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JUDICIAL CENTRE	CALGARY
PLAINTIFF/APPLICANT	CANADIAN WESTERN BANK
DEFENDANTS	AAA WINDOWS LTD., AAA HOLDINGS LTD., AAA DOORS LTD., RANBIR SANDHU, MOHINDER SANDHU, SUKHDEV SANGHA and BALDEV SANGHA
DOCUMENT	**BENCH BRIEF OF CANADIAN WESTERN BANK RE: APPROVAL AND VESTING ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT

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File No. 45003-552 and 45003-553

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Canadian Western Bank ("**CWB**" or the "**Lender**"), in its capacity as the senior secured lender of AAA Windows Ltd. ("**Windows**") and AAA Holdings Ltd. ("**Holdings**" and together with Windows, the "**Debtors**"), in support of CWB's application (the "**Application**") seeking, among other things:

   (a) to appoint Hardie & Kelly Inc. (the "**Proposed Receiver**") pursuant to Section 243 of the *Bankruptcy and Insolvency Act* (Canada) (the "***BIA***"), Section 99 of the *Business Corporations Act* (Alberta), and Section 13 of the *Judicature Act* (Alberta) as receiver and manager (the "**Receiver**") without bond, of:

      (i) all of the assets, undertakings and properties of Windows other than the accounts receivable of Windows; and

      (ii) all of the assets, undertakings and properties of Holdings;

   (b) approval of the transaction (the "**Holdings Transaction**") for certain property of Holdings (the "**Holdings Property**") detailed in the Agreement of Purchase and Sale entered into between the Proposed Receiver and 2214308 Alberta Inc. ("**221 Inc**.") dated December 12, 2019 (the "**Holdings PSA**");

   (c) approval of the transaction (the "**Windows Transaction**") for certain property of Windows (the "**Windows Property**") as detailed in the Agreement of Purchase and Sale between the Proposed Receiver and A-Apollo Windows & Doors Ltd. ("**A-Apollo**") dated December 12, 2019 (the "**Windows PSA**"); and

   (d) authorizing the Proposed Receiver to take such steps as are necessary to close the Transactions, vesting the Holdings Property in 221 Inc. and the Windows Property in A-Apollo (collectively, the "**Property**").

2. The facts in support of CWB's Application are detailed in the Application, the Affidavit of Tyson Hartwell filed January 20, 2020, which includes reference to a previously filed Affidavit of Default of Tyson Harwell, filed July 17, 2019 (collectively the "**Hartwell Affidavit**"), and the Report of the Proposed Receiver (the "**Proposed Receiver's Report**"), which CWB adopts as if

reproduced herein.[1] Reference is also made to the unfiled Confidential Supplement to the Proposed Receiver's Report (the "**Confidential Supplement**").

3. The Transactions, known as "quick flip" or "pre-pack" transactions, involve the appointment a receiver for the immediate consummation of a proposed transaction. Although quick flip transactions are subject to heightened scrutiny from the court, in these circumstances granting the orders sought is demonstrably just and reasonable.

4. CWB submits that the Transactions are commercially reasonable and fair, and satisfy the *Soundair* principles in the unique circumstances of this receivership. As more fully set out in the Proposed Receiver's Report and the Confidential Supplement, while the Proposed Receiver has not run a sales process for the Property, it has reviewed the Real Estate Appraisal and the Windows Asset Appraisal (collectively, the "**Appraisals**"). CWB, as the principal lender and fulcrum secured creditor, has also reviewed the Transactions with the Proposed Receiver and supports the Transactions.

5. Further, by approving the Transactions, this Honourable Court would eliminate the costs of the Receiver assuming control of the Property as well as those associated with conducting a formal sales process.[2]

6. CWB respectfully submits that a formal sales process would only serve to reduce recoveries to the Debtors' stakeholders and the costs, delay and uncertainty all militate in favour of appointing the Receiver and approving the Transactions.

II. ISSUES

7. This Application raises, among others, the following issues, which are addressed in this Brief:

   (a) is it appropriate for this Honourable Court to appoint the Receiver; and

   (b) if so, whether the Transactions ought to be approved and the Receiver authorized to act in accordance with the Holdings PSA and the Windows PSA (the "**PSAs**") to implement the Transactions.

[1] Unless otherwise indicated, capitalized terms not otherwise defined herein have the meaning ascribed to them the in the Application, the Hartwell Affidavit or the Proposed Receiver's Report.
[2] Proposed Receiver's Report, at paragraph 26.

III. LEGAL PRINCIPLES

A. Appointment of a Receiver

8. CWB satisfied the procedural prerequisite to seeking appointment of the Receiver in March of 2019 when it provided the Debtors with the Notices of Intention to Enforce Security pursuant to s.244 of the *BIA*.[3]

9. Each of section 243 of the *BIA*[4] and section 13(2) of the *Judicature Act*[5] vest in this Honourable Court the authority to appoint a receiver where it is "just and convenient" to do so.

10. CWB respectfully submits that this Honourable Court ought to exercise its discretion to appoint a receiver of the Property of the Debtors, because it is just, convenient, and otherwise appropriate to do so.

11. In considering whether to appoint a receiver, this Honourable Court has relied on the test used to determine if an interlocutory injunction is appropriate,[6] but loosened the test in cases where "the dictates of fairness are so overwhelming".[7] In *Murphy*, Justice Veit found that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Tests are not met.[8]

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

> In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:
>
> (i) whether irreparable harm might be caused if no order is made;
>
> (ii) the risk to the parties;
>
> (iii) the risk of waste of the debtor's assets;
>
> (iv) the preservation and protection of property pending judicial resolution; and

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[3] Hartwell Affidavit, at paragraphs 18, 36 and 38.
[4] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), Section 243 [**TAB 1**].
[5] RSA 2000 c J-2, as amended (the "***Judicature Act***") [**TAB 2**]
[6] The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**")[6] *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paragraphs 83-85 [**TAB 3**]
[7] *Murphy v. Cahill*, 2013 ABQB 335 ("***Murphy***") at paragraph 8 [**TAB 4**]
[8] *Ibid*, at paragraph 62.

