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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ORPHAN WELL ASSOCIATION
RESPONDENT	HOUSTON OIL AND GAS LTD.
DOCUMENT	**BENCH BRIEF OF THE APPLICANT ORPHAN WELL ASSOCIATION** **With respect to an Originating Application to be heard Tuesday, October 29, 2019 at 2:00 pm**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILES DAVISON LLP 900, 517-10th Avenue S.W. Calgary, Alberta T2R 0A8 Attention: Terry Czechowskyj Telephone No.: (403) 298-0326 Facsimile No.: (403) 263-6840 File No.: 47280

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I. FACTS

1. The Orphan Well Association (the "**Applicant**" or "**OWA**") is an independent non – profit organization that operates under the delegated legal authority of the Alberta Energy Regulator ("**AER**"), the provincial regulator of the oil and gas industry. Its mandate is to safely decommission orphaned oil and gas wells, pipelines and production facilities where the owners of such assets are insolvent and restore the land as close to its original state as possible.[1]

2. Houston Oil and Gas Ltd. ("**Houston**") is a Calgary based energy company involved in the exploration and production of oil and natural gas resources in Alberta. Houston currently holds 1,438 well licenses, 73 facility licenses and 272 pipeline licenses (collectively the "**Houston Sites**") granted by the AER, including a number of sour gas sites (the "**Houston Sour Sites**").[2]

3. On August 28, 2019, Houston notified the AER that due to financial distress, it intended to shut– in all its oil and gas operations on the Houston Sites in "an orderly, safe and secure manner".[3]

4. On August 30, 2019, the AER issued an Order suspending all sour well, sour facility and sour pipelines licenses relating to the Houston Sour Sites ("**Order 201908 – 17**") and provided Houston with a deadline of September 20, 2019 in order to properly shut in, seal, lock and chain those affected Houston Sour Sites in a manner acceptable to the AER.[4]

5. Houston failed to comply with the terms of Order 201908 – 17 in the timeframe provided and confirmed that it did not have the ability to maintain the Houston Sites in accordance with regulatory requirements.[5]

6. By AER Order 2019-012 dated October 2, 2019, as amended by AER AD Order 2019 – 012A dated October 11, 2019, Houston was required to abandon and properly shut – in the remaining Houston Sites (1,264 wells, 41 facilities and 251 pipeline licenses) by October 12, 2019. Houston was unable to comply with the terms of Order 2019 – 012 and AER AD Order 2019 – 012A and confirmed

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[1] Affidavit of Lars De Paux sworn October 15, 2019 (the "**De Pauw Affidavit**") at para 3

[2] *Ibid* at para 4 and Exhibit D – Letter from AER to OWA dated October 10, 2019

[3] *Ibid* at Exhibit "A" – AER Order 201908-17 in Preamble

[4] *Idib* at para 6-7

[5] *Idib* at para 6-7 and Exhibit "B" – AER Order 2019-012

that it had ceased operations and no longer had any employees.[6]

7. As at October 10, 2019, seven wells from the Houston Sites have been designated as "orphan wells" by the AER pursuant to section 70(2)(a) of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 for purposes of abandonment. The Applicant has been advised by the AER that there may be additional Houston wells, facilities and pipelines declared orphan in the near future.[7]

8. In the event all Houston Sites are orphaned, the total estimated abandonment and reclamation cost would be over $81.5 million and will likely be the responsibility of the OWA.[8]

9. By Originating Application, the OWA seeks an Order for the appointment of Hardie & Kelly Inc. as receiver and manager of Houston (the "**Receivership Order**").

II. ISSUE

10. The key issue can be summarized as follows:

1. Is it just and convenient for a receiver – manager to be appointed?

III. LEGAL ARGUMENT

A. Legislative Authority

11. The Court has jurisdiction to grant the relief sought by the Applicant pursuant to section 13(2) of the *Judicature Act*, R.S.A. 2000, c. J – 2[9]:

> (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.

12. As an interested party, the OWA also applies under section 99(a) of the *Business Corporations Act*, R.S.A. 2000, c. B – 9[10] ("***BCA***") which states as follows:

---

[6] De Pauw Affidavit at para 10-12, Exhibit "B" – AER Order 2019-012 and Exhibit "C" – AER AD Order 2019 -12A

[7] *Ibid* at Exhibit "B" – AER Order 2019 -012 at para 6(b) and Exhibit "D" – Letter from AER to OWA dated October 10, 2019

[8] *Ibid* at para 14 and Exhibit "D" – Letter from AER dated October 10, 2019

[9] *Judicature Act*, R.S.A. 2000, c. J – 2, s. 13 **[TAB 1]**

[10] *Business Corporations Act,* R.S.A. 2000, c. B – 910, s. 99 **[TAB 2]**

Powers of the Court

> **99** On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (a) an order appointing, replacing or discharging a receiver or receiver - manager and approving the receiver's or receiver - manager's accounts;
>
> ***
>
> (f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

13. With respect to OWA's status to bring an application for a receiver – manager, being a creditor of Houston is not a prerequisite. Justice Romaine confirmed this in *Alberta Health Services v. Networc Health Inc.,* 2010 ABQB 373 ("***Networc***") noting "there is nothing on the face of this legislation that requires such an application for the appointment of a receiver to be made by a creditor".[11] The legislation relied upon in that case was section 46(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("***BIA***") and section 13(2) of the *Judicature Act* although the Applicants are not relying upon the provisions of the *BIA* in the current case.

14. In *Networc*, Alberta Health Services ("**AHS**") initially claimed to be a "contingent creditor" of Networc Health Inc. ("**Networc**") as it had filed a Statement of Claim seeking unquantified damages from Networc and claiming it had committed an act of insolvency. Romaine J. provided the following commentary at paragraph 19 of the decision:

> In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc...[12]

15. It is submitted that a determination as to whether OWA is a creditor of Houston is unnecessary in the present case. Similarly to AHS in *Networc*, OWA acts for the benefit of, and on behalf of, the Alberta public and is a major stakeholder with respect to the operations and financial health of Houston. As such, it has standing to bring an application for the Receivership Order.

