack of cooperation and communication will continue.[19] The

[14] Second Chelin Affidavit at para 35, and Exhibit "I".
[15] Second Chelin Affidavit at para 43(e), and Exhibit "K".
[16] Second Chelin Affidavit at para 43(g).
[17] First Chelin Affidavit at Exhibit "B" at ss. 4.1-4.7, and Exhibit "C" at s. 1.
[18] Second Chelin Affidavit at paras 28-30, Exhibit "F", and Exhibit "G".
[19] Second Chelin Affidavit at para 43(h).

appointment of a Receiver is therefore necessary to mitigate delays and unnecessary cost for the judicial listing.

Contractual Rights to Appoint Receiver

25. Third, Lanyard is a first-ranking secured creditor in respect of the Property and has express contractual rights under the Security to appoint a Receiver. Specifically, under the Mortgage and GSA, Lanyard has the contractual right to appoint or seek the appointment of a Receiver in respect of the Lands, the rents and leases relating to the Lands, and the personal property relating to the Lands.[20]

26. All of the Security is valid and now enforceable (including the Mortgage, which was declared as such in the Redemption Order[21]), and Lanyard's various contractual rights to appoint a Receiver are a further significant factor supporting the relief sought.

Other Factors

27. Finally, the following additional factors support the appointment of D Manning as Receiver:

(a) **Balance of Convenience**: Having regard to the significant debt due and owing to Lanyard (as confirmed by the Redemption Order), the difficulty Lanyard has faced in exercising its right to market the Lands pursuant to the judicial listing, the risk to the Property, and the limited scope of the proposed receivership, among other things, the balance of convenience favours the appointment of the Receiver.

(b) **Lanyard's Good Faith and Commercial Reasonableness**: In pursuing the within Application and the Redemption Application, Lanyard has acted in good faith and commercially reasonably and not acted precipitously. Among other things, Lanyard did not immediately seek the appointment of a Receiver, but rather attempted to realize upon its Security through ordinary commercial foreclosure proceedings. It was only after the facts and circumstances detailed in the Second Chelin Affidavit came to light that Lanyard pursued the Application.

(c) **Cost to the Parties / Maximizing Returns**: Finally, as outlined above, the scope of the proposed receivership is limited. The Receiver will not have the power of sale and will

[20] Second Chelin Affidavit at para 14; and First Chelin Affidavit at Exhibit "B", and Exhibit "D".
[21] Second Chelin Affidavit at para 23(a).

instead be tasked with preserving the Property pending its sale. Given this limited mandate, the professional fees and expenses associated with the receivership are expected to be comparatively modest. In contrast, the anticipated benefits of a more efficient judicial listing process and preservation of the Property's value are expected to maximize returns to stakeholders.

V. CONCLUSION

28. For all of the foregoing reasons, the Plaintiff respectfully requests that this Honourable Court grant an Order appointing D Manning as Receiver of the Property, with costs in favour of the Plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of November, 2026.

LAWSON LUNDELL LLP

Per: 

Jack R. Maslen
Solicitors for the Plaintiff/Applicant, Lanyard Capital Corporation

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 2, 243, 244
2.	*Judicature Act*, RSA 2000, c J-2, s 13(2)
3.	*Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430
4.	*Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11
5.	*Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43
6.	*Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
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")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

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"common-law partnership" means the relationship between two persons who are common-law partners of each other; *("union de fait")*

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *("personne morale")*

Proposed Amendment — 2 "corporation"

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies, loan companies or prescribed public post-secondary educational institutions; *("personne morale")*

2024, c. 15, s. 273 [To come into force June 20, 2026.]

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *("tribunal")*

"creditor" means a person having a claim provable as a claim under this Act; *("créancier")*

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

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(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

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(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"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")*

"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; *("personne")*

"prescribed"

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(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person*

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who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

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"child" includes a child born out of marriage;

Judicial Consideration (7)

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

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

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

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

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

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

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

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

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

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

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

Judicial Consideration (9)

Currency
Federal English Statutes reflect amendments current to July 30, 2025
Federal English Regulations Current to Gazette Vol. 159:5 (February 26, 2025)

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

s 244.

Currency

244.

244(1)Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

244(2)Period of notice

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

244(2.1)No advance consent

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

244(3)Exception

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

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

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

244(4)Idem

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

Amendment History

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

Currency

Federal English Statutes reflect amendments current to July 30, 2025
Federal English Regulations Current to Gazette Vol. 159:5 (February 26, 2025)

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TAB 2

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

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

s 13. Part performance

Currency

13.Part performance

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

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

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

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Judicial Consideration (1)

Currency
Alberta Current to Gazette Vol. 121:6 (March 31, 2025)

End of Document

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TAB 3

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

2002 ABQB 430 (CanLII)

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.

