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| COURT FILE NUMBER | |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANT | BANK OF MONTREAL |
| RESPONDENTS | TRADESMEN ENTERPRISES LIMITED PARTNERSHIP, and TRADESMEN ENTERPRISES INC. |
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| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| MATTER | IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES LIMITED PARTNERSHIP<br><br>AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES INC. |
| DOCUMENT | **BENCH BRIEF IN SUPPORT OF APPLICATION TO APPOINT RECEIVER** |

Clerk's Stamp


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## I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicant, Bank of Montreal ("**BMO**"), in support of its Application for the appointment of a receiver filed on April 6, 2021 (the "**Application**"). BMO seeks an order (the "**Receivership Order**"), pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") and Section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "***Judicature Act***"), appointing KSV Restructuring Inc. ("**KSV**") as the receiver (the "**Receiver**") over all the property ("**Property**") of the Respondent Tradesmen Enterprises Limited Partnership ("**Tradesmen LP**") and the Respondent Tradesmen Enterprises Inc. ("**Tradesmen Inc.**", collectively, "**Tradesmen**").

2. Tradesmen was a Calgary-based business specializing in the construction of mining and oil and gas infrastructure. On January 11, 2021, Teck Coal Limited ("**Teck**") terminated a works agreement with Tradesmen (the "**Teck Contract**"), which was Tradesmen's only business.

3. As a result of the termination, Tradesmen experienced a severe liquidity crisis, defaulted on its obligations to BMO (its primary secured lender), and became insolvent. On February 1, 2021, each of Tradesmen LP and Tradesmen Inc. then filed a Notice of Intention to Make a Proposal (an "**NOI**"), pursuant to Section 50.4(1) of the BIA in Alberta Court File No. BK01-095189 (the "**NOI Proceedings**").

4. Most recently, Tradesmen has determined it no longer intends to make a proposal to creditors and will allow the NOI Proceedings to expire. Consequently, Tradesmen will be deemed to have made an assignment into bankruptcy on or about April 17, 2021, by virtue of Section 50.4(8) of the BIA.

5. There is now an urgent need for a Receiver over the Property. In particular, a Receiver is just, convenient, and indeed necessary, (i) to preserve the Property, given that the NOI stay of proceedings will terminate; (ii) to enable Tradesmen's outstanding litigation against Teck, Tradesmen's only substantial asset, to be pursued effectively and efficiently; and (iii) since Tradesmen has consented to the appointment of a Receiver. If a Receiver is not appointed, BMO will suffer substantial and material prejudice through an inability to recover on its indebtedness, which now exceeds $19 million.

6. In the circumstances, it is also appropriate for this Court to (i) lift the NOI stay of proceedings to allow BMO to make this Application; and (ii) grant and continue certain Court-ordered charges pursuant to the Receivership Order.

## II. ISSUES

7. The issues before this Honourable Court are:

   (a) whether the stay of proceedings arising from the NOI Proceedings should be lifted to allow BMO to make the within Application;

   (b) whether a Receiver should be appointed in respect of Tradesmen; and

   (c) whether this Court should grant and continue certain Court-ordered charges, and if so, how such charges should be prioritized.

## III. FACTUAL BACKGROUND

8. The facts in support of the Application are set out in the Affidavit of Zachary Newman sworn on April 6, 2021 (the "**Newman Affidavit**"), the Fourth Report to the Court of KSV as Proposal Trustee dated April 6, 2021 (the "**Fourth Report**"), and in the other affidavits and reports filed in the NOI Proceedings. At a high-level, the key facts include:

   (a) on or about April 16, 2013, Tradesmen LP, as borrower, and BMO, as lender, entered into a loan agreement (the "**Loan Agreement**"), whereby BMO agreed to advance to Tradesmen LP certain credit facilities;[1]

   (b) as security for Tradesmen LP's obligations under the Loan Agreement, Tradesmen LP granted to BMO a general security interest in all of its present and future property, pursuant to a security agreement dated April 17, 2013 (the "**Borrower GSA**");[2]

   (c) as further security, Tradesmen Inc. provided BMO a guarantee dated April 17, 2013 (the "**Tradesmen Inc. Guarantee**"), which was secured by a general security interest in all of Tradesmen Inc.'s present and future property, pursuant to a security agreement dated April 17, 2013 (the "**Guarantor GSA**");[3]

   (d) Tradesmen LP and BMO later amended the credit facilities from time to time. Ultimately, on or about July 6, 2020, BMO and Tradesmen LP agreed to a fourth amended and restated loan agreement (the "**Restated Loan Agreement**"), whereby BMO agreed to make available to Tradesmen LP certain facilities (the "**Pre-NOI Facilities**") including a demand

[1] Affidavit of Zachary Newman, sworn on April 6, 2021 (the "**Newman Affidavit**") at para 12.
[2] Newman Affidavit at para 13, Exhibit "A".
[3] Newman Affidavit at paras 14-15, Exhibits "B" and "C".

revolving credit facility up to $23 million. Tradesmen LP's obligations under the Restated Loan Agreement were secured by various security (the "**Security**"), including the Tradesmen Inc. Guarantee, the Borrower GSA and Guarantor GSA (the "**GSAs**");[4]

(e) in May 2019, Tradesmen and Teck entered into the Teck Contract, pursuant to which Tradesmen was to perform works for Teck's Fording River Operations Active Water Treatment Facility South, located near Elkford, British Columbia (the "**Project**"). By that time, the Teck Contract constituted substantially all of Tradesmen's business;[5]

(f) by letter dated January 11, 2021, Teck terminated the Teck Contract. As a result, Tradesmen experienced a severe liquidity crisis and defaulted on its obligations to BMO under the Restated Loan Agreement and Security;[6]

(g) on January 14, 2021, BMO issued demands and Notices of Intention to Enforce Security under Section 244 of the BIA to Tradesmen (the "**Demands**");[7]

(h) on February 1, 2021, Tradesmen commenced the NOI Proceedings and KSV was appointed as the proposal trustee (the "**Proposal Trustee**");[8]

(i) on or about February 24, 2021, Tradesmen filed a Notice of Civil Claim in the Supreme Court of British Columbia, against Teck and others, in respect of the termination of the Teck Contract (the "**Teck Litigation**"). Tradesmen also wound-down its remaining operations, engaged a liquidator to sell Tradesmen's residual fixed assets, and reduced its workforce from over 600 employees to nine employees;[9]

(j) pursuant to an Order of this Court pronounced on March 2, 2021 (the "**Extension Order**"), the time within which Tradesmen was required to file a proposal to its creditors was extended from March 3, 2021 to April 16, 2021 (the "**NOI Expiry**"). Consequently, the stay of proceedings under Section 69(1) of the BIA, applicable to the NOI Proceedings, was likewise extended to April 16, 2021 (the "**NOI Stay**");[10]

[4] Newman Affidavit at paras 19-20, 22.
[5] Newman Affidavit at paras 24-26.
[6] Newman Affidavit at paras 27 and 29.
[7] Newman Affidavit at paras 30-32, Exhibits "E" and "F".
[8] Newman Affidavit at paras 34-35.
[9] Newman Affidavit at paras 36(a), 36(d), and 36(e).
[10] Newman Affidavit at para 36(b).

(k) Tradesmen and BMO entered into an amended and restated interim financing agreement on or about March 2, 2021 (the "**Interim Financing Agreement**"), pursuant to which BMO agreed to make available to Tradesmen LP a senior secured super-priority, interim, revolving credit facility for the NOI Proceedings (the "**Interim Facility**"). Pursuant to an amended and restated Order, pronounced on March 2, 2021 (the "**Interim Finance Order**"), the Court granted BMO a super priority charge on all of the Property (subject only to an administration charge) as security for the Interim Financing Agreement (the "**Interim Financing Charge**");[11] and finally,

(l) Tradesmen now advises BMO that it no longer intends to make a proposal to its creditors before the NOI Expiry. Thus, Tradesmen will be deemed to have made an assignment into bankruptcy on or about April 17, 2021. Tradesmen's anticipated assignment to bankruptcy is an event default under the Interim Financing Agreement.[12]

9. As of March 30, 2021, Tradesmen owed BMO $19,414,771.54, in respect of the Pre-NOI Facilities and Interim Facility, with interest and charges continuing to accrue thereon.[13]

## IV. LAW AND ARGUMENT

### A. THIS COURT SHOULD LIFT THE NOI STAY OF PROCEEDINGS

10. As a preliminary matter, BMO seeks relief from the NOI Stay to make this Application.

***The Court has Discretion to Lift the Stay of Proceedings***

11. Pursuant to Section 69(1) of the BIA, upon the filing of an NOI, creditors' remedies against the insolvent person and its property, including those of secured creditors, are stayed.[14] However, pursuant to Section 69.4 of the BIA, the Court has discretion to lift the stay of proceedings provided the Court is satisfied that:

(a) the applicant creditor is "likely to be materially prejudiced by the continued operation" of the stay; or

[11] Newman Affidavit at para 36(c).
[12] Newman Affidavit at paras 39-40.
[13] Newman Affidavit at paras 41.
[14] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), s 69(1), attached at **Schedule "A"**.

(b) lifting the stay would be "equitable on other grounds".[15]

12. "Material prejudice" means prejudice different from that suffered by creditors as a whole.[16] Moreover, the analysis for lifting the stay focuses on the "totality of the circumstances".[17]

13. Recently, Canadian Courts have shown a willingness to lift an NOI stay of proceedings to permit a receivership application.

14. In *White Oak Commercial Finance LLC v Nygard Holdings (USA) Limited et al*,[18] the Manitoba Court of Queen's Bench lifted an NOI stay of proceedings to allow a receivership application by the debtor's secured lenders. The Manitoba Court was satisfied that the stay should be lifted to "provide experienced and effective oversight" of the debtor's business.[19]

15. Similarly, in *Yukon (Government of) v Yukon Zinc Corporation*,[20] the Yukon Territory Supreme Court lifted an NOI stay to allow a receivership application by the Government of Yukon. Here, the Yukon Court was satisfied that material prejudice and equitable grounds were established since, among other things, Yukon was acting in the public interest to safeguard a mine and prevent environmental harm.[21]

***The NOI Stay Should be Lifted***

16. In the instant case, there are sound reasons for this Court to exercise its discretion to lift the NOI Stay to permit BMO's Application.

17. First, and foremost, Tradesmen has no intention of making a proposal to creditors or extending the NOI Proceedings beyond the NOI Expiry.[22] Thus, Tradesmen will be deemed bankrupt on or about April 17, 20201, which in turn means there will be no stay of proceedings constraining BMO as a secured lender at that time.[23] Simply put, BMO seeks relief from the NOI Stay, to do now, what it may otherwise do in a few days' time. It would be inequitable, and unduly formalistic, to prevent BMO from making its Application in these circumstances.

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[15] BIA, s 69.4, attached at **Schedule "A"**.
[16] *Bellatrix Exploration*, 2020 ABQB 809 at para 68, **TAB 1.**
[17] *Ibid* at para 65.
[18] *White Oak Commercial Finance LLC v Nygard Holdings (USA) Limited et al*, 2020 MBQB 58 ("***White Oak***"), **TAB 2**.
[19] *Ibid* at para 31.
[20] *Yukon (Government of) v Yukon Zinc Corporation*, 2019 YKSC 39, **TAB 3**.
[21] *Ibid* at para 43.
[22] Newman Affidavit at para 39.
[23] The stay of proceedings under Section 69(1), which applies to the NOI Proceedings, will be replaced with a stay of proceedings under Section 69.3 applicable to bankruptcies. That provision does not stay the rights or remedies of secured creditors: see BIA, s 69.3(2), attached at **Schedule "A"**.

18. Second, BMO is Tradesmen's primary secured lender and the interim lender to Tradesmen for the NOI Proceedings. BMO also holds, pursuant to the GSAs, a first-ranking security interest in all of Tradesmen's Property (subject only to the Court-ordered charges),[24] and a super priority security interest in all the Property (subject only to an administration charge) under the Interim Financing Charge.[25] Hence, BMO is more greatly prejudiced by the NOI Stay, and its inability to enforce its security as a result therefrom, than other creditors. BMO has the primary economic interest in the Property.

19. Finally, Tradesmen has consented to the appointment of the Receiver, and thus, expressly or impliedly agrees to the NOI Stay being lifted. This is a further equitable factor supporting the lifting of the NOI Stay.

20. In sum, there is material prejudice to BMO and/or compelling equitable grounds for this Court to lift the NOI Stay to allow BMO to make its Application.

## B. IT IS JUST OR CONVENIENT TO APPOINT A RECEIVER

### *The Court has Discretion to Appoint a Receiver*

21. This Court has discretion to appoint a receiver pursuant to both Section 243(1) of the BIA and Section 13(2) of the *Judicature Act*.[26] Under either legislation, the test to be applied by the Court is whether a receiver is "just or convenient".[27]

22. In *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co*,[28] Justice Romaine held that in analyzing whether a receiver is "just or convenient" the Court may consider the factors enumerated in *Bennett on Receiverships*.[29] The applicability of those factors depends on the particular factual matrix. These factors include:[30]

    (a) the risk of harm to the secured lender if a receiver is not appointed;

    (b) the risk of to the secured lender of suffering a sizeable deficiency;

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[24] Newman Affidavit at para 16.
[25] Newman Affidavit at para 36(d).
[26] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd,* 2015 SCC 53 ("***Lemare***") at para 47, **TAB 4**; *BG International Ltd v Canadian Superior Energy Inc,* 2009 ABCA 127 ("***BG***") at para 6, **TAB 5**.
[27] See BIA, s 243(1) and *Judicature Act*, s 13(2), attached at **Schedule "A"** and **Schedule "B"**, respectively.
[28] *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.,* 2002 ABQB 430 ("***Paragon Capital***"), **TAB 6.**
[29] *Ibid* at para 27.
[30] *Paragon Capital*, *supra* note 28 at para 27, **TAB 6**; *Alexis Paragon Limited Partnership, Re,* 2014 ABQB 65 ("***Alexis Paragon***") at para 51, **TAB 7**; *Schendel Management Ltd, Re*, 2019 ABQB 545 ("***Schendel***"), at paras 44-45, 48, **TAB 8**.

(c) the fact that the creditor has a contractual right to appoint a receiver;

(d) the balance of convenience;

(e) the likelihood of maximizing return to the parties; and

(f) the secured lender's good faith, commercial reasonableness and the equities.[31]

23. In *Schendel Management Ltd., Re*, Justice Lema of this Court considered applications by the debtor's primary secured lender, ATB, to: (i) terminate NOI proceedings, and (ii) appoint a receiver. His Lordship initially concluded that the NOI proceedings should be terminated since any proposal would be rejected by ATB.[32] In respect of the receivership application, Justice Lema then held that "many of the factors" from *Paragon* did not apply as the debtor was "now bankrupt". Nevertheless, Justice Lema was satisfied that a receiver was warranted since, *inter alia*:

(a) collecting the debtor's receivables "require[d] the expertise and resources of an experienced receiver-manager"; and

(b) the complex nature of the work required to "complete, collect or otherwise harvest" the debtor's receivables required a receiver.[33]

24. Finally, in *Servus Credit Union Ltd v Proform Management Inc*,[34] Justice Lema considered a receivership application, in circumstances where the debtor had executed a consent receivership order with a prior forbearance agreement. The debtor defaulted on the forbearance agreement, the lender then made the receivership application, and sought to rely on the consent order. In granting the relief, his Lordship "emphasized" the significance of the debtor's prior consent.[35]

***Procedural Requirements Under the BIA***

25. When a receiver is sought under Section 243(1) of the BIA, the applicant must also meet certain procedural requirements, namely that:

(a) the applicant is a secured creditor;

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[31] While some authority indicates that the Court must apply the tripartite test for injunctive relief when considering a receivership application, these requirements are only mandatory when the applicant is not a security holder; see *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at paras 16-17, **TAB 9.**
[32] *Schendel, supra* note 30 at paras 42, 49-54, **TAB 8**.
[33] *Ibid* at para 48.
[34] *Servus Credit Union Ltd. v. Proform Management Inc*., 2020 ABQB 316 ("***Proform***"), **TAB 10**.
[35] *Ibid* at paras. 56, 60 and 72.

(b) the applicant delivered a Notice to Intention to Enforce Security under Section 244(1) of the BIA (a "**244 Notice**") at least ten days prior to the application; and

(c) the responding party is an insolvent person or is bankrupt.[36]

***A Receiver Should be Appointed over the Property***

26. In the instant case, the following factors strongly demonstrate that the appointment of a Receiver in respect of the Property is just or convenient.

A Receiver is Needed to Prevent Harm to BMO Arising From Tradesmen's Bankruptcy

27. As set out above, the NOI Proceedings will expire on April 16, 2021 and Tradesmen will become bankrupt on or about April 17, 2021.[37] Among other things, the NOI Stay will then terminate and secured creditors will be free to pursue their rights and remedies against Tradesmen.[38] Tradesmen owes secured debt to BMO, but also to a shareholder (the Fulcrum group) and potentially to various sub-contractors who have asserted liens in respect of the Project.[39]

28. Simply put, this Court's appointment of a Receiver is necessary to ensure that a collective insolvency process[40] replaces the NOI Proceedings, and that Tradesmen's remaining property (the Litigation) is realized in the most efficient and value maximizing manner.

29. A Receiver is necessary to prevent Tradesmen's creditors from obtaining improper advantages over others and destroying, or breaking up, the value of BMO's security.[41]

A Receiver is Needed to Effectively Manage the Litigation and Prevent a Deficiency to BMO

30. After beginning the NOI Proceedings, Tradesmen commenced the Litigation against Teck and others. Tradesmen no longer has any going concern business and the Litigation is now Tradesmen's only substantial asset.[42]

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[36] BIA, ss 243-244, attached at **Schedule "A"**.
[37] Newman Affidavit at para 39.
[38] *Schendel, supra* note 30 at para 4, **TAB 8**.
[39] First Report of KSV Restructuring Inc. in its Capacity as Proposal Trustee Under the Notices of Intention to Make a Proposal dated and filed on February 2, 2021 (the "**First Report**") at para 3.2.
[40] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 ("***Alvarez***") at para 23, **TAB 11**, in which the Alberta Court of Appeal held that "[t]he policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation."
[41] Newman Affidavit at para 42(b).
[42] Newman Affidavit at para 37; see also Fourth Report of KSV Restructuring Inc. in its Capacity as Proposal Trustee Under the Notices of Intention to Make a Proposal dated and filed on April 6, 2021 (the "**Fourth Report**"), section 3.0(1).

31. However, the Litigation will be a lengthy, complex, document intensive, and hard fought process, particularly since: (i) there are tens of millions of dollars in dispute; (ii) the Litigation pertains to over 900 change order requests; (iii) there are complex builders' lien or trust claims; and (iv) Teck, a sophisticated litigant, strongly opposes Tradesmen's claims.[43]

32. In short, the Litigation is best, most efficiently and most effectively, pursued by a Receiver, who is a sophisticated insolvency professional and an officer of the Court. This will maximize recoveries for BMO and Tradesmen's creditors as a whole. Conversely, if a Receiver is not appointed, and the Litigation is not properly managed by a Receiver, BMO will likely suffer a substantial shortfall on its security through an inability realize on the Litigation.[44]

33. In *Schendel Management Ltd, Re*, Justice Lema concluded that "coordinating and managing the pursuit of its receivables …requires the expertise and resources of an experienced receiver-manager."[45] These comments are apposite in the instant case.

Tradesmen Consents to a Receiver

34. It is also significant that Tradesmen consents to the appointment of a Receiver and has executed a Consent Receivership Order for this Application.[46] This strongly tips the equities in favour of the Court appointing a Receiver.

35. In *Proform Management Inc.*, Justice Lema "emphasized" the significance of the debtor's consent to the receivership[47] and the same analysis applies here.

Other Factors Supporting a Receiver

36. Finally, the following factors also support the appointment of a Receiver:[48]

    (a) the GSAs grant BMO the right to appoint a receiver over Tradesmen's property,[49] and the Proposal Trustee's legal counsel has opined that BMO's Security is valid and enforceable (subject to the standard qualifications and assumptions);[50]

[43] Newman Affidavit at para 38.
[44] Newman Affidavit at para 42(j).
[45] *Schendel*, *supra* note 30 at para 48, **TAB 8**.
[46] Newman Affidavit, Exhibit "I".
[47] *Proform, supra* note 34 at paras 56, 60 and 72 **TAB 10**.
[48] Newman Affidavit at paras 42-44.
[49] Newman Affidavit, Exhibits "A" and "C", which are the GSAs; see s 14 of each.
[50] Fourth Report, section 2.0(9).

(b) the Interim Financing Agreement entitles BMO to apply to the Court for the appointment of a receiver upon an event of default, and Tradesmen is in default under the Interim Financing Agreement;[51]

(c) the appointment of a Receiver will maximize returns to creditors through the effective pursuit of the Litigation;

(d) the balance of convenience favours the appointment of a Receiver, particularly as Tradesmen consents to a Receiver;

(e) BMO is and has acted in good faith at all times;

(f) KSV, the proposed Receiver, is the Proposal Trustee and is familiar with the affairs of Tradesmen and consents to its appointment as Receiver;

(g) there is no other process available to BMO that would enable it to adequately protect its interests other than a receivership; and

(h) BMO intends to fund the Receiver.

37. The procedural requirements under the BIA are also met.[52]

38. In sum, a Receivership Order in respect of the Property is just, convenient and necessary in the circumstances, and should, respectfully, be granted.

## C. THIS COURT SHOULD CONTINUE AND GRANT COURT-ORDERED CHARGES

39. Finally, in the proposed form of Receivership Order, BMO seeks that this Court grant and continue certain Court-ordered charges, as well as, determine the relative priorities among the charges.

### *The Court has Discretion to Grant and Prioritize Court-Ordered Charges*

40. It is clear that this Court has discretion to appoint a receiver.[53] As a corollary, this Court has discretion to (i) grant charges over the debtor's property in favour of the proposed receiver; and (ii) determine the relative priority of such charges, including *vis-à-vis* pre-existing Court-ordered

[51] Newman Affidavit at para 40, and Exhibit "H" at Schedule "A", which is the Interim Financing Agreement, s 30.
[52] BMO is a secured creditor and that Tradesmen is insolvent. Additionally, BMO delivered 244 Notices to each of Tradesmen LP and Tradesmen Inc. on January 14, 2021: see Newman Affidavit, paras. 29-32, and Exhibits "E" and "F".
[53] *Lemare, supra* note 26 at para 47, **TAB 4**; *BG, supra* note 26 at para 6 **TAB 5**.

charges. The Court's discretionary authority to grant charges in support of a receiver is expressed under, among other things, Sections 243(6) and Section 31(1) of the BIA.

41. Section 243(6) pertains to charges for the receiver's professional fees and disbursements; it states:

> Orders respecting fees and disbursements
>
> (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.[54] (underlining and bold added)

42. Section 31(1) pertains to the receiver's borrowings and states:

> Borrowing powers with permission of court
>
> 31(1) With the **permission** of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, **on any terms and on any** property that **may be authorized** by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.[55] (underlining and bold added)

43. In *Royal Bank of Canada v Reid-Built Homes Ltd*, Justice Graesser summarized the Court's authority under these provisions as follows:

> The Court has the jurisdiction to determine the priority of the Receiver's fees and disbursements, as well as repayment of any court-authorized borrowing. The Court has the power to grant a super priority for the Receiver's fees and disbursements ahead of secured creditors, including secured creditors with proprietary interests. This power must be exercised equitably, having regard to the purpose of the legislation and the purpose of the receivership.[56] (underlining added)

***The Court Should Exercise its Discretion as Proposed by the Receivership Order***

Continuation of NOI Charges

44. In the instant case, this Court granted several charges in the NOI Proceedings, namely: an administration charge (the "**Administration Charge**"), the Interim Financing Charge and a key employee retention plan charge (the "**KERP Charge**", collectively, the "**NOI Charges**").[57]

[54] BIA, s 243(6), attached at **Schedule "A"**; see also *Alvarez, supra* note 40 at paras 9, 26, **TAB 11**.
[55] BIA, s 31(1), attached at **Schedule "A".**
[56] *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 at paras 28, 163-165, **TAB 12**, rev'd on other grounds *Alvarez, supra* note 40 **TAB 11**.
[57] See Newman Affidavit, Exhibit "H"; see Fourth Report, section 4.0.