---

[11] *Alberta Health Services v. Networc Health Inc.,* 2010 ABQB 373 at paras 7-8, 14, 19 ("***Networc***") **[TAB 3]**

[12] *Networc* at para 19 and 60 **[TAB 3]**

B. Tripartite Test for Injunctive Relief

16. Although the Applicant relies upon two separate pieces of legislation to support this Application, the Court has held that the appointment of a receiver-manager of a corporation under the *BCA* is the same process as an appointment pursuant to the *Judicature Act*.[13]

17. In determining whether to grant relief pursuant to section 13(2) of the *Judicature Act*, the Court has adopted the same test used for granting interlocutory injunctive relief [14]. The "tripartite test" for interlocutory injunctive relief was outlined by the Supreme Court of Canada decision in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 which was cited in *MTM Commercial Trust v. Statesman Riverside Quays Ltd.,* 2010 ABQB 647 ("***MTM Commercial***") as follows:

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

(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused; and

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience." [15]

18. In *Bennett on Receiverships*, 2nd edition, the author outlines a number of factors a court may consider in determining whether it is appropriate to appoint a receiver including whether irreparable harm might be caused if no order were made, the nature of the property, the balance of convenience to the parties and the effect of the order upon the parties.[16] This list of factors is often cited in receivership applications and the Court in *Murphy* noted that the majority, if not all, of the factors (as updated in *Bennett on Receiverships*, 3rd edition) "can be seen as a particularization of one of the three branches of the tripartite test".[17]

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[13] *Murphy v. Cahill*, 2013 ABQB 335 at paras 58, 60 - 61 and 96 ("***Murphy***") **[TAB 4]**

[14] *Murphy* at paras 7, 60, 64 and 73; *MTM Commercial Trust v. Statesman Riverside Quays Ltd.,* 2010 ABQB 647 at para 11 ("***MTM Commercial***") **[TAB 5]**

[15] *MTM Commercial* at para 12

[16] *Paragon Capital Corp. v. Merchants & Traders Assurance Co.,* 2002 ABQB 430 at para 27 **[TAB 6];** *Murphy* at para 71 **[TAB 4];** *Strategic Financial Corp. v. 1402801 Alberta Ltd.,* 2012 ABQB 292 at para 15 **[TAB 7]**

[17] *Murphy* at para 71 **[TAB 4]**

(a) Serious Issue to be Tried

19. As outlined in *MTM Commercial*, in determining whether there is a serious issue to be tried, the Court will look at "the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial".[18]

20. The OWA has established a strong *prima facie* case that Houston has breached the *Oil and Gas Conservation Act* which has necessitated a designation by the AER that several of the Houston Sites are orphans for the purposes of abandonment. Further, the evidence of OWA is not contested.[19]

(b) Irreparable Harm Test

21. When reviewing this factor, OWA would have to show that failure to grant the Receivership Order would "give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured".[20]

22. It is submitted that failure to appoint a receiver – manager could have grave environmental risks if the Houston Sites are not properly shut in, sealed and locked in the proper manner, especially the Houston Sour Sites. The harm cannot be quantified in monetary terms that could be paid by Houston.

(c) Balance of Convenience Test

23. This factor requires that the Court make an assessment to determine which of the parties would suffer greater harm from the granting or refusal of an interlocutory injunction, or in this case, which party would suffer greater harm in the granting or refusal of the Receivership Order.[21]

24. In *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 ("***BG International***"), the Court of Appeal dealt with an appeal of a decision appointing an interim receiver to take control of an oil well operated by Canadian Superior Energy Inc. located off the coast of Trinidad and Tobago. The receivership order at issue was granted under the *Judicature Act* and the Court of Appeal provided the following commentary with respect to balancing the rights of the parties:

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[18] *MTM Commercial* at para 52 **[TAB 5]**
[19] *Murphy* at para 84 **[TAB 4]**
[20] *MTM Commercial* at para 56 **[TAB 5]**
[21] *Ibid* at para 59 **[TAB 5]**

> 17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used. [22]

25. It should be noted that the current situation is not one where the respondent is operating as a going concern. Further, this isn't a situation where the loss of management control could have "devastating effects" on the respondent's business. It is arguably not disputed that:

- Houston has ceased operations [23] ;
- The company is not able to provide ongoing custody and care of its oil and gas operations in accordance with the regulatory requirements [24] ;
- Houston does not appear to have any directors and all employees and contractors have been terminated [25] ;
- A large number of wells on Houston Sites may still be in production without proper oversight[26];

When weighing the position of the parties, it is respectfully submitted that any balancing of interests favors granting the Receivership Order.

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[22] *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 at para 17 ("**BG International**") **[TAB 8]**

[23] De Pauw Affidavit at para 11 and Exhibit "C" – AD Order 2019 – 012A at Preamble

[24] *Ibid* at para 9, Exhibit "B" – AD Order 2019 – 012 at Preamble and Exhibit "D" – Letter from AER to OWA dated October 10, 2019

[25] *Ibid* at para 16 and Exhibit "C" – AD Order 2019 – 012A at Preamble

[26] *Ibid* at para 16

C. Alternatives to Receivership

26. In *BG International* the Court of Appeal noted that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should (1) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (2) carefully balance the rights of both the applicant and the respondent; and (3) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.[27]

27. The same sentiment was echoed in *MTM Commercial* where Romaine J pointed out the "principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant."[28]

28. Based on the arguments contained in this Bench Brief, it is respectfully submitted that there are no appropriate remedies short of a receivership in the current case that would protect the interests of the OWA.

IV. <u>CONCLUSION</u>

29. It is conceded that an application brought by a person other than a security holder is an extraordinary remedy[29]. However, it is respectfully submitted that based on the foregoing, it is necessary and in the public interest to appoint a receiver - manager over Houston to ensure that the Houston Sites are properly cared for and maintained, shut – in where necessary and where possible, be sold and placed in the hands of responsible producers.

30. The Applicant has met the tripartite test for injunctive relief and there are no other remedies, short of a receivership, that could serve to protect the interests of the Applicant and the general public. Given the potential environmental issues and for the public good, the granting of the Receivership Order is therefore "just and convenient".