2002 ABQB 430 (CanLII)

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.

2002 ABQB 430 (CanLII)

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*

2002 ABQB 430 (CanLII)

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

2002 ABQB 430 (CanLII)

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;

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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

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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.

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[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.

2002 ABQB 430 (CanLII)

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TAB 4

Court of King's Bench of Alberta

Citation: Bank of Nova Scotia v Smiling Simba Learning Academy Inc, 2025 ABKB 11

Date: 20250110
Docket: 2401 04463
Registry: Calgary

2025 ABKB 11 (CanLII)

Between:

Bank of Nova Scotia

Plaintiff/Applicant

- and -

Smiling Simba Learning Academy Inc.,
Uma Pujari and Prince Chahal

Defendants/Respondents

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

[2] For the reasons set out below, the receivership order requested is granted.

II. Background

[3] BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as

"Special Purpose – Community Service (S-CS)", which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

[4] BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of $8.2 million.

[5] From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal's involvement in the potential childcare operator in March 2023.

[6] SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

[7] The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the "**Loans**".

[8] By March 31, 2024, the amount outstanding on the Loans was over $9 million.

[9] The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS's security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

[10] SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

[11] On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[12] On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to "collateralized debt" in the amount of approximately $900,000. SSLA did not obtain BNS' consent to this registration.

[13] On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of $200,000. SSLA did not obtain BNS' consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was $164,487.56 (based on Mortgagequote's Statement of Claim against SSLA).

[14] In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

[15] On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

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[16] On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024.[1] Chahal's evidence is that the tenant is currently paying monthly rent of $28,200[2]. SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

[17] On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

[18] On April 2, 2024, BNS filed a receivership application in respect of SSLA.

[19] The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

[20] In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of $9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

[21] SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

[22] SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

[23] On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

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[1] The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

[2] The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

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[24] As of December 30, 2024, the amount outstanding under the Loans was $10,170,652.26.

[25] The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

[26] The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

[27] The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

[28] The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24.

[29] As noted in ***Higgerty***, at para 25, which I adopt:

> [25] A receivership order "should not be lightly granted": ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[30] Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd***, 2024 ABKB 635 at para 65 [***Mayfield***]; ***Worth Ventures Ltd v MegaSys Enterprises Ltd***, 2024 ABKB 385 at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd***, 2023 ABKB 718 at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at para 33; ***Schendel Management Ltd***, 2019 ABQB 545 at paras 44-45; ***Murphy v Cahill***, 2013 ABQB 335 at para

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71; ***Kasten*** at para 13; ***Romspen Investment Corporation v Hargate Properties Inc***, 2011 ABQB 759 at para 20; ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27. Those factors include:

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

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

(c) the nature of the property;

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

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

(f) the balance of convenience to the parties;

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

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

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

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

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

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

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver; and

(q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

[31] In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: ***Mayfield*** at para 40. The applicable principles were summarized by Justice Lema in ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 60-63 (footnotes omitted):

> [60] On how to approach a consent order, the guiding principles are as follows:
>
> • the Court is not obliged, from the mere fact of consent, to grant a consent order; and

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- the Court must be satisfied (at minimum) that:
    - it has the jurisdiction to grant the order;
    - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
    - consent has actually been provided;
    - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
    - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
    - the proposed relief does not exceed that consented to; and
    - consent aside, the ordered relief is warranted in the circumstances.

> [61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.
>
> [62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.
>
> [63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

[32] In assessing the effect of a debtor's consent to a receivership order, Justice Lema went on to point out in ***Servus***, at para 66 (emphasis in original): "by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*". In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

[33] No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what

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should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

[35] I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

[36] BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in ***Paragon***, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

[37] Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 1953 at para 43; ***Murphy*** at para 72.

b. Risk to Security

[38] SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

[39] SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

[40] I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: ***Braile v Calgary (Police Service)***, 2018 ABCA 109 at para 23; ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2005 ABCA 46 at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was $6,790,000 (and the Property is in tax arrears of $359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

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[41] While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

[42] It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

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c. Nature of the Property

[43] BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

[44] SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

[45] Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): ***Mayfield*** at para 40; ***Servus*** at paras 42-50; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

[46] I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

[47] This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

[48] SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

[49] SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

[50] A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

[51] SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

[52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: ***Bank of Montreal v Haro-Thurlow Street Project Limited Partnership***, 2024 BCSC 47 ***[Haro-Thurlow Street Project***]at para 95.