45. The NOI Charges were necessary to enhance the prospects of Tradesmen's restructuring efforts.[58] Amongst these charges, the Interim Financing Charge is the most significant, and secures the $2.36 million advanced by BMO to Tradesmen under the Interim Facility.[59]

46. This Court should exercise its discretion to continue the NOI Charges, under the Receivership Order, so to (i) maintain fairness to those persons who advanced resources to assist Tradesmen's insolvency, and (ii) afford a streamlined transition from the NOI Proceedings to the receivership.

47. Moreover, it is routine practice for this Court to continue charges created in restructuring proceedings upon their conversion to a receivership.[60] Further, KSV as Proposal Trustee and proposed Receiver supports the continuation of the NOI Charges.[61]

Creation of Receivership Charges

48. Additionally, BMO's intention (subject to final internal approval) is to provide financing to the Receiver through Receiver's Certificates, to enable it to conduct the Litigation and otherwise perform its duties as Receiver.[62] As such, the proposed Receivership Order contemplates the creation of a "Receiver's Borrowings Charge" to secure such advances. The Receivership Order also contemplates a "Receiver's Charge" as security for the Receiver's professional fees and disbursements (collectively, the "**Receivership Charges**").

49. As with the NOI Charges, this Court should exercise its discretion to grant the Receivership Charges, since (i) they are needed for the Receiver to perform its duties as the Court's officer in a meaningful way, (ii) such charges are routinely granted by this Court and are contemplated by the Alberta Template Receivership Order,[63] and (iii) they are supported by KSV.[64]

Ranking of Court-Ordered Charges

50. Lastly, this Court should exercise its discretion to rank or prioritize the NOI Charges and Receivership Charges, as follows:

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[58] See e.g. Affidavit No. 1 of Dean Kato, sworn on February 1, 2021 at para. 48 (in relation to the Administration Charge); and see Affidavit No. 2 of Dean Kato, sworn and filed on February 24, 2021 at para 33 (in relation to the Interim Financing Charge) and para 35 (in relation to the KERP Charge).
[59] Newman Affidavit at para 41(a).
[60] See Receivership Order pronounced by Justice Eidsvik, on February 17, 2017, in Alberta Court of Queen's Bench File No. 1701-00143 (the "**Quattro Receivership Order**"), s 34, **TAB 13**.
[61] Fourth Report, section 4.0(2).
[62] Newman Affidavit at para 47.
[63] See Alberta Template Receivership Order (revision February 2019), ss 18-25.
[64] Fourth Report, section 4.0(2).

(a) First - the Receiver's Charge;

(b) Second - the Administration Charge;

(c) Third - the Receiver's Borrowings Charge;

(d) Fourth - the Interim Financing Charge; and

(a) Fifth - the KERP Charge.

51. This ranking reflects, on the one hand, the need to protect the Receiver as the Court's officer,[65] and on the other hand, the increased risk that BMO will accept through advancing funding to the Receiver.[66] The proposed ranking is also consistent with receivership orders granted by this Court in other matters.[67] Finally, KSV supports the foregoing prioritization and considers it commercially reasonable in the circumstances.[68]

52. In sum, this Court should exercise its discretion to continue and grant the Court-ordered charges sought, and should rank the charges in the manner proposed in the Receivership Order.

## V. CONCLUSION

53. In light of the foregoing, BMO respectfully seeks the relief sought in its Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF APRIL 2021**

**BORDEN LADNER GERVAIS LLP**

Per: Josef G.A. Kruger, Q.C. / Jack R. Maslen
Solicitors for the Applicant, Bank of Montreal

[65] See e.g., *Alvarez, supra* note 40 at para 17, **TAB 11**.
[66] Newman Affidavit at para 47.
[67] See Quattro Receivership Order, s 34, **TAB 13**.
[68] Fourth Report, section 4.0(2).

## TABLE OF AUTHORITIES

| TAB | DOCUMENT |
|---|---|
| A. | *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Sections 50.4, 69, 69.1, 69.3, 69.4, |
| B. | *Judicature Act*, RSA 2000, c J-2, Section 13 |
| 1. | *Bellatrix Exploration*, 2020 ABQB 809 |
| 2. | *White Oak Commercial Finance LLC v Nygard Holdings (USA) Limited et al*, 2020 MBQB 58 |
| 3. | *Yukon (Government of) v Yukon Zinc Corporation*, 2019 YKSC 39 |
| 4. | *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd,* 2015 SCC 53 |
| 5. | *BG International Ltd v Canadian Superior Energy Inc,* 2009 ABCA 127 |
| 6. | *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.,* 2002 ABQB 430 |
| 7. | *Alexis Paragon Limited Partnership, Re,* 2014 ABQB 65 |
| 8. | *Schendel Management Ltd, Re*, 2019 ABQB 545 |
| 9. | *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 |
| 10. | *Servus Credit Union Ltd. v. Proform Management Inc*., 2020 ABQB 316 |
| 11. | *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 |
| 12. | *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 |
| 13. | Receivership Order pronounced by Justice Eidsvik, on February 17, 2017, in Alberta Court of Queen's Bench File No. 1701-00143 |

# SCHEDULE “A”

Canada Federal Statutes
Bankruptcy and Insolvency Act

**Most Recently Cited in:** Response Energy Corporation v. Barr, 2021 ABCA 109, 2021 CarswellAlta 671 | (Alta. C.A., Mar 22, 2021)

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

Currency

An Act respecting Bankruptcy and Insolvency

R.S.C. 1985, c. B-3, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 203; R.S.C. 1985, c. 31 (1st Supp.), ss. 3, 28, 69-77; R.S.C. 1985, c. 3 (2nd Supp.), s. 28; R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); S.C. 1990, c. 17, s. 3; 1991, c. 46, s. 584; 1992, c. 1, ss. 12-20, 143 (Sched. VI, item 2), 145, 161; 1992, c. 27, ss. 1-90; 1993, c. 28, s. 78 (Sched. III, items 6, 7) [Amended 1999, c. 3, s. 12 (Sched., item 3).]; 1993, c. 34, s. 10; 1994, c. 26, ss. 6-9, 46; 1995, c. 1, s. 62(1)(a); 1996, c. 6, s. 167(1)(b), (2); 1996, c. 23, s. 168; 1997, c. 12, ss. 1-119; 1998, c. 19, s. 250; 1998, c. 21, s. 103; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 1999, c. 28, ss. 146, 147; 1999, c. 31, ss. 17-26; 2000, c. 12, ss. 8-21; 2000, c. 30, ss. 143-148; 2001, c. 4, ss. 25-27, 28 (Fr.), 29-32, 33(1) (Fr.), (2), (3); 2001, c. 9, ss. 572-574; 2002, c. 7, ss. 83-85; 2002, c. 8, s. 182(1)(b); 2004, c. 25, ss. 7(1), (2) (Fr.), (3)-(8), (9) (Fr.), (10), 8, 9 (Fr.), 10(1) (Fr.), (2), (3) (Fr.), 11 (Fr.), 12-16, 17 (Fr.), 18, 19 (Fr.), 20-23, 24 (Fr.), 25(1), (2) (Fr.), 26, 27(1)-(3), (4) (Fr.), (5), 28-31, 32(1), (2), (3) (Fr.), 33-35 (Fr.), 36-48, 49(1) (Fr.), (2), (3), 50(1), (2) (Fr.), (3), 51 (Fr.), 52(1) (Fr.), (2), 53-64, 65 (Fr.), 66, 67-69 (Fr.), 70-74, 75 (Fr.), 76 (Fr.), 77, 78 (Fr.), 79 (Fr.), 80-83, 84 (Fr.), 85 (Fr.), 86, 87, 88(1), (2) (Fr.), 89, 90 (Fr.), 91 (Fr.), 92, 93, 94 (Fr.), 95-99, 100(1) (Fr.), (2), 101 (Fr.), 102(1), (2) (Fr.), 103; 2005, c. 3, ss. 11-14; 2005, c. 47, ss. 2(1), (2) (Fr.), (3)-(5), (6) (Fr.), 3-52, 53 (Fr.), 54-100, 101(1), (2) (Fr.), (3), 102-123 [ss. 20(3), 30(2), 31(3), 37, 104(3), 106, 116, 120(2) repealed 2007, c. 36, ss. 95-98, 101-104; ss. 39(2), 103 amended 2007, c. 36, ss. 99, 100.]; 2007, c. 29, ss. 91-102; 2007, c. 36, ss. 1-3, 4 (Fr.), 5-7, 8 (Fr.), 9(1) (Fr.), (2), (3), 10, 11 (Fr.), 12-32, 33(1), (2), (3) (Fr.), (4), (5), 34, 35, 36 (Fr.), 37-52, 53(1) (Fr.), (2), 54-60, 112(4), (10)(b), (13), (14) [ss. 25, 31, 40 repealed 2007, c. 36, s. 112(2), (7), (10)(a).]; 2009, c. 2, ss. 355 (Fr.), 356 (Fr.); 2009, c. 31, ss. 63-65; 2009, c. 33, ss. 21-26; 2012, c. 16, ss. 79-81; 2012, c. 31, ss. 414-418; 2014, c. 20, s. 484; 2015, c. 3, ss. 6 (Fr.), 7 (Fr.), 8, 9, 10 (Fr.); 2017, c. 6, s. 122; 2017, c. 26, ss. 5-10; 2018, c. 10, s. 82; 2018, c. 27, ss. 265 (Fr.), 266-268; 2019, c. 29, ss. 133-135, 160, 161.

**Currency**
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals



R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

**50.4**

**50.4(1)Notice of intention**

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

**50.4(2)Certain things to be filed**

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

**50.4(3)Creditors may obtain statement**

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

**50.4(4)Exception**

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

**50.4(5)Trustee protected**
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

**50.4(6)Trustee to notify creditors**
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

**50.4(7)Trustee to monitor and report**
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

**50.4(8)Where assignment deemed to have been made**
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

**50.4(9)Extension of time for filing proposal**
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual

extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

**50.4(10)Court may not extend time**
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

**50.4(11)Court may terminate period for making proposal**
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

**Amendment History**
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

**Currency**
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings



R.S.C. 1985, c. B-3, s. 69

s 69.

Currency

**69.**

**69(1)Stay of proceedings — notice of intention**

Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar

purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

**69(2)Limitation**
The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed 2012, c. 31, s. 416.]

**69(3)Limitation**
A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**Note:**

S.C. 2000, c. 30, s. 145(3), provides as follows:

*(3) Subsections (1) [which replaced s. 69(1)(c) and added s. 69(1)(d)] and (2) [which replaced s. 69(3)] are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the* Employment Insurance Act *shall be read as references to the* Unemployment Insurance Act.

**Note:**

S.C. 1997, c. 12, s. 62(2), provides as follows:

*(2) Application*
*Subsection (1) [S.C. 1997, c. 12, s. 62(1), which re-enacted s. 69(2)(b) and added (c)] applies to proceedings under Part III that are commenced after that subsection comes into force [September 30, 1997].*

**Amendment History**
1992, c. 27, s. 36(1); 1997, c. 12, s. 62(1); 2000, c. 30, s. 145; 2005, c. 3, s. 12; 2005, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416

**Currency**
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings



R.S.C. 1985, c. B-3, s. 69.1

s 69.1

Currency

**69.1**

**69.1(1)Stay of proceedings — Division I proposals**

Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(i) the trustee has been discharged,

(ii) six months have elapsed following court approval of the proposal, or

(iii) the insolvent person becomes bankrupt; and

(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until

(iii) the trustee has been discharged,

(iv) six months have elapsed following court approval of the proposal, or

(v) the insolvent person becomes bankrupt.

**69.1(2)Limitation**

The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the proposal was filed from dealing with those assets;

(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before

(i) a notice of intention was filed in respect of the insolvent person under section 50.4, or

(ii) the proposal was filed, if no notice of intention under section 50.4 was filed

from enforcing that security;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed 2012, c. 31, s. 417.]

**69.1(3)Limitation**

A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the proposal and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**69.1(4)Limitation**

If, by virtue of subsection 69(3), the stay provided by paragraph 69(1)(c) or (d) does not apply or terminates, the stay provided by paragraph 1(c) or (d) of this section does not apply.

**69.1(5)Secured creditors to whom proposal not made**

Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

**69.1(6)Where secured creditors vote against proposal**

Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

**Note:**

S.C. 2000, c. 30, ss. 146(4) and (5), provide as follows:

*(4) Subsection (1) [which replaced s. 69.1(1)(c) and added s. 69.1(1)(d)] applies to proposals in respect of which proceedings are commenced under the Act after September 29, 1997.*

*(5) Subsections (2) [which replaced s. 69.1(3)] and (3) [which replaced s. 69.1(4)] are deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in subparagraphs 69.1(3)(a)(ii) and (b)(ii) of the Act, as enacted by subsection (2), to the* Employment Insurance Act *shall be read as references to the* Unemployment Insurance Act.

**Note:**

S.C. 1997, c. 12, s. 63(3), provides as follows:

*(3) Application*
*Subsection (1) or (2) [S.C. 1997, c. 12, s. 63(1), (2), which re-enact s. 69.1(a) to (c) and s. 69.1(2)(b) and added (c)] applies to proposals in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].*

**Amendment History**
1992, c. 27, s. 36(1); 1994, c. 26, s. 8; 1997, c. 12, s. 63(1), (2); 2000, c. 30, s. 146(1)-(3); 2005, c. 3, s. 13; 2005, c. 47, s. 61; 2007, c. 36, s. 35; 2009, c. 33, s. 24; 2012, c. 31, s. 417

**Currency**
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

**End of Document** 

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

**Most Recently Cited in:**Jesson v. Jesson, 2021 ABQB 93, 2021 CarswellAlta 257, [2021] A.W.L.D. 950 | (Alta. Q.B., Feb 8, 2021)

R.S.C. 1985, c. B-3, s. 69.3

# s 69.3

Currency

**69.3**

**69.3(1)Stays of proceedings — bankruptcies**

Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

**69.3(1.1)End of stay**

Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged.

**69.3(2)Secured creditors**

Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

**69.3(2.1)Exception**

No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

**69.3(3)** [Repealed 2012, c. 31, s. 418(2).]

**Amendment History**

1992, c. 27, s. 36(1); 2005, c. 3, s. 14; 2005, c. 47, s. 62; 2007, c. 29, s. 96; 2012, c. 31, s. 418

**Currency**

Federal English Statutes reflect amendments current to March 17, 2021

Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

**Most Recently Cited in:** Re O'Leary , 2021 ONSC 431, 2021 CarswellOnt 1173, 328 A.C.W.S. (3d) 221 | (Ont. S.C.J., Jan 19, 2021)

R.S.C. 1985, c. B-3, s. 69.4

# s 69.4 Court may declare that stays, etc., cease

Currency

**69.4Court may declare that stays, etc., cease**

A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

**Note:**

S.C. 1997, c. 12, s. 65(2), provides as follows:

*(2) Subsection (1) [S.C. 1997, c. 12, s. 65(1), which added ss. 69.31 and 69.41 and re-enacted s. 69.4] applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].*

**Amendment History**

1992, c. 27, s. 36(1); 1997, c. 12, s. 65(1)

**Currency**

Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

# SCHEDULE “B”

Alberta Statutes
Judicature Act

**Most Recently Cited in:** Doniger v. Law Society of Alberta, 2021 ABCA 94, 2021 CarswellAlta 541 | (Alta. C.A., Mar 15, 2021)

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

Currency

R.S.A. 2000, c. J-2, as am. R.S.A. 2000, c. A-30, s. 91; R.S.A. 2000, c. 16 (Supp.), ss. 27, 36, 73 [s. 73(3) not in force at date of publication. Repealed 2004, c. 11, s. 3(5).]; S.A. 2001, c. 24, s. 9; 2002, c. 32, s. 9; 2003, c. 41, s. 1; 2003, c. 42, s. 11; 2004, c. 11, s. 3(1)-(4) [s. 3(2) amended 2006, c. 4, s. 2.]; 2005, c. 15, s. 7; 2007, c. 21; 2008, c. 13, s. 14; 2009, c. 53, s. 1; 2011, c. N-6.5, s. 13 [Not in force at date of publication.]; 2011, c. 20, s. 8(17); 2013, c. 10, s. 20; 2013, c. 11, s. 2(2); 2013, c. 23, s. 8; 2014, c. 13, s. 29; 2017, c. 22, s. 30; 2018, c. 20, s. 9.

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

**Currency**
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

**End of Document**

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

**Most Recently Cited in:** DGDP-BC Holdings Ltd v. Third Eye Capital Corporation, 2020 ABCA 442, 2020 CarswellAlta 2308, 325 A.C.W.S. (3d) 463, [2021] A.W.L.D. 6 | (Alta. C.A., Dec 4, 2020)

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

## s 13. Part performance

Currency

**13.Part performance**

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

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

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

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

**Currency**

Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

**End of Document**

# TAB 1

**Most Negative Treatment:** Recently added (treatment not yet designated)
**Most Recent Recently added (treatment not yet designated):** Bellatrix Exploration Ltd (Re) | 2021 ABCA 85, 2021 CarswellAlta 508 | (Alta. C.A., Mar 5, 2021)

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166

# In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
Howard A Gorman, Q.C., Gunnar Benidiktsson, for BP Canada Energy Group LLC
Joseph G.A. Kruger, Q.C., Robyn Gorofsky, for Monitor, Pricewaterhousecoopers Inc.

Subject: Civil Practice and Procedure; Insolvency; Restitution
**Related Abridgment Classifications**
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.i Liens
X.1.b.i.D Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Restitution and unjust enrichment
I General principles
I.1 When remedy available
**Headnote**
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer

notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Corporation had no right to set-off either legal or equitable — Corporation's damages arose from pre-filing contract — Company had not violated Act process — Court was reluctant to interfere with contract between parties — Continuation of stay would not prejudice corporation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Company was transparent as to its situation after bankruptcy took place — No bad faith claim was tenable — If court was in error on issue of equitable rights, company could be entitled to relief on basis of delay — Corporation had not provided evidence of its claimed damages — Claim of corporation remained unliquidated and unsecured.

Restitution and unjust enrichment --- General principles — When remedy available

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — There was juristic reason for enrichment — Corporation could not claim constructive trust.

**Table of Authorities**

**Cases considered by *B.E. Romaine J.*:**

*Alberta Energy Regulator v. Lexin Resources Ltd* (2019), 2019 ABQB 23, 2019 CarswellAlta 73, 69 C.B.R. (6th) 39 (Alta. Q.B.) — considered

*Alignvest Private Debt Ltd. v. Surefire Industries Ltd.* (2015), 2015 ABQB 148, 2015 CarswellAlta 485, 23 C.B.R. (6th) 66, 39 B.L.R. (5th) 87, 16 Alta. L.R. (6th) 1, 3 P.P.S.A.C. (4th) 308, 608 A.R. 292 (Alta. Q.B.) — considered

*Bank of Montreal v. Probe Exploration Inc.* (2000), 2000 CarswellAlta 1659, 33 C.B.R. (4th) 173 (Alta. Q.B.) — followed

*Bellatrix Exploration Ltd v. BP Canada Energy Group ULC* (2020), 2020 ABCA 178, 2020 CarswellAlta 807, 79 C.B.R. (6th) 205 (Alta. C.A.) — referred to

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim;

4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and

5. Unliquidated claims are on the same footing as liquidated claims.

57 The Court noted at para 19:

The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require the appellants to pay the costs of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement is unjust.

58 In *Blue Range*, the CCAA debtor terminated the contracts. Here, BP's position is that the GasEDI Agreement has not been terminated, remains in full force and effect and that Bellatrix is required to perform the agreement.

59 The First Lien Lenders and Bellatrix submit that BP does not meet the test for equitable set-off because it would not be "manifestly unjust" to allow Bellatrix to claim the December payment without taking into consideration the cross-claim.

60 They point out that, in a letter dated February 11, 2020, Bellatrix's counsel advised BP on its position on the ability of a CCAA debtor to elect non-performance of an agreement. Bellatrix responded that the EFC Decision did not deal with the issue of performance or set-off. Bellatrix has been consistent in its position throughout the CCAA proceedings. Despite this, BP did not apply to lift the stay or to claim a right of set-off until this application was filed.

61 While I have found later in this decision that BP's delay in taking action would not disentitle it from a equitable remedy, BP has not established an equitable ground for being protected, and therefore fails the *Telford* test for that reason. BP is not entitled to set-off the December payment, whether or not the GasEDI Agreement is an EFC.

62 Bellatrix submits that, since BP does not fit within the permitted set-off provisions of section 34(8), but for the agreement among Bellatrix, BP and the Monitor to have the Monitor hold the December payment in trust, BP would have been in violation of the stay under the initial CCAA order had it purported to withhold the December payment. If it had unilaterally withheld the payment, BP would have deprived Bellatrix of substantial liquidity at a time when Bellatrix was seeking to pursue its strategic process to identify a going concern transaction for the benefit of its many stakeholders, relying on funds drawn under its Interim Financing Facility, and Bellatrix would have been unable to make various payments to secured and other unsecured creditors.

63 However, as I have found that BP has neither a legal nor an equitable right of set-off, it is not necessary that I decide this issue.

***C. Is BP entitled to lift the stay to permit it to obtain and enforce a judgement against the sale proceeds?***

64 As a corollary to the relief of lifting the stay, BP asks the Court to direct immediate payment of the alleged damages to BP out of the sale proceeds, less the December payment.

65 The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v. Lexin Resources Ltd*, 2019 ABQB 23 (Alta. Q.B.) in the context of a receivership, citing *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).

66 Guidance can be drawn from the provisisons of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party

applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.).

67 Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Ma, Re*, at para 3.

68 In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Canwest Global Communications Corp., Re* (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

69 BP submits that it suffers unique harm from the breach of the GasEDI Agreement, and argues that such prejudice favours the lifting of the stay to allow it to enforce its damages claim against Bellatrix. However, BP does not provide any valid reason why its damages claim is unique.

70 First, BP submits that it is a post-filing creditor. This is incorrect: its damages claim arises from a pre-filing contract, whether it is an EFC or not.

71 Second, BP notes, relying on *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.), that courts are reluctant to interfere with the rights of contractual parties in a liquidation scenario where the result would be to prefer the interests of the debtor and its primary secured creditor. However, I agree with the First Lien Lenders that the *Probe* case is distinguishable from the situation of Bellatrix's failure to perform under the GasEDI Agreement.

72 In *Probe*, the unique facts included the existence of an intercreditor agreement that contemplated the mutual intent between the secured creditor and the party opposing the termination of the agreement at issue that any purchaser of Probe would be bound by Probe's obligations under the contract.

73 BP submits in proposing the lifting of the stay that Bellatrix has abused and violated the CCAA process. As noted later in this decision, there is no basis for this allegation.

74 BP also submits that the stay should be lifted because the GasEDI Agreement as an EFC is entitled to certain benefits. These benefits do not imply a right to lift the stay in the context of a damages claim. Section 34(10) of the *Act* makes it clear that such a claim merely makes the holder a creditor, in this case an unsecured creditor. The unique risks inherent in the status of an EFC contract are recognized in the limited relief offered in section 34. The CCAA does not provide any special security or priority for a damages claim arising from an EFC.

75 Finally, as noted by the Agent, this is the end of the CCAA process, and in the nature of a priorities dispute. There exists no valid reason to lift the stay or to order the immediate payment to BP of damages out of the sale proceeds or to grant BP a priority charge on the sale proceeds ranking *pari passu* with the Interim Lenders Charge unless consideration of good faith or equity compel that result.