(v) the balance of convenience.[9]

13. As recently as July 2019, this Honorable Court in *Schendel*[10] affirmed the non-exhaustive list of factors set forth in *Bennett on Receiverships* to be considered in Courts' decision to appoint a receiver, originally by Justice Romaine in *Paragon* (the "***Paragon* Factors**").[11]

14. CWB respectfully submits that it is appropriate for this Honourable Court to customize its consideration with certain *Paragon* factors to prioritize facts that best articulate the interests at play.[12]

15. In *Paragon*, Justice Romaine customized Her Ladyship's approach where she held that parties' contractual interests should be honoured above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm if a Court does not appoint a receiver:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.[13]

16. Similarly, the applicant in *Kasten* had the right to appoint a receiver pursuant to the terms of its security documentation and this Honourable Court held:

> The security documentation in the present case authorizes the appointment of a Receiver […]. Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed.[14]

17. Having regard for the *Paragon* Factors, CWB submits that:

(a) CWB's Security authorizes the appointment of a receiver. It is an express term of the Security that, upon default, one of the remedies available to CWB is the appointment of receiver over all or any portion of the Debtors' Property. CWB submits that this

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[9] *Lindsey Estate v. Strategic Metals Corp*, 2010 ABQB 242 ("***Lindsey***") at paragraph 32 [**TAB 5**].
[10] *Re Schendel Management Ltd.*, 2019 ABQB 545 ("***Schendel***") at paragraph 44 [**TAB 6**].
[11] *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co*., 2002 ABQB 430 ("***Paragon***") at paragraph 27 [**TAB 7**].
[12] *Alexis Paragon Limited Partnership, Re* 2014 ABQB 65 at paragraph 51 [**TAB 8**].
[13] *Paragon*, at paragraph 27 [**TAB 7**].
[14] *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*., 2013 ABQB 63 ("***Kasten***") at paragraph 21 [**TAB 9**].

Honourable Court ought to give substantial weight to the explicitly contractually available receivership remedy;[15]

(b) the balance of convenience weighs in favour of CWB, in light of CWB's unanswered demands;

(c) the appointment of the Receiver is necessary for the preservation and protection of the Property and the interests of CWB therein, particularly in light of the Debtors' stated intention to abandon the Lands and shutter their business prior to the end of this month;

(d) the risk to CWB is significant, given that the indebtedness owing exceeds CAD$4,500,000; and

(e) Windows and Holdings have been Noted in Default in these proceedings.

B. Duties of a Receiver

18. A receiver is required to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner.[16]

19. The Alberta Court of Appeal has recently affirmed that a receiver is "expected to realize on the debtor's Assets and pay the security holders and the other creditors who are owed money".[17]

C. Court Approval of Receivership Sales

20. In considering whether to approve a proposed sale of assets by a receiver, Courts apply the four factors set out in *Soundair*:[18]

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

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[15] Hartwell Affidavit, at paragraph 41.
[16] *BIA*, *supra*, at Section 247 [**TAB 1**]
[17] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 ("***Reid-Built***"), paragraph. 22, in which the Court refers to *Bennett on Receiverships* [**TAB 10**].
[18] *Sydco Energy Inc (Re)*, 2018 ABQB 75 ("***Sydco***") at paragraph. 50 [**TAB 11**], citing *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA) ("***Soundair***") [**TAB 12**].

(d) whether there has been unfairness in the working out of the process.

21. Although the factors relate primarily to sale processes adopted by a receiver, Alberta Courts have found that *Soundair* does not require a formal court-supervised sale process in every case. Rather, the approval of a sale by a receiver is a "matter of discretion"[19] and Courts consider the relevant facts and circumstances in a particular case.

22. For example, the Alberta Court of Appeal in *Salima*, explained that:

> It certainly does not follow, for example, that the court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations, In Can. Permanent Trust Co. v. King Art Dev, Ltd,, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. [20] [emphasis added]

23. Similarly, in *Calpine*, Justice Romaine considered whether to approve competing transactions in a *Companies' Creditors Arrangement Act* ("***CCAA***") proceeding, and remarked that "*Soundair* did not suggest that a formal auction process was necessary or advisable in every case." [21] In the particular circumstances of that case, Justice Romaine remarked that the uniqueness of an asset may bear on the appropriate sales process.[22]

D. Pre-Pack Transactions

24. In *Sanjel*, this Honourable Court approved an asset sale in *CCAA* proceedings, even though the marketing process had occurred before the insolvency proceedings and outside of the Court's oversight. In reaching the conclusion that the sale was reasonable in the circumstances, the Court considered a number of factors, including the following which are relevant to the present case:

(a) the deteriorating financial condition of the debtor militated against running a further sale process;

(b) creditors were consulted and involved in the sale process;

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[19] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 ("***Snowdon***"), paragraph. 20 [**TAB 13**].
[20] *Salima Investments Ltd v Bank of Montreal*, 1985 CarswellAlta 332 (CA) ("***Salima***") at paragraph 11 [**TAB 14**].
[21] *Calpine Canada Energy Ltd.*, Re, 2007 ABQB 49 ("***Calpine***") at paragraph 29 [**TAB 15**].
[22] *Ibid*, paragraph. 49.

(c) while the sale would only provide returns to the debtor's primary secured creditors, other options were considered, and there was a prospect that "there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them"; and

(d) the evidence demonstrated that the consideration was reasonable and fair.[23]

25. Other Canadian Courts have also approved asset sales by a receiver without a court-supervised sale process or formal marketing process at all. In *Tool-Plas*,[24] Justice Morawetz approved a "quick flip" sale in a receivership. In that case, RSM Richter was engaged prior to the receivership to assess the financial viability of the debtor. Eventually, a transaction was agreed to, and an application was made to appoint RSM Richter as receiver and approve the sale. While RSM Richter considered "alternative courses of action"[25] prior to filing the sale approval application, there was no formal marketing process.

26. Justice Morawetz nevertheless approved the sale and concluded that "in circumstances of this case I am satisfied that the principles set out in *Soundair* have been followed."[26] He held:

> A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.[27] [emphasis added]

27. In *Montrose*,[28] the Ontario Superior Court stated the following before citing the above quote from *Tool-Plas:*

> "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such *as Bank of Nova Scotia v. Freure Village on*

[23] *Sanjel Corp, Re*, 2016 ABQB 257 ("***Sanjel***") at paragraph 112 [**TAB 16**].
[24] *Tool-Plas Systems Inc, Re*, 2008 CarswellOnt 6258 (SC) ("***Tool-Plas***") [**TAB 17**].
[25] *Ibid*, paragraph. 18.
[26] *Ibid*, paragraph. 20.
[27] *Ibid*, paragraph. 15.
[28] *Montrose Mortgage Corporation v. Kingsway Arms Ottawa*, 2013 ONSC 6905 at paragraph 10 ("***Montrose***") [**TAB 18**]

> *Clair Creek* and *Royal Bank v. Soundair Corp*., respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:
>
> > Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case … [emphasis added]

28. Simply stated, the *Soundair* principles apply to whether the Court should approve an asset sale by a receiver; but, the decision is discretionary[29] and the application of the *Soundair* principles depends on the circumstances of the receivership at hand.[30] The appropriate process in a given case may, for example, depend on:

    (a) the uniqueness of the assets;[31]

    (b) the deteriorating financial position of the debtor;[32]

    (c) whether there are any realistic alternatives;[33] and

    (d) whether stakeholders (including secured creditors and employees) are served by the proposed sale.[34]

IV. THE APPRAISALS

29. As indicated in the Proposed Receiver's Report, the Real Estate Appraisal supports the purchase price of the Holdings Property and the Windows Asset Appraisal supports the purchase price of the Windows Property. [35]