V. <u>NATURE OF RELIEF SOUGHT</u>

31. The Applicant therefore asks this Honourable Court for an Order substantially in the form attached as Schedule "B" to the Originating Application granting the following relief:

---

[27] *BG International* at paras 16-17 **[TAB 8]**; *Networc* at para 18 **[TAB 3]**
[28] *MTM Commercial Trust* at para 9 **[TAB 5]**
[29] *Murphy* at para 7 **[TAB 4]**

(a) An Order deeming service of the Application good and sufficient if necessary and declaring that there is no other party with an interest in the subject matter of this application to whom notice should have been given;

(b) An Order Appointing Hardie & Kelly Inc. as receiver and manager of Houston Oil and Gas Ltd. and

(c) Such further and other relief as this Honorable Court deems just and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Calgary, in the Province of Alberta, this 21st day of October, 2019

Terry Czechowskyj/Ashley F. Hahn
Counsel for the Applicant, Orphan Well Association

TABLE OF AUTHORITIES

TAB

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

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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

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Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 11, 2018

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arising under the trust indenture and continuing at the time that the notice is given, unless the trustee reasonably believes that it is in the best interests of the holders of the debt obligations to withhold the notice and so informs the issuer or guarantor in writing.

1981 cB-15 s85

Trustee's duty of care

90 A trustee in exercising the trustee's powers and discharging the trustee's duties shall

(a) act honestly and in good faith with a view to the best interests of the holders of the debt obligations issued under the trust indenture, and

(b) exercise the care, diligence and skill of a reasonably prudent trustee.

1981 cB-15 s86

Trustee's reliance on statements

91 Notwithstanding section 90, a trustee is not liable if the trustee relies in good faith on statements contained in a statutory declaration, certificate, opinion or report that complies with this Act or the trust indenture.

1981 cB-15 s87

No exculpation of trustee by agreement

92 No term of a trust indenture or of any agreement between

(a) a trustee and the holders of debt obligations issued under the trust indenture, or

(b) between the trustee and the issuer or guarantor

shall operate so as to relieve a trustee from the duties imposed on the trustee by section 90.

1981 cB-15 s88

Part 8
Receivers and Receiver-Managers

Functions of receiver

93 A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property, pay the liabilities connected with the property and realize the security interest of those on behalf of whom the receiver is appointed, but, except to the extent permitted by the Court, the receiver may not carry on the business of the corporation.

1981 cB-15 s89

Functions of receiver-manager

94 A receiver of a corporation may, if the receiver is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom the receiver is appointed.

1981 cB-15 s90

Directors' powers during receivership

95 If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

1981 cB-15 s91

Court-appointed receiver or receiver-manager

96 A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.

1981 cB-15 s92

Duty under debt obligation

97 A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 99.

1981 cB-15 s93

Duty of care

98 A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honestly and in good faith, and

(b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

(b) take into the receiver's or receiver-manager's custody and control the property of the corporation in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed,

(c) open and maintain a bank account in the receiver's or receiver-manager's name as receiver or receiver-manager of the corporation for the money of the corporation coming under the receiver's or receiver-manager's control,

(d) keep detailed accounts of all transactions carried out by the receiver or receiver-manager as receiver or receiver-manager,

(e) keep accounts of the receiver's or receiver-manager's administration that must be available during usual business hours for inspection by the directors of the corporation,

(f) prepare at least once in every 6-month period after the date of the receiver's or receiver-manager's appointment financial statements of the receiver's or receiver-manager's administration as far as is practicable in the form required by section 155, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and

(g) on completion of the receiver's or receiver-manager's duties,

(i) render a final account of the receiver's or receiver-manager's administration in the form adopted for interim accounts under clause (f),

(ii) send a copy of the final report to the Registrar who shall file it, and

(iii) send a copy of the final report to each director of the corporation.

1981 cB-15 s96

Part 9
Directors and Officers

Directors

101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

(2) A corporation shall have one or more directors but a distributing corporation whose shares are held by more than one person shall have not fewer than 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates.

RSA 2000 cB-9 s101;2005 c8 s20

Bylaws

102(1) Unless the articles, bylaws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any bylaws that regulate the business or affairs of the corporation.

(2) The directors shall submit a bylaw, or an amendment or a repeal of a bylaw, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the bylaw, amendment or repeal.

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2010 ABQB 373
Alberta Court of Queen's Bench

Alberta Health Services v. Networc Health Inc.

2010 CarswellAlta 1017, 2010 ABQB 373, [2010] 11 W.W.R. 730, [2010] A.W.L.D. 4119, [2010] A.W.L.D. 4120, [2010] A.W.L.D. 4121, [2010] A.W.L.D. 4122, [2010] A.J. No. 627, 118 Alta. L.R. (5th) 118, 189 A.C.W.S. (3d) 939, 28 Alta. L.R. (5th) 118

Alberta Health Services (Applicant) and Networc Health Inc. (Respondent)

B.E. Romaine J.

Heard: May 3, 11, 2010
Judgment: June 1, 2010
Docket: Calgary BK01-094004

Counsel: Josef G.A, Krüger, Q.C., R.J. Daniel Gilborn, Rahim N. Punjani for Applicant, Alberta Health Services
C. Michael Smith, Smith Mack LaMarsh, Richard Dixon for Cambrian Group
David LeGeyt, David G. Loader for Respondent, Networc Health Inc.
Howard A. Gorman, Anne L. Kirker for Interim Receiver, PricewaterhouseCoopers
J. Alexander Kotkas, John Grieve for Healthcare Property Holdings Ltd.
Darren R. Bieganek for Clark Builders

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
  III.4 Stay of petition
    III.4.c Miscellaneous

Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
  III.5 Withdrawal of petition

Bankruptcy and insolvency
IV Receivers
  IV.1 Appointment

Bankruptcy and insolvency
V Bankruptcy and receiving orders
  V.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Status to apply — N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. and applied to continue receivership — AHS submitted that it was contingent creditor of N Inc. due to