***D. Is BP entitled to equitable relief?***

76 BP seeks a declaration of constructive trust as a remedy for Bellatrix's breach of the GasEDI Agreement, arguing that Bellatrix's stakeholders have been unjustly enriched. BP also submits that Bellatrix has engaged in a pattern of abusive conduct and has unjustly appropriated approximately $14.5 million by breaching a contract that it is prohibited from disclaiming.

77 The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Hoard, Re*, 2014 ABQB 426 (Alta. Q.B.) at para 26.

# TAB 2

**Most Negative Treatment:** Check subsequent history and related treatments.

2020 MBQB 58
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2020 CarswellMan 174, 2020 MBQB 58, 317 A.C.W.S. (3d) 238, 79 C.B.R. (6th) 44

# IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 26, 2020
Docket: Winnipeg Centre CI 20-01-26627

Counsel: Marc Wasserman, Jeremy Dacks, Catherine Howden, Eric Blouw, for Applicant
Wayne Onchulenko, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere (articling student), for Richter Advisory Group Inc.
David Jackson, Shayne Kukulowicz, Hylton Levy, for proposal trustee, A. Farber & Partners Inc.

Subject: Civil Practice and Procedure; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
**Headnote**
Bankruptcy and insolvency --- Receivers — Appointment
WC LLC, lender, advanced funds to N Group to fund their payroll — Funding was advanced by WC LLC because N Group had not confirmed that sufficient funds were deposited in corporate account — N Group did not deposit necessary payroll funds, and WC LLC funded payroll to ensure that employee payroll was not interrupted during crucial time frame — New evidence was received, which included that N Group provided no indication of how they intended to fund payroll, that WC LLC had responded to N Groups funding request, but that N Group did not respond to WWC LLC's proposal — WC LLC brought application for R LLP to be appointed as receiver — Application granted — Further evidence satisfactorily showed that N Group had not been acting in good faith and with due diligence — As result of N Group failing to provide accurate and timely information to proposal trustee and WC LLC, proposal proceedings were untenable — Further, N Group had no plan to continue to fund its operations and no other lender had stepped up to provide necessary financing to pay out WC LLC — It was fundamental, for purpose of proposal process to continue, that N Group cooperate with proposal trustee and this had not occurred — Unilateral closing of its retail stores, distribution centres and website, without consulting with WC LLC or proposal trustee, was in breach of Credit Agreement and court order.
**Table of Authorities**
**Cases considered by *Edmond J.*:**

*Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to
*Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 ONSC 163, 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — referred to
*Dondeb Inc., Re* (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — followed
*Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to
*Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to
*7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al* (2019), 2019 MBCA 95, 2019 CarswellMan 772 (Man. C.A.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — pursuant to

s. 243(1) — considered

s. 244(1) — referred to

*Court of Queen's Bench Act*, S.M. 1988-89, c. 4
s. 55(1) — considered

APPLICATION by WC LLC for R LLP to be appointed as receiver.

***Edmond J.*:**

**Introduction**

1 The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*") and s. 55(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as amended ("*QB Act*") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

2 By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

3 The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

21 The closure of the retail stores, distribution centres and website without consulting the Lenders and the proposal trustee is a serious concern that directly affects the ability of the Nygård Group to continue to operate and for the applicant to realize on the Collateral.

22 I agree with the applicant that the Nygård Group has provided no information to the Lenders about:

a) What has happened to the employees and specifically how they have been dealt with;

b) How the retail stores are being secured and locked down;

c) How the inventory located in the stores is being dealt with, if at all;

d) What is happening with the Nygård Group wholesale customers; or

e) How the Nygård Group is planning to sell its inventory other than the reference to the Perry Ellis potential offer.

23 It is fundamental for the proposal process to continue that the Nygård Group cooperate with the proposal trustee and that the proposal trustee be in a position to state specifically that the parties subject to the proposal proceeding have been acting in good faith and with due diligence. As noted above, that has not occurred.

24 In addition to the foregoing, the Nygård Group has failed to comply with orders made by this court and undertakings given by their counsel. Specifically, and contrary to their counsel's representations in court on March 12, 2020, the Nygård Group has failed to return the payroll funds to the Nygård Group's bank account and repay the applicant the payroll advance. The explanation provided in the affidavit of Mr. Fenske affirmed March 18, 2020 is inconsistent with what the court was advised on March 12, 2020.

25 The Nygård Group was directed pursuant to orders made by the court on March 12 and 13, 2020, to continue to comply with the Credit Agreement. The unilateral closing of its retail stores, distribution centres and website without consulting with the Lenders or the proposal trustee is in breach of the Credit Agreement and the court order. I also find that it is a material adverse change to the creditors which placed the proposal trustee in the position of not being able to comply with its duties under the *BIA*.

26 I agree with the applicant that in light of the events that have occurred since March 12, 2020, the appointment of Richter was urgently required and Richter was appointed as receiver effective March 18, 2020.

27 Richter is in the best position to assess the reasonableness of the offers to purchase the real estate and make a motion to court with evidence seeking approval. The evidence filed by the Nygård Group is insufficient to assess the reasonableness of the sale of the Toronto Property and the real estate located in Winnipeg. The proposal trustee stated at para. 15 of the second report that it is not in a position to advise the court or stakeholders that the offer respecting the Toronto Property is fair and reasonable.

28 The events that occurred since orders were made on March 12 and 13, 2020, are material developments that have caused or had the potential to cause a material prejudice to the Lenders and to the Nygård Group's business, creditors and stakeholders.

29 The adjournment of the receivership application on March 13, 2020 and allowing the proposal proceedings to continue with the oversight of the proposal trustee was not granting the Nygård Group a licence to operate with impunity. The court's decision on March 13, 2020, was to allow the respondents a limited period of time to make good faith efforts to repay the debt owing to the Lenders and to fully cooperate with the proposal trustee.

30 I am satisfied that the appropriate course of action is to lift the stay of proceedings that was granted pursuant to s. 69(1) of the *BIA*. The court has jurisdiction pursuant to s. 69.4 of the *BIA* to lift the stay in circumstances in which the court is satisfied:

**69.4**

. . . . .

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

**69.4**

. . . . .

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

31 In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee and the Lenders require the ability to oversee the preservation of the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

32 Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the *BIA* under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

33 While the court has the authority pursuant to s. 50.4(11) of the *BIA* to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

34 Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

35 A similar approach was taken by the Ontario Superior court in *Dondeb Inc., Re*, 2012 ONSC 6087, [2012] O.J. No. 5853 (Ont. S.C.J. [Commercial List]) and, in my view, that approach is equally applicable in this case.

**Conclusion**

36 The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

37 Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

*Application granted.*

**End of Document**

# TAB 3

2019 YKSC 39
Yukon Territory Supreme Court

Yukon (Government of) v. Yukon Zinc Corporation

2019 CarswellYukon 78, 2019 YKSC 39, 309 A.C.W.S. (3d) 295, 71 C.B.R. (6th) 212

# GOVERNMENT OF YUKON as represented by the Minister of the Department of Energy, Mines and Resources (Petitioner) and YUKON ZINC CORPORATION (Respondent)

S.M. Duncan J.

Judgment: August 7, 2019
Docket: Whitehorse S.C. 19-A0067

Counsel: John T. Porter, Laurie Henderson, for Petitioner
Laurie Henderson, for Respondent
Kibben Jackson, John Sandrelli, for Proposed Receiver, Pricewaterhouse Cooper

Subject: Civil Practice and Procedure; Insolvency; International; Public
**Related Abridgment Classifications**
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Conflict of laws
VII Bankruptcy
VII.1 General principles
**Headnote**
Conflict of laws --- Bankruptcy — General principles
Government of Yukon brought petition to appoint receiver for mine owned by respondent located in southeast Yukon — Yukon maintained that respondent failed to pay approximately $25 million in outstanding security, and it was concerned about continually deteriorating condition of mine site, capacity of respondent to carry out care and maintenance at site, erosion of current security, and breach of licence conditions and failure to comply with inspector's conditions for remedial actions by respondent — Respondent filed notice of intention to make proposal in bankruptcy (NOI) in British Columbia (BC) day before hearing in Supreme Court of Yukon of Yukon's petition to appoint receiver — Effect of NOI was to create automatic stay of petition for up to six months — Yukon applied to lift automatic stay — Application granted — Supreme Court of Yukon had jurisdiction and ability to hear application to lift stay — Respondent's head office was in Vancouver and company was incorporated in BC — Two of six directors had residential addresses in Vancouver, while other four directors had residential addresses in China — Mine, principal asset of respondent, was located in southeast Yukon — Respondent's employees were in Yukon, and other assets used by respondent for mine operation were on site in Yukon — Regulator who was carrying out significant work on site was Government of Yukon — Costs and consequences of mine remediation would occur in Yukon — No substantive steps had been taken in BC to advance proposal — Respondent carried on business over past year in Yukon — There were more substantial connections to Yukon — Yukon was entitled to hearing of its case that it was just and convenient to appoint receiver in Yukon, where there was most real and substantial connection to facts.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Government of Yukon brought petition to appoint receiver for mine owned by respondent located in southeast Yukon — Yukon maintained that respondent failed to pay approximately $25 million in outstanding security, and it was concerned about continually deteriorating condition of mine site, capacity of respondent to carry out care and maintenance at site, erosion of current security, and breach of licence conditions and failure to comply with inspector's conditions for remedial actions by respondent — Respondent filed notice of intention to make proposal in bankruptcy (NOI) in British Columbia day before hearing in Supreme Court of Yukon of Yukon's petition to appoint receiver — Effect of NOI was to create automatic stay of petition for up to six months — Yukon applied to lift automatic stay — Application granted — Yukon must show it qualified under one of exemptions under Bankruptcy and Insolvency Act (BIA) for imposition of automatic stay — Yukon was not secured creditor for purpose of obtaining exemption from stay — At time Yukon filed petition, there was no bankruptcy, proposal or receivership — Yukon could not rely on its own petition to appoint receiver to bring itself under s. 14.06(7) of BIA — Yukon was materially prejudiced by stay and it would be equitable to lift stay to allow petition to appoint receiver to be heard — Yukon, in its capacity as environmental regulator, was actively and pro-actively managing mine site in order to contain environmental damage since respondent refused to comply with inspector's directions and its own licence terms — Yukon had security from respondent to spend on remediation activities, but respondent was required to furnish additional $25 million in security in order to remedy environmental issues and it had not done so — There remained uncertainty about respondent's ongoing commitment to site — Intent of s. 14.06(7) of BIA was to make security for purpose of environmental clean-up priority — Yukon was acting in public interest and taxpayer dollars were at risk as respondent continued to fail to provide required security amount and amounts continued to erode due to needs of deteriorating site — Yukon was entitled to hearing of its case that it was just and convenient to appoint receiver in Yukon, where there was most real and substantial connection to facts.

**Table of Authorities**

**Cases considered by *S.M. Duncan J.*:**

*Andre Tardiff Agency Ltd. v. Burlingham Associates Inc.* (2015), 2015 SKQB 87, 2015 CarswellSask 232, 473 Sask. R. 159 (Sask. Q.B.) — considered

*Cook v. Hunters Trailer & Marine Ltd.* (2001), 2001 YKSC 533, 2001 CarswellYukon 85, 27 C.B.R. (4th) 33 (Y.T. S.C.) — considered

*Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — referred to

*Eagle River International Ltd., Re* (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — considered

*Flax Investment Ltd., Re* (1979), 32 C.B.R. (N.S.) 65, 14 C.P.C. 184, 1979 CarswellOnt 248 (Ont. S.C.) — considered

*Francisco, Re* (1995), 19 C.L.R. (2d) 146, 32 C.B.R. (3d) 29, 1995 CarswellOnt 363 (Ont. Bktcy.) — referred to

*Francisco, Re* (1996), 40 C.B.R. (3d) 77, 1996 CarswellOnt 2176 (Ont. C.A.) — referred to

*JRB v. Jimenez* (2018), 2018 ABQB 847, 2018 CarswellAlta 2328 (Alta. Q.B.) — followed

*Retail Merchants Assn. v. Melissa Derek Inc.* (2002), 2002 CarswellOnt 2748, 60 O.R. (3d) 547, 37 C.B.R. (4th) 147 (Ont. S.C.J.) — considered

*Ross v. Ross Mining Ltd.* (2009), 2009 YKSC 55, 2009 CarswellYukon 123, 57 C.B.R. (5th) 77 (Y.T. S.C.) — referred to

*Yukon v. B.Y.G. Natural Resources Inc.* (2007), 2007 YKSC 2, 2007 CarswellYukon 1, 27 B.L.R. (4th) 147, 31 C.B.R. (5th) 100 (Y.T. S.C.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "locality of a debtor" — considered

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

s. 50.4 [en. 1992, c. 27, s. 19] — considered

> ... it is my view that the choice of forum in an insolvency is somewhat more nuanced that only considering the locality of the debtor. The type of application matters as does the involvement of the competing venue. However, neither the Act nor the decided cases close the door to arguing that the appropriate forum for an application under the Act be somewhere other than where the insolvency is.

38 The Court in Alberta further noted that the court in Ontario had not yet been engaged and the real and substantial connection existed between Alberta and the facts of the case. The Court found it was vital that the plaintiff's damages be assessed for her to obtain relief against the defendant as well as to advance her claim against the other defendants.

39 I adopt the approach of the Court in *Jimenez*, including its noting of the gaps and distinguishing features in *Cook*.

40 Here, Yukon Zinc's head office is in Vancouver and the company is incorporated in British Columbia. Two of the six directors have residential addresses in Vancouver. The other four directors have residential addresses in China. Wolverine Mine, the principal asset of Yukon Zinc, is located in southeast Yukon. Yukon Zinc's employees are in Yukon. Other assets used by Yukon Zinc for the mine operation and during the closure are on site in Yukon. The regulator who is carrying out significant work on site is the Government of Yukon. The costs and consequences of mine remediation and Yukon Zinc's insolvency will occur in Yukon. The NOI was filed in British Columbia by Yukon Zinc on July 31, 2019, one day before the hearing of the petition, which was filed on July 17, 2019 in Yukon, with notice of it provided by the Government of Yukon to Yukon Zinc on July 3, 2019. At the date of hearing of this objection, no substantive steps had been taken in British Columbia to advance the proposal, except to appoint a trustee. The Court in British Columbia has not yet been substantively engaged.

41 Yukon Zinc has carried on business over the past year (to the extent of minimal care and maintenance of its principal asset) in Yukon (s. 2(a)). While it is true that the company's head office, accounts, corporate records, and incorporation status are in British Columbia, and the President and CEO who is the main contact for the Government of Yukon currently lives in Vancouver, and there may be creditors in British Columbia, I find there are more substantial connections to the Yukon in this matter on the basis of the facts set out above in paragraph 40. I also note from the affidavit material that Mr. Lu, the President and CEO of Yukon Zinc, advised in an email dated July 8, 2019 that he will be retired from the parent corporation of Yukon Zinc, by the end of August, 2019. There is no evidence of who his replacement will be, or where they will reside.

42 It is not necessary for me to decide whether the NOI is a nullity or not. The Court in British Columbia has the ability to transfer the proceeding to Yukon (s. 187(10) of the *BIA*), or a further argument can be made in this Court that the Yukon matters be transferred to British Columbia. I am restricting my decision to a finding that Yukon is the proper forum to hear the application to lift the stay created by the filing of the NOI in British Columbia.

43 This is an appropriate case to lift the stay on the basis of material prejudice and other equitable grounds. The following facts as presented in the affidavit material before me support this finding:

> i. The Government of Yukon in its capacity as environmental regulator is actively and pro-actively managing the mine site in order to contain environmental damage, since Yukon Zinc has refused to comply with the inspector's directions and its own licence terms, and has also not taken any steps towards providing a water treatment system to prevent contaminated water from being released untreated.
>
> ii. The Government of Yukon still has security from Yukon Zinc to spend on remediation activities, but it has estimated its costs to ensure environmental integrity on the site over approximately 18 months to be $6 million. If this is spent, two thirds of existing security will be gone, without the assurance of additional security amounts to support the ongoing care and maintenance and remediation requirements. Under Yukon Zinc's licence, it is required to furnish an addition $25 million in security in order to remedy the environmental issues and has not done so.
>
> iii. The Government of Yukon currently relies on Yukon Zinc's four employees (two per shift) on site to provide basic care and maintenance assistance but in June and July 2019 the employees advised they had not been paid since mid-May.

While this situation has been recently rectified, there remains uncertainty about Yukon Zinc's ongoing commitment to the site, even minimally.

iv. Section 14.06(7) of the *BIA* gives special security priority to government environmental regulators in situations of environmental risk where government may have to incur costs of remedying environmental damage created by a debtor. Although I have found that this section did not apply to the original circumstances of bringing this petition, the intent of this section in the scheme of the *BIA* is to make security for the purpose of environmental clean-up a priority.

v. The Government of Yukon is acting in the public interest and Yukon taxpayer dollars are at risk as Yukon Zinc continues to fail to provide the required security amount and the amounts continue to erode due to the needs of the deteriorating site. While it may be true that a sale of the company will result in additional funding, Yukon Zinc has advised on two previous occasions that a sale was imminent, and in the end neither materialized. In this most recent promise of a likely sale, the deal was to have been completed by the end of July, 2019, or by mid-August at the latest, but there was no evidence on August 1 that it has been completed. Further, Yukon Zinc has stated that no company wants to pay the outstanding security amount of $25 million up front, making a sale difficult.

44 In this context, the Government of Yukon is entitled to a hearing of its case that it is just and convenient to appoint a receiver at this time in Yukon, where there is the most real and substantial connection to the facts.

45 In deciding that the stay may be lifted, I make no comment on the merits of the petition to appoint a receiver.

46 Finally, I note that at my request, counsel made supplementary oral submissions on August 2, 2019, based on the case of *Retail Merchants Assn. v. Melissa Derek Inc.* (2002), 60 O.R. (3d) 547 (Ont. S.C.J.) that an application to lift a stay should be done on notice to the trustee with an opportunity for them to participate. Both counsel stated this was not necessary in this case. In particular, counsel for Yukon Zinc advised he had spoken to the trustee about this matter and they advised that as they had just been appointed they would have nothing substantive to add to this determination.

47 I am grateful to counsel for their helpful written and oral submissions.

*Application granted.*

**End of Document**

# TAB 4

2015 SCC 53, 2015 CSC 53
Supreme Court of Canada

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.

2015 CarswellSask 680, 2015 CarswellSask 681, 2015 SCC 53, 2015 CSC 53, [2015] 3 S.C.R. 419, [2016] 1 W.W.R. 423, 259 A.C.W.S. (3d) 215, 31 C.B.R. (6th) 1, 391 D.L.R. (4th) 383, 467 Sask. R. 1, 477 N.R. 26, 651 W.A.C. 1

# Attorney General for Saskatchewan, Appellant and Lemare Lake Logging Ltd., Respondent and Attorney General of Ontario and Attorney General of British Columbia, Interveners

Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: May 21, 2015
Judgment: November 13, 2015
Docket: 35923

Proceedings: reversing *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.); affirming *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.)

Counsel: Thomson Irvine, Katherine Roy, for Appellant
No one for Respondent
Michael S. Dunn, Daniel Huffaker, for Intervener, the Attorney General of Ontario
R. Richard M. Butler, Jean M. Walters (written) for Intervener, the Attorney General of British Columbia.
Jeffrey M. Lee, Q.C., Kristen MacDonald — Amicus curiae

Subject: Civil Practice and Procedure; Constitutional; Insolvency; Property; Public
**Related Abridgment Classifications**
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
**Headnote**
Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation
Secured creditor applied pursuant to s. 243(1) of Bankruptcy and Insolvency Act (BIA) for appointment of receiver over substantially all assets of debtor — Debtor was "farmer" within meaning of Saskatchewan Farm Security Act (FSA), and contested appointment — Debtor argued that creditor was required to submit notice of intention, wait 150-day notice period and engage in mandatory review and mediation process under Part II of FSA — Chambers judge held that s. 243(1) BIA and Part II FSA were not in conflict — Court of Appeal held that in circumstances where application was made to appoint receiver, Part II FSA frustrated purpose of s. 243(1) BIA and was therefore inoperative — Attorney General for Saskatchewan appealed — Appeal allowed — Under doctrine of federal paramountcy, federal law prevails when there is genuine inconsistency between

federal and provincial legislation — Conflict arises when there is operational conflict or where operation of provincial law frustrates purpose of federal enactment — Paramountcy was to be narrowly construed, favouring harmonious interpretations — No operational conflict existed as it was possible to comply with both statutes — Section 243 of BIA had simple and narrow purpose of establishing regime for appointment of national receiver — Under BIA, appointment of national receiver could not be made before expiry of 10 day notice provision — Part II FSA afforded protection to farmers against loss of farm land by imposing compulsory and non-waivable 150-day waiting period during which mandatory review and mediation process occurs — Conflict only arises if interference frustrates purpose of federal regime — Words and discretionary nature of s. 243 BIA support narrow reading of provision's purpose — Section 243 of BIA did not suggest it was comprehensive remedy exclusive of provincial law — BIA also explicitly recognized continued operation of provincial law, except where inconsistent with BIA — Evidence did not support argument that 150-day delay or other conditions of FSA frustrated effectiveness or timeliness concerns — Part II FSA was not constitutionally inoperative where application was made to appoint receiver pursuant to s. 243(1) BIA.
Droit autochtone --- Divers
Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale
Créancier garanti a déposé une requête en vertu de l'art. 243(1) de la Loi sur la faillite et l'insolvabilité (LFI) afin de faire nommer un séquestre pour s'occuper de la majeure partie des biens de son débiteur — Débiteur, un « fermier » au sens de la Saskatchewan Farm Security Act (FSA), a contesté la nomination — Débiteur a fait valoir que le créancier était tenu de déposer un avis d'intention, attendre l'expiration du délai d'avis de 150 jours et participer au processus obligatoire d'examen et de médiation prévu à la partie II de la FSA — Juge siégeant en son cabinet a estimé que l'art. 243(1) de la LFI et la partie II de la FSA ne se contredisaient pas — Cour d'appel a estimé que dans le cas où une demande est faite en vue de faire nommer un séquestre, la partie II de la FSA va à l'encontre du but poursuivi par l'art. 243(1) de la LFI, ce qui la rendait du coup inopérante — Procureur général de la Saskatchewan a formé un pourvoi — Pourvoi accueilli — En vertu de la doctrine de la prépondérance fédérale, la loi fédérale prévaut lorsqu'il y a une véritable contradiction entre la législation fédérale et la législation provinciale — Il y aura un conflit lorsqu'il y a conflit d'application parce qu'il est impossible de se conformer aux deux lois ou lorsque l'application de la loi provinciale va à l'encontre du but poursuivi lors de l'adoption de la loi fédérale — On doit interpréter la prépondérance fédérale de manière stricte et favoriser une interprétation harmonieuse — Il n'y avait pas de conflit d'application puisqu'il était possible de conformer aux deux lois — Article 243 de la LFI poursuit un objectif simple et strict qui est l'établissement d'un régime permettant la nomination d'un séquestre à l'échelle nationale — En vertu de la LFI, la nomination d'un séquestre à l'échelle nationale ne peut se faire avant l'expiration d'un délai de dix jours — Partie II de la FSA accorde une protection spécifique aux fermiers contre la perte de leur ferme en prévoyant qu'un créancier hypothécaire doive attendre l'expiration d'un délai d'attente obligatoire de 150 jours auquel le débiteur ne peut renoncer et au cours duquel survient un processus obligatoire d'examen et de médiation — Conflit ne surviendra que si une interférence ne permet pas d'atteindre le but poursuivi par le régime fédéral — Libellé et la nature discrétionnaire de l'art. 243 de la LFI favorisent une interprétation stricte du but poursuivi par cette disposition — Article 243 ne laisse aucunement croire qu'il prévoit une mesure de réparation complète qui exclut l'application des lois provinciales — LFI reconnaît explicitement l'application continue de la loi provinciale dans le contexte d'une faillite ou d'une insolvabilité, sauf dans la mesure où elle contredit la LFI — Rien dans la preuve ne permettait d'affirmer que le délai de 150 jours ou que les autres conditions mentionnées à la FSA faisaient échec à toute préoccupation en matière d'efficacité ou de possibilité d'agir en temps opportun — Partie II de la FSA n'était pas constitutionnellement inopérante dans le cas où une demande est faite en vertu de l'art. 243(1) de la LFI en vue de la nomination d'un séquestre.
A secured creditor applied pursuant to s. 243(1) of the Bankruptcy and Insolvency Act (BIA) for the appointment of a receiver over substantially all of the assets of its debtor. The debtor, a "farmer" within the meaning of The Saskatchewan Farm Security Act (FSA), contested the appointment. The debtor argued that the creditor was required to submit a notice of intention, wait the 150-day notice period, and engage in a mandatory review and mediation process under Part II of the FSA.
The chambers judge held that s. 243(1) of the BIA and Part II of the FSA were not in conflict. The Court of Appeal held that in circumstances where an application is made to appoint a receiver, Part II of the FSA frustrates the purpose of s. 243(1) of the BIA, thus rendering it inoperative.
The Attorney General for Saskatchewan appealed.
**Held:** The appeal was allowed.