A. The Holdings Property and the Holdings PSA

30. The Real Estate Appraisal, commissioned by CWB, was prepared by Cushman & Wakefield ULC ("**C&W**"). CW is a well respect and experienced commercial realtor in the Alberta

[29] *Snowdon*, *supra* at paragraph. 20 [**TAB 13**].
[30] *Tool-Plas*, *supra* at paragraph 15 [**TAB 17**].
[31] *Calpine*, *supra* at paragraph. 49 [**TAB 15**].
[32] *Sanjel*, *supra* at paragraph. 112 [**TAB 16**].
[33] *Tool-Plas*, *supra* at paragraph. 15 [**TAB 17**].
[34] *Sanjel*, *supra* at paragraph. 112 [**TAB 16**]; *Tool-Plas*, *supra* at paragraph. 16 [**TAB 17**].
[35] Proposed Receiver's Report, at paragraphs 22-23.

marketplace.[36] The Proposed Receiver notes in the Confidential Supplement that, based on the Proposed Receiver's recent experiences in other mandates:

(a) The Proposed Receiver believes it is unlikely that the market value of the Holdings Property would have increased significantly over the intervening period; and

(b) any public marketing process otherwise undertaken by the Receiver, which would likely be administered by a commercial real estate agent on the Receiver's behalf, would be unlikely to result in any significantly higher realizations, particularly in light of the current economic conditions which Calgary continues to face.[37]

31. Further, the Proposed Receiver's Report indicates that it is unlikely that public marketing of the Holdings Property would result in any significant greater realizations and would also involve incurring real estate commissions and other costs.[38]

B. The Windows Property and the Windows PSA

32. The Windows Asset Appraisal, commissioned by the Proposed Receiver, was prepared by GD Auctions & Appraisals Inc. ("**GD**"). GD has over 40 years of hands-on auction, liquidation and appraisal experience. The Receiver notes in the Confidential Supplement that:

(a) the Windows PSA avoids the Receiver incurring the costs of auction commissioners and either (i) the holding costs that would be necessary in order to facilitate an on-site auction or (ii) the expense to otherwise transport the Windows Property to an offsite auction location; and

(b) despite the composition of the inventory and work-in-progress ("**WIP**") likely to have changed in the intervening period, GD has advised the Proposed Receiver that given the customization of the inventory and WIP, it would ascribe minimal value to inventory and WIP at any given time.

33. In the ordinary course of a receivership proceeding, when there are assets that are unique in nature, it is prudent for a receiver to engage a firm with expertise and knowledge of the assets, to ensure that those assets can be properly marketed in an appropriate manner to specific targets. To

[36] Confidential Supplement, paragraph 8.
[37] Confidential Supplement, at paragraph 10.
[38] Receiver's Report, at paragraph 22.

that end, if the Receiver was to market the Property further, it would likely engage firms such as C&W and GD to assist the Receiver in its marketing efforts.

V. THE PROPOSED TRANSACTION SHOULD BE APPROVED

34. CWB submits that the Transactions are commercially reasonable and satisfy the *Soundair* Principles for, among others, the following reasons:

(a) the Proposed Receiver makes, among others, the following comments with respect to the PSAs:

(i) they were negotiated in good faith and are commercially reasonable;

(ii) the purchase prices under the PSAs are supported by the Appraisals;

(iii) the Transactions are generally not subject to any material conditions other than Court approval;

(iv) based on its experience in other mandates, the Proposed Receiver is satisfied that a public marketing of the Property by the Receiver would be unlikely to generate realizations significantly greater than the prices provided for in the PSAs;

(v) in light of the anticipated immediate closings of the sales upon Court approval, the costs associated with the Receiver assuming control of the respective assets and operations and administering sales processes can be avoided;

(vi) CWB, as the principal lender and fulcrum creditor, is supportive of the consummation of the Transactions; and

(vii) it is anticipated that a significant number of Windows' employees will be offered employment by A-Apollo, which the Proposed Receiver views as an important consideration in light of the current economic conditions in Calgary as it is highly unlikely the Receiver would otherwise operate Windows' business;[39]

(b) although it has not undertaken a formal marketing process, the Proposed Receiver has had the opportunity review the Appraisals;

[39] Receiver's Report, at paragraph 42.

(c) this Honourable Court is entitled to rely on informal processes undertaken prior to the appointment of a receiver;[40]

(d) the Proposed Receiver has independently analyzed the Transactions, and concluded that it is likely the best possible recovery in the circumstances. Importantly, "a court will not lightly interfere with the commercial judgment of the receiver"[41] and a "sales process is only required to be reasonable, not perfect";[42]

(e) the only likely other alternative to be a shutdown of the Debtors' business; and

(f) there is no evidence that the Proposed Receiver has acted improvidently or unfairly. Further, CWB has provided notice to CRA and other secured creditors.

35. In all the circumstances, CWB respectfully requests that this Honourable Court exercise its discretion to approve the Transactions.

VI. CONCLUSION

36. For the reasons above, CWB respectfully requests that the Honourable Court grant an order approving the PSAs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF JANUARY, 2020

Burnet, Duckworth & Palmer LLP

Per: _____
David LeGeyt
Solicitors for Canadian Western Bank

[40] See e.g. *Sanjel, supra* paragraph. 70 [**TAB 16**] and *Tool-Plas supra* paras. 15-20 [**TAB 17**].
[41] *Soundair, supra* paragraph. 46 [**TAB 12**].
[42] *Sanjel, supra* paragraph. 80 [**TAB 16**].

TABLE OF AUTHORITIES

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1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Judicature Act*, RSA 2000 c J-2
3.	*RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311
4.	*Murphy v. Cahill*, 2013 ABQB 335
5.	*Lindsey Estate v. Strategic Metals Corp*, 2010 ABQB 242
6.	*Re Schendel Management Ltd.*, 2019 ABQB 545
7.	*Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430
8.	*Alexis Paragon Limited Partnership, Re* 2014 ABQB 65 at paragraph 51
9.	*Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63
10.	*Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109
11.	*Sydco Energy Inc (Re)*, 2018 ABQB 75
12.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA)
13.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47
14.	*Salima Investments Ltd v Bank of Montreal*, 1985 CarswellAlta 332 (CA)
15.	*Calpine Canada Energy Ltd.*, Re, 2007 ABQB 49
16.	*Sanjel Corp, Re*, 2016 ABQB 257
17.	*Tool-Plas Systems Inc, Re*, 2008 CarswellOnt 6258 (SC)
18.	*Montrose Mortgage Corporation v. Kingsway Arms Ottawa*, 2013 ONSC 6905

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to January 8, 2020

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

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

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

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

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

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

Audit of proceedings

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

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

Vérification des comptes

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

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

Application of this Part

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

Automatic application

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction on appointment of receiver

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

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

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

Definition of *receiver*

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

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

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

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

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

Definition of *receiver* — subsection 248(2)

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

Trustee to be appointed

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

Définition de *séquestre*

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

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

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

Définition de *séquestre* — paragraphe 248(2)

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

Syndic

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

Place of filing

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

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.