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filing of Statement of Claim against N Inc. alleging it breached its agreement with AHS by committing act of insolvency and claiming unquantified damages — AHS's applications granted on other grounds — Although AHS submitted that it had status to apply for receivership order as "contingent creditor," such standing was not required under s. 46 or s. 13(2) — Whether AHS was contingent creditor was not determinative of its status — AHS was major stakeholder with respect to operations and financial health of N Inc. — AHS's interest in ensuring that citizens of province who required surgical services performed in facility provided by N Inc. were not deprived of those services gave it an interest far greater than that of mere customer of goods or services.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Withdrawal of petition
N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — Creditor applied for leave to withdraw bankruptcy application — AHS applied to continue interim receivership, and opposed creditor's application for leave to withdraw bankruptcy application — AHS's applications granted; receivership order granted and continued — Creditor's application dismissed — Creditor did not establish that its application to withdraw petition for receiving order should be allowed — Creditor did not prove solvency of N Inc., lack of prejudice to other creditors or that withdrawal would not undermine integrity of process.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — Miscellaneous
N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act (BIA) and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — N Inc. filed affidavit denying its indebtedness to creditor — Creditor brought application for leave to withdraw its petition — AHS applied to continue interim receivership and opposed creditor's application to withdraw — AHS's applications granted; creditor's application dismissed — Applying tri-partite test for injunctive relief, it was established that there were several serious issues to be tried — There might be irreparable harm to public interest if existing application was terminated and AHS was required to reapply under different provision of BIA — Balance of convenience favoured AHS's interest in having creditor's application remain in place and be stayed as opposed to creditor's application to have it withdrawn.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous
N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — Fact of receivership gave rise to default under N Inc.'s lease with its landlord which, but for stay created by receivership order, would entitle landlord to terminate lease — AHS brought application for appointment of interim receiver of financial records and accounts of N Inc. — Interim receiver was appointed — N Inc. filed affidavit denying indebtedness to creditor — Creditor sought to withdraw its bankruptcy application — AHS applied to continue interim receivership and opposed creditor's application for leave to withdraw its application — Landlord brought application to require interim receiver to adopt remainder of lease with N Inc. or abandon premises or allow landlord to terminate lease — AHS's applications granted and creditor's application dismissed on other grounds — Landlord's application to lift stay to allow termination of lease dismissed; application to compel receiver to affirm or disclaim lease dismissed — Landlord was not prejudiced, except to extent that its right to terminate lease for breach of covenant not to be insolvent was stayed during course of receivership — Rent would continue to be paid — Allowing landlord to terminate lease and evict N Inc. would destroy purpose of receivership: to ensure that surgical services provided by N Inc. to public in Alberta were not interrupted — Strong public policy issues were involved in present receivership.

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s. 31(4) — referred to

s. 43 — considered

s. 43(11) — considered

s. 43(14) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — considered

s. 47 — considered

s. 47(2)(c) — considered

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s. 13(2) — considered

APPLICATIONS by Alberta Health Services for appointment of interim receiver and continuation of receivership; COUNTER-APPLICATIONS by various interested parties.

***B.E. Romaine J.*:**

Introduction

1 On May 3, 2010 Alberta Health Services applied for the appointment of an interim receiver of the financial records and accounts of Networc Health Inc. ("Networc"). On May 11, 2010, Alberta Health applied to continue the receivership. Various interested parties opposed these applications and brought counter-applications. I granted a receivership order on May 3, 2010 and continued it on May 11, 2010. These are my reasons.

Facts

2 Networc operates an accredited non-hospital surgical facility in Calgary under the name of the Health Resource Centre. In December, 2006, Networc and the Calgary Health Region (now Alberta Health Services) entered into an agreement whereby Networc would provide orthopaedic surgical services to the public in Alberta, the cost of which would be covered by Alberta Health. This agreement expires on March 31, 2012. Alberta Health submits that this arrangement was intended as an interim measure to assist it in dealing with capacity constraints until a new Alberta Health-owned surgical facility could be constructed. Currently, it is expected that this new facility will be operational in January, 2011. The agreement between Networc and Alberta Health limits the maximum annual number of procedures that can be performed at the Health Resource Centre, but Alberta Health has no obligation to fund any minimum number of procedures.

3 Networc also performs surgeries for the Alberta Workers' Compensation Board and out-of-province or federal insurers, but Alberta Health is its primary source of income. According to the first report of the Interim Receiver, the surgeons and anaesthetists who perform the procedures are not employees of Networc and bill Alberta Health directly for their services, but the Health Resource Centre employs about one hundred other staff members.

4 Networc planned to expand its surgical capacity and in 2008 and 2009 entered into various lease and construction agreements related to two new facilities which are not yet completely constructed.

5 On April 1, 2010, 4040 Properties Corp., Cambrian (Foothills) I Properties Corp. and Cambrian Wellness I Development Corp. (the "Cambrian Group") applied for a bankruptcy order against Networc. The Cambrian Group alleged that Networc was indebted to them in the amount of approximately $636,000.00 pursuant to two lease agreements. They alleged that Networc had admitted that it was no longer capable of meeting its obligations under the leases, relying on a letter from Networc that stated that, as Networc had received only partial commitment from Alberta Health with respect to business volumes for the budget year commencing April 1, 2010, Networc did not have the ability to pay lease costs on the two

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buildings that were the subject of the leases. The letter also suggested the renegotiation of one of the leases. Networc denied these allegations in a Notice of Dispute and was directed by court order to provide an affidavit setting out details of its position by Friday, April 30, 2010.

6 Alberta Health says that it followed the status of this application carefully, and on April 30, 2010, it applied for the appointment of an interim receiver of Networc and an order staying the bankruptcy proceedings commenced by the Cambrian Group by way of Notice of Motion returnable on May 3, 2010.

7 Alberta Health's application was made pursuant to section 46(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA") and section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

8 While there is nothing on the face of this legislation that requires such an application for the appointment of a receiver to be made by a creditor, Alberta Health submitted that it was in fact a contingent creditor of Networc as a result of filing a Statement of Claim against Networc alleging that it had breached its agreement with Alberta Health by committing an act of insolvency and claiming unquantified damages.