Per Abella and Gascon JJ. (Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring): Under the doctrine of federal paramountcy, the federal law prevails when there is a genuine inconsistency between federal and provincial legislation. A conflict will arise when there is an operational conflict because it is impossible to comply with both laws or where the operation of the provincial law frustrates the purpose of the federal enactment. Paramountcy must be narrowly construed, favouring harmonious interpretations of federal and provincial legislation.

There was no operational conflict since it was possible to comply with both statutes. The issue was whether the FSA frustrated the purpose of the federal legislation.

Section 243 of the BIA has a simple and narrow purpose, which is the establishment of a regime allowing for the appointment of a national receiver. It authorizes the appointment of a receiver where it is "just and convenient". A secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a debtor that was acquired for, or used in relation to, a business carried on by the debtor, must send a notice pursuant to s. 244(1) of the BIA. The appointment of a national receiver cannot be made before the expiry of 10 days after the creditor sends the notice.

Part II of the FSA affords protection specifically to farmers against loss of their farm land. A mortgagee is prohibited from commencing any "action" with respect to farm land until a number of preconditions are met, including a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. After the waiting period, the mortgagee may apply for an order granting leave to commence the action.

The concurrent operation of s. 243(1) of the BIA and Part II of the FSA requires a secured creditor wishing to enforce its security interest against farm land to wait 150 days and comply with the various additional requirements of the FSA, rather than the 10 days required under the federal legislation. That interference, however, does not, itself, create a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime.

The words and discretionary nature of s. 243 of the BIA support a narrow reading of the provision's purpose. Interference with a discretion granted under federal law is not sufficient to establish frustration of federal purpose. The text of s. 243 does not suggest that it is meant to be a comprehensive remedy exclusive of provincial law. Section 72(1) of the BIA also explicitly recognizes the continued operation of provincial law in the bankruptcy and insolvency context, except where inconsistent with the BIA. Parliament did not intend to preclude notice periods longer than the 10-day period nor to oust legislation which is intended to favour mediation between creditors and farmers.

There was no evidence to support the argument that the 150-day delay or other conditions of the FSA frustrated any effectiveness or timeliness concerns. Part II of the FSA is not constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the BIA.

Per Côté J. (dissenting): With s. 243(1) of the BIA, Parliament intended to establish a timely process for appointing national receivers. To the extent that the FSA is incompatible with that purpose, there is a frustration of purpose. The notice period in the FSA is far longer and is absolute. The FSA establishes a series of evidentiary hurdles incompatible with Parliament's purpose to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. The FSA hinders the timely appointment of a receiver, thereby triggering the application of the doctrine of federal paramountcy.

Un créancier garanti a déposé une requête en vertu de l'art. 243(1) de la Loi sur la faillite et l'insolvabilité (LFI) afin de faire nommer un séquestre pour s'occuper de la majeure partie des biens de son débiteur. Le débiteur, un « fermier » au sens de la Saskatchewan Farm Security Act (FSA), a contesté la nomination. Le débiteur a fait valoir que le créancier était tenu de déposer un avis d'intention, attendre l'expiration du délai d'avis de 150 jours et participer au processus obligatoire d'examen et de médiation prévu à la partie II de la FSA.

Le juge siégeant en son cabinet a estimé que l'art. 243(1) de la LFI et la partie II de la FSA ne se contredisaient pas. La Cour d'appel a estimé que dans le cas où une demande est faite en vue de faire nommer un séquestre, la partie II de la FSA va à l'encontre du but poursuivi par l'art. 243(1) de la LFI, ce qui la rendait du coup inopérante.

Le procureur général de la Saskatchewan a formé un pourvoi.

**Arrêt:** Le pourvoi a été accueilli.

Abella et Gascon, JJ. (Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à leur opinion) : En vertu de la doctrine de la prépondérance fédérale, la loi fédérale prévaut lorsqu'il y a une véritable contradiction entre la législation fédérale et la législation provinciale. Il y aura un conflit lorsqu'il y a conflit d'application parce qu'il est impossible de se conformer aux deux lois ou lorsque l'application de la loi provinciale va à l'encontre du but poursuivi lors de l'adoption de la loi fédérale. On doit

interpréter la prépondérance fédérale de manière stricte et favoriser une interprétation harmonieuse de la législation fédérale et provinciale.

Il n'y avait pas de conflit d'application puisqu'il était possible de conformer aux deux lois. La question était de savoir si la FSA allait à l'encontre du but poursuivi par la législation fédérale.

L'article 243 de la LFI poursuit un objectif simple et strict qui est l'établissement d'un régime permettant la nomination d'un séquestre à l'échelle nationale. Il autorise la nomination d'un séquestre lorsque cela est « juste ou opportun ». Un créancier garanti ayant l'intention d'exécuter une sûreté sur l'ensemble ou une partie importante de l'inventaire, des comptes recevables ou des autres biens du débiteur qui ont été acquis ou utilisés en relation avec les activités commerciales du débiteur doit envoyer un avis suivant l'art. 244(1) de la LFI. La nomination d'un séquestre à l'échelle nationale ne peut se faire avant l'expiration d'un délai de dix jours après que le créancier ait envoyé l'avis.

La partie II de la FSA accorde une protection spécifique aux fermiers contre la perte de leur ferme. Un créancier hypothécaire ne peut entamer une [TRADUCTION] « action » concernant une ferme à moins que certaines conditions ne soient respectées, y compris l'expiration d'un délai d'attente obligatoire de 150 jours auquel le débiteur ne peut renoncer et au cours duquel survient un processus obligatoire d'examen et de médiation. Une fois le délai expiré, le créancier hypothécaire peut s'adresser aux tribunaux afin d'obtenir l'autorisation d'entamer une action.

L'application concurrente de l'art. 243(1) de la LFI et de la partie II de la FSA exige d'un créancier garanti ayant l'intention d'exécuter sa sûreté à l'encontre d'une ferme qu'il attende l'expiration d'un délai de 150 jours, plutôt que le délai de 10 jours exigé en vertu de la loi fédérale, et se conforme aux différentes exigences de la FSA. Toutefois, cette interférence, ne crée pas, en soi, un conflit. Un conflit ne surviendra que si une telle interférence ne permet pas d'atteindre le but poursuivi par le régime fédéral.

Le libellé et la nature discrétionnaire de l'art. 243 de la LFI favorisent une interprétation stricte du but poursuivi par cette disposition. L'existence d'une interférence avec une discrétion accordée en vertu de la loi fédérale ne suffit pas à établir que l'objectif de la disposition fédérale ne pourra être atteint. Le libellé de l'art. 243 ne laisse aucunement croire qu'il prévoit une mesure de réparation complète qui exclut l'application des lois provinciales. L'article 72(1) de la LFI reconnaît explicitement l'application continue de la loi provinciale dans le contexte d'une faillite ou d'une insolvabilité, sauf dans la mesure où elle contredit la LFI. Le législateur fédéral n'avait pas l'intention d'écarter l'application de délais d'avis plus longs que la période de 10 jours ni de faire obstacle à toute loi ayant pour but de favoriser la médiation entre les créanciers et les fermiers.

Rien dans la preuve ne permettait d'affirmer que le délai de 150 jours ou que les autres conditions mentionnées à la FSA faisaient échec à toute préoccupation en matière d'efficacité ou de possibilité d'agir en temps opportun.

Côté, J. (dissidente) : En adoptant l'art. 243(1) de la LFI, le législateur fédéral avait l'intention d'établir un processus permettant la nomination d'un séquestre à l'échelle nationale à l'intérieur d'un délai raisonnable. Dans la mesure où la FSA est incompatible avec cet objectif, ce dernier ne peut être atteint. Le délai d'avis est beaucoup plus long et est obligatoire. La FSA établit en matière de preuve une série d'obstacles incompatibles avec l'intention du législateur fédéral de mettre en place un processus de nomination d'un séquestre à l'échelle nationale à l'intérieur d'un délai raisonnable, qui puisse s'adapter à un cas d'urgence et répondre à l'ensemble des circonstances. La FSA ne permet la nomination d'un séquestre à l'intérieur d'un délai raisonnable, de sorte qu'il fallait appliquer la doctrine de la prépondérance fédérale.

**Table of Authorities**

**Cases considered by *Abella J., Gascon J.*:**

*Bank of Montreal v. Hall* (1990), 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 1990 CarswellSask 25, 1990 CarswellSask 405 (S.C.C.) — referred to

*Borowski v. Canada (Attorney General)* (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.) — referred to

*Bruyère c. Québec (Commission de la santé & de la sécurité du travail)* (2011), 2011 SCC 60, 2011 CarswellQue 13253, 2011 CarswellQue 13254, 94 C.C.P.B. 1, (sub nom. *Canada (Ministere des Ressources humaines & Développement social) v. Bruyère)* 339 D.L.R. (4th) 473, D.T.E. 2011T-812, (sub nom. *A.G. (Quebec) v. Canada (H.R.S.D.))* 2012 C.L.L.C. 240-002, (sub nom. *Quebec (Attorney General) v. Canada (Minister of Human Resources & Social Development))* 424 N.R. 198, (sub nom. *Quebec (Attorney General) v. Canada (Human Resources & Social Development))* [2011] 3 S.C.R. 635, 99 C.C.E.L. (3d) 1 (S.C.C.) — referred to

purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

46 Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.

47 In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose:*COPA*, at para. 66; see also *114957 Canada Ltée*.

48 This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of security interests prescribed by provincial legislation. Unlike the self-executing remedy at issue in that case, where the bank could seize the chattel upon default without the need to go to court, the appointment of a s. 243 receiver is not mandatory. More importantly, in contrast with *Hall*, the s. 243 receivership remedy cannot be said to create a "complete code": p. 155. Nothing in the text of the provision or the *BIA* more generally suggests that s. 243 is meant to be a comprehensive remedy, exclusive of provincial law. The provision itself recognizes that a receiver may still be appointed under a security agreement or other provincial or federal laws, and creates no right to the appointment of a national receiver: s. 243(2)(*b*). As this Court observed in *COPA*, at para. 66, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission".

49 Any uncertainty about whether s. 243 was meant to displace provincial legislation like the *SFSA* is further mitigated by s. 72(1) of the *BIA*, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

This too demonstrates that Parliament has explicitly recognized the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the *BIA*: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.), at paras. 46-47.

50 Other provisions of the *BIA* further support a more narrow reading of s. 243's purpose. Notably, s. 47 of the *BIA* empowers a court to appoint an interim receiver where a notice of intention to enforce a security was sent or is about to be sent under s. 244(1). Where there is an urgent need for the appointment of a receiver, the *BIA* thus provides a mechanism for the appointment of an interim receiver. As Bennett has observed:

> In practice, a secured creditor may apply for an interim receiver under subsection 47(1) for a short term, and then apply under section 243 for a full receivership and, before the appointment of the interim receiver expires or, alternatively, apply for an extension under subsection 47(1)(c).

(Frank Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 883)

While s. 48 of the *BIA* provides that ss. 43 to 46 do not apply to individuals whose principal occupation is farming, the provision does not exempt farmers from the operation of s. 47. This shows that Parliament thinks farmers generally warrant special consideration, but not in cases where an interim receiver under s. 47 is found to be warranted. Promptness and timeliness is a concern that Parliament appears to have addressed precisely through the interim receivership regime. The potential conflict, if any, between s. 47 of the *BIA* and Part II of the *SFSA* is not, however, at issue in this appeal.

51 The legislative history of s. 243 of the *BIA* further supports a narrow construction of the provision's purpose focussed on the establishment of a national receivership regime. The purpose of a court-appointed receiver, generally, "is to preserve and protect the property in question pending resolution of the issues between the parties": Bennett, at p. 6, citing *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada)* (1995), 169 A.R. 138 (Alta. C.A.). While historically receivership law was primarily a remedy for secured creditors, the legislative regulation of receiverships has resulted in many significant rights also being given to the debtor and other interested parties as well: Wood, at p. 459.

52 Part XI of the *BIA* was added to the Act in 1992, bringing under federal law various aspects of receivership law that had previously applied to insolvent debtors at common law or under provincial legislation: S.C. 1992, c. 27, s. 89. In discussing the rationale for Part XI's adoption, Pierre Blais, the then-Minister of Consumer and Corporate Affairs and Minister of State (Agriculture), suggested that Part XI was enacted "to impose duties of disclosure and good faith on secured creditors and receivers and to require that a secured creditor give a debtor notice before enforcing its security": *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., October 29, 1991, at pp. 4177-78. He further noted, in the context of a discussion about the legislation more generally, that he had "made a point of consulting closely with [his] provincial counterparts to ensure [the federal] regime meshes smoothly with existing or planned provincial ones": p. 4180.

53 Although the 1992 legislation did not create a national receivership remedy, it amended the *BIA* in two ways that are particularly relevant to this appeal. First, it codified a 10-day notice period under s. 244 for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor. As Professor Wood explains, the requirement of a notice period developed initially at common law as a way to protect against the potential abuse of power by secured creditors: p. 474. The introduction in 1992 of a statutory notice period largely eliminated uncertainty associated with the common law rule: Wood, at p. 476. The purpose of the s. 244 notice requirement is "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs":, Janis P. Sarra, Geoffrey B. Morawetz and L. W. Houlden, *The 2015 Annotated Bankruptcy and Insolvency Act* (2015), at p. 1054; see also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, No. 7, 3rd Sess., 34th Parl., September 4, 1991, at p. 12, Ron MacDonald (Vice-chairman of the Committee). Second, the 1992 amendments gave the courts expanded authority when appointing interim receivers under the *BIA*: Wood, at p. 461-62; Bennett, at pp. 841-42. This new regime was intended "to prevent the prejudice that might otherwise be caused by the imposition of [the] new statutory notice period": Wood, at p. 461.

54 The 1992 legislation provided for parliamentary review of the *BIA* in three years' time: s. 92. In 1993, an advisory committee was established to identify further necessary amendments: Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (2007), at p. 3. Although s. 243 remained unchanged when Parliament enacted legislation amending the *BIA* in 1997, the 1997 amendments called for further parliamentary review in five years' time: S.C. 1997, c. 12, s. 114.

55 In anticipation of this review, Industry Canada engaged in a consultation process with stakeholders, culminating in a report published in 2002 summarizing many issues that stakeholders identified as concerns with regard to the operation and administration of the *BIA*: Marketplace Framework Policy Branch, Policy Sector, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.* In its report, Industry Canada noted that Part XI of the *BIA* had not been effective and had not been used as intended in many areas of the country: p. 20.

# TAB 5

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

# BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure

**Related Abridgment Classifications**

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement

**Headnote**

Debtors and creditors --- Receivers — Appointment — General principles

Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that

M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

**Table of Authorities**

**Cases considered:**

*Medical Laboratory Consultants Inc. v. Calgary Health Region* (2005), 19 C.C.L.I. (4th) 161, 43 Alta. L.R. (4th) 5, 2005 ABCA 97, 2005 CarswellAlta 333, 363 A.R. 283, 343 W.A.C. 283 (Alta. C.A.) — referred to

*Roberts v. R.* (2002), 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewaykum Indian Band v. Canada)* 2002 SCC 79, (sub nom. *Wewaykum Indian Band v. Canada)* [2003] 1 C.N.L.R. 341, (sub nom. *Wewaykum Indian Band v. Canada)* 220 D.L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada)* 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada)* [2002] 4 S.C.R. 245, (sub nom. *Wewayakum Indian Band v. Canada)* 236 F.T.R. 147 (note) (S.C.C.) — referred to

*Royal Bank v. W. Got & Associates Electric Ltd.* (1999), 178 D.L.R. (4th) 385, 1999 CarswellAlta 892, 1999 CarswellAlta 893, 247 N.R. 1, 73 Alta. L.R. (3d) 1, [2000] 1 W.W.R. 1, 250 A.R. 1, 213 W.A.C. 1, [1999] 3 S.C.R. 408, 15 P.P.S.A.C. (2d) 61 (S.C.C.) — referred to

*Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

*Judicature Act*, R.S.A. 2000, c. J-2

Generally — referred to

APPEAL by operator of oil well of decision appointing interim receiver.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

**Facts**

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

**Standard of Review**

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

**Appointment of the Receiver**

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

# TAB 6

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
**Headnote**
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.
**Table of Authorities**
**Cases considered by *Romaine J.*:**
*Bank of Nova Scotia v. Freure Village on Clair Creek*, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to
*Canadian Urban Equities Ltd. v. Direct Action for Life*, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to
*Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

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

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

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

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

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

***Should the ex parte order now be set aside?***

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

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

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

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

# TAB 7

2014 ABQB 65
Alberta Court of Queen's Bench

Alexis Paragon Limited Partnership, Re

2014 CarswellAlta 165, 2014 ABQB 65, [2014] A.W.L.D. 1428, 237 A.C.W.S. (3d) 300, 9 C.B.R. (6th) 43

# In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA")

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA")

In the Matter of a Plan of Compromise or Arrangement and reorganization of Alexis Paragon Limited Partnership and the Petitioners Listed in Appendix "A" (Collectively the "Company")

In the Matter of applications by the Company for, inter alia, a continuation of proceedings under the CCAA, a stay and the addition of Alexis Casino LP as an applicant

Silver Point Finance, LLP Applicant (Respondent) and Paragon Canada Alexis, ULC; Alexis Paragon Limited Partnership; Paragon Tamarack Alexis General Partnership; and Paragon Alexis Holdings, Inc., Respondents (Applicants) and Alexis Trustee Corporation, Alexis Nakoda Sioux Nation and Alexis Casino Limited Partnership Respondents (Interveners)

D.R.G. Thomas J.

Heard: January 24, 2014
Judgment: January 31, 2014
Docket: Edmonton 24-1823083, 24-1823084, 24-1823085, 24-1823086

Counsel: Mr. Michael J. McCabe, Q.C. for Paragon Group
Mr. Darren R. Bieganek, Q.C. for Alexis Group
Mr. Charles P. Russell, Mr. Logan Willis for Silver Point
Mr. Kent Rowan, Q.C., Ms Stephanie Wanke for PWC

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
**Headnote**
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
Casino was located on First Nations reserve — P Group of companies borrowed money from creditor SP to construct and provide for ongoing operation of casino — SP said that indebtedness now amounted to approximately $82 million — P Group operated casino — Revenues had never met projections prepared by P Group, with result being that there had never been enough money generated in casino to pay rents — It was common ground that P Group had been default on its debt obligation to SP for some time — SP wanted its money back and commenced proceedings to have receiver manager appointed to take over operation of casino and restructure debt — P Group resisted and claimed that it had injected up to $20 million dollars into operation of casino to keep it running and should be granted stay to prepare plan of arrangement under Companies' Creditors Arrangement Act — Application granted — P Group failed to satisfy court that it would be able to restructure complex set of entities and

operations, some of which were limited partnerships, and still be able to carry on viable business in casino — P Group had not been acting with due diligence in addressing various issues which it faced with SP, and in dealing with operational issues which had apparently constrained revenues available to meet its debt obligations and profits — It was appropriate to appoint receiver manager — SP had contractual right to appointment of receiver and it would be at risk of serious harm if one were not appointed.

**Table of Authorities**

**Cases considered by *D.R.G. Thomas J.*:**

*Alberta Treasury Branches v. Tallgrass Energy Corp* (2013), 2013 ABQB 432, 2013 CarswellAlta 1496 (Alta. Q.B.) — followed

*Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — considered

*Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

Pt. III — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 57.1 [en. 1997, c. 12, s. 34] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 243 — considered

s. 243(1) — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

*Judicature Act*, R.S.A. 2000, c. J-2

s. 13(2) — considered

*Personal Property Security Act*, R.S.A. 2000, c. P-7

s. 65(7) — considered

HEARING concerning various applications, including application by creditor seeking appointment of receiver manager.

***D.R.G. Thomas J.*:**

**I. Introduction**

1 These are my decisions on the applications described in Schedule "A" argued in a common hearing on January 24, 2014 Terms used in this decision including 'Alberta Gaming Regulator', 'Alexis Group', 'Paragon Group' and 'Silver Point' are defined in Schedule "B". Relationships between Silver Point, the Paragon Group and the Alexis Group are shown in Schedule "C".

2 The essence of the Paragon Group applications are for a stay pursuant to s. 11.02(3) of the *CCAA*, for a period of 30 days, to give it an opportunity to develop and file a plan of arrangement under the *CCAA*. Silver Point opposes the Paragon Group applications for a stay and continuation under the *CCAA* and ask instead, for a receiver/manager to be appointed. The Alexis Group also responds to the *CCAA* applications by the Paragon Group and intervenes to support Silver Point in its receivership application. The Paragon Group opposes the appointment of a receiver.

3 The applications of the Paragon Group are dismissed and a receiver manager is appointed.

**II. Background**

4 The Eagle River Casino and Travel Plaza (the "Casino") is located on a portion of the Alexis First Nation Reserve, near Whitecourt, Alberta. The Casino has been located on those lands to take advantage of policies established by the Government of Alberta in 2001 to facilitate development of gaming facilities on First Nations Reserves and to access grants made available from senior levels of Government through the FNDF.

5 The portion of the Reserve land on which the Casino is built and operated is subject to a head lease from Her Majesty the Queen in Right of Canada and a number of sub-leases between corporate entities which are part of the Alexis Group.

6 The license to operate the Casino is issued by the Alberta Gaming Regulator and is held by the Alexis Casino LLP, a limited partnership composed of Alexis Trustee Corporation and Alexis Casino Corporation. This structure appears to have been dictated by the Alberta Gaming Regulator so that the Casino operation will qualify under Alberta policies and regulations governing gaming on First Nations Reserves.

7 Paragon borrowed money from Silver Point to construct and provide for ongoing operation of the Casino. The creditor Silver Point says that the indebtedness now amounts to approximately 82 million dollars. This debt was to be serviced by rents and profits from the gambling operation carried on in the Casino, and to a lesser extent from the related service station operation. By agreement between the Alexis Group and the Paragon Group, the latter is mandated as the manager of the Casino and as such, has day-to-day responsibility for running the gaming operation in the Casino.

8 The Casino has struggled financially since it opened and on a number of occasions, various third parties have determined and declared the operation to be either insolvent, e.g. Grant Thornton, or noncompliant, e.g. audit by Alberta Aboriginal Relations.

9 Revenues have never met the projections prepared by the operator, Paragon Group, with the result being that there has never been enough money generated in the Casino to pay rents. Some share of revenues have been passed back to a charity controlled by the Alexis First Nation. It is common ground that the Paragon Group has been default on its debt obligation to Silver Point for some time. Silver Point wants its money back and has commenced proceedings to have a receiver manager appointed to take over the operation of the Casino and restructure the debt. Paragon resists and claims that it has injected up to $20 million dollars into the operation of the Casino to keep it running and should be granted a stay to prepare a plan of arrangement under the CCAA.

10 Over the years disagreements between the Alexis Group and the Paragon Group have escalated. There have been several attempts to work out solutions, but dialogue has come to an end and these legal proceedings have resulted.