Meaning of *disbursements*

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

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Period of notice

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

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

Intellectual property — disclaimer or resiliation

(2) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property, the disclaimer or resiliation of that agreement by the receiver does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2018, c. 27, s. 268.

Propriété intellectuelle — résiliation

(2) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle, la résiliation de ce contrat par le séquestre n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2018, ch. 27, art. 268.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

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

RSA 1980 cJ-1 s8

Province-wide jurisdiction

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

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

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

RSA 1980 cJ-1 s10

Declaration judgment

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

RSA 1980 cJ-1 s11

Canadian law

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

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

TAB 3

Original
1994 CarswellQue 120
Supreme Court of Canada

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

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Injunctions --- Availability of injunctions — Public interest
Injunctions --- Availability of injunctions — Need to show irreparable injury
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal
Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event

that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.
Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20. Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
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Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.
Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada

for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment* , SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act* , R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act* , particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada.

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

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

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under

TAB 4

Original
2013 ABQB 335
Alberta Court of Queen's Bench

Murphy v. Cahill

2013 CarswellAlta 1490, 2013 ABQB 335, [2013] A.J. No. 854,
231 A.C.W.S. (3d) 960, 568 A.R. 80, 88 Alta. L.R. (5th) 69

Gerald Murphy and Gerald Murphy in his capacity as Trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust Applicant and Margaret Cahill, Christopher Cahill, 1248429 Alberta Ltd., 554168 Alberta Ltd., 1247738 Alberta Ltd., and Canadian Consolidated Salvage Ltd. Respondents

J.B. Veit J.

Heard: June 4-6, 22, 2013; August 6, 2013
Judgment: August 15, 2013
Docket: Edmonton 1203-04666

Counsel: Sandeep K. Dhir, Lindsey E. Miller for Applicants, Gerald Murphy and Gerald Murphy's Children's Parallel Life Interest Settlement Trust
Rostyk Sadownik for Respondent, Margaret Cahill
Terrence Warner, Lesley M. Akst for Respondent, Christopher Cahill, Sr.
M.T. Coombs, D.R. Peskett for Inspector, BDO Canada Ltd.

Subject: Occupational Health and Safety; Corporate and Commercial; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles

GM resided in Ireland; GM's sister, MC, emigrated to Canada and ran companies — GM alleged MC had mismanaged large matters such as funding by companies of residences put into MC's name and to small matters such as MC's authorization of purchase of baby clothes for employees — MC and husband, CC, alleged that GM failed to recognize their equity interest in companies and MC's right to manage companies, including right to authorize payment to others for work done on behalf of companies — GM brought application for appointment of receiver-manager — Application dismissed — GM's serious complaints about management raised serious issues to be tried; complaints of MC and CC also raised serious issues to be tried — However, GM had not established irreparable harm would be suffered if relief was not granted; GM failed to establish that balance of convenience favoured appointing interim receiver-manager — There was no need for immediate corporate action and there was no important corporate issue that needed to be addressed in near future — Current value of properties owned by companies exceeded GM's original investment; if MC was responsible for financial losses suffered by companies then her apparent equity interest in companies appeared to be adequate to compensate for losses — GM had considerable financial resources whereas financial resources of MC and CC were tied to employment and equity positions in companies — Granting interim relief that would deal with GM's concerns but not those of MC and CC and would create inappropriate balance in GM's favour — Appointment of receiver-manager would give GM relief that he requested without addressing fundamental issue of corporate structure — Parties would be ready for trial within short time and there was no justification for proceeding with interlocutory remedy without full hearing on contested evidence.

Table of Authorities

Cases considered by *J.B. Veit J.*:

Alberta Health Services v. Networc Health Inc. (2010), 28 Alta. L.R. (5th) 118, 2010 ABQB 373, [2010] 11 W.W.R. 730, 2010 CarswellAlta 1017 (Alta. Q.B.) — referred to

such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

8 Moreover, the test itself must be interpreted within the court's equitable jurisdiction. One effect of the equitable character of the relief is that the granting of this exceptional relief is discretionary. Another is that general equitable principles infuse the court's assessment of the positions of the parties on such an application, especially with respect to the balancing of convenience; as one example of the overarching effect of equitable principles in this context, the dictates of fairness may exceptionally be so overwhelming that interim relief is justified even where one or more branches of the tripartite test have not been met.

9 It can be misleading to express the appropriate test as consisting merely of a requirement that the applicant has established a strong *prima facie* case of oppression. In any event, even if the test could be formulated in that way, the applicant has not satisfied that test.

10 Dealing then with the test as elaborated in the case law, as is agreed by the parties, the first branch of the tripartite test has been met: clearly there are serious issues to be tried.

11 However, in relation to the second branch of the test, Gerald Murphy has not established that he, or the Trust, will suffer irreparable harm if the relief is not granted. There is no need for immediate corporate action; as the Inspector observes, nothing much will change in the companies' outlook within the next several months. There is no important corporate issue that must be addressed in the near future. Also, the lowest appraisal of the current market value of the real property owned by the CCS companies establishes that the current value of those properties significantly exceeds the original investment. If Ms. Cahill has been responsible for financial losses suffered by the companies, her apparent equity interest in the companies appears to be adequate to compensate the Trust for such losses.

12 Nor, with respect to the third branch of the test, has Mr. Murphy been able to establish that the balance of convenience favours the appointment of an interim receiver-manager. The evidence on this application is that Mr. Murphy has considerable financial resources whereas the financial resources of the respondent Cahills are tied to their employment at, and apparent equity position in, the companies. The granting of interim relief which deals with Mr. Murphy's concerns but not those of the Cahills and which virtually cuts off the financial ability of the Cahills to advance their apparently legitimate interests would create an inappropriate balance in favour of Mr. Murphy.

13 In considering the equities of the overall application, Mr. Murphy has not established that this is a situation where the dictates of fairness are so overwhelming that they justify the appointment of a receiver-manager. Mr. Murphy's legitimate expectations do not justify the appointment of a receiver-manager on an interim basis: there has been no material change of management style of the CCS group since Mr. Murphy acquired the companies and put Ms. Cahill in charge of the day to day operations of the companies. Furthermore, the appointment of an interim receiver-manager would presume that Mr. Murphy's position with respect to the corporate structure is correct and that he is therefore entitled to present this application. However, the only evidence on this application with respect to the corporate structure consists of documents apparently executed by Mr. Murphy which require him to go to arbitration to solve management disputes rather than to invoke the assistance of courts. Also, in light of the Inspector's opinion about the current status of the companies, it is obvious that the appointment of an interim receiver-manager would not deal effectively with the real problems facing this group of companies. Also, the appointment of an interim receiver-manager would give Mr. Murphy the relief which he requests without addressing the fundamental issue of corporate structure.