9 The application by Alberta Health originally included an application to stay the application commenced by the Cambrian Group to petition Networc into bankruptcy.

10 The whole of the application was opposed for a number of reasons by the Cambrian Group, which sought an adjournment to file a responding affidavit and to cross-examine on the affidavits. The arguments made by the parties are summarized later in this decision. Submissions were made during a hearing that commenced in the morning of May 3, 2010 and was adjourned for a few hours. When the hearing recommenced, Alberta Health advised the court that it would adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings to a later date and would remove any reference to a stay of the bankruptcy proceedings from its application for an interim receiver. Ultimately, I appointed an interim receiver, adjourned the application to stay the bankruptcy proceedings and directed Networc to file its affidavit in response to the Cambrian Group's application for a bankruptcy order by the end of the next day. The matter was put over to May 11, 2010 on the basis that submissions could be made on all relief sought, including the issue of whether the appointment of an interim receiver should continue.

11 Between May 3, 2010 and May 11, 2010, the complexion of the application changed dramatically. Networc filed an affidavit denying the alleged indebtedness to the Cambrian Group and raising a number of defences to the bankruptcy application. Alberta Health acquired the interest of the Canadian Imperial Bank of Commerce in Networc's current secured borrowing facilities. According to the Interim Receiver's first report to the Court, the Canadian Imperial Bank of Commerce was in the process of considering its options, including the enforcement of its security (which it appears it would be entitled to do, relying on a breach of Networc's working capital covenant associated with its operating line of credit). The Cambrian Group subsequently agreed with Networc to discontinue its application to petition Networc into bankruptcy.

12 According to the Interim Receiver's first report, on the basis of its information as of May 10, 2010 and its calculations based on that information, if the Interim Receiver were discharged, Networc would not be able to carry on its operations and repay the CIBC loans and pre-receivership payables, including construction indebtedness and the Cambrian Group's claim for rent, without a cash injection of approximately $7.2 million. I continued the interim receivership and made some ancillary orders.

Analysis

Status of Alberta Health to Apply for Receivership

13 Alberta Health based its original application for an interim receiver on section 46(1) of the BIA and section 13(2) of the *Judicature Act*. These statutory provisions are set out in Appendix A to this decision.

14 Neither of these provisions requires that an application for a receivership be made by a creditor, but it is clear from case authority that it is usually a creditor that makes such an application. Section 46 follows the sections of the BIA that deal with an application made by a creditor against a debtor for a bankruptcy order, and it requires that such an application has

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been filed before an application for an interim receiver can be made. There do not appear to be any reported decisions of an application under section 46 being made by a party other than a creditor, although applications under section 47.1 of the BIA, which allows the appointment of a receiver in different circumstances, have been made by trustees in bankruptcy and even by debtors themselves on occasion: for example, *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.)

15 As noted by Professor Jacob Ziegel in Part II of "The Personal Liabilities of Insolvency Practitioners under Insolvency Legislation: A Comparative Analysis of the Canadian, English and American Positions" in J. Sarra, ed., 2006 Annual Review of Insolvency Law (Toronto: Carswell 2007) at 277-338, receivers are creations of equitable origin and have served a variety of functions in many different contexts. In determining whether Alberta Health had status to apply for the appointment of an interim receiver, it was helpful to look briefly at the history of the development of receiverships under the BIA.

16 Section 46 of the BIA has long provided for the appointment of an interim receiver where an application for a bankruptcy order has been filed if the court is satisfied that such appointment is shown to be necessary for the protection of the estate of a debtor, and an undertaking with respect to damages is provided by the applicant. The appointment of an interim receiver under section 46 is for conservatory purposes and is limited specifically by section 46(2) such that the interim receiver shall not unduly interfere with the debtor except to the extent necessary for such conservatory purposes or to comply with the order of appointment. Sections 47 and 47.1 were added to the BIA in 1992 and were intended to give greater protection and flexibility to secured creditors during the period of time when they were in the process of enforcing their security. An interim receiver appointed under these sections may exercise broader powers.

17 As noted by Professor Ziegel, these 1992 amendments radically transformed insolvency administrations, as they became very popular with secured creditors. Orders were granted that gave receivers extensive powers and remained in effect, not on an interim basis, but for lengthy periods of time. Some courts and commentators were critical of this broad use of what was described as an interim remedy under the BIA, and, in September 2009, amendments to sections 47 and 47.1 came into effect that had the result of limiting the period of time of an interim receiver appointment under these sections unless otherwise ordered by a court, and limiting the powers available to such interim receivers. However, a new provision was added to the BIA, section 243, which is available to secured creditors and allows a court to give such receiver (commonly referred to as a "national receiver") broad powers equivalent to those previously available to interim receivers under sections 47 and 47.1. It is noteworthy that these amendments did not affect section 46, either in terms of scope of powers or duration of appointment.

18 Section 13(2) of the *Judicature Act* does not require even the pre-requisite of the filing of an application for bankruptcy, as required under section 46 of the BIA, nor does it appear to limit the scope of powers of a receiver appointed under the section, requiring that it must appear to a court to be "just and convenient that the order be made." It is clear, however, that the appointment of a receiver under this provision should not be lightly granted, that alternate remedies should be explored short of a receivership, and that the rights of both an applicant and the respondent debtor must be carefully balanced before an appointment is made: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.).

19 In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc. While counsel for the Cambrian Group suggested that Alberta Health had only the status of a "customer" of Networc, and that to allow a mere customer the use of the remedy of a receivership would open the proverbial floodgates, Alberta Health's interest in ensuring that citizens of the Province who require the surgical services performed in the facility provided by Networc were not deprived of those services gives it an interest far greater than that of a mere customer of goods or services. The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the *Judicature Act*, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.