11 What is clear is that there are immense losses which are going to be incurred here, probably over $55 million dollars on the part of Silver Point and $20 million dollars on the part of the Paragon Group and an individual related thereto who has made secured advances but stands second to Silver Point.

**III. Issues**

12 Briefly stated, the issues are:

> (1) Should a stay be granted to allow the Paragon Group an opportunity to file a plan of arrangement under the *CCAA*? and
>
> (2) If a stay is not granted, should a receiver be appointed?

**IV. Jurisdiction of this Court under the CCAA and to appoint a receiver**

13 There is no disagreement among the various participants in these hearings that the Paragon Group has met the technical requirements of the *CCAA*. The Paragon Group is indebted for more than $5 million dollars to Silver Point and the members of

the Paragon Group appear to be affiliated under the relevant provisions of the *BIA*. The Casino is operated in Alberta and the Casino is the core business of the Paragon Group. This Court has jurisdiction to hear and decide the Paragon Group application for a stay and continuation under the *CCAA*.

14 The participants accept that the Paragon Group and Paragon Canada, Alexis, ULC in particular, is in default under its financial arrangements with Silver Point and that the amount of the debt accrued is in the range of $82 million dollars. There is no dispute that the secured lender, Silver Point, is entitled to apply for a receivership order and the question is whether it should be granted given the allegations of breach of fiduciary duty and conspiracy which are made by Paragon Group against Silver Point and the Alexis Group.

**V. Analysis — CCAA Application by Paragon Group**

15 Section 11.02 (3) of the *CCAA* prescribes that:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that the circumstances exist that make the order appropriate; and
>
> (b) In the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Clearly, the burden of proof lies on Paragon Group, as the applicant.

16 At para. 13 of *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.), Romaine, J. stated the test for granting such an order under s. 11.02(3) of the *CCAA*. I adopt and restate the test as being that I must be satisfied:

> (a) the circumstances exist that make the order, i.e. the continuation under the *CCAA*, appropriate;
>
> (b) the applicant has acted and is acting in good faith; and
>
> (c) the applicant has acted and is acting with due diligence.

17 In considering whether this test has been met, I have considered the Supplemental Pre Filing Report prepared by the proposed Monitor PricewaterhouseCoopers Inc. ("PWC") which confirms the evidence in the affidavits of the parties that this is a financial mess.

***(A) Appropriateness***

18 The Paragon Group must satisfy me that it will be able to restructure this complex set of entities and operations, some of which are limited partnerships, and still be able to carry on a viable business in the Casino (including the related service station).

19 At para. 14 of *Tallgrass Energy Corp*, *supra*, Romaine, J. stated:

> ... there should be **a germ of a reasonable and realistic plan**, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring...
>
> [Emphasis added.]

20 The question here is whether the Paragon Group have presented *a germ of a reasonable and realistic plan* given the very strong opposition to its proposal from the Alexis Group and Silver Point. This 'germ' of a plan must be found in the evidence before the Court.

21 The Paragon Group argues that there is a 'germ' of a plan found in the Lavelle Affidavit filed in support of the Silver Point application. Specific reference is made to paras. 118 to 122 inclusive, which describes the 'Proposed Transaction', (the "Proposed

Transaction") which is a conditional deal between a future nominee of the Alexis Group and Silver Point. The essence of the Proposed Transaction would see a reduction in the outstanding indebtedness currently owed by the Paragon Group to Silver Point achieved through a combination of write-downs of debt by Silver Point and a reduction in debt charges, the assumption of a reduced amount of debt by the Alexis Group and the further purchase of a portion of the existing debt by the Alexis Group or its nominee from Silver Point.

22 The Paragon Group also suggests that as part of its plan, it would obtain accommodations from the Alberta Gaming Regulator and the Government of Alberta to somehow unblock funds held by the FNDF for the operation of the Casino and the payment of arrears of rent.

23 Presumably these funds, if they could be made to flow, would be directed to pay down a portion of the indebtedness owing by the Paragon Group to Silver Point.

24 The Paragon Group proposes to flesh out this concept, which it says is an example of the germ of a plan, if 30 more days can be allowed for the delivery of a full blown plan.

25 The Paragon Group argues further that there is also a 'germ' of a restructuring proposal set out in the Affidavit of Scott Menke, made on January 13. It appears that this is a reference to para. 47 of that deposition, which reads:

> In order to make the Project viable, it will be necessary to address the use of FNDF funds with Alberta, address the allocation of overheads to the Casino with Alberta and restructure the lease payment for the Casino space. At this time I have only a general idea as to the structure of the proposed Plan of Arrangement. I contemplate
>
> a. taking every reasonable step to reduce overhead;
>
> b. entering into discussions with Alberta to amend the structure of the Project to maximize the availability of FNDF Funds and the allocation of overheads;
>
> c. determining the amount of debt the operation can handle;
>
> d. making a proposition to the secured creditors for a rearrangement of the Applicants' obligations to those creditors to something the Applicants can support;
>
> e. obtaining a third party assessment as to fair market rent;
>
> f. amending the lease to reflect the restructured obligations to the secured creditors;
>
> g. entering into discussions with Alexis for an orderly transition of management duties from PCA to Alexis.

26 In respect to the 'germ' of a plan represented by the 'Proposed Transaction' outlined in the Lavelle Affidavit, it is trite to observe that none of the entities making up the Paragon Group have been invited to participate in this restructuring scenario. While the scenario described in the 'Proposed Transaction' may provide a realistic template for a restructuring, it does not appear that there is any role for the Paragon Group, because the relationship between the Paragon Group and Silver Point and the Alexis Group is irretrievably broken. The parties involved appear to have agreed to go their separate ways some time ago and the opposition by the Alexis Group, in particular, to any ongoing role for the Paragon Group is to put it mildly "fierce".

27 In the result, this particular template is neither a reasonable nor realistic 'germ' of a plan.

28 In respect to the 'germ' of a plan said to be found in para. 47 of the Menke Affidavit, it is cast in terms of a 'contemplation' of a number of steps which might be taken to address issues such as the use of FNDF funds, the allocation of overheads etc. It does provide a logical catalogue of many of the business and regulatory issues which must be addressed.

29 That said, I agree with counsel for the Alexis Group that this is more of a process to finalize a plan than an outline of a plan that contains details such as sources of new funding available on some limited conditional basis, specific examples of

overheads which could be reduced, etc. Even in the second Menke Affidavit, made January 21, 2014, at para. 8 there are no specific overhead reductions provided.

30 While the Court has the power under the CCAA to impose a stay and ultimately to approve a plan, it is my view that it is unrealistic to think that a plan which involves the ongoing involvement of the Paragon Group in the operation of the Casino facility will be acceptable to the Alexis Group and Silver Point. Both of these parties have expressed strenuous opposition, particularly based on a concern about the effect the continued involvement by the Paragon Group may have on the gaming license issued by the Alberta Gaming Regulator, which in turn has expressed discomfort with the ongoing failure of the Paragon Group to reduce overheads in the Casino operation. That said, I note this Regulator remains resolutely neutral in this dispute (see January 21, 2014 letter).

31 However, I am not satisfied on the evidence before me that the Paragon Group can come up with a plan which will involve the ultimate endorsement by the Alberta Gaming Regulator of a scheme whereby the Paragon Group remains involved in the day-to-day operations of the Casino facility. In particular, it is not realistic to assume that this will happen in 30 days. I also note that while this Court may have the power to continue the gaming license under the CCAA this Court does not have the power to renew licenses if they expire on their own terms. I observe that the gaming worker supplier registrations enabling the Paragon Canada Alexis, ULC to provide workers to the Casino will expire on February 7, 2014.

32 Before coming to a final conclusion on whether there is a 'germ of a reasonable and realistic plan' presented here, I consider at this stage of the analysis the appropriateness of the inclusion of the Alexis Casino Limited Partnership in the proposed plan of arrangement. This entity must be included in this restructuring because it is the holder of the critical gaming license granted by the Alberta Gaming Regulator. The asset represented by this license is at the very core of this dispute and any restructuring must preserve and continue that fundamentally important authorization.

33 I find that the Paragon Group does not have any direct ownership interest of a legal nature in the Alexis Casino Limited Partnership, or the gaming license.

34 There are relationships between the Paragon Group and some of the entities making up the Alexis Group, such as the limited partnership known as the Alexis Paragon Limited Partnership. There are also two operating agreements, including the Casino Management Agreement and the Alexis Paragon Limited Partnership Agreement. While the approval of a plan under the *CCAA* could perhaps preserve the limited partnership arrangements and the management agreement, I am still not convinced that Paragon has met the burden of demonstrating that the *CCAA* should be used to draw in the Alexis Casino Limited Partnership. It is neither an affiliated company, nor a subsidiary of the Paragon Group. It is a live issue as to whether the Alexis Casino LP is a 'related party' within the definition of that term found in the *BIA* but I do not decide this aspect of the application on that point. I mention it only because it was raised in the course of argument by the Paragon Group.

35 The Paragon Group points out that Romaine, J. had considered a complex set of limited partnerships in *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153 (Alta. Q.B.) and therefore partnerships can be captured by the *CCAA* legislation. I note that *Calpine Canada Energy Ltd., Re* was a completely different type of business and had many different types of relationships through complex limited partnership arrangements. These businesses were very different from this gaming operation located on First Nations Lands.

36 In the result, given the serious questions about whether the Alexis Casino LP qualifies as a debtor under the CCAA in these circumstances and given the discretionary nature of my powers under this section of the CCAA, I am disinclined to force the heretofore independent Alexis Casino LP into a forced marriage with the Paragon Group. It would not be appropriate in these circumstances and for all these reasons the first limb of the *Tallgrass* test has not been met.

***(B) Good Faith***

37 The second part of the *Tallgrass*, *supra*, test requires that the Paragon Group, as applicant, establish that it has acted in good faith in the past and is acting currently acting in good faith. The Alexis Group takes particular issue with the conduct of the Paragon Group and its failure to move, in a timely way, to reduce overheads in the Casino operation and to address issues raised

by the Alberta Gaming Regulator, despite many requests that it do so over the last several years. Further, the Alexis Group complains of the failure of the Paragon Group to maintain its debt obligations with Silver Point in good standing. The Alexis Group assert that the relief sought under the *CCAA* by the Paragon Group is more of a defensive tactic than a bona fide effort to restructure, as referred to in the case of *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163 (Ont. S.C.J. [Commercial List]), at para. 58.

38 I am not prepared to find that the Paragon Group is not acting in good faith here. There is evidence the Paragon Group and its principals have continued to inject capital into the operation of the Casino to keep it afloat and that is not disputed. The applications by the Paragon Group appears to be acts of desperation akin to 'Hail Mary' passes, rather than a series of activities demonstrating bad faith. I accept that the Paragon Group has established that it is acting in good faith in making these applications.

***(C) Due Diligence***

39 Under the third limb of the *Tallgrass* test, the Paragon Group must show that it has acted at all times with due diligence. I take this to mean that the Applicants must have taken steps in a timely way to deal with the financial problems arising from its defaults under the borrowing arrangements with Silver Point and in addressing operational problems in the Casino, such as the continuing high overheads which have apparently upset the Alberta Gaming Regulator.

40 The evidence shows that the problems of high overheads and the defaults on the Silver Point debt have been of longstanding. The Paragon Group has not been duly diligent in addressing and resolving the issues which have been raised by the Alexis Group, including the failure to reduce the overall indebtedness to a level which could be supported by revenues from the Casino operation, the making of satisfactory standstill arrangements with Silver Point and reducing, in a significant way, the overhead and operating costs in the Casino to levels consistent with other Alberta rural casinos and also in maintaining a robust relationship with the all-important Alberta Gaming Regulator and the departments of the Alberta Government responsible for aboriginal relations. I make no observation or comment in respect to the alleged failure by the Paragon Group to construct a hotel.

41 In conclusion on the third limb of the test, I am not satisfied that the Paragon Group has been acting with due diligence in addressing the various issues which it faced with its major creditor, Silver Point, and in dealing with the operational issues which have apparently constrained the revenues available to meet its debt obligations and profits which could go to the Alexis Group.

42 For all these reasons, I find that the Paragon Group has not satisfied all aspects of the test outlined in s. 11.02(3) of the CCAA, a test which must be met before this Court can make the order applied for. The application for a stay is denied and all other applications by the Paragon Group are dismissed.

**VI. Decision on the Receivership Application by Silver Point**

43 Silver Point is the first-ranking secured creditor of the Paragon Group and as of December 31, 2013 the Paragon Group and each of the entities making up that group jointly and severally owed Silver Point approximately $82 million dollars. It is indicated that these amounts are owed pursuant to a first-ranking secured loan which matured over 15 months ago and remains unpaid.

44 Under s. 243 of the *BIA* and s. 13(2) of the *Judicature Act*, this Court may appoint a receiver or a receiver and manager where it is just and convenient to do so on such terms as it may consider just. Under s. 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give directions on any matter relating to the duties of a receiver. I will deal with the objections by the Paragon Group to the appointment of the receiver/manager before dealing with the Silver Point application on the merits.

45 In response to the Silver Point receivership application the Paragon Group raises an alleged breach of a fiduciary duty owed by the Alexis Group to the Paragon Group through the Alexis Paragon Limited Partnership and the contractual arrangements such as the Casino Management Agreement. This breach is said to be constituted by the involvement of the Alexis Group in developing the Proposed Transaction with Silver Point.

46 It is not clear whether there is a fiduciary duty owed by any of the Alexis Group entities to the Paragon Group. The wording in the various agreements indicates that he parties did not intend to create partnerships so no duty could arise on that traditional basis. Further, it appears that the Paragon Canada Alexis, ULC entity is an agent of the Alexis Casino LP for the purposes of management. The Alexis Group argues that it is the subservient participant in these various arrangements and owes no fiduciary duty to the Paragon Group.

47 Even if there is a fiduciary duty and the Proposed Transaction constitutes a breach thereof the Alexis Group is not the applicant on the receivership application which is made by Silver Point. The Alexis Group merely intervenes to support that application.

48 The Paragon Group attempts to fill this gap by alleging a conspiracy between the Alexis Group and Silver Point which is the applicant for the appointment of a receiver/manager.

49 While a theoretical tort of conspiracy may exist, it is not a cause of action which I am prepared to deal with and make findings on in this type of chambers application. A full trial would be needed to determine that type of claim.

50 Further, the Paragon Group has been aware for some time that their relationship with the Alexis Group has come to an end. All participants were seeking solutions to their badly damaged business arrangements. I do not see anything illegal or improper on the part of Silver Point and Alexis Group in discussing ways to cut their losses and preserve the Casino operation and move on. I see no misconduct on their part which would create an equity in favour of the Paragon Group which in turn would block the granting of the equitable remedy of imposing a receivership structure on this failed business arrangement. Accordingly, I reject this set of arguments from the Paragon Group and move on to deal with the merits of the Silver Point receivership application.

51 The factors which I must consider to determine whether it is appropriate to appoint a receiver pursuant to either s. 243(1) of the *BIA*, or s. 13(2) of the *Judicature Act* include, *inter alia*, the following as customized to this case:

> (a) Silver Point has a contractual right to appoint a receiver - the Paragon Group have committed contractually in the loan agreement to the appointment of a receiver on the application of Silver Point.
>
> (b) Risk of harm to Silver Point if a receiver is not appointed — the preservation of the gaming license is critical and the renewal of the license to provide workers to the Casino is also on a short fuse. It is appropriate to appoint a receiver to preserve these critical assets of this business.
>
> (c) Risk to Silver Point from a sizeable deficiency - Silver Point is prepared to accept a $48 million dollar loss as part of the Proposed Transaction referred to above. There is a sizeable deficiency and it is growing.
>
> (d) The nature of the property — the Casino is located on the Alexis Reserve and the First Nation is prepared to allow a receiver to enter to manage the Casino and take possession of related property. There is evidence that the proposed receiver manager Alvarez & Marsal is in discussions with the Alberta Gaming Regulator and that it will be able to preserve the all important gaming licenses.
>
> (e) Length of the receivership process — the operation of the Casino should be stabilized and the jobs of the 80+-employees must be preserved. It appears that the 'Proposed Transaction' can be closed within a very short timeframe following the appointment of a receiver manager and the operations can be put on a more stable footing and the 80+-jobs can be saved.
>
> (f) Costs to the parties minimized if a receiver is appointed — the appointment of a receiver, as with the appointment of a monitor under the *CCAA*, can involve expending significant amounts on professional fees. Silver Point is prepared to absorb these costs and it appears the appointment of a receiver/manager and the closing of the Proposed Transaction will keep these types of expenses to a minimum.

52 In the result and for these reasons, I am satisfied on the materials put before me that the appointment of Alvarez & Marsal as the receiver manager is just and convenient and meets the requirements of s. 243 (1) of the *BIA* and s. 13(2) of the *Judicature Act*. Accordingly, all stays are lifted and Alvarez and Marsal shall be appointed as the receiver/manager in accordance with the modified template order provided.

**Schedule "A" — Summary of Applications**

The applications by the Paragon Group are for:

1. An abridgment of time.

2. A direction that the proceedings commenced by the Paragon Group under Part III of the *BIA* through the filing of Notices of Intention ("NOI") shall be taken up and continued under the *CCAA*.

3. A stay of all proceedings taken or that might be taken against the Paragon Group.

4. Restraining any further proceedings in any action, suit or proceedings against the Paragon Group.

5. Prohibiting the commencement of or proceeding with any other action, suit or proceeding against the Paragon Group.

6. The adding of the Alexis Casino LP as an applicant to this matter or, alternatively, directing that Alexis Casino LP continue its operations in the ordinary course pending further order of this Court or expiry of the stay, if granted.

The applications by Silver Point are for:

1. Termination of the NOI Stay referred to in s. 50.4(8) of the *BIA* in respect of the Paragon Group.

2. Lifting the NOI Stay pursuant to section 69.4 of the BIA, if and to the extent necessary, to permit Silver Point to file a statement of claim and a receivership application.

3. Appointing Alvarez & Marsal Canada Inc. ("*Alvarez & Marsal*") as the receiver and manager (the "*Receiver*") over all of the undertakings, property and assets of some of the entities in the Paragon Group pursuant to section 243(1) of the BIA, section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "*Judicature Act*"), and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "*PPSA*").

4. Appointing Alvarez & Marsal as trustee of the Paragon Group in lieu of PwC pursuant to s. 57.1 of the *BIA*

**Schedule "B" — Defined Terms**

1. 'Alberta Gaming Regulator' means the Alberta Gaming and Liquor Commission.

2. 'Alexis Group' means Alexis Trustee Corporation, Alexis Nakota Sioux Nation, Alexis Casino Limited Partnership, Alexis Casino Corporation and Alexis Land Management Corp.

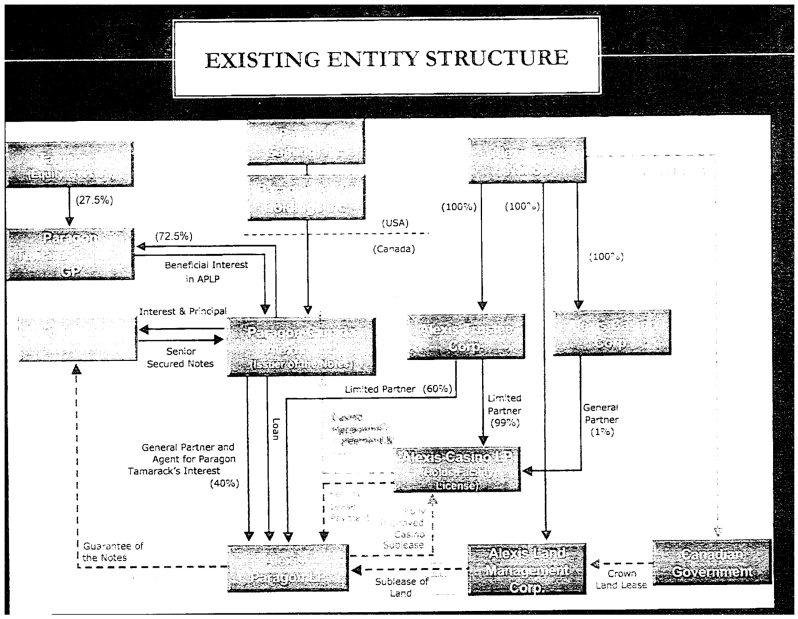
3. 'FNDF' means the First Nation's Development Fund.

4. 'Paragon Group' means Alexis Paragon Limited Partnership, Paragon Canada Alexis, ULC, Paragon Tamarack Alexis General Partnership and Paragon Alexis Holdings, Inc.

5. 'Silver Point' means Silver Point Finance, LLC.

**Schedule "C" — Existing Entity Structure**




**Graphic 1**

*Order accordingly.*

# TAB 8

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

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

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

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

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

M.J. Lema J.

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

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

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

not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused.

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

**Table of Authorities**

**Cases considered by *M.J. Lema J.*:**

*Enirgi Group Corp. v. Andover Mining Corp.* (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — distinguished

*Hypnotic Clubs Inc., Re* (2010), 2010 ONSC 2987, 2010 CarswellOnt 3463, 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) — considered

*Laserworks Computer Services Inc., Re* (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

*Marine Drive Properties Ltd., Re* (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

*Murphy v. Cahill* (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — considered

*Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

*Promax Energy Inc. v. Lorne H. Reed & Associates Ltd.* (2002), 2002 ABCA 239, 2002 CarswellAlta 1241 (Alta. C.A.) — considered

*Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.* (2005), 2005 NBQB 394, 2005 CarswellNB 635, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 290 N.B.R. (2d) 278, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 755 A.P.R. 278, 17 C.B.R. (5th) 244 (N.B. Q.B.) — considered

*The Bank of Nova Scotia v. 1934047 Ontario Inc.* (2018), 2018 ONSC 4669, 2018 CarswellOnt 12568 (Ont. S.C.J.) — considered

*Toronto-Dominion Bank v. Rismani* (2015), 2015 BCSC 596, 2015 CarswellBC 991, 25 C.B.R. (6th) 127 (B.C. S.C.) — considered

*West Coast Logistics Ltd. (Re)* (2017), 2017 BCSC 1970, 2017 CarswellBC 3014, 53 C.B.R. (6th) 68 (B.C. S.C.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 50(4) — referred to

s. 50(12) — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 62(2)(b) — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — considered

s. 244 — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

*Judicature Act*, R.S.A. 2000, c. J-2

s. 13(2) — considered

*Personal Property Security Act*, R.S.A. 2000, c. P-7

s. 66 — considered

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

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

**A. Introduction**

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

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

**B. Facts**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**C. Issues**

4 The issues are:

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

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

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

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

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

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

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

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

**D. Analysis**

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

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

7 My reasoning is outlined below.

***ATB veto***

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

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

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

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

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

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

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

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

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

***Uncertainty over possible amendments***

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

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

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

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

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

- it does not support the proposal; *and*
- it sees no prospect of an acceptable amended proposal.

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

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

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

- this is the proposal it made;
- the focus of the ss 50(12) exercise is the proposal *as filed*;
- the proposal cannot be withdrawn (ss 50(4) *BIA*);
- the applicant creditor had the option of waiting, until the vote meeting, for proposal "sweetening";
- if the applicant perceived the likelihood or even a real possibility of worthwhile amendments, it would not have brought the "deemed refused" application;
- even if it had seen such likelihood or possibility, it is entitled to balance the potential upside of waiting against the downside e.g. the costs associated with waiting;
- if the debtor had needed more time (i.e. to put forward a different, and better, proposal), it had the option (as here) of seeking another extension of the notice-of-intention period (six-month maximum had not been reached);
- having not done so (instead, filing the proposal now under review), the debtor must live with that proposal. For the ss. 50(12) exercise, *that* proposal is the only slide under the microscope. The possibility of a different, and better, slide is *not* a factor;
- in other words, by laying down a proposal, the proponent takes the risk that a creditor (or group of creditors) will say "this is not good enough" and move for termination under ss 50(12). The section weighs who is supporting and who is not and whether the outcome at the voting stage is "likely" refusal; and
- here, with ATB having an effective veto, its "opposed" stance is determinative: *this* proposal will fail. The possibility of a different proposal down the road does not enter into the equation.