14 Lastly, the biggest hurdle which Mr. Murphy faces in obtaining this relief on an interim basis is his acknowledgement that he would be prepared for a final hearing on the merits of his oppression application within months, a timing estimate with which the respondents agree. In such a situation, especially where the consequences of the appointment of a receiver-manager would be so dire from the respondents' perspective, there can be no justification for proceeding with an interlocutory remedy without a full hearing on contested evidence when a full hearing can finally resolve the crucial factual disputes between the parties.

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

(Emphasis added)

61 However, I don't disagree with the applicant's overall position concerning the applicable test, assuming that that position includes acceptance that irreparable harm must usually be established. Nor would I disagree with the applicant's overall position assuming that the position recognized that the test under the *Judicature Act* is not markedly different from that which applies under the *Business Corporations Act*: in my view, since the specific provisions of the *Business Corporations Act* overtake the general provisions of the *Judicature Act* where the request is for the appointment of an interim receiver of a corporation.

62 I have concluded that requiring an applicant for the appointment of a receiver-manager of a business corporation to satisfy each of the requirements the tripartite test may, in some exceptional circumstances, be relaxed. Along with Clackson J., and recognizing that the application in the Ontario case related "only" to an interim order "prohibiting the respondents from proceeding with the proposed purchase transaction with Luna Tech without obtaining shareholder approvals as set out in the USA and an interim order prohibiting the respondents from continuing to operate the business and manufacturing facility of Luna Tech pending the closing of the Luna Tech transaction and requiring them to immediately cease all such activity and to remove any and all of their assets from the Luna Tech facility" rather than to the more comprehensive remedy of appointment of an interim receiver-manager, I endorse the view of Pepall J. in *Le Maitre Ltd. v. Segeren* [2007 CarswellOnt 3226 (Ont. S.C.J.)]:

30 It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as *Deluce Holdings Inc. v. Air Canada*, 10 *M. v. H.*, 11 *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, 12 *Ellins v. Coventree*13 and *RV&S Ltd. v. Aiolos Inc.*14

(Emphasis added)

63 I note that two relatively recent Quebec Court of Appeal decisions, *Nicolas* and *176283 Canada Inc.*, have usefully emphasized that the situations in which the "dictates of fairness are so overwhelming" that the traditional tripartite test can be ignored will be few and far between.

TAB 5


Original
2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495,
[2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies and A Inc. were complicit in fraud perpetrated by B — S Corp. was placed into receivership — Investors brought application to have same receiver appointed over assets and undertakings of A Inc. and companies owned by B and S — Application granted — Although S was not involved directly in proceedings before commission, his companies and A Inc. were subject of investigation in view of flow of monies — B's companies, S's companies and A Inc. were involved in receipt and transfer of tens of millions of dollars which flowed freely between B's companies and S's companies — There was no evidence put forward by S to lend any credence to position that he was conducting legitimate business at arm's length with B — There was evidence which suggested contrary — S and his companies received over $50 million directly or indirectly from B and his companies and there was no accounting

for any of these monies — B was directing mind of A Inc. and A Inc. shared address and director with S Corp. — There was real risk of irreparable harm in wasting of proposed receivership companies' assets if no order was made — Appointment of receiver would allow assets to be preserved which was essential given nature of claim — Balance of convenience favoured placement of receiver — Receiver would be able to preserve assets and further investigate whereabouts of any other assets — There was no evidence of any harm to companies by placement of receiver.

Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies were complicit in fraud perpetrated by B — Investors brought application for attachment order against S — Application granted — In order to obtain attachment order, investors had to show that there was reasonable likelihood of success at trial — S and his companies received between $50 and 80 million in investor funds — There had been no accounting with respect to these funds — S had to do more than simply say he never had contact with investors and that he did not solicit funds from them directly — Looking at conclusions of commission, there was little doubt that S and his companies were key element in raising and dissipation of funds — S appeared to have been key element in fraud perpetrated by B.

Table of Authorities

Cases considered by *G.C. Hawco J.*:

Alberta (Securities Commission) v. Brost (2008), 2008 ABCA 326, 2 Alta. L.R. (5th) 102, 2008 CarswellAlta 1325, 440 A.R. 7, 438 W.A.C. 7 (Alta. C.A.) — considered

APPLICATION by investors for receivership and attachment orders.

***G.C. Hawco J.*:**

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

4 Mr. Quilling is granted an Attachment Order against Mr. Sorenson.

Background

5 By way of brief background, in May and June of 2006, a hearing took place before the Alberta Securities Commission ("ASC") against Milowe Allen Brost, one of two Respondents, and others, with respect to allegations of misrepresentations and fraud, relating to Strategic and investors in Strategic. On February 16, 2007, the ASC found that Strategic and a number of their representatives, specifically Edna Forrest, Carol Weeks, Bradley Regier and Mr. Brost, were responsible for false or misleading statements in an Offering Memoranda and that all of those parties engaged in a course of conduct that amounted to a fraud on the shareholders of Strategic. Mr. Sorenson was not a named party to the ASC hearing and did not appear, but was featured prominently in the deliberations and findings of the ASC.

6 What appears to be fairly clear from the ASC hearings is that Mr. Brost and Strategic were involved in a massive fraudulent scheme whereby the Applicants and other investors were induced to trust Mr. Brost and his associates with large amounts of money to be invested on their behalf. The information which was provided to the investors has been determined to be false. The total amount of money received by Mr. Brost and his associates was upward of $500 million. None has been recovered.

7 The decision of the ASC was appealed to our Alberta Court of Appeal. On October 3, 2008, the Court dismissed the appeals by Mr. Brost, Strategic and others. *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (Alta. C.A.).

8 In paragraph 20 and 21 of the Court of Appeal's decision, it stated:

> 20. The Commission summarized the fraudulent scheme, and the roles of each of the Appellants played in that scheme as follows (at para. 13 of the *Sanctions Decision):*
>
> > ... Brost was at the centre of the activities of Strategic and alternatives and ... when he developed Strategic and his business plan, he had in mind the involvement of Gary Sorenson ("Sorenson") and Art (Arthur) Wigmore ("Wigmore") [neither of whom were involved in the proceedings before the Commission] and the funding of mining ventures of either or both of them (as indeed incurred in respect of ventures within the Merendon orbit).... [The] plan was to lure public investor (with promises of high returns and safety along with tantalizing references to gold) into putting money into securities of Strategic - essentially a shell of a company whose main (but undisclosed) function was to finance Sorenson's mining ventures. ...
>
> 21. The Commission described the materials that Alternatives put out to market Strategic shares as "highly promotional", "factually weak" and "clearly designed to entice investors." It noted blatant untruths and misrepresentations in those materials. For example, it noted that Strategic's shares were touted as being secured by precious metals when that clearly was not the case. The Commission was convinced that Strategic investors would not see the returns they expected to realize on their investments and was doubtful that they would recover much of the money they paid.

9 In paragraph 42, the Court concluded that it was reasonable for the ASC to conclude that each of the Appellants engaged in conduct that amounted to regulatory fraud. It went on to say, at para. 47:

> We are of the view that there was evidence upon which the Commission could reasonably conclude, on a balance of probabilities, that Brost was responsible for making false and misleading statements to, and participating in a fraud on, investors.