20 The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and

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interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *A. Marquette & fils Inc. v. Mercure*, [1977] 1 S.C.R. 547 (S.C.C.) at 556, the Supreme Court commented:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

Initial Application

21 The focus of the case law interpreting section 46 of the BIA is on protecting the debtor against unwarranted intrusion from petitioning creditors. The courts have recognized the serious consequences that the appointment of an interim receiver has on the business of a debtor, and thus, section 46 requires that the applicant establish that:

> a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case, the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and
>
> b) there is an immediate need for the protection of the debtor's estate.

22 Networc consented to Alberta Health's application to appoint a receiver at the initial application. The Cambrian Group, while it opposed the application, was vehement, at least on May 3, 2010, with respect to the strength of its application for an order petitioning Networc into bankruptcy.

23 Alberta Health deposed that there was an immediate need for the protection of Networc's estate. It submitted that if the bankruptcy threatened by the Cambian Group's application occurred, a trustee in bankruptcy would face huge obstacles to the continuance of Networc's operations, including exposure to liability, problems arising from the fact that the agreement between Networc and Alberta Health was not assignable without the consent of Alberta Health and the Minister of Health and the dearth of potential assignees that could properly be designated and accredited to run the facility. If Networc had to cease operations, surgeries would be disrupted, highly-skilled employees would be left jobless and physicians would be left without facilities in which to operate. Alternatively, allowing Networc to operate under the supervision of an interim receiver would alleviate this disruption and would allow Networc to generate income for the benefit of creditors.

24 The Cambrian Group applied for an adjournment of the application in order to file further materials and to cross-examine on the affidavits. Initially, given the careful consideration that a court must give to the appointment of a receiver, I considered granting a brief adjournment to May 11, 2010 without appointing an interim receiver, contingent upon the Cambrian Group agreeing not to proceed further with the bankruptcy application during this period of time. Counsel for Alberta Health submitted that in the absence of a stay, there were other parties that may take action during the week's adjournment. I asked counsel to identify this risk when the hearing recommenced in the early afternoon of May 3, 2010. At that time, Alberta Health produced an affidavit that indicated that the publicity of the proceedings had caused significant disruption to Networc's operations and uncertainty among patients, employees and suppliers, providing additional evidence of an immediate need for the protection of Networc's estate.

25 Alberta Health also indicated that it would agree to adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings and had removed any reference to that relief from its application for an interim receivership order. I was satisfied that Alberta Health had established the basis for an interim receivership order, particularly as the alleged prejudice to the Cambrian Group arising from a stay of its right to proceed with the bankruptcy proceedings was no longer a major issue. I was satisfied that the supplemental affidavit provided persuasive evidence that the bankruptcy application and the subsequent receivership application had created significant uncertainty and concern and a heightened risk of an interruption in medical services at the Networc facility. I was therefore satisfied that there were strong public interest reasons to appoint an interim receiver until the matter could be more thoroughly argued.

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Applications on May 11, 2010

A. Status of Parties

26 As previously described, Alberta Health had stepped into the shoes of a secured creditor between the initial appointment and May 11, 2010, and there was no longer an issue of whether it was entitled to apply for a receivership order under bankruptcy legislation. While it would be entitled to use section 47 and/or new section 243 of the BIA, Alberta Health applied to continue the receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* for reasons that will be discussed later in this decision.

27 As a result of the affidavit filed by Networc denying its indebtedness to the Cambrian Group and denying that it had committed an act of insolvency, the next step in the bankruptcy application would have been the trial of an issue under section 43 of the BIA. After a bankruptcy judge had heard evidence in this proceeding, he or she would have the option of:

(a) granting a bankruptcy order against Networc if satisfied with the Cambrian Group's evidence;

(b) dismissing the application if satisfied with Networc's defences, or

(c) determining that there was a *bona fide* dispute with respect to the debt that could not be decided in bankruptcy court and should be litigated in the normal course.

28 The Cambrian Group, however, announced that it had agreed with Networc that it would withdraw its application to petition Networc into bankruptcy on the basis that neither party would be liable for costs, and applied for an order of the court allowing such withdrawal. Counsel for the Cambrian Group suggested that it was satisfied by Networc's recent affidavit that Networc could not be said to have committed an act of insolvency. It is, of course, also clear that if no application for a bankruptcy order exists, an interim receivership under section 46 of the BIA may no longer be sustainable.

29 Networc filed a Notice of Motion on May 4, 2010 applying to dismiss the bankruptcy proceeding and to terminate the interim receivership. However, on May 11, 2010, Networc did not oppose either the continuation of the receivership or the Cambrian Group's application to approve the agreement to withdraw the bankruptcy application.

30 Networc filed a supplemental affidavit on May 11, 2010 attaching a letter from its controller to its CEO projecting a more optimistic operating profit for Networc than that projected by the Interim Receiver. The controller gives his opinion that Networc's financial difficulties are due to the development of the new facilities and not Networc's normal operations.

31 Networc's current landlord, Healthcare Property Holdings Ltd., (the "Landlord") which supported Alberta Health's application on May 3, 2010, brought an application returnable on May 11, 2010 to require the Interim Receiver to either personally affirm and adopt the remainder of the lease with Networc or to abandon the premises or to allow the Landlord to terminate the lease and obtain vacant possession.

32 The Interim Receiver filed its first report and applied for the authority to make certain pre-filing payments to employees at Networc and to deposit money collected by the Interim Receiver on accounts receivable into its account established for the purpose.

B. Continuation of the Receivership

33 Alberta Health sought to continue the interim receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* rather than substituting an application for a receivership under section 47 and/or section 243 of the BIA, and opposed the Cambrian Group's application for leave to withdraw its bankruptcy application.

34 Section 43(14) of the BIA provides that a petition for an order in bankruptcy cannot be withdrawn without the leave of

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the Court. The Court will not lightly permit such a withdrawal. An agreement to withdraw between the petitioning creditor and the debtor is not necessarily enough. As noted in Houlden, Morawetz & Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2009) at p. 155:

> Since bankruptcy proceedings are for the benefit of all creditors and since the date on which an application is filed may be of crucial importance in attacking fraudulent transactions, the court will not allow an application to be withdrawn or dismissed unless it is satisfied that the debtor is solvent and that other creditors will not be prejudiced by the withdrawal or dismissal.