***Subsection 50(12) exists for a reason***

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

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

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

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

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

***Same approach taken under CCAA***

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

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

> *In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved*. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

***Good faith***

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

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

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

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

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

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

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

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

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

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

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

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.* [3] and *Toronto-Dominion Bank v. Rismani* [4], as well as *Good Faith as an Organizing Principle*

*in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back*, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

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

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

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

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

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

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

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

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

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He

> also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

***Conclusion on "proposal deemed refused" application***

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

**E. Appointment of receiver**

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

***Test for appointing a receiver***

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

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

***Arguments***

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
    - the Proposal is not viable;
    - the Debtors operate at a loss;
    - the Proposal will not be approved by [ATB]; and
    - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";

• per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";

• ATB has not provided evidence to support its receiver-related arguments; and

• more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

***Applying the "appointment of receiver" factors here***

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

• Schendel is a large enterprise with complex construction projects underway;

• coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

• recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

• ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

• Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

• ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

• as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

**F. Conclusion**

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

54 I note that, under section 33 of the draft order, "any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver . . . "

**G. Closing note**

55 I thank all counsel for their very helpful briefs and submissions.

56 On a final house-keeping note, I grant the order sought by Ms. Fisher in her July 17, 2019 email (concerning the sealing of a certain affidavit).

*Application granted.*

Footnotes

1 2005 NBQB 394 (N.B. Q.B.) at paras 36-43

2 2009 BCSC 145 (B.C. S.C.) at paras 31 and 32

3 2018 ONSC 4669 (Ont. S.C.J.) at paras 13-15

4 2015 BCSC 596 (B.C. S.C.) at paras 31-37

5 Rogers, LA, Sieradzki D, and Kanter M, Journal of Insolvency in Canada, Vol 4 [2015] 55 at 77

6 2014 Annual Review of Insolvency Law (ed Janis P Sarra)

7 Affidavit of Alex Corbett filed April 4, 2019, paras 31-41

8 2017 BCSC 1970 (B.C. S.C.)

9 1998 NSCA 42 (N.S. C.A.)

10 2002 ABCA 239 (Alta. C.A.)

11 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) at paras 33 and 36

12 2013 BCSC 1833 (B.C. S.C.)

13 2002 ABQB 430 (Alta. Q.B.) at paras 26-32

14 2013 ABQB 335 (Alta. Q.B.) at para 71

# TAB 9

2016 ABQB 43
Alberta Court of Queen's Bench

Alberta Treasury Branches v. COGI Limited Partnership

2016 CarswellAlta 73, 2016 ABQB 43, [2016] A.W.L.D. 548, 262 A.C.W.S. (3d) 638, 33 C.B.R. (6th) 22

# Alberta Treasury Branches, Applicant and COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc., Respondents

K.M. Eidsvik J.

Heard: January 14-15, 2016
Judgment: January 20, 2016
Docket: Calgary 1501-12220

Counsel: G.B. Davison, Q.C., for Receiver
R. Algar, R. Zahara, for Applicant, ATB
D.S. Nishimura, for POA
C.E. Hanert, for COGAM
A.C. Maerov, for Respondents

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.1 Order appointing receiver

**Headnote**

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order appointing receiver

Receivership order had been granted with respect to several subsidiaries of C Inc. — Receiver was concerned that shares in P Ltd., subsidiary of C Inc., were issued without due notice, at hands of directors who were in conflict of interest and without evidence of fair value — Receiver was also concerned that asset purchase of wells from subsidiary of C Inc. by P Ltd. had left some potential liability in hands of subsidiary — Receiver applied for receivership order of P Ltd. and it sought to be appointed pursuant to s. 242 of Alberta Business Corporations Act or s. 13(2) of Judicature Act — Application dismissed — Share transaction did not violate what C Inc.'s reasonable expectations of corporate and financial behaviour of P Ltd. should have been at time — P Ltd. had its own separate financing structure in place, which was in peril, and it was reasonable for it to try to get further financing — Share transaction appeared to have allowed P Ltd. to continue on with its operations, and to extent that C Inc.'s share value and position were diluted, it was necessary evil — While P Ltd. admitted it did not comply with all its statutory obligations, its conduct was not oppressive at time — There was serious issue with respect to dilution of shares but there was also very reasonable defence to potentially oppressive conduct — With respect to asset sale of wells, transaction appeared to have been made for valid business purpose and for full market value and it was hard to say that P Ltd. acted in oppressive manner toward C Inc. — There was complicated corporate structure in place but given more recent disclosure by P Ltd., proposed cooperation by holder of shares, and standstill agreement that was in place, issues might be able to be determined without powers of receiver and there would be no irreparable harm — There were orders and measures in place that would

protect companies under receivership — Receivership was extraordinary relief that should be granted sparingly — Balance of convenience and fairness favoured rights of P Ltd. and its secured creditor over C Inc. as unsecured creditor.

**Table of Authorities**

**Cases considered by *K.M. Eidsvik J.*:**

*BCE Inc., Re* (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560 (S.C.C.) — considered

*Murphy v. Cahill* (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 243(1) — considered

*Business Corporations Act*, R.S.A. 2000, c. B-9

Generally — referred to

s. 242 — considered

s. 242(1) — considered

s. 242(2) — considered

s. 242(3)(b) — considered

*Judicature Act*, R.S.A. 2000, c. J-2

s. 13(2) — considered

APPLICATION by receiver for receivership order of subsidiary.

***K.M. Eidsvik J.*:**

**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 1 st Corporation (Conserve 1 st ) and Proven Oil Asia Ltd (POA).

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

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

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

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

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

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

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

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

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

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

**The law**

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

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

> 242 (1) A complainant may apply to the Court for an order under this section,
>
> (2) If, on application under subsection (1) the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) Any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

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

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

15 Oppressive conduct has been interpreted by the Supreme Court in *BCE Inc., Re*, 2008 SCC 69 (S.C.C.). 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 (Alta. Q.B.) at para 7).

**Analysis.**

***Serious issue to be tried***

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

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

*1. Share transaction*

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

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

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

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

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

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

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

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

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

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

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

# TAB 10

2020 ABQB 316
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Proform Management Inc.

2020 CarswellAlta 903, 2020 ABQB 316, [2020] A.W.L.D. 1940, 12 P.P.S.A.C. (4th) 120, 318 A.C.W.S. (3d) 404

# Servus Credit Union Ltd. (Plaintiff/Applicant) and Proform Management Inc., Proform Concrete Services Inc., and Proform Construction Products Inc., formerly known as Proform Precast Products Inc. (Defendants / Respondents)

M.J. Lema J.

Heard: May 5, 2020
Judgment: May 11, 2020
Docket: Edmonton 2003-06374

Counsel: Rick T.G. Reeson, Q.C., Patrick Harnett, for Plaintiff / Applicant
Jeffrey Oliver, D. Maréchal, for Defendants / Respondents
Adam Maerov, for Respondent / Guarantor, 285319 Alberta Ltd.
Sean E. Fleming, for Interim Monitor
J. Phillips, M. Phillips, for themselves

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
**Headnote**
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
Debtors, group of related companies, were indebted to creditor for approximately $12.6 million — There had been two forbearance periods and additional period of interim monitoring — Creditor held consent receivership order granted at onset of forbearance — Debtors believed they could arrange refinancing to pay out entire debt if they had further 30 days of monitoring — Creditor applied for appointment of receiver; debtors applied to extend interim monitoring period — Creditor's application granted; debtors' application dismissed — Debtors were in state of default, creditor's enforcement rights were engaged, and gateway for entering consent receivership order had been opened — COVID-19 pandemic did not impact debtors in material way — Debtors' defaulted on second forbearance agreement as early as March 3, 2020, but massive impact of COVID-19 only began to emerge as of March 8, 2020 — Evidence was insufficient to show that pandemic had any material impact on debtors' businesses, refinancing efforts or asset sale efforts through March 12, 2020, when second forbearance period ended, and debtors received further 19 days of no enforcement when interim monitoring order was granted and further five week stay of proceedings — By signing consent receivership order debtors acknowledged their indebtedness to creditor, their default status, triggering of creditor's enforcement options which included applying for receiver, and that appointment of receiver was warranted once period of forbearance had expired without clearance of creditor's debt — At this stage, in light of agreement, it was not open to debtors to argue why receivership order was not just or convenient — Creditor lived up to its end of deal by forbearing from taking action, and by end of forbearance periods debtors had not accomplished clearing creditor's debt in full — Creditor had not agreed to any further forbearance period, consequence that it could seek receivership order in circumstances was exactly what debtors agreed to, and debtors had blocked themselves from resisting granting of order — Court had jurisdiction to grant receivership order, debtors consented to receivership order, and consent was not tainted — Debtors conceded that, if and when forbearance

period ended, consent order could be entered if they remained in default and without any substantive argument objection by them — In circumstances, and emphasizing debtors' consent to proposed receivership order, it was just and convenient that it be entered — Interim monitoring period should not be extended and receiver should be appointed.

**Table of Authorities**

**Cases considered by *M.J. Lema J.*:**

*Chegancas v. Lukezic* (2011), 2011 CarswellOnt 10873, 2011 CarswellOnt 10874, *(*sub nom. *Royal Bank of Canada v. Lukezic)* 429 N.R. 391 (note), *(*sub nom. *Royal Bank of Canada v. Lukezic)* 294 O.A.C. 398 (note) (S.C.C.) — referred to

*Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc.* (2019), 2019 ABQB 732, 2019 CarswellAlta 2187, 50 C.P.C. (8th) 391 (Alta. Q.B.) — referred to

*Fisher v. Fisher* (2008), 2008 ABQB 170, 2008 CarswellAlta 340, 52 R.F.L. (6th) 435, 442 A.R. 304 (Alta. Q.B.) — considered

*G. (C.T.) v. G. (R.R.)* (2016), 2016 SKQB 387, 2016 CarswellSask 778, 86 R.F.L. (7th) 312 (Sask. Q.B.) — considered

*K. (T.E.H.) v. S. (C.L.)* (2011), 2011 ABCA 252, 2011 CarswellAlta 1538 (Alta. C.A.) — referred to

*Mraiche v. Sander* (2010), 2010 ABQB 341, 2010 CarswellAlta 968 (Alta. Q.B.) — considered

*Octa Hage Enterprises Ltd. v. Bank of Credit & Commerce Canada* (1988), 59 Alta. L.R. (2d) 31, 1988 CarswellAlta 64, 1988 ABCA 109 (Alta. C.A.) — considered

*Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

*Royal Bank v. Lukezic* (2011), 2011 ONCA 314, 2011 CarswellOnt 8970 (Ont. C.A.) — referred to

*Royal Bank v. Walker Hall Winery Ltd.* (2010), 2010 ONSC 4236, 2010 CarswellOnt 6025 (Ont. S.C.J. [Commercial List]) — considered

*Skagen v. Canadian Imperial Bank of Commerce* (2004), 2004 BCSC 602, 2004 CarswellBC 1035 (B.C. S.C.) — considered

*Smith v. Pricewaterhousecoopers Inc.* (2013), 2013 ABCA 288, 2013 CarswellAlta 1520, *(*sub nom. *Smith v. PricewaterhouseCoopers Inc.)* 245 A.R. 245, 584 W.A.C. 245, 3 Alta. L.R. (6th) 341 (Alta. C.A.) — considered

*Western Surety Co. v. Hancon Holdings Ltd.* (2007), 2007 BCSC 180, 2007 CarswellBC 274, 59 C.L.R. (3d) 255, [2007] 6 W.W.R. 630, 68 B.C.L.R. (4th) 382 (B.C. S.C.) — considered

*741431 Alberta Ltd. v. Devon (Town)* (2002), 2002 ABQB 870, 2002 CarswellAlta 1162, 32 M.P.L.R. (3d) 67, 4 R.P.R. (4th) 84, 324 A.R. 201 (Alta. Q.B.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 243 — referred to

s. 243(2) "receiver" — considered

*Judicature Act*, R.S.A. 2000, c. J-2

s. 13(2) — considered

*Personal Property Security Act*, R.S.A. 2000, c. P-7

s. 65(7) — referred to

**Authorities considered:**

DiSarro, Anthony, *"Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation"* (2010) 60:2 Am U L Rev 275

at 317-320.

APPLICATION by creditor for appointment of receiver; APPLICATION by debtors to extend interim monitoring period.

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

**A. Introduction**

1 Servus Credit Union Ltd. (Servus) seeks the appointment of a receiver of a group of related companies collectively indebted to it for approximately $12 million. This follows two forbearance periods of approximately six months and three more months, respectively, and an additional month of interim monitoring. It holds a consent receivership order granted at the onset of forbearance and submits that the debtors' ongoing defaults allow Servus to submit it for entry.

2 The debtor companies, supported by a guarantor, seek a further 30 days of monitoring, during which they believe they can make material headway on paying down their debt to Servus and in arranging refinancing to pay it out entirely. They acknowledge having provided the consent receivership order but submit (in part) that the emergence of the Covid-19 pandemic deprived it of the full benefit of the second forbearance period and that, accordingly, the order should not be entered now.

3 I find that the debtors are in state of default, that Servus's enforcement rights are engaged, that the gateway for entering the consent receivership order has been opened, that the Covid-19 pandemic did not cast a material shadow here, that the debtors' available arguments do not extend beyond those issues, that the interim-monitoring period should not be extended, and that it is just and convenient that a receiver be appointed.

**B. Issues**

4 The issues are:

1. the preconditions to Servus submitting the consent receivership order (CRO) for filing;

2. the impact (if any) on Servus's enforcement position of the emergence of the Covid-19 pandemic — in particular, its impact on the debtors' businesses and refinancing and asset-sale efforts, and whether it deprived the debtors of the full benefit of the combined forbearance and stay period;

3. whether the debtors are entitled, in the face of the CRO, to raise any arguments bearing on whether granting a receivership order is "just or convenient" or otherwise appropriate i.e. aside from arguments bearing on the enforceability and state of the forbearance arrangements, including the satisfaction of the triggering conditions for the entry of the CRO;

4. the Court's duty when presented with a consent order generally and in these circumstances; and

5. whether the CRO should be granted.

**C. Analysis**

***Preconditions to Servus seeking entry of the consent receivership order***

5 Servus and the debtors entered into a forbearance agreement, following default by the debtors under certain credit arrangements, which included a guarantee from a third party, anchored by real property mortgages against properties owned by that party.

6 In that agreement, the debtors and the guarantor acknowledged owing approximately $12.4 million to Servus and that various events of default had occurred.

7 Here is the heart of the forbearance agreement:

2.1 **Forbearance period.** Subject to compliance by Borrowers and Guarantor with the terms and conditions of this Agreement, the Lender hereby agrees to forbear from exercising its right and remedies against the Borrowers and guarantor under the Loan Documents and otherwise with respect to the Existing Defaults during the period (the "**Forbearance Period**") commencing on the Effective Date [defined elsewhere] and ending on the earlier of (i) 2:00 p.m. (Edmonton Time) Friday, November 9, 2019 and (ii) the date that any Forbearance Default [defined elsewhere] occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to*

> *me under the Loan Documents, the Consent Documents (as hereinafter defined [and discussed further below]) or otherwise available to the Lender at Law.*
>
> 2.2 **Scope of Forbearance.** During the Forbearance Period, the Lender will not initiate or continue proceedings to collect or enforce the Obligations, including by repossessing, foreclosing upon, or disposing of any of the Collateral, through judicial proceedings or otherwise. [emphasis added]

8 Article 3 outlined various conditions precedent to the Forbearance Agreement taking effect, including the provision of "a duty executed consent receivership order with respect to the Borrowers and the Guarantor [limited, for the latter, in certain respects], in the form attached hereto as Schedule '*B*.'" The debtors and the guarantor signed the draft order in the required form, reflecting their consent to it.

9 In a parenthetical note tucked between subparagraphs (i) and (j), s. 3.1 defines "*Consent Documents*" as meaning various documents including the consent receivership order.

10 The application proceeded on the basis that the various condition precedents were satisfied, including the provision of the CRO, and that the initial forbearance period took effect thereafter.

11 The debtors did not clear their collective debt to Servus by the November deadline. On November 22, 2019, counsel for Servus wrote counsel for the debtors:

> Pursuant to the Forbearance Agreement . . . we confirm that the Borrowers have not repaid the Lender in full . . . its outstanding indebtedness prior to the [November 2019] expiration of the Forbearance Period as required by . . . the Forbearance Agreement. This constitutes an Event of Default under . . . the Forbearance Agreement.
>
> As you know, the Lender is currently reviewing the Borrowers' request for a further extension of the Forbearance Agreement.
>
> Notwithstanding this Notice of Default and, without in any way waiving the Event of Default or waiving any other rights of the Lender in relation to the Event of Default, the Lender acknowledges receipt of the Borrowers' request for a further extension and will advise of its decision in respect of that request in due course.

12 As it turned out, Servus decided to extend the forbearance period, via a Forbearance Amendment / Extension Agreement made with the debtors and the guarantor on December 30, 2019. One preamble of that agreement states: "The Borrowers have advised the Lender that they anticipate being able to *repay the Loans in full by March 12, 2020*, if an extension is granted" (emphasis added).

13 The extension agreement also included the debtors and guarantor acknowledging indebtedness to Servus, as of December 10, 2019, of approximately $13.6 million and the existence of various ongoing defaults under the credit arrangements.

14 The purpose of the agreement was described (in s. 1.4) as "to provide [the] Borrowers with a further period of time to restructure and refinance to *pay out the Obligations in full* . . . " (emphasis added).

15 The heart of the extension agreement is here:

> 2.1 **Forbearance Period.** The Forbearance Period, as defined in s. 2.1 of the Forbearance Agreement, is amended to end on the earlier of (i) 2:00 p.m. (Edmonton Time), Thursday, March 12, 2020 and (ii) the date that any Forbearance Default (as defined in the Forbearance Agreement) occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to it under the Loan Documents, the Consent Documents (as hereinafter defined) or otherwise available to the Lender at law.* [emphasis added]

16 Article 3 outlined various conditions precedent to the extension agreement taking effect. At the application, the parties proceeded on the basis that the agreement indeed took effect.

17 The extension agreement did not provide a particular definition for Consent Documents. However, s. 1.1 (Definitions) stated that:

> Capitalized terms [e.g. "Consent Documents" in s. 2.1] not otherwise defined herein shall have the meaning ascribed thereto in the Forbearance Agreement. . . . [As noted above, s. 3.1 of the first agreement defined "Consent Documents" as including the consent receivership order.]

18 The extension agreement also included "entire agreement" and "full force and effect" terms:

> The Forbearance Agreement, this Amendment Agreement and the Loan Documents constitute the sole and entire agreement of the parties to this Amendment Agreement with respect to the subject matter contained herein and therein and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such matter.
>
> The Forbearance Agreement and the Loan Documents shall remain unchanged, in full force and effect, and continue to govern and control the relationship between the parties hereto, except to the extent they are inconsistent with, superseded or explicitly modified herein. To the extent of any inconsistency, amendment or superseding provision, this Amendment Agreement shall govern and control

19 On March 3, 2020, counsel for Servus wrote the debtors to advise (or confirm) that certain financial reporting by the debtors was overdue per the credit arrangements and the Forbearance Agreement, and that it regarded this as an event of default under the Forbearance Agreement. It gave three days' notice to rectify, failing which it reserved its right to enforce its security and use the Consent Documents.

20 On March 10, 2020, counsel for Servus wrote counsel for the debtors reviewing certain information provided by the debtors and providing its assessment that the borrowers and the guarantor were in breach of certain margining requirements and that they continued "to be in default under the terms of the Forbearance Agreement." Servus also advised:

> [We are] not willing to discuss a further extension of the forbearance period beyond the current March 12, 2020 expiry date without having unconditional commitment letters from reputable lenders in place, and which are accepted by the Borrowers and the Guarantor, in an amount sufficient to promptly pay Servus in full. Further Servus also requires the margining deficiency to be resolved to Servus' satisfaction, before it is willing to discuss any extension to the forbearance period.
>
> Nothing in this matter constitutes a commitment from Servus with respect to any extension to the Forbearance Agreement. Servus continues to reserve al of its rights and remedies, including those under the Forbearance Agreement.

21 On March 13, 2020, counsel for Servus wrote the debtors again (stating in part):

> Further to our March 3, 2020 correspondence, this letter confirms that the Forbearance Period as set out in the Forbearance Agreement has now terminated, in accordance with its terms.
>
> Pursuant to the terms of the Forbearance Agreement, the Lender is entitled to exercise all of its rights and remedies available to it under the Loan Documents, the Consent Documents, and otherwise available to the Lender at law.
>
> We are also advised by the Lender that the Borrowers and Guarantor remain in breach of their margining requirements, and that the Borrowers and Guarantor are aware of this breach.
>
> Please take this as notice of the Lender's intention to enforce its "Servus Security" as set out in the August 8, 2019 Priority Agreement made between [various parties.]"

22 On March 31, 2020, ACJ Nielsen granted an interim monitoring order on the consent of Servus and the debtors, installing PWC Inc as the monitor. Section 4 of the order stated:

> The Interim Monitoring [Order] shall terminate on the earliest of:
>
> > (a) The taking of possession by a receiver, within the meaning of subsection 243(2) [*BIA*], of the Debtor's property over which the Interim Monitor was appointed; and
> >
> > (b) May 5, 2020, unless renewed by further Order of this Court prior to the expiry date.

23 The Interim Monitoring Order had the same general effect as the forbearance agreements, freezing Servus's enforcement rights, albeit temporarily:

> 15. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Monitor or with leave of this Court[,] and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court . . . .
>
> 16. All rights and remedies of any Person . . . against or in respect of the Debtor . . . or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court . . .

24 I also note the "material adverse change" provision:

> 10. Upon:
>
> > (a) the Interim Monitor filing with the Court a Material Adverse Change Report;
> >
> > (b) the Debtor failing to pay when due any Employee-related Obligations; or
> >
> > (c) the Debtor otherwise being in default of any of its obligations in this Order;
>
> then Servus is at liberty to immediately apply to Court, on 3 days' notice, for a Receivership Order to appointed [PWC] as receiver in respect of the Debtor and Property.

25 On April 27, 2020, Sean Fleming of PWC Inc prepared a report of PWC's interim-monitoring activities and a snapshot of the debtors' financial picture as of that date. It also included an update on the debtors' refinancing efforts. In a nutshell, it noted that, of nine lenders they had connected with, "only one lender has provided a commitment letter to [them]", namely, a certain lender providing a commitment letter for the lending of $6.5 million against a particular property owned by the guarantor, which (in light of other borrowing against it) would yield about $5 million for application against the debtors' debts.

26 As of April 21, 2020, the debtors' debts to Servus stood at approximately $12.6 million, "plus further amounts owed in respect of costs and expenses incurred by Servus, plus further accruing interest."

27 The debtors remained in default under their credit arrangements with Servus as of that date and as of the application heard on May 6, 2020.

28 The debtors did not dispute the state of default. Neither did they assert that the forbearance period was still in effect, that the Interim Monitoring Order was still in effect, or that Servus was not otherwise in a position to enforce its security, including seeking the entry of the consent receivership order.

29 Their position, instead, was that, in light of significant progress in their refinancing efforts and also in separate efforts to liquidate certain properties, and considering the impact of the current pandemic and the partially related turmoil in the Alberta economy, they should be given another month, through to June 4, 2020, to continue those efforts, which would very likely produce substantial paydowns — as much as $9 or $10 million — against their debts to Servus and very possibly a refinancing package to clear those debts completely.

30 In other words, as of May 6, 2020:

- Servus was still owed over $12.5 million;
- the debtors continued to be in default under their credit arrangements;
- the forbearance period (per the first and second agreements) had expired;
- no additional forbearance agreement had been put in place;
- the Interim Monitoring Order stay and suspension had expired;
- Servus had reserved its rights to enforce its security and to use the Consent Documents, including the consent receivership order;
- the debtors did not assert that any new forbearance period was in place or otherwise that Servus was not entitled to take enforcement steps, including seeking the entry of the consent receivership order;
- the debtors did not disavow that order in any fashion; and
- the debtors instead asked the Court to find it was not "just or convenient" that the consent receivership order be entered now.