The Court went on to dismiss the Appeals.

10 Pursuant to a Notice of Hearing dated May 17, 2009, the ASC has commenced proceedings against Arbour, Brost, IFFL, Sorenson, MMCL and a number of additional parties. The Notice of Hearing alleges, among other things, that the Respondents engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors. That hearing is on-going.

Receivership

11 As mentioned, Strategic has been placed into receivership. Mr. Quilling has delivered two reports. The Applicants and others are, or were, investors who allege that the Respondents conspired and acted jointly together to defraud them of funds through the use of an investment scheme that operated in the same way as the investment scheme alleged and referred to in the ASC hearing in 2006 and in the Strategic action.

12 The hearing before the ASC and the matters heard by this Court and our Court of Appeal concerned Strategic and Mr. Brost. Mr. Sorenson and his companies (collectively referred to as the Merendon Companies) were not parties to those proceedings. Neither was Arbour a party.

13 The Applicants allege that Mr. Sorenson, the Merendon companies and Arbour are complicit in the fraud perpetrated by Mr. Brost. They seek to have Mr. Quilling appointed as Receiver of the Respondent companies and seek to have an injunction or attachment order against Mr. Sorenson.

14 Mr. Sorenson states that he was not a party to the original ASC hearings and denies even having anything to do with Mr. Brost's investment schemes. He admits to having been involved in "arm's length business dealings with Mr. Brost and certain of his corporate entities" but denies having been in business with Mr. Brost. I must assume he means that he has not conducted any nefarious business with Mr. Brost.

15 Mr. Sorenson objects to the evidence of Mr. Quilling being received because Mr. Quilling relies upon certain findings of the ASC. He argues that the ASC was not bound by the rules of evidence. Contrary to those rules, the ASC received and relied upon hearsay evidence. As neither Mr. Sorenson nor his companies were parties to that proceeding, the evidence ought not be relied upon. Nor should any of the ASC reasoning or findings be relied upon.

16 The argument of the Applicants is that their case is not founded upon any hearsay evidence which may be found in Mr. Quilling's affidavit, but rather upon the evidence of the financial documents which had been placed before the ASC and which have been examined by Mr. Quilling, as well as the affidavit of Mr. Sorenson and his cross-examination upon that affidavit.

17 What must be born in mind is that the Court of Appeal of this province has considered the decisions of the ASC in some detail and has upheld those decisions with respect to its findings relating to false and misleading statements and misrepresentations of Mr. Brost and others involved with Strategic and the related corporate vehicles. The ASC found that the Offering Memoranda "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money". The ASC further found that fraud had been perpetrated on the investors, who include the Applicants.

18 The Court considered the grounds of appeal of Mr. Brost and the others and, in its analysis referred to the arguments of the Appellants which included the objection to the admission of the hearsay evidence. In paragraph 34, the Court stated:"The Commission acknowledged that transcripts of investigative interviews are not the same as live testimony in that hearsay evidence can be problematic. It treated the impugned hearsay evidence with caution when assessing its value and reliability." In paragraph 36, the Court concluded that the Appellant's arguments (including its arguments to exclude the hearsay evidence) were without merit.

19 Clearly, Mr. Sorenson was not involved directly, as a party, in the previous proceedings before the ASC. Just as clearly, however, his Merendon companies and Arbour were the subject of investigation in view of the flow of monies that went through Mr. Brost, Strategic and his related companies including IFFL and Capital Alternatives. Mr. Brost was the principle of Strategic, Capital Alternatives, IFFL and Merendon Mining (Colorado). These companies and Mr. Sorenson's Merendon companies, and Arbour were involved in the receipt and transfer of tens of millions of dollars which flowed freely between Mr. Brost's companies and Mr. Sorenson's companies.

20 MMCL received over $26 million from Mr. Brost's company - IFFL. MMCL purchased a mine in Tulameen, British Columbia for $1 million and sold it shortly after to Strategic for $9.6 million. That mine was held out by Strategic to be a prime property. It was information and belief of Sgt. Fuller that it was a sham. That appears to be confirmed from Mr. Quilling's investigation.

21 Arbour went from an insolvent company to one loaning $39 million in investors funds in a matter of months to MMCL. Mr. Sorenson claims that MMCL extinguished its obligation to Arbour by selling back to Arbour 25% interest in Tar Sand Recovery Limited. Nothing has been presented by Mr. Sorenson to justify Tar Sand's worth.

22 SGD was another Brost/Sorenson company which received money from Strategic and then directed huge sums of money (over $50 million) to MMCL. Again, no accounting is offered by Mr. Sorenson. Mr. Sorenson simply says that these were monies lent to MMCL and that the debt was retired. The documentation as to how it was retired and the documentation with respect to the value of any assets transferred is sadly lacking. There is simply no evidence put forward by Mr. Sorenson to lend

any credence to his position that he was conducting a legitimate business at arm's length with Mr. Brost. There is evidence which suggests the contrary.

23 Mr. Quilling's report of August 26, 2008 states that as a result of information he has received, the Merendon Mining operation in Honduras is a sham as well. I have already determined that the Tulameen mine is basically a sham.

24 Both Mr. Brost and Mr. Sorenson were shareholders of SGD which provided funds to MMCL. Mr. Sorenson was aware that funds were being provided to MMCL through SGD and that they were being sourced from IFFL.

25 SGD existed for the sole purpose of channelling tens of millions of dollars of IFFL members' money to MMCL in exchange for no discernable value.

26 Mr. Sorenson argues he is being tarred by Mr. Brost's brush yet says that he does not have to disprove what is alleged. He continues to argue that he had no involvement in Strategic. Yet, it was Mr. Brost's evidence that Mr. Sorenson initially agreed to, and did become, a director of Strategic.

27 Mr. Sorenson continues to assert that the Honduran mine is continuing to produce gold while the evidence of Mr. Quilling, as fully set out in his report, is that the mine is a sham.

28 Serious allegations have been made against Mr. Sorenson and his companies in these proceedings. Mr. Sorenson has filed an affidavit and has been cross-examined on it. However, he has failed to produce any documentation which would speak to the value of any companies owned by him or that would answer in any manner the allegations of either fraud or dissipation of assets within the companies. Indeed, neither Mr. Sorenson nor MMCL have put forth any independent or reliable evidence of legitimate operations or value in MMCL or any of its subsidiaries or to account for any of the tens of millions of dollars of investors funds that Mr. Sorenson admits that his companies received. His position is that "only" $26 million went to his companies through Mr. Brost and that these were arm's length transactions which were legitimately retired.

29 I am satisfied that Mr. Sorenson and his companies have indeed received over $50 million directly or indirectly from Mr. Brost and his companies. There is no accounting for any of these monies. Mr. Sorenson's explanation of repaying the $26 million loan lacks credibility.