35 The Cambrian Group has provided no evidence that Networc is solvent or that no other creditors would be prejudiced by the withdrawal. In fact, Alberta Health, now a secured creditor, would be prejudiced by the withdrawal.

36 Since Networc has agreed with the Cambrian Group not to oppose the withdrawal, the Cambrian Group bears no risk of a costs application if the withdrawal is delayed for a period of time. Counsel to the Cambrian Group could not identify any specific prejudice if the application for an order in bankruptcy remains in place during the course of a receivership, other than a vague reference to how this may affect the Cambrian Group's ability to pursue other options.

37 Alberta Health's concern over the withdrawal and the necessity that this may require the receivership to continue under a different statutory provision relates to the complexity of insurance coverage now put in place for the benefit of the Interim Receiver in recognition of its limited role under the section 46 receivership and the concern that a termination of a section 46 receivership and the commencement of a receivership authorized under section 47 or section 243 may create practical issues with respect to the possibility of two estates, or give rise to a perceived interruption in the stay of proceedings.

38 In addition, Alberta Health submits that allowing the Cambrian Group to withdraw its petition at this point in the proceedings would be contrary to the integrity of the process, and that creditors should be discouraged from filing for and then withdrawing petitions for receiving orders for strategic reasons. Alberta Health submits that adjourning the bankruptcy application to January 15, 2011 would preserve the existing process and prevent the possibility of complications arising from converting the receivership from a section 46 receivership to a section 47 or section 243 receivership.

39 Clark Builders, identified in the Interim Receiver's report as a major creditor of Networc with respect to the development of new facilities, opposed neither the withdrawal of the bankruptcy petition nor the continuation of the interim receivership. Counsel for Clark Builders noted that the situation would be no different in outcome if this was an application for a receivership under section 47 of the BIA.

40 The Landlord supported the Cambrian Group's application to withdraw its application in bankruptcy, alleging that Alberta Health's application was a misuse of the receivership remedy. The Landlord's submissions were tied to its application to lift the stay for certain purposes, and will be discussed in greater detail later in these reasons.

41 The Cambrian Group did not satisfy me that its application to withdraw its petition for a receiving order should be allowed. In particular, it did not prove the solvency of Networc, the lack of prejudice to other creditors or that the withdrawal would not undermine the integrity of the process. In addition, to allow the withdrawal and then force Alberta Health into the formality of an application under section 47 or 243 of the BIA would only create additional expense in the receivership, expense which I am aware would likely be borne by the taxpayers of Alberta. At any rate, even if the bankruptcy application that triggered Alberta Health's ability to apply under section 46 were now to disappear, there is no such prerequisite to the granting of a receivership order under section 13(2) of the *Judicature Act.*

42 Farley, J in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) at 185 , in reference to the court's powers under then section 47(2)(c) (which have now been transferred to section 243(1)(c)), remarked famously that Parliament did not intend to take away from the court when fashioning an order in receivership the ability to do not only what "justice dictates" but also what "practicality demands". He noted, accurately, that:

> It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own

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internal seeds of chaos, unpredictability and instability.

43 While a certain amount of strategic posturing among creditors and stakeholders can be expected in the chaotic conditions that surround a situation of alleged insolvency, what is involved in this case is not just the rights of private creditors *inter se* but also the public interest in preserving the uninterrupted provision of surgical services in Alberta.

44 Counsel for the Cambrian Group submitted that the Court should not refuse it leave to withdraw its application for a receiving order since if the Court did so, it would be perceived by the public to be assisting Alberta Health in a manner not justified by law, suggesting that Alberta Health needed the bankruptcy proceedings to continue in order to justify its receivership application. As I have indicated in these reasons, that is a mischaracterization of the law and ignores the Cambrian Group's failure to satisfy the Court that its application should be withdrawn. These competing applications have raised public policy issues about the provision of health care services in Alberta by private contractors, but those issues are not issues for this Court except to the extent that the public interest in uninterrupted health care services may validly affect the exercise of any discretion granted to the Court in the appointment of a receiver.

45 It may be argued that the adjournment of the Cambrian Group's application for a receiving order for the period of time requested by Alberta Health is, in effect, a stay of these proceedings, although the Cambrian Group has now by virtue of its agreement with Networc made it clear that it will not be taking steps in the application in any event. While it is doubtful that the principles relating to an application for a stay apply to the circumstances as they have now evolved, I have considered whether the relief sought by Alberta Health would meet the tests for a stay.

46 Section 43(11) of the BIA provides under the description "Stay of proceedings for other reasons" that the court, for reasons other than the denial of the facts set out in an application for a bankruptcy order against the debtor, may "for other sufficient reason" make an order staying the proceedings. The general tests developed with respect to this section of the BIA do not apply to this particular circumstance. Under the common law, the tri-partite test for injunctive relief applies in determining whether a stay of a bankruptcy application should be granted: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 (S.C.C.). Applying this test to the current circumstances, I am satisfied that there would be several serious issues to be tried (including whether the Cambrian Group should be allowed to withdraw its application, and if not, whether the application should be stayed), that there may be irreparable harm to the public interest if the existing application was terminated and Alberta Health was required to reapply under a different provision of the BIA, and that the balance of convenience favours Alberta Health's interest in having the application remain in place and be stayed as opposed to the Cambrian Group's application to have it withdrawn.

C. The Landlord

47 The Interim Receiver reports that, as the Canadian Imperial Bank of Commerce froze Networc's operating line of credit when the receivership order was granted, the automatic debit for May rent did not go through. On May 5, 2010, the Interim Receiver advised the Landlord that the Interim Receiver would pay the May rent as soon as it had a bank account in place and funding was obtained. On May 7, 2010, the rent was paid, including NSF charges.

48 Thus, Networc is not in default of its covenant to pay rent. The fact of the receivership, however, gives rise to a default under the lease which, but for the stay created by the receivership order, would entitle the Landlord to terminate it.