31 I find, on the first issue, that the express "trigger conditions" — i.e. for Servus to seek the entry of the consent receivership order — were satisfied here: the forbearance period was over, and the debtors continued to be in default.

***Impact of Covid-19 pandemic***

32 The debtors argued that they did not get the benefit of the full second forbearance period, invoking the onset of the Covid-19 pandemic.

33 I do not accept this argument:

1. the debtors went into default in June 2019;
2. Servus issued notices of default to the debtors on June 4, 2019;
3. the debtors had the benefit of the first forbearance period (mid-July 2019 to mid-November 2019);
4. they received the benefit of a *de facto* forbearance period from mid-November 2019 to the end of December 2019), while the parties negotiated the second forbearance period;
5. the second forbearance period ran from December 30, 2019 to March 12, 2020;
6. the debtors defaulted on the second forbearance agreement as early as March 3, 2020;
7. Covid-19's now-massive impact was only beginning to emerge in the week of March 9-13. I take judicial notice that no provincially ordered "restrictions on gatherings" were in place by that week. (I was sitting in Grande Prairie that week; it was "business as usual" at the Court through March 13, at minimum.) The Alberta Government's Covid-19 case statistics [1] only start as of March 8, 2020. The bar-graphs are not calibrated to allow perfect counts, but, from a baseline of zero confirmed cases as of March 8, 2020, the collective number of probable and confirmed cases in those early days (March 8-12) appears to be approximately 25 people. That compares to 6,017 cases as of May 7, 2020. Another chart shows total hospitalized cases, in those same days, at under 10 people, with one or two in intensive care; that compares to 255 "hospitalized ever" and 52 "ICU ever" cases as of May 7, 2020; and

8. in any case, the debtors' Covid-19-related evidence is silent or vague about the pandemic having any impact on their businesses before March 13. In one of his March 30, 2020 affidavits, Shaun Peesker stated (in part):

> 6. . . . the Companies are seeking an adjournment of the Receivership Application for the following reasons, among others:
>
> a. The Companies have been making substantial progress in their refinancing efforts, but the COVID-19 pandemic has temporarily prevented such efforts from being advanced to a conclusion . . .
>
> . . .
>
> 22. The majority of the Companies' customers have either temporarily shut down operations or have delayed their projects pending the resolution of the COVID-19 pandemic. [no information about when that started]
>
> 23. *As a result of the foregoing, the business operations and employee numbers of the Companies are different than they would normally be at this time of year*. A summary of the current operations and employee numbers for [one debtor company] and [another one] are summarized below:
>
> a. [neutral employment information for one debtor company]
>
> b. Prior to last week [i.e. the week of March 23-27, 2020] [another debtor company] had approximately 110 employees that had been retained throughout the winter season. However, *last Thursday [i.e. March 26, 2020], the decision was made to cease all operations all [two certain plants], other than those operations that are required to fill ongoing orders from current customers. As such, as of last Thursday, the workforce of [that company] has been further reduced to approximately 30 employees.* [major changes but no detailed indication of any Covid-19 impact before late March]

34 In his other affidavit of the same date, Mr. Peesker describes the status of various refinancing possibilities. Of the total number described, two include a Covid-19 dimension: one indicated a delay "as a result of the COVID-19 pandemic." However, that lender had only been approached around March 23. Another prospect is described as retreating from a possible commitment on account of Covid-19 concerns; however, no evidence is given of when that prospect emerged and when the retreat occurred.

35 In Mr. Peesker's follow-up affidavits sworn May 1, 2020, while updates are provided on various fronts, no mention is made of Covid-19, let alone any impact on the debtors' efforts to attract refinancing and sell assets.

36 This evidence is insufficient to show the pandemic having any material impact on the debtors' businesses, refinancing efforts, or asset-sale efforts through March 12, 2020, when the second forbearance period ended.

37 In any case, the debtors received the benefit of a further 19 days of no enforcement (between March 12 and March 31, when the Interim Monitoring Order was granted) and a further five-week stay of proceedings (March 31 to May 5) under that order i.e. almost two more months combined.

38 For all its devastating impact to date, the pandemic did not impair the debtors in any material way through March 12.

39 As for the stay period from March 31 to May 5 (i.e. the lifespan of the Interim Monitoring Order), the debtors and Servus negotiated that arrangement (and obtained the Court's blessing of it, via the March 31 consent order) with their collective eyes opened wider to the Covid-19 phenomenon. And (as noted above re their May 1 affidavits), the debtors produced no evidence about Covid-19 having any particular effect on their activities or efforts from March 31 through May 1, or thereafter.

***Whether the debtors are generally blocked from contesting the receivership order***

40 The debtors made various other arguments, not akin to the unexpected circumstance of Covid-19, about why no receivership order should be granted. They focused on the "just or convenient" requirement in ss. 13(2) of the *Judicature Act*[2], addressing progress made to date in reducing their indebtedness to Servus, the state of various financing "irons in the fire", the sale of certain properties, and the overall prospect of making major headway against the debt if more time is given to them. They also point to evidence that Servus is over-secured and will or should recover its entire claim eventually i.e. even if more time (up to June 4, 2020, at minimum) is given to them.

41 This raises a question: was it open to the debtors to make such (substantive) arguments in the face of the consent receivership order? I examine this question next.

*Consent orders provided as part of forbearance or standstill agreements*

42 In *Octa Hage Enterprises Ltd. v. Bank of Credit & Commerce Canada*[3], the Alberta Court of Appeal examined a consent-order-in-exchange-for-more-time scenario:

> [2] In this mortgage foreclosure action the defendants filed a statement of defence by a law firm. In response to the plaintiff's motion for an order nisi, *the defendants' solicitors negotiated a settlement agreement under which more time was purchased in return for a form of final order of foreclosure with the endorsed consent of the defendants' solicitors of record. The plaintiff held this form and in due course when the agreed time had elapsed, presented it to a Master in chambers, with notice to the defendants*. The Master granted a final order of foreclosure in the same terms but with a stay of execution for an additional six months. The defendants appealed that order to a Queen's Bench justice and now to us.
>
> . . .
>
> [4] The defendants also argue that section 41(2) of the Law of Property Act impliedly forbids going directly to final order without passing the previous step and collecting an order nisi. Two decisions to that effect were cited, the latter being Canada Trustco Mortgage Co. v. Coleman (M 1985) 1985 CanLII 1132 (AB QB), 59 A.R. 367. But neither involved a consent order, and in our view nothing in section 41 prevents such a consent. Subsection (5) on waivers or releases is referring only to the situation before suit or even before default. It is not necessary here to determine whether the consent operated under subsection (3) of section 41, or under subsection (4), or under the general law on consents to judgment. ***The most that could be said of any requirement for an order nisi (if there is one) is that it would a matter of substantive law, not jurisdiction. And consent judgments are expressly designed to bypass substantive defences***.
>
> [5] That in turn is an answer to a number of substantive defences which the defendants now suggest, including want of formal demand for payment and certain interpretations of the mortgages and the interaction of their amounts. That applies even more strongly to some suggested flaws in the wording of the statement of claim. ***A consent to judgment would be worthless if the plaintiff still had to prove his case in full and negative every defence. It might be (as the defendants argue) that the Master or judge is not always required to grant the order consented to and reserves some power to refuse or vary it. But we need not decide that, for the Master and chambers judge both decided to grant it***, except for the stay of which the defendants do not complain.
>
> [6] ***The defendants also sought to argue that later facts made the final order unjust. For example, they try to argue that their equity in the lands has risen substantially. Given the 16 months which have now elapsed since the consent was given, any injustice is hard to see. But in any event when more time is purchased by a consent judgment the defendant takes the risk of whether the future will be kinder to him or to the plaintiff.*** [emphasis added]

43 The apparent matter-of-fact entry of a consent receivership order, after forbearance, is reflected in *Smith v. Pricewaterhousecoopers Inc.*[4], where Rowbotham JA (in chambers) commented:

> [31] The draft statement of claim also alleged that Servus acted negligently or unreasonably and in bad faith in putting Caliber into receivership at the time that it did. The applicant failed to identify any evidence that could support his

allegations. He acknowledged that Caliber was in "a cash flow crisis." *It was never seriously disputed that Caliber had been in a constant state of default for the nine-month period leading up to the receivership.* ***The terms of the final forebearance agreement executed between Caliber and Servus, which the applicant personally signed on behalf of Caliber, made it explicit in clauses 3.4 and 3.5 that Servus was at liberty to make immediate use of the Consent Receivership Order that had previously been signed by Caliber's legal counsel on the company's behalf.*** The applicant's counsel conceded that it would have been easy to undo the receivership order if any of Caliber's other creditors or another third party would have come forward to rescue the company. It was demonstrably false that the trustee and Servus refused to meet with the restructuring group as alleged in the proposed statement of claim. Accordingly, it was reasonable for the chambers judge to have concluded, as she did, that the negligence claim was spurious. [emphasis added]

44 In *741431 Alberta Ltd. v. Devon (Town)* [5] , Watson J. (as he then was) kept a defaulting party to a consent-judgment-to-be-held arrangement:

[40] Ultimately there was a settlement of the action reached which, in sum, provided that (a) the *Applicant would endorse a Consent Judgment to the Respondent's motion for Summary Judgment granting all relief sought*, and (b) the Applicant would provide Counsel for the Respondent with a suitable Transfer and (c) the Applicant would pay the legal costs of the Applicant to a maximum of $4,600.00.

[41] *As part of this settlement*, ***the Respondent did agree that it would make no use of the Consent Judgment and Transfer unless the Applicant failed to reach the roof stage deadline by July 1, 2001 at which point the Respondent could proceed to use the Transfer and Consent Judgment.*** The Respondent also agreed, however, to discontinue its action if the Applicant reached the roof stage by that date. The Applicant would have to pay all fees related to the project promptly upon submission of its plans.

[42] The Respondent's Counsel prepared the Consent Judgment and Transfer and forwarded it to Abbey for execution. Ultimately, *Abbey signed the Consent Judgment and returned it along with the Transfer to Counsel for the Respondent by letter dated December 29, 2000.* ***That letter imposed trust conditions as to the Respondent's holding off on use "unless 741431 Alberta Ltd. fails to meet the roof stage level of construction by July 1, 2001".***

. . .

[117] In the case at bar, the Applicant's Notice of Motion effectively sought an indefinite period of time within which to enable it to decide when to get on with this project. Its argument, in my view, came down to the proposal of a series of estoppels by acquiescence by the Respondent allowing the Applicant to evade the consequences of a series of separate promises, defaults, re-promises and re-defaults. This history does not persuade me of an entitlement of the Applicant on the equities of this case.

. . .

[119] . . . the Applicant has failed to prove the existence of an alleged settlement contract overriding the Consent Judgment and Transfer agreement, such as to require this Court to enforce the latter.

. . .

[136] ***In my view, the Respondent is not acting punitively to enforce the old agreement as in the concept of the liquidated damages cases. The Respondent is seeking merely to enforce the terms of their agreement as to the Consent Judgment and Transfer.*** [emphasis added]

45 As did Macklin J. in *Mraiche v. Sander* [6] :

[27] In my view, this is simply a contractual matter and the Court needs only to review the facts and the agreements between the parties. All of the agreements were voluntarily entered into between sophisticated parties. The Defendant

Shirley Sander describes herself as a businesswoman. She owns a number of properties in B.C. When Ms. Sander entered into the Purchase Contract, she utilized the services of a realtor. When she entered into the Affirming Agreement, she did so in the presence of her lawyer. The transfer back was signed by her in the presence of her lawyer. In Clause 10 of the Affirming Agreement, Ms. Sander acknowledged that "she has had the time to review, and has reviewed, this Agreement and that she has received independent legal advice prior to the execution and delivery of this Agreement".

[28*] The agreements expressly contemplate remedies which were agreed to between the parties in the event either failed to complete the contract according to its terms. In the event that Ms. Sander, as the buyer, failed to complete, the agreements contemplated, among other things, a transfer back of the Edmonton property to the Plaintiff, and the filing of the Consent Order granting the Plaintiff immediate possession of the Edmonton property.*

[29] There is no suggestion, nor on these facts could there be, of *non est factum*. Ms. Sander understood the terms of each agreement, she had the advice of a realtor, and, importantly, she had the advice of legal counsel.

[30] ***It is not the function of this Court to rewrite Agreements negotiated and executed by sophisticated business people. It is also not the function of this Court to examine such Agreements to see whether the consideration flowing from one side to the other is appropriate. The parties made those decisions.***

[31] *Ms. Sander has clearly defaulted on payment under the agreements. She has still not paid, or even tendered, the amounts due on the extended date of March 26*. Ms. Sanders' allegations concerning alleged interference by the Plaintiff in her efforts to obtain financing do not have the air of reality or accuracy. The lender advised Ms. Sander's representative that he was declining the loan and would not be providing financing three days before counsel for the Plaintiff spoke to the lender.

[32*] Ms. Sander's lawyer executed a Consent Order in November of 2009 knowing of all of the terms and conditions set out in the various agreements. The Consent Order was entered after Ms. Sander had received an extension of one week by Justice Verville of this Court and after she had failed to make payment as required by that Order. The Consent Order was entered after Ms. Sander's representative had clearly been advised that the lender would not be providing financing.*

. . .

[35] At the commencement of the Appeal, counsel for Ms. Sander provided the Court with a new affidavit sworn by Ms. Sander and filed the same day (May 12, 2010). She now claims to have received a commitment for bridge financing from a company called Kennedy Financing, Inc. located in New Jersey. ***This new evidence does not impact on the fact that Ms. Sander is still in default and does not justify granting any further relief to her***. I would point out, however, that the supposed commitment appears to be conditional only, both as to the granting of a loan and as to amount. [emphasis added]

46 And Morawetz J. (as he then was) in *Royal Bank v. Walker Hall Winery Ltd.* [7] :

[18] Counsel to the Receiver also points out that the receivership application was commenced in November 2009 and Walker Hall retained Mr. Duncan. Mr. Duncan and counsel to RBC reached agreement on a timetable to have the application heard on December 16, 2009, but the day before such hearing Mr. Duncan contacted counsel to RBC to request an adjournment. ***Counsel agreed that, in exchange for Walker Hall's consent to the Receivership Order, the hearing would be adjourned to December 23, 2009, to provide time for Walker Hall to obtain refinancing***. Mr. Lukezic signed the consent on behalf of Walker Hall. ***Walker Hall did not obtain refinancing and, acting on Mr. Lukezic's consent, counsel to RBC obtained the Receivership Order on December 23, 2009.***

. . .

[36] ***The central issue is whether circumstances exist that would make it appropriate to nullify or remove the Receivership Order***. A secondary issue is whether the damage claim against RBC is more properly pursued in CV-10-399090.

[37] The Receivership Order was made on consent.

[38] Mr. Macfarlane submits that a party who seeks to have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed. In this case, Mr. Macfarlane submits that there is no evidence of fraud. Further, the application was resolved when the respondents consented to the Receivership Order which they did not appeal.

[39] Counsel also submits that, in the absence of fraud or collusion, a consent order cannot be set aside. See ***Houston v. Bousquet***, (1965) CarswellMan 20 (M.C.Q.B.) and Sjogren v. Lamson, (1922) CarswellMan 12.

. . .

[41] Mr. Lukezic has stated that his consent was premised on the $150,000 promised advance***. In my view, it follows that in order to succeed on this motion, the Court has to be satisfied that the consent was not a true consent***. The Court has to be satisfied that there was an agreement under which the Receiver or RBC would advance $150,000 to Walker Hall.

. . .

[46] *In my view, even overlooking evidentiary deficiencies, Mr. Lukezic has failed to persuade me that it is appropriate to set aside or vary the Receivership Order.*

[47] ***Mr. Lukezic consented to the Receivership Order on December 23, 2009.***

[48] ***In my view, there is no evidence of fraud or that there was an arrangement under which $150,000 would be advanced by the Receiver or RBC to Walker Hall***. [various evidence reviewed]

. . .

[63] ***Mr. Lukezic has failed to provide any basis to have the Receivership Order set aside or varied. He has alleged that the Receiver or BDO promised to advance $150,000 to Walker Hall at the time of the Receivership Order and that, in response to this promise, he consented to the Receivership Order. The allegations set out in his factum are, simply put, not supported by the evidence***. No credible alternative to the receivership has been put forth by Mr. Lukezic. [emphasis added]

47 In contrast, see *Western Surety Co. v. Hancon Holdings Ltd.* [8] , where a creditor had received a consent judgment as part of a work-out arrangement, but the trigger clause was found to be ambiguous. The clause was as follows:

4. As security for the performance and fulfillment of their respective obligations under the General Indemnity Agreement, Moh Creek and the Indemnitors will execute an Appearance and *Consent to Judgment* in an action under the General Indemnity Agreement in an amount which includes the anticipated Advances, Expenses and Interest *to be held by counsel for WSC on the basis that it will not be entered unless Moh Creek does not make payment of the Advances, Expenses and Interest in accordance with a payment schedule to be agreed upon by Moh Creek and WSC prior to September 30, 2000 and in any event payment in full shall be made by December 31, 2001 or make such other agreement to extend that period*. [emphasis added]

48 The parties were unable to agree on a payment schedule; eventually, the creditor filed the consent to judgment and registered it against title to various properties. Per Gerow J.:

[20] On March 13, 2002, the defendants brought an application to have the Consent Judgment removed from the titles. In opposing the application, *Western Surety argued that it was entitled to file and register the Consent Judgment because the defendants were in default under the Agreement for failing to provide a payment schedule as required by paragraph 4 of the Agreement. However, Morrison J. set aside the Consent Judgment on the basis that it was premature. In her reasons,*

> *Morrison J. stated that paragraph 4 of the Agreement was uncertain and ambiguous.* [consent judgments were removed from the titles] [emphasis added] [9]

49 Similarly, in contrast, see *Skagen v. Canadian Imperial Bank of Commerce* [10], where Williams J. found that the trigger condition (default) did not exist:

> [6] The plaintiffs say the Bank has breached its agreement and that the Consent Judgment which was entered against both Skagen and the numbered company should be set aside.
>
> . . .
>
> [48] *With respect to the consent judgment that was provided to the Bank, it constitutes valuable consideration provided by the plaintiffs on the understanding that it would be entered in the event that the plaintiffs defaulted on their contractual obligations.* When the October payment was not received, the Bank entered the judgment. In my view, *that must be set aside, as the pre-condition for its entry, default by the plaintiffs of their obligations under the Agreement, did not occur*. When the consent judgment was entered, the repudiation had been accepted and there was no further obligation owing by the plaintiffs, hence there could be no default. The decision of Koenigsberg J. in ***Harbelah Enterprises Ltd. v. O'Neil*** (1994), 1994 CanLII 16671 (BC SC), 94 B.C.L.R. (2d), 26 C.P.C. (3d) 315, [1994] 9 W.W.R. 162 (paras. 22-25) establishes that a consent order can be set aside in circumstances such as these. [emphasis added]

*Applying those principles here*

50 By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and *that the appointment of a receiver was warranted* i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.

51 The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."

52 I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.

53 It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

54 Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.

55 Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.

56 Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

***Court's duty when presented with a consent order***

57 What, then, is the Court's duty when presented with a consent order, as here? Many cases confirm it is not simply to act as a rubber stamp: see, for instance, *G. (C.T.) v. G. (R.R.)* [11], where Popescul CJQB held:

> [11] Where parties have had their agreement sanctioned by the court by incorporation of the child support terms into a judgment or order, a judicial determination has been made. The courts have a duty to scrutinize agreements and consent orders or consent judgments that are submitted by the parties in order to ensure that they comply with the law and are in accordance with the best interests of the child or children who are subject to the order or judgment. ***The process is more than just a "rubber stamp".*** See ***Hayes v Hayes*** (1987), 6 RFL (3d) 138 (Sask QB).

58 In *Fisher v. Fisher* [12], McDonald J. (as he then was) held:

> [65] On June 23, 1993 Ostapowich [defendant in ***BMO v Ostapowich (Trustee of)*** (1996) 144 Sask R 207 (CA)] made an assignment into bankruptcy. Shortly thereafter the Bank brought an application by way of Notice of Motion seeking to set aside the vesting order and other portions of the consent judgment claiming it represented a settlement or fraudulent conveyance. Ostapowich opposed the application, claiming that it was in substance a collateral attack on a valid judgment of the Court. The Court agreed, holding at paras. 11-13:
>
> > *The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment*. See: The Hardy Lumber Co. v. The Pickerel River Improvement Co. (1899) 1898 CanLII 16 (SCC), 29 S.C.R. 211; City of Toronto v. Toronto R.W. Co. (1917) 39 O.L.R. 310 at p. 313. ***Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it.*** See Peterson v. Bishop et al., 1923 CanLII 356 (SK CA), [1923] 3 W.W.R. 25; Hope Hardware et al. V. Fields Stores Ltd. et al. (1978), 1978 CanLII 254 (BC SC), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement ***the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement.*** *The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.*
>
> > . . .
>
> [66] While Georgette Fisher is proceeding pursuant to the provisions of Section 10 of the *Matrimonial Property Act* in advancing her claim to a larger interest in the Haysboro property than stipulated in the Hawco Order, the reasoning in *Ostapowich* is applicable. ***The Hawco Order is more than just a mere agreement between Suzanne Fisher and Morris Fisher; it represents a final determination of their respective interests in the Haysboro property as sanctioned by this Court.*** [emphasis added]

59 For a supportive American perspective, see "Six Degrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation" [13], where Anthony DiSarro wrote:

> V. A CONSENT DECREE IS THE COURT'S DOCUMENT
>
> . . . a consent decree "contemplates judicial interests apart from those of the litigants." ***Courts have an interest in the contents of their orders***. Absent a statutory obligation to approve the terms of settlement, courts have no interest in the contents of private settlement agreements.
>
> *A. Consent Decree as Both Contract and Order: Entry of the Decree*

A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree. A court should not unilaterally alter a proposed consent decree that has been submitted to it for entry." Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.

***However, a court does have the prerogative to at least make the "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree". A consent decree should bear some relationship to the case and pleadings that have invoked the federal court's jurisdiction in the first place'" and "further the objectives of the law upon which the complaint was based." The decree should not undermine judicial integrity***.

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.

The court's role here is discretionary, not mandatory. A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

***Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry. As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions."*** Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement. [footnotes omitted] [emphasis added]

*Distillation of principles*

60 On how to approach a consent order, the guiding principles are as follows:

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

61 The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.

62 At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

63 A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside. [14]

***Whether it is "just or convenient" to appoint a receiver in these circumstances***

64 The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

65 The question becomes whether it is indeed "just or convenient" to appoint a receiver here.

66 Here is where (as confirmed by the "consent-order-and-forbearance" cases) the debtors' consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

67 The debtors' core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs — continuing default — in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

68 In other words, even acknowledging significant progress to date, and even acknowledging the likelihood of more such progress over the next month, the debtors have *already agreed* that, if and when Servus decided against further grace (i.e. after the expiry of the latest hold period), it could move for the order *with no "merits" objection by them*.

69 Accordingly, on the "merits" review i.e. whether it is "just or convenient" to appoint a receiver here, I focus on the circumstances outlined by Servus.