30 With respect to Arbour, Mr. Brost was its directing mind. Arbour and Strategic shared an address and had at least one common director. Arbour received $820,000.00 from Strategic and has accounted for none of it. Arbour was used as a flow-through to send investment funds to Mr. Sorenson's company, MMCL. Arbour appears to be insolvent at this time. It is not carrying on business presently. It has been the recipient of at least $28 million from the Applicants and other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

32 In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

38 Mr. Sorenson appears to have gone to great lengths to make himself judgment-proof. He claims that he has not dissipated assets yet refuses to answer specific questions on his cross-examination with respect to asset dissipation or the presence of any bank accounts he may have.

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements of Mr. Brost, Mr. Sorenson must do more than simply say that he never had any contact with these Applicants and that he did not solicit funds from them directly. When I looked at the conclusions of the ASC there is little doubt but that Mr. Sorenson and his companies were a key element in the raising and dissipation of those funds. He appears to have been a key element in the fraud perpetrated by Mr. Brost.

40 In the end result, I am satisfied that an Attachment Order is appropriate and such Order will issue together with the Receivership Order as indicated.

Application granted.

Footnotes

* Affirmed at *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.).

End of Document

TAB 6

Original
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, 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

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

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

TAB 7

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

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

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

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.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

TAB 8


Original
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

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

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.

TAB 9

Original
2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency

Headnote

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

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Natural resources --- Oil and gas — Oil and gas leases — Transfer of title

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Table of Authorities

Cases considered by *Donald Lee J.*:

Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc. (1992), 2 Alta. L.R. (3d) 168, 127 A.R. 155, 20 W.A.C. 155, [1992] 4 W.W.R. 499, 1992 CarswellAlta 53, 1992 ABCA 93 (Alta. C.A.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — considered

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88, 2010 ABQB 242 (Alta. Q.B.) — referred to

resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

17 The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc.*, 1992 ABCA 93 (Alta. C.A.); at para 10, [1992] 4 W.W.R. 499 (Alta. C.A.). Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at 576, (1971), [1972] 2 W.W.R. 28 (S.C.C.). The contract is assignable and subject to seizure.

Shamrock's Submissions

18 The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

19 Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

22 Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

TAB 10

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, 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

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:

TAB 11

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018
Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

Subject: Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous
Insolvent oil company (S) went into receivership in February 2017 and court approved sale process — S's major shareholder RD sent Alberta Energy Regulator (AER) proposed sales process order — AER added condition that successful bidder be at arm`s length to S to which RD opposed with concern it would improperly fetter receiver`s ability to conduct sales process in commercially reasonable manner for benefit of all creditors and stakeholders and also that "at arm's length" was vague term — AER refused to allow second company 203 with virtually same principals as S to transfer some of S's wells to itself and refused to allow third company WR to assume S`s well licences unless it could prove it was not related — Receiver applied for court order approving sale of assets and vesting order to WR and based on AER history, sought specifics from Redwater order to be incorporated respecting AER authority — Application granted — Portions of Redwater order incorporated into application properly interpreted, did not give AER authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in insolvency — While AER had discretion to review transfer applications, it must do so within provincial law in force — In deciding whether or not concerns expressed by third parties during 30-day review process warrant further delay in approval process, AER could not take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require hearing — AER failed to establish their concern that WR Ltd bid was example of unfairness of allowing insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid costs of public obligations — With respect to court's jurisdiction to restrain AER from exercising its discretion regarding licence transfer applications, Supreme Court in AbitibiBowater

made it clear that, while regulatory body has discretion on how best to ensure that regulatory obligations were met, and court should avoid interfering, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings" — In most recent amendments to insolvency legislation, decisions of AbitibiBowater and Redwater tried to delineate boundary between creditor and regulatory claims in environmental sphere, but difficult issues remain that must be determined.

Table of Authorities

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

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.*) 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.*) [2012] 3 S.C.R. 443 (S.C.C.) — considered

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.)*) 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.)*) 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.)*) 652 W.A.C. 123 (S.C.C.) — considered

Alberta Energy Regulator v. Grant Thornton Limited (2017), 2017 ABCA 278, 2017 CarswellAlta 1568, 57 Alta. L.R. (6th) 37, 52 C.B.R. (6th) 1, 9 C.P.C. (8th) 238 (Alta. C.A.) — referred to

Alberta Treasury Branches v. COGI Limited Partnership (2016), 2016 ABQB 43, 2016 CarswellAlta 73, 33 C.B.R. (6th) 22 (Alta. Q.B.) — considered

Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered

Cansearch Resources Ltd v. Regent Resources Ltd (2017), 2017 ABQB 535, 2017 CarswellAlta 1601, 52 C.B.R. (6th) 114, 60 Alta. L.R. (6th) 373, 7 P.P.S.A.C. (4th) 278 (Alta. Q.B.) — considered

Grant Thornton Ltd. v. Alberta Energy Regulator (2016), 2016 ABQB 278, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 33 Alta. L.R. (6th) 221, [2016] 11 W.W.R. 716 (Alta. Q.B.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 CarswellAlta 2352, 2017 CarswellAlta 2353 (S.C.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

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

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 24(1) — referred to

s. 24(2) — referred to

s. 106(1) — considered

s. 106(3) — referred to

s. 108 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

48 The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

49 It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision*specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormword Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

> a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the interests of all parties;
>
> c) the efficacy and integrity of the process by which offers are obtained; and
>
> d) whether there has been unfairness in the working out of the process.

51 The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

52 Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face, interpreted in context and in accordance with the *Redwater* decisions, which have precedential effect.

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing

TAB 13

2019 ABCA 47
Alberta Court of Appeal

Jaycap Financial Ltd v. Snowdon Block Inc

2019 CarswellAlta 160, 2019 ABCA 47, [2019] A.W.L.D. 951, 301 A.C.W.S. (3d) 475, 68 C.B.R. (6th) 7

Jaycap Financial Ltd. (Respondent / Plaintiff) and Snowdon Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation (Appellants / Defendants)

Brian O'Ferrall, Barbara Lea Veldhuis, Ritu Khullar JJ.A.

Heard: November 7, 2018
Judgment: February 4, 2019
Docket: Calgary Appeal 1701-0314-AC

Counsel: A. Henderson, for Respondent
K.W. Jesse, for Appellants

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.1 General principles

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — General principles

Appeal arose in context of insolvency proceedings — Guarantors appealed chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets — Appeal allowed, order was set aside and matter returned to Queen's Bench for rehearing before different judge — Receiver provided no evidence about termination nor did it explain why it failed to deliver final closing documents, giving rise to termination, when first asset purchase agreement reflected its understanding of purchase price — Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with assistance of legal counsel, will be held to their bargain — Had receiver sought to compel J Ltd. to close first asset purchase agreement, instead of abandoning it, its application may well have been successful.