[53] In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: ***Haro-Thurlow Street Project*** at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

[54] SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

[55] SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

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3. Conclusion re: Receivership

[56] For those reasons, I find the appointment of a receiver is just and convenient.

[57] Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

[58] I grant the receivership order as proposed by BNS.

Heard on the January 6th and 9th, 2025.
Dated at Calgary, Alberta this 10th day of January, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Natalie Thompson
for Bank of Nova Scotia

Randolph W. Mitchell
for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal

Cale W. Ellis Toddington (January 9, 2025 only) and Madona Markaj (student-at-law)
for Mortgagequote Canada Corp.

Anthony Merah
for 2499311 Alberta Ltd

Derek Pontin (January 9, 2025 only)
for the proposed receiver

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TAB 5

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43

2016 ABQB 43 (CanLII)

Date: 20160121
Docket: 1501 12220
Registry: Calgary

Between:

Alberta Treasury Branches

Applicant

- and -

COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc.

Respondents

Oral Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik

Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

[3] On November 10, 2015 Justice Jeffrey allowed expanded powers with respect to several subsidiaries and adjourned the claims with respect to Conserve 1st and POA to November 27, 2015 and ordered further information to be disclosed.

[4] Mr. Crombie, the President and sole director of POA, subsequently filed an Affidavit on November 23, 2015 and was cross-examined on it on November 24, 2015. A supplemental, correcting Affidavit was filed on November 26, 2015.

[5] The receiver filed a second report on November 27, 2015 outlining its concerns about the information that had been obtained including:

1) 100,000 shares had been issued and transferred to Arrow Point Oil and Gas Ltd. (Arrow Point) and then to Capital Asia Group Pte Ltd (CAGOM) thereby diluting Conserve's 1000 shares and sole ownership position in POA;

2) Some oil and gas wells had transferred from COGI (a subsidiary of Conserve) to POA but COGI still holds the assets' title and there were potential substantial abandonment liabilities in POA.

[6] Therefore, the receiver sought an adjournment of the application set for November 27, 2015 to investigate further. The adjournment application was allowed to January 14, 2016 by Justice Hawco, with deadlines about further material to be filed, and a standstill Order was granted wherein certain powers with respect to the assets, shares, and management of POA were detailed.

[7] The second application filed January 4, 2016 seeks a receivership order of POA, and alternatively an order seeking certain rights and powers over POA and an order that net proceeds from the operation of assets of POA be paid into court.

[8] The receiver seeks to be appointed pursuant to the oppression remedy under s.242 of the ***ABCA*** or s. 13(2) of the ***Judicature Act***.

[9] A third Affidavit was filed by Mr. Crombie, along with a supplemental brief of POA and a brief by CAGOM on January 7, 2016 opposing the relief sought by the receiver.

[10] Meantime, on January 6th, 2016, Justice Horner determined that the Conserve subsidiary Conserve 1st was bound by a guarantee of January 27, 2012, Debenture, Demand and Pledge Agreement and GSA in favour of ATB, and as such allowed the receiver to be appointed over Conserve 1st's assets etc. pursuant to s.243(1) of the ***Bankruptcy and Insolvency Act***.

The law

[11] The parties did not disagree on the law with respect to appointing a receiver in these circumstances but did disagree about its application on the facts as they have slowly and confusingly emerged over the last couple of months.

[12] As noted above, the receiver is bringing the application on the grounds of s 242 of the ***ABCA*** and s 13 (2) of the ***Judicature Act.*** The ***ABCA*** section reads as follows:

242 (1) A complainant may apply to the Court for an order under this section,

(2) If, on application under subsection (1) the Court is satisfied that in respect of a

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corporation or any of its affiliates

(a) Any act or omission of the corporation or any of its affiliates effects a result,

(b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

Analysis.

Serious issue to be tried

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.

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1. Share transaction

[20] In my view, the transaction in questions does not violate what Conserve's reasonable expectations of corporate and financial behaviour of POA should have been at the time, for the following reasons.

[21] Conserve is a shareholder of POA wherein it paid $1000 for 1000 shares. It was the sole shareholder since its inception in 2012. There is no evidence that Conserve put any other funds into POA.