70 Here it cites Romaine J.'s decision in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [15], in particular her helpful catalogue of appointment factors. I reproduce the *Paragon*-factors review from Servus's application brief:

> (a) Servus is a secured creditor of the Debtors and holds a security interest in of all the present and after-acquired property of the Debtors, subject to certain provisions of priority agreements entered into by Servus. Servus holds a first- ranking security interest in the Alberta Lands and NWT Lands;
>
> (b) The Debtors have demonstrated losses for the past 3 years;
>
> (c) the nature of the Debtors' property includes mobile equipment potentially located across Alberta, the Northwest Territories, British Columbia, Saskatchewan. There is also a risk of these mobile assets being subject to unauthorized sale and removal. The Debtors' also own two parcels of land located in Alberta and one parcel of land located in the Northwest Territories subject to Servus' security;

(d) given that the Debtors' property includes multiple parcels of land, and that the Debtors' property is located across multiple jurisdictions, a receiver is a cost effective mechanism to organize the sale of the property;

(e) an organized sale by a Receiver is likely to maximize recovery for secured and unsecured creditors rather than secured creditors individually seeking to enforce their securities;

(f) the balance of convenience is in favour of Servus. The most recent consolidated financial statements of the Debtors indicates a net loss of $1,137,511 for the month of January 2020. This is indicative of the serious financial distress facing the Debtors;

(g) the conduct of the Debtors is supportive of the granting of the Order requested, as:

(i) Servus first demanded payment from the Debtors in June 2019, and Servus has since entered into a lengthy forbearance period between July 2019 and March 2020 to assist the Debtors in making alternative arrangements to pay Servus in full. To date, the Debtors have failed to pay their obligations to Servus in full, which includes the Indebtedness; and

(ii) the large net loss reported in the January 31, 2020 consolidated financial statements of the Debtors, the Debtors cannot sustain their current operations on an ongoing basis without a material injection of capital or refinancing. Such refinancing has not materialized, despite this additional time to obtain it; and

(iii) the Debtors have consented to the Consent Receivership Order;

(h) the Securities granted by the Debtors and Forbearance Agreement authorize Servus to appoint a Receiver over the Debtors upon default, which is further supported by the Consent Receivership Order provided for in the Forbearance Agreement;

(i) a court appointment is necessary to enable the Receiver to carry out its duties more effectively and efficiently given the nature of the Debtors' property and assets;

(j) a Receivership Order would place all creditors and stakeholders of the Debtors on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

(k) while there is a cost of appointing a Receiver, all indications to date indicate that the appointment of a Receiver will be the most cost effective means of dealing with the estates of the Debtors;

(l) it is likely that the value of the property of the Debtors will be maximized by establishing a level and transparent process administered by this Honourable Court; and

(m) Servus is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver, particularly in giving the Debtors since July 2019 to make arrangements to pay Servus in full.

71 I also note the following comments by the interim monitor (from his April 27 report):

6. STATUS OF PROFORM'S REFINANCING EFFORTS

6.1 At paragraph 35 of the Peesker Affidavit and at paragraph 10 of the Confidential Peesker Affidavit, Mr. Peesker provides a summary of nine lenders the Company was pursuing for financing.

6.2 The Interim Monitor understands that only one lender has provided a commitment letter to Proform:

6.2.1 Lender : Lender 2 has provided a commitment letter in the total amount of $6.5 million to be financed against the Old Brew Property owned by 285. This property has an existing mortgage registered by Servus to secure

approximately $1.43 million due to Servus from 285. Therefore, the net amount that would be available to be applied against Proform's indebtedness to Servus is approximately $5.07 million.

6.3 With respect to the balance of the potential lenders identified in the Peesker Affidavit, the Company advised the Interim Monitor that many were not prepared to provide commitment letters due to the current economic environment, while one significant potential lender apparently advised Proform that it did not meet the lender's mandate to lend to businesses in rural communities.

6.4 In summary, as at April 27, 2020 the Company has secured only one financing commitment. This is not sufficient to repay Servus in hill as illustrated below.

| | $ |
|---|---|
| Estimated Proform indebtedness to Servus | (12,750,000) |
| Lender 2 - net ATB financing available to Servus on Old Brew | 5,070,000 |
| Remaining outstanding Proform indebtedness | (7,680,000) |

6.5 On April 27, 2020, the Company provided the Interim Monitor with an executed real estate purchase contract with respect to the sale of the NWT Property ('NWT Sale Contract'). The NWT Sale Contract is included in the confidential appendix noted below. Management advise that the full amount of the sales proceeds would be applied against the Servus debt, of which approximately $790,000 relates to a Servus mortgage registered against the NWT Property. Regardless, there remains a significant shortfall to Servus.

6.6 The Company advised that it anticipates the receipt of a number of commitment letters in the next several days that will address this shortfall. While the Interim Monitor is hopeful, it should be noted that the Company has stated this on various occasions over the last several weeks and months. For various reasons, including those noted above, commitment letters have not been obtained.

EVALUATION OF THE ASSETS

7.1 As set out in paragraph 9 of the Interim Monitor Order, the Interim Monitor is to conduct a review and evaluation of the Property (as defined in the Interim Monitor Order) and file a report to the Court in respect of the same.

7.2 To assist in its evaluation of the Company's major assets and to assess Mr. Peeskers claim that 'the value of collateral held by Servus is several multiples in excess of the $12 million outstanding", the Interim Monitor immediately engaged the previous real estate appraisers utilized by the Company and 285 seeking the previous real estate appraisers utilized by the Company and 285 seeking updated appraisals for the Burnt Lake Property, the NW' Property, the Gasoline Alley Property and the Old Brew Property. In addition, the Interim Monitor sought a high — level valuation of the Company's major pieces of equipment, rolling stock and concrete plant assets from Century.

7.3 With respect to the real estate, on April i6, 2020, SWM delivered its NWT Property appraisal to the Interim Monitor. Subsequently, on April 21, 2020, Soderquist delivered to the Interim Monitor appraisals of the Burnt Lake Property, the 01(1 Brew Property and the Gasoline Alley Property.

7.4 With respect to the Company's equipment, rolling stock, and concrete plant assets, on April 23, 2020 Century provided the Interim Monitor with its estimated valuation on these assets.

7.5 It is the Interim Monitor's view that Proform's assets subject to the security of Servus are insufficient to repay Servus in full. The Interim Monitor estimates the shortfall to be in range of $1.94 million to $6.81 million. Accordingly, it will he necessary for Servus to look to the additional collateral pledged to Servus by 285 to address shortfall.

**D. Conclusion**

72 In these circumstances, and emphasizing the debtor's consent to the proposed receivership order, it is "just *and* convenient" that it be entered and, accordingly, that the debtors' application to extend the interim-monitoring period to June 4, 2020 be dismissed.

*Creditor's application granted; debtors' application dismissed.*

Footnotes

1 https://covid19stats.alberta.ca. I am using these statistics as a proxy for the general state of the Covid-19 pandemic in Alberta in the first part of March.

2 Servus also invoked s. 243 *BIA*, ss. 65(7) *PPSA*, and "Part A of the [*ABCA*]."

3 1988 ABCA 109 (Alta. C.A.)

4 2013 ABCA 288 (Alta. C.A.)

5 2002 ABQB 870 (Alta. Q.B.)

6 2010 ABQB 341 (Alta. Q.B.)

7 2010 ONSC 4236 (Ont. S.C.J. [Commercial List]) affd 2011 ONCA 314 (Ont. C.A.) leave denied 2011 CanLII 65628 [*Chegancas v. Lukezic*, 2011 CarswellOnt 10873 (S.C.C.)]

8 2007 BCSC 180 (B.C. S.C.)

9 See also the judgment of Mahoney J. in *Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc.*, 2019 ABQB 732 (Alta. Q.B.)

10 2004 BCSC 602 (B.C. S.C.)

11 2016 SKQB 387 (Sask. Q.B.)

12 2008 ABQB 170 (Alta. Q.B.)

13 (2010) 60 Am U L Rev 275 at 317-320

14 See, for example, *K. (T.E.H.) v. S. (C.L.)*, 2011 ABCA 252 (Alta. C.A.). See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 ("Judgments, Orders, and Settlements), R. ("Consent Orders or Judgments"), 7. ("Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 ("Consent Orders as Evidence of a Contract Between Parties" and "Binding Effect of Consent Orders") at p 303.

15 2002 ABQB 430 (Alta. Q.B.)

# TAB 11

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109, [2019] 5 W.W.R. 38, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, 85 M.P.L.R. (5th) 1

# City of Edmonton (Respondent / Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp. (Appellants / Defendants) and Royal Bank of Canada (Not a Party to the Appeal / Plaintiff) and Reid-Built Homes Ltd and Emilie Reid (Not Parties to the Appeal / Defendants)

Marina Paperny, Sheila Greckol, Ritu Khullar JJ.A.

Heard: February 7, 2019
Judgment: March 25, 2019
Docket: Edmonton Appeal 1803-0050-AC

Proceedings: reversing *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), [2018] 5 W.W.R. 565, 2018 CarswellAlta 305, 2018 ABQB 124, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55, Robert A. Graesser J. (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., A.M. Badami, for Appellants
A. Turcza-Karhut, C.N. Androschuk, for Respondent

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

**Related Abridgment Classifications**

Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order
Municipal law
XXI Tax collection and enforcement
XXI.9 Practice and procedure
XXI.9.a Parties

**Headnote**

Bankruptcy and insolvency --- Receivers — Fees and expenses

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's

charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Municipal law --- Tax collection and enforcement — Practice and procedure — Parties

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

**Table of Authorities**

**Cases considered:**

*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

*Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.* (2013), 2013 ONSC 6809, 2013 CarswellOnt 15121 (Ont. S.C.J.) — considered

*First Leaside Wealth Management Inc., Re* (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — considered

*JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 2006 CarswellOnt 4619, 25 C.B.R. (5th) 156 (Ont. S.C.J.) — followed

*Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — followed

*Royal Bank of Canada v. Delta Logistics Transportation Inc.* (2017), 2017 ONSC 368, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 7 P.P.S.A.C. (4th) 1 (Ont. S.C.J.) — considered

*Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.) — referred to

*Royal Bank v. Vulcan Machinery & Equipment Ltd.* (1992), 3 Alta. L.R. (3d) 358, 13 C.B.R. (3d) 69, [1992] 6 W.W.R. 307, 1992 CarswellAlta 287 (Alta. Q.B.) — considered

*Secure 2013 Group Inc. v. Tiger Calcium Services Inc* (2017), 2017 ABCA 316, 2017 CarswellAlta 1856, 58 Alta. L.R. (6th) 209, 417 D.L.R. (4th) 509, 13 C.P.C. (8th) 1 (Alta. C.A.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 243 — considered

s. 243(6) — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

*Municipal Government Act*, R.S.A. 2000, c. M-26

s. 348 — considered

s. 348(d)(i) — considered

APPEAL by receiver from judgment reported at *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.), refusing to prioritize receiver's charge for fees and disbursements over municipality's claim for unpaid property taxes.

***Per curiam*:**

**Introduction and Standard of Review**

1 The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v. Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta. Q.B.) [*Decision*].

2 The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc. v. Tiger Calcium Services Inc*, 2017 ABCA 316 (Alta. C.A.) at para 34, (2017), 58 Alta. L.R. (6th) 209 (Alta. C.A.).

**Background**

3 The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

4 On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

5 The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

**Issues on appeal**

6 The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

7 The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

8 For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

**Analysis**

9 Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of

the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

> (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.

10 The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

> Any expenditure or liability which shall properly be made or incurred by the Receiver . . . shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge")

11 Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

> **Tax becomes debt to municipality**
>
> 348 Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) *are a special lien*
>
> (i) *on land and any improvements to the land, if the tax is a property tax*, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
>
> (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

12 Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

13 In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors — a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority

position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

14 The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the decision in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84 (Ont. C.A.) [*Robert F. Kowal Investments Ltd.*], applied in *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] 6 W.W.R. 307, 13 C.B.R. (3d) 69 (Alta. Q.B.). *Robert F. Kowal Investments Ltd.* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Robert F. Kowal Investments Ltd.*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Robert F. Kowal Investments Ltd.*:

> 1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

15 These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

16 In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

> [136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.
>
> [137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

17 In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), where it was noted that in *CCAA* proceedings, "professional services are provided . . . in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

> . . . comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* . . .

18 The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in, *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.) at para 45 (and cited in, *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809 (Ont. S.C.J.) at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

19 Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

20 The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

21 There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

22 We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

23 The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

> The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

24 With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

25 This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process.

There is no evidence that the running of individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

26 Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

*Appeal allowed.*

Footnotes

1 *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para 51.

# TAB 12

**Most Negative Treatment:** Reversed
**Most Recent Reversed:** Edmonton (City) v. Alvarez & Marsal Canada Inc | 2019 ABCA 109, 2019 CarswellAlta 511, 85 M.P.L.R. (5th) 1, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, [2019] 5 W.W.R. 38, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724 | (Alta. C.A., Mar 25, 2019)

2018 ABQB 124
Alberta Court of Queen's Bench

Royal Bank of Canada v. Reid-Built Homes Ltd

2018 CarswellAlta 305, 2018 ABQB 124, [2018] 5 W.W.R. 565, [2018] A.W.L.D. 1030, [2018] A.W.L.D. 1031, [2018] A.W.L.D. 1107, 289 A.C.W.S. (3d) 16, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55

# Royal Bank of Canada (Plaintiff) and Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builders Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, Reid Capital Corp and Emilie Reid (Defendants) and Alvarez & Marsal Canada Inc in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp (Applicants)

Robert A. Graesser J.

Heard: November 29, 2017; January 9, 2018
Judgment: February 21, 2018
Docket: Edmonton 1703-21274

Counsel: Howard A. Gorman, Q.C., Aditya M. Badami for Receiver, Alvarez & Marsal Canada Inc.
Ray C. Rutman, Dean Hitesman for Royal Bank of Canada (November 29, 2017)
Daniel R. Peskett, Michael T. Coombs for ICI Capital Corporation and Standard General (November 29, 2017)
Kent A. Rowan, Q.C. for Emilie Reid (November 29, 2017)
Michael J. McCabe, Q.C. for Melcor Developments Ltd. (November 29, 2017)
Ryan Zahara for Laurentian Bank (November 29, 2017)
C.P. Russell, Q.C. for Canadian Western Bank (November 29, 2017)
Jerritt Pawlyk for K.V. Capital (November 29, 2017)
Dean Hitesman, Thomas Gusa for Royal Bank of Canada (January 9, 2018)
Ryan Trainer for Canadian Western Bank (January 9, 2018)
Allan Delgado, Carleen Androschuk for Edmonton (January 9, 2018)

Subject: Civil Practice and Procedure; Insolvency; Property; Public; Tax — Miscellaneous; Municipal
**Related Abridgment Classifications**
Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order
Municipal law

XXI Tax collection and enforcement

XXI.1 Tax as debt

**Headnote**

Bankruptcy and insolvency --- Receivers — Fees and expenses

RB Ltd. group of companies ("RB Group") were placed into receivership through consent receivership order entered into between bank and various corporations comprising RB Group — Receiver granted order approving certain property powers and granting it first-ranking super priority charge for its property powers charge — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Creditor I Corp. was mortgagee on four parcels of land owned by RB Group and S Ltd. had filed builders' liens against lands it worked on for RB Group — I Corp. and S Ltd. brought applications for relief, including varying charging provisions in order — Applications dismissed — There was no good reason why court-appointed receiver under Bankruptcy and Insolvency Act (BIA) should not have same rights and priorities as given to mortgagee — Orders made under BIA concerning priorities prevailed over priority given to S Ltd.'s builders' liens under Builders' Lien Act, based on paramountcy — It was appropriate to have receiver's charges rank ahead of claimants who would benefit from receivership, to extent that they had benefitted from receivership — For creditors who may benefit from receivership, super priority is generally appropriate for receiver's fees and disbursements, on expectation that these fees and disbursements will ultimately be fairly apportioned — Receiver's super priority charge was to remain, and it applied to I Corp. and S Ltd. with respect to receiver's fees and borrowing power.

Municipal law --- Tax collection and enforcement — Tax as debt

RB Ltd. group of companies ("RB Group") were placed into receivership as result of consent receivership order entered into between R bank and various corporations comprising RB Group — Receiver applied for, and was granted, order approving certain property powers relating to enhancement and preservation of property, and granting it first-ranking super priority charge for its property powers charge against any property so enhanced or preserved — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Municipality E brought application to be exempted from super priority provisions of receivership order with respect to its property tax claims — E's application granted — Receivership order must fit circumstances of case — Ultimately, these determinations are in discretion of court — In liquidating receivership, it is appropriate that taxing authority's contribution to receivership is potential delay in receiving payment of outstanding taxes, penalties, and interest — On facts of this case, it being liquidating process and there being no apparent benefit to E arising out of receivership, E's priority for property taxes was not subordinate to receiver's fees or approved borrowings — While court has power to subordinate municipal tax claims to costs of receivership, this was not appropriate case in which to do so — In this case, receiver's charge and borrowing power did not rank ahead of E's property tax claims.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

RB Ltd. group of companies ("RB Group") were placed into receivership through consent receivership order entered into between bank and various corporations comprising RB Group — Receiver granted order approving certain property powers and granting it first-ranking super priority charge for its property powers charge — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Creditor I Corp. was mortgagee on four parcels of land owned by RB Group and S Ltd. had filed builders' liens against lands it worked on for RB Group — Both creditors took issue with provisions in order giving receiver priority over their claims for receiver's fees and disbursements, as well as for approved borrowings — I Corp. brought applications for relief, including lifting stay of proceedings on mortgages held against RB Group — Application dismissed — Interests of I Corp. and other creditors did not completely align — I Corp. wanted to get paid out fully, and as quickly as possible — It has no interest in any surplus should properties be worth more than was owed to I Corp. on them — Receiver, on behalf of other creditors, had interest in maximizing return from these properties — Absent evidence of prejudice to I Corp., stay should not be lifted.

**Table of Authorities**

**Cases considered by *Robert A. Graesser J.*:**

*Bank of Montreal v. Peri Formwork Systems Inc.* (2012), 2012 BCCA 4, 2012 CarswellBC 10, 85 C.B.R. (5th) 80, 8 C.L.R. (4th) 79, 314 B.C.A.C. 240, 534 W.A.C. 240, 346 D.L.R. (4th) 495 (B.C. C.A.) — considered

*Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373, 1972 CarswellMan 9 (Man. C.A.) — considered

security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

26 The Receiver was appointed pursuant to section 243(1) of the *BIA*. That section provides:

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

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

(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.

. . .

27 Subparagraph 6 deals with the Receiver's fees and disbursements:

(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.

28 The *BIA* provides for borrowing powers for receivers in section 31:

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

**Preliminary objection to Edmonton's application**

29 The Receiver provided a preliminary objection to Edmonton's application. It noted that Edmonton did not bring this application at the come-back application, nor did it appeal the initial Receivership Order or the amended order following the November 29, 2017 application. The Receiver argues that this application is tantamount to an appeal of both orders, and Edmonton is out of time.

30 The Receiver did not provide any authority for the proposition that once a Receivership Order is granted and the appeal period has expired, the Court has no jurisdiction to vary the earlier order. Edmonton cites Rules 9.12, 9.13 and 9.14 of the *Alberta Rules of Court*, Alta Reg 124/2010, in support of its argument that the Court has jurisdiction to hear its application and grant the relief sought. Those Rules provide:

9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.

9.13 At any time before a judgment or order is entered, the Court may

(a) vary the judgment or order, or

(b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

159 My conclusion with respect to ICI is the same as it is to Standard General. In the absence of circumstances that allow them to lift the stay or opt out of the Receivership, I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. The same holds true for the Borrowing Power. The Receiver may (for example) borrow to pay off claims ranking in priority to ICI, or for maintenance or improvements to the properties. The cost of any borrowings will have to be apportioned fairly at the end of the process so there is no free ride for any creditor.

160 ICI's application regarding its priority position vis a vis the Receiver is dismissed.

**Conclusion**

161 In reviewing the various submissions and the case law submitted, I have arrived at a number of conclusions.

162 Where there is a conflict between provincial legislation dealing with priorities and the provisions of the *BIA* or the exercise of powers by the Court under the *BIA*, the provisions of the *BIA* prevail.

163 On the appointment of a Receiver under the *BIA*, or during the receivership, the Court has the jurisdiction to determine the priority of the Receiver's fees and disbursements, as well as repayment of any court-authorized borrowing.

164 The Court has the power to grant a super priority for the Receiver's fees and disbursements ahead of secured creditors, including secured creditors with proprietary interests.

165 This power must be exercised equitably, having regard to the purpose of the legislation and the purpose of the receivership.

166 Creditors should not get a "free ride" in a receivership, paid for by other creditors.

167 Court approved borrowings for the purpose of preserving and improving property may properly enjoy a priority over proprietary interests such as property taxes, mortgagees, and builders' lien claimants in appropriate circumstances.

168 Different considerations apply to liquidating processes than to restructuring processes under either the *BIA* or the *CCAA*.

169 Ultimately, the apportionment of the Receiver's fees and disbursements is for the Court to determine at the end of the receivership, including repayment of any borrowings authorized by the Court: see e.g. *Maple Leaf Loading*, *Integris Credit Union*,*Medican Holdings Ltd., Re*, 2013 ABQB 224 (Alta. Q.B.), *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277 (Alta. Q.B.).

170 As a result of this analysis, I conclude that the Receiver's super priority charge should remain, and that it applies to ICI and Standard General with respect to the Receiver's fees and the Borrowing Power.

171 On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

172 ICI has not met its burden to lift the stay of proceedings or to otherwise be removed from the Receivership. If circumstances change, ICI (and other creditors) may reapply for appropriate relief.

173 Ultimately, apportionment of the Receiver's fees, expenses, and approved borrowings will have to be done at the end of the receivership.

174 I am indebted to counsel for their able written and oral arguments.

*Order accordingly.*

# TAB 13

I hereby certify this to be a true copy of
the original Order
Dated this 2 day of Feb/17
for Clerk of the Court

CLERK'S STAMP
CLERK OF THE COURT
FILED
FEB 02 2017
JUDICIAL CENTRE
OF CALGARY

| | |
|---|---|
| COURT FILE NUMBER | 1701- 00143 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | BUSINESS DEVELOPMENT BANK OF CANADA |
| DEFENDANT | QUATTRO EXPLORATION AND PRODUCTION LTD. |
| DOCUMENT | **RECEIVERSHIP ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **CASSELS BROCK & BLACKWELL LLP**<br>Millennium Tower<br>Suite 1250, 440 2nd Avenue SW<br>Calgary, Alberta T2P 5E9<br><br>Attention: Jeffrey Oliver<br>Telephone No.: 403-351-2921<br>Fax No.: 403-648-1151<br>Client File No.: 33845-205 |

JUDICIAL CENTRE OF CALGARY
FILED
FEB 02 2017
CLERK OF THE COURT

**DATE ON WHICH ORDER WAS PRONOUNCED:** February 2, 2017

**LOCATION OF HEARING:** Calgary, Alberta

**NAME OF JUDGE WHO MADE THIS ORDER:** Honourable Madam Justice Eidsvik

**UPON** the application of Business Development Bank of Canada ("**BDC**") in respect of Quattro Exploration and Production Ltd. (the "**Debtor**" or "**Quattro**"); **AND UPON** having read the Notice of Application, the Affidavit of Derek Church sworn December 29, 2016, the First Confidential Affidavit of Derek Church sworn December 29, 2016, the Fifth Report of the Monitor dated December 30, 2016, the Second Confidential Affidavit of Derek Church sworn January 4, 2017, the Third Confidential

32. BDC shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of BDC's security or, if not so provided by BDC's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

**PRIORITY OF CHARGES**

34. The priority of the charges previously granted by this Honourable Court in the CCAA, namely the Administration Charge, the Interim Lender's Charge, and the Directors' Charge (together, the "CCAA Charges") shall continue to charge the Property and the priority of the CCAA Charges, in relation to the Receiver's Charge and the Receiver's Borrowing Charge granted in this Order, shall be as follows:

(a) First – Administration Charge (to the maximum amount of $250,000) on a *pari passu* basis with the Receiver's Charge;

(b) Second – Receiver's Borrowing Charge;

(c) Third – Interim Lender's Charge (to a maximum amount of $1,750,000); and

(d) Fourth – Directors' Charge (to the maximum amount of $250,000).

35. For greater certainty, the directors and officers of Quattro shall be entitled to the benefit of the Directors' Charge, within the limits prescribed by the Initial Order, only in respect of any obligations and liabilities they have incurred or may have incurred as directors and/or officers of Quattro between the date of the commencement of the CCAA and the date of this Order.