Table of Authorities

Cases considered:

Beazer v. Tollestrup Estate (2017), 2017 ABCA 429, 2017 CarswellAlta 2689, 63 Alta. L.R. (6th) 25, [2018] 4 W.W.R. 513 (Alta. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board)*) 118 O.R. (3d) 800 (note) (S.C.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub

nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Toronto Dominion Bank v. Canadian Starter Drives Inc. (2011), 2011 ONSC 8004, 2011 CarswellOnt 15140, 90 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — referred to

APPEAL by guarantors from chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets.

***Per curiam*:**

Introduction

1 This appeal arises in the context of insolvency proceedings. The guarantors appeal a chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. These parties had earlier entered into an agreement for the same assets and obtained a court order approving that sale. However, they terminated this agreement after court approval on the basis of a mistake about the purchase price. The parties then entered into a second asset purchase agreement for a lower purchase price, which exposed the guarantors to a significant deficiency judgment. The guarantors (and as discussed below, the court) were provided very little information about what transpired between the execution of first and second agreements. The guarantors were unsuccessful before the chambers judge in arguing that the first asset purchase agreement should not be rectified because mutual mistake was not established on the record. The guarantors appeal to this Court alleging errors with the chambers judge's finding of mutual mistake and that the receiver's conduct challenged the integrity of the process.

2 We agree with the guarantors that there are some significant deficiencies with how the receiver proceeded and that the integrity of the process was seriously compromised. As a result, we allow the appeal.

Background

3 MNP Ltd. (the Receiver) was appointed receiver and manager of the debtor company, Snowdon Block Inc. (Snowdon) in February 2016. The only material asset of Snowdon was a parcel of land and a building in Calgary. In July 2016 the Receiver commenced a sales process to solicit offers for the assets. In October 2016 the Receiver finally received two offers for the assets and accepted a conditional offer from a third party. After months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed.

4 Jaycap Financial Ltd. (Jaycap) was the primary creditor of Snowdon and was financing the Receiver's costs. Over time Jaycap became concerned with the increasing costs and protecting its investment. The Receiver advised Jaycap that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end. On July 5, 2017 Jaycap emailed the Receiver that it would credit bid its "current costs" noted to be a certain amount. Jaycap arranged for a numbered company it controlled to be the purchaser, but for simplicity, we will refer to Jaycap's nominee as Jaycap.

5 An asset purchase agreement was prepared and executed by Jaycap and the Receiver on August 2, 2017. The total debt was defined to be the amount contained in the July 5, 2017 email and that amount was also the purchase price.

6 On August 2, 2017 a representative of the Receiver and a representative of Jaycap also emailed about a request from one of the guarantors, the appellant Mr. Richardson, about the pending transaction. As part of this exchange, the two sides set out their understanding of the purchase price and the impact on the guarantors' liability. This was their exchange:

> Reid [*Jaycap's representative*]. Neil Richardson [*one of the appellants*] has contacted us asking for an adjournment of the application next week as he is out of town. His concern is that he does not have any idea of what #Co's offer is and is concerned about his personal guarantee. As #Co is offering Jaycap's total indebtedness, Neil would not be

before the hearing. She issued her decision a week later and granted the second approval and vesting order. She found that she was not precluded from vacating the first order and issuing another. The first approval and vesting order did not direct the Receiver to close the transaction, but approved the terms of the asset purchase agreement and its execution by the Receiver. Pursuant to the termination clause, the agreement could be terminated by the parties if certain conditions were met.

14 The chambers judge also found that the Receiver and Jaycap terminated the first asset purchase agreement since they had, by error, failed to revise the purchase price in the agreement in accordance with earlier correspondence. The chambers judge found that the parties met the requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

15 The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.). She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

16 The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

17 Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

18 Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

19 The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 10 and 23, [2002] 2 S.C.R. 235 (S.C.C.). Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

20 The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.).

Analysis

TAB 14

In the Court of Appeal of Alberta

Citation: Salima Investments Ltd. v. Bank of Montreal, 1985 ABCA 191

Date: 19850826
Docket: 17697, 17696
Registry: Calgary

Between:

Salima Investments Ltd.

Appellant

- and -

Bank of Montreal

Respondent
(Plaintiff)

- and -

Mammoth Developments Ltd. and Bolero Management Ltd.

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Kerans

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

Rajko Dodic, Esq., for the Appellant

Grant McKibben, Esq., for the Respondent (Plaintiff)

Quincy Smith, Esq., for the Respondent (Defendants)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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persons concerned before giving its blessing to a particular transaction submitted for approval.

[11] The real issue, in our view, is the appropriate exercise of the admitted discretion of the Court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the Court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In Canada Permanent Trust Co. v. King Art Developments (June 20, 1984) [1984] 4 W.W.R. 587, we said that receivers (and Masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this Court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the Court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

[12] We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an enquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the Court may consider. As Macdonald, J.A. said in the Cameron case at p. 11:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

[13] This is not a total catalogue of those factors which might lead a Court to refuse to approve a sale.

[14] The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

[15] We do not have the benefit of the recorded Reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while

TAB 15

Court of Queen's Bench of Alberta

Citation: Calpine Canada Energy Limited (Companies' Creditors Arrangements Act), 2007 ABQB 49

Date: 20070208
Docket: 0501 17864
Registry: Calgary

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

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

Introduction

[1] These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

[2] This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

[29] The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.*, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 at para. 16 as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. 58, 65 A.R. 372, 21 D.L.R. (4th) 473, where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

[30] I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

[31] There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open

[48] The process was certainly not pretty. It started with a privately-negotiated Settlement Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these circumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

[49] The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

[50] Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so attractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

[51] There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

[52] It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson, J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) set out at page 112:

TAB 16

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

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

And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

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

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I. Introduction

[1] The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

[64] Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

[65] What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

[66] As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

[67] The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

[68] In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

[69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

[70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in

advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[72] Similar issues were considered in *Re Nelson Education Ltd.*, 2015 ONSC 5557 at paras 31-32, and in *Re Bloom Lake*, [p.1], 2015 QCCS 1920 at para 21.

[73] The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

[74] While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

[75] The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

[76] Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

[77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

[78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

[79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

[80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

TAB 17

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **D. Bish, for the Applicant, Tool-Plas**

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD & RELEASED: **SEPTEMBER 29, 2008**

ENDORSEMENT

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: **October 24, 2008**

TAB 18

CITATION: Montrose Mortgage Corporation v. Kingsway Arms Ottawa, 2013 ONSC 6905
COURT FILE NO.: CV-13-10298-00CL
DATE: 20131106

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Montrose Mortgage Corporation Ltd., Applicant

AND:

Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Dietrich, for the Applicant

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited

HEARD: November 5, 2013

REASONS FOR DECISION

I. Application for approval of a "pre-pack" credit bid sale in a proposed receivership

[1] Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

[2] On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

[3] The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013,

advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

[4] The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

[5] As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

[6] In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

[7] The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

[8] Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

[9] In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the

leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

[10] "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

[11] In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior

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[1] *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.)
[2] (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List)
[3] (1991), 4 O.R. (3d) 1 (C.A.)
[4] *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

[12] Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

[13] Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

[14] Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D. M. Brown J.

Date: November 6, 2013