[22] POA's business involves the acquisition and operation of wells. In order to fund such acquisitions, POA uses funds raised and advanced by CAGOM. CAGOM has security in the nature of guarantees and GSAs on POA's assets. The funds are used to acquire properties, having those properties operated by third parties, including but not exclusively COGI, and receiving revenues from those properties which are then repaid to investors, who reside in Asia.

[23] Conserve and COGI did some administration duties for POA, including managing most of its wells. The terms of the administration and operating duties, and remuneration for such responsibilities, were not before me.

[24] POA has regularly scheduled payments to its secured creditor CAGOM for distribution to its Asian investors.

[25] Mr. David Crombie is the sole director of Conserve and POA and a shareholder of Conserve. He does not hold any personal shares in POA. Although Mr. Crombie suggested that he was a director and officer of Arrow Point in questioning, his lawyer advised at the hearing that this was in error and that he had no relationship to Arrow Point.

[26] The applicant ATB has security over Conserve and COGI's assets. The debt outstanding, as of October 20, 2015, was $300,000 and $34 M respectively.

[27] However, ATB confirmed at the hearing that, contrary to the receiver's belief, it did not have any security over any of POA's assets.

[28] In March 2015 POA entered into a secured demand loan agreement with Arrow Point wherein Arrow Point lent POA $7 M in return for 100,000 shares. Initially these shares were common shares but ultimately POA issued and transferred preferred shares to Arrow which could be redeemed into common shares. The cost of the shares in the agreement was initially suggested to be $1 per share but this was corrected by Mr. Crombie subsequently to be $1 for all of the shares.

[29] The loan was obtained since POA was required to make a substantial payment to investors in April 2015. Funds were advanced on the loan by way of a payment on March 12 2015 in the amount of $4,823,000 and March 27,2015 of $4,000,000.

[30] The receiver complains that there was not consideration for the shares, the issuance of the shares diluted Conserve's shareholding to 1 %, and certain corporate requirements were not conducted.

[31] The Affidavit filed by Mr. Crombie of January 7, 2016 answers many of the concerns. It is unfortunate that this detail was not forthcoming initially. POA's lawyer suggested that this was because oppression was not claimed by the receiver until the January 4 application so it did not know it needed this information. This excuse is somewhat hollow in my view considering that

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there is mention of this transaction in the initial Nov 23 affidavit and Mr. Crombie was questioned on this but gave incorrect and confusing answers, not out of malice, but likely confusion on his own part.

[32] The corporate structure in this case, which I've only outlined a small part which is relevant to these applications, is rather vast and convoluted, involves many of the same human players, and seems to be constantly changing. Accordingly, it is no surprise that the receiver has had difficulties figuring it out, and as an officer of the court he has raised many reasonable questions of concern.

[33] In my view, the evidence discloses that POA has its own separate financing structure in place which was in peril in early 2015. It is reasonable to understand that it would try to get further financing. The deal made with Arrow Point appears to have allowed POA to continue on with its operations. To the extent that this meant diluting the share value and diluting Conserve's position, this was likely a necessary evil.

[34] The receiver complains that these shares have since been converted into common shares and transferred to COGAM from Arrow Point. The deal between these parties was not in evidence. In any event this transfer was not done by POA. It is hardly surprising to me that COGAM, POA's major creditor, would want to solidify its position further by controlling POA via its shareholding position. In this regard, the receiver has now had a chance to review the five guarantees granted by POA to COGAM between November 1, 2013 and March 1, 2015 which total approximately $70 M. Other credit documents have not yet been reviewed but CAGOM suggested at the hearing that it was open to cooperate in this regard.

[35] Mr. Crombie advised that the value of POA at the time the shares were issued to Arrow Point was either $35 or $30 M (another example of rather careless testimony). In any event, on this evidence, the value of POA according to this testimony, and therefore of Conserve's shares, would have been nil.

[36] There has been far from forensic accounting dealing with the value of these shares, as pointed out by the solicitor of ATB, however, for this application's purposes the evidence sets out what could be considered to be a reasonable transaction in terms of the issuance of these shares even though there was dilution of Conserve's shareholding

[37] The receiver complains that Conserve was not given due notice of the transaction. However, Mr. Crombie, wearing dual hats for Conserve and POA was well aware of the transaction so notice was not necessary as the transaction was well known to Conserve through its director.

[38] POA admits that it did not comply with all of its statutory obligations required under the ***ABCA*** i.e.holding the requisite shareholder meetings etc. However, in the whole of the circumstances, I do not find this to be oppressive conduct at the time. Note that this transaction occurred well before the receiver was appointed in October.

[39] Finally, I asked the receiver if he had another suggestion about how Conserve's share position could have been better protected. The receiver suggested in its brief that Conserve was prevented from taking "preventative steps". No concrete solution was forthcoming from the receiver about what these steps could have been. He suggested that there was no need for Arrow Point to have a shareholder position at the time. However, it appears that this was the deal.

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Certainly if POA's credit had been called at that time, it appears that Conserve's shareholding may have been worthless in any event.

[40] In sum, I agree that there are many details with respect to this share transaction which are missing and the veracity of the evidence given by Mr. Crombie has not been thoroughly tested. The receiver and ATB want the power to examine this transaction with the powers of a receivership. There is a serious issue with respect to the dilution of the shares but there is also a very reasonable defence to this potentially oppressive conduct which, if found true, would answer the situation for the reasons I have outlined.

[41] The other serious issue is the asset sale which I will now turn to.

2. Asset sale

[42] POA purchased various well assets from COGI in 2015. A letter from COGI to ATB dated June 26, 2015 was put into evidence via Mr. Crombie's January 7, 2016 Affidavit. In it COGI advised ATB that POA was purchasing various interests for the purchase price of $3M, $5.7M and $11.9M approximately and that the funds received from POA would go to reduce COGI's credit facility with ATB. The closing dates were July 15, August 5, and October14, 2015 respectively for the various sales.

[43] The sale agreements were not put into evidence in this proceeding (although they were in evidence in the CCAA proceeding against COGI in late August 2015). In any event, I am to understand that the beneficial title to these wells were transferred to POA and that the wells continued to be operated by, and remain on legal title to, COGI. COGI collects the oil sale production proceeds and pays them to POA.

[44] The receiver was concerned that pursuant to the agreement, since COGI maintains legal title to the wells, it may face AER abandonment and reclamation liability if that were to occur to those wells. According to the operating manager the receiver has put into place since the receivership of COGI in October, Niven Fischer Energy Services Inc., the net potential liability is almost $15 M.

[45] The receiver argues that since COGI needs to pay the proceeds of these wells to POA and that these funds will be sent off to investors in Asia, COGI has a large liability from POA with no corresponding benefit. Accordingly, the receiver has been withholding payments to POA over the last few months. The gross revenue in September 2015 was $285,000 and in October it was $183,000. Operational expenses can be deducted from these amounts however, as noted above, it was not in evidence what these amounts are. The receiver wants an order that the net funds be paid into Court as an alternative to a receivership order.

[46] POA replies that the sale transactions represented full market value, they were approved by ATB, and that the revenue represents trust funds that the receiver is improperly withholding. This withholding is to the prejudice of POA which has obligations to its own creditors and investors.

[47] With respect to the potential AER liability, POA is attempting to deal with the problem. Indeed, contrary to Niven Fisher's opinion that this situation is unlikely to change in the near future, AER's counsel indicated at the hearing that they are working on solutions with Arrow Point and another purchaser of these wells.

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[48] It is difficult, without the appropriate documents, to comment extensively on this issue at this time. However, for the purposes of the potential oppression claims as a basis to appoint a receiver, in my view, again, the transaction on the surface appears to have been made for a valid business purchase and for full market value. To the extent that the potential AER liability was not considered, ATB was notified of this transaction and could have stopped this transaction at the time. Instead it accepted payments (of gross $20.6 M approximately – the net amount was not disclosed) and consented to the deal by way of No Interest notices. It is hardly fair then to say that they have been oppressed or that POA acted in an oppressive manner towards Conserve in these circumstances.

[49] The suggestion that it is fair to hold the oil proceeds in this situation is problematic. It is not clear that a set off is appropriate in these circumstances considering that the production revenue may be trust funds and that this contingent AER liability is very far from being crystallised.

[50] In other words, there may be an issue to be tried about these sale transactions, however, on the limited evidence before me on this issue, it appears that POA may have a good defence that there is any oppression here.

Irreparable harm

[51] The receiver suggests that it will suffer irreparable harm if it is not appointed a receiver for POA so that it can control its management and avoid further dissipation of the shares and any of its assets. It further argues that if the proceeds from the wells are not paid into Court it will be paid to foreign investors and the money will not be easily recoverable.

[52] POA argues that loss of management control could have devastating effects on its business. Further, that the lack of payments from its wells jeopardises its ability to maintain its obligations to COGAM and its investors which may cause irreparable harm to POA. There is no irreparable harm to the receiver here as the wells are still located in Alberta and should POA face liability to COGI, these assets can be called upon. Further, it has no present plans to divest of further assets in any event.

[53] COGAM, the secured creditor of POA, points out that the standstill Order in place by Justice Hawco answers any concerns of divestiture.

[54] The Court's concern in this case is the complicated corporate structure in place and the difficulty the receiver has had to untangle the web of transactions between non- arms length corporations without the powers of a receiver over POA. However, considering the more recent informational disclosure by POA , and proposed cooperation by COGAM, and the standstill Order presently in place, at the present time, the receiver may well be able to get to the bottom of the issues without the powers of a receiver and therefore will not be irreparably harmed.

[55] With respect to the oil proceeds, I agree with POA that the wells are some security presently for the potential AER liability. In any event, on the evidence before me and the representations of the AER, the potential liability is legally uncertain and remote at this time so that the receiver has not met the onus to show that it will be irreparably harmed.

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Balance of convenience

[56] As mentioned, appointing a receiver is an extraordinary relief and should be granted cautiously and sparingly – especially in circumstances such as these where there is no outstanding debt from POA to ATB, no security arrangements between them, and that POA has its own secured creditors who oppose the appointment of this receiver.

[57] I can understand the receiver's concerns that have arisen since it started investigating into the corporate structure and its belief that a receiver order over POA is just and convenient and will enable it to carry out its duties more efficiently.

[58] However, as I have analysed above, in my view, on the evidence as it stands, I am not presently "satisfied" as required under s 242 of the ***ABCA*** that the conduct in question can be considered to be oppressive. It did not breach the reasonable expectations of Conserve that some sort of further financing was necessary to keep POA from reneging on its creditor's obligations, and the wells sale agreements between COGI and POA appear to be reasonable business transactions.

[59] The receiver may still consider starting an oppression action against POA if it wants to pursue this further. Alternatively, if it turns out that the assumptions that I have had to make on the limited evidence before me are not accurate, a further application could be made at a later time.

[60] With respect to the wells, I note that they are presently already being managed under the control of the receiver. I would also ask that it reconsider the position it has been taking over the proceeds from the wells by reviewing the agreements that were put into place and are attached to an affidavit in the CCAA proceedings to which it has access. If these are indeed trust relationships that are being breached by the withholding of those funds, I recommend that this position be reconsidered by the receiver, failing which POA may bring a further application about this issue. Having not looked at these agreements, I am not in a position to say further on this topic. But, to be clear, I will not order that the proceeds be paid into Court at this time.

[61] In balancing the interests of POA and its secured creditor, vs those of ATB and Conserve, the latter as a shareholder in POA, an unsecured position, it seems that the fairer answer to this application by the receiver is to dismiss it at this time. I would allow Justice Hawco's standstill Order to continue for the time being, but would reconsider its continuance once further answers to outstanding questions about the interrelationship between these companies is answered.

[62] Conserve continues to have its shareholdings in POA and so continues to enjoy those rights, even if it now is as a minority shareholder, which will have to be respected.

[63] It is expected that POA and COGAM will continue to cooperate with the receiver to determine certain rights and obligations, hopefully without formal litigation. I would also recommend in that regard that sensitive business documents can be kept confidential and if there are any issues in that regard you can seek further Court directions.

Conclusion

[64] There may be serious issues to be tried but the defences to an oppression action are also quite strong on the evidence before me. I am not satisfied that an oppression action would have success on the limited evidence presently before the Court. The receiver has also not convinced

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me that any harm would be irreparable if he was not appointed receiver over POA at this time. There are other Orders and measures in place that will protect the companies in question under receivership. Further, on the balance of convenience, fairness in my view dictates that POA's rights to self-determination and the secured creditor's interests to POA prevail over those of the unsecured shareholder and ATB.

[65] For these reasons, the applications of the receiver are dismissed.

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Heard on the 14th and 15th days of January, 2016.
Dated at the City of Calgary, Alberta this 20th day of January, 2016.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

G.B. Davison, Q.C. for the Receiver
R. Algar
R. Zahara for ATB
for the Applicant

D. S. Nishimura for POA
C. E. Hanert for COGAM
A. C. Maerov
for the Respondents

TAB 6

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.

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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

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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.

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[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.

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[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.

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[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

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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

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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

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(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*.

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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

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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

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[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

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> 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;

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> 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.

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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

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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

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