49 As a general rule, in a receivership, a tenant's interest in a lease does not rest with the receiver but remains in the name of the debtor. In a court-appointed receivership, the receiver is not bound by the debtor's existing contracts, nor is it personally liable for the performance of those contracts: Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 341; *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.L.R. (4th) 127 (N.S. C.A.) at 143-147; *Sovereign Bank v. Parsons*, [1913] A.C. 160 (Ontario P.C.) at 167-172.

50 If the receiver occupies the premises, it may be liable for occupation rent, but that is not the situation in this case, given the Receiver's limited role. Nevertheless, Alberta Health has agreed to pay rent due and owing during the course of the receivership and has assured the Landlord that rent will be paid until at least January 31, 2011. The Landlord is not prejudiced except to the extent that its right to terminate the lease for breach of a covenant not to be insolvent is stayed during

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the course of the receivership.

51 The Landlord relies on *North America Steamships Ltd., Re*, 2007 BCSC 267 (B.C. S.C.) in which the court considered the necessity of a trustee in bankruptcy affirming certain forward swap agreements between a bankrupt and creditors if the trustee wished to take the benefit of the agreements. The first thing of note is that this decision deals with a trustee in bankruptcy, not a receiver. The relevance of this is set out in paragraphs 11 and 18 of the decision, discussing the position of a trustee in bankruptcy with respect to the debtor's business. The decision also deals with the special aspects of forward swap agreements: para. 15. It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination: Section 84.2 (7) (8) and (9) of the BIA. While the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract. In summary, this case does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor.

52 The present case can be distinguished even further by the fact that the receivership is a limited one, with the powers of the Receiver limited to records and financial affairs, and not a situation where a receiver-manager has been appointed.

53 The Landlord also relies on an oral decision of Brenner, J. in *Pope & Talbot Ltd., Re* [2008 CarswellBC 1726 (B.C. S.C. [In Chambers])] dated May 20, 2008. This was a complex matter, primarily involving a filing under the CCAA, but certain properties of the debtor were also subject to a receivership order. This specific decision involved a contract for the supply of wood chips between a third-party sawmill owner, Canfor, and Pope & Talbot with respect to one of its mills under receivership. From the date of the initial order under the CCAA in November 2007 to April 25, 2008, Pope & Talbot paid monthly for the supply of wood chips. After that, it stopped paying, and on May 10, 2008 a receiver was appointed. At the time of the application, invoices for two months supply of wood chips were outstanding and Canfor submitted that it was suffering additional prejudice with respect to storage costs, space issues and contamination of stored stock. Brenner, J. considered the use of the CCAA in an insolvency that was clearly heading towards a liquidation and noted that Canfor was no longer being paid for goods supplied even though a receiver-manager was in place. He referred to *North America Steamships Ltd.*, and commenting that he was "balancing the equities as best as I can", gave the receiver until June 13, 2008 to decide whether to affirm the contract. In this case, the supplier was not being paid for the supply of materials, and the termination of the contract in question had been stayed, first by the CCAA order and then by the receivership order for seven months. Like *North America Steamships Ltd.*, this case was driven by its specific and complex facts.

54 The Landlord deposes that, at the time the application for a receivership order was being made by Alberta Health, it was negotiating a new lease with the principals of Networc. The new tenant was to be a company related to Networc, which would take up Networc's business, subject to Alberta Health agreeing to issue a contract to this new tenant. The concept was that Networc would sell its assets to this new company through a proposal under the BIA, leaving the Cambrian Group litigation to be resolved separately. Counsel for the Landlord in a letter attached to the Landlord's affidavit notes that the Cambrian Group intends to withdraw its bankruptcy application and remarks "(t)here seems to be subterfuge here, but what that subterfuge is escapes me at the moment". The letter outlines the many details that would have to be resolved as part of this proposal.

55 The Landlord also deposes to receiving expressions of interest from possible new tenants for the Networc space. It submits that the uncertainty over how long Networc may continue to be a tenant is prejudicial to its ability to re-lease the premises. What the Landlord proposes is that either Alberta Health or the Receiver assume the liabilities of Networc under the lease for the balance of its term or that it be allowed to terminate the lease.

56 Even in cases where a receiver has become liable for the supply of goods and services as a result of the use of these goods or services during the course of the receivership, this liability normally extends only during the course of the receivership, and does not place the receiver in the position of the debtor for the balance of the contract: *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)*, 2001 ABQB 223 (Alta. Q.B.) at paras. 3, 4.

57 As noted by Alberta Health, even if a trustee in bankruptcy choses to affirm a contract, it does so on behalf of the debtor company, and any subsequent breach will only result in liability to the debtor company or its estate and not personally to the trustee: *North America Steamships Ltd.* at para. 20- 23 and 25 - 26; BIA section 31(4).

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58 The Landlord submits that the limited role of the receiver in this case, and the limited scope of its powers may preclude the stay from applying to the Landlord. While the limited language of the receivership order is consistent with the cautionary language of section 46, that the receivership should not unduly interfere with the debtor carrying on its business, the stay imposed by the receivership must be broad enough to ensure that the goal of conservatory measures is effective. The Landlord, somewhat disingenuously, suggests that the "simple solution" would be to direct that the stay is not effective against it, and that it "would not act precipitously."

59 Allowing the Landlord to terminate the lease and evict Networc would certainly destroy the purpose of this receivership: to ensure that surgical services provided by Networc to the public in Alberta are not interrupted. As noted by Alberta Health, the Landlord's "simple solution" is to make the Landlord's problem the problem of Alberta Health and to allow the Landlord an advantage over other creditors and stakeholders that is not justified in the circumstances. The receivership is not, as argued by the Landlord, an "artificial construct".

60 Alberta Health has an interest as a major stakeholder, and now as a secured creditor, in applying for a receivership order. Its valid interest on behalf of the public of Alberta need not be postponed to that of the Landlord, who will continue to receive rent during the course of the receivership.

61 Given the strong public policy issues involved in this receivership, the fact that rent will continue to be paid and that the prejudice to the Landlord is limited to a delay in its ability to enforce its rights under the lease, I declined to lift the stay to allow the termination of the lease. I dismissed the Landlord's application to compel the Receiver to affirm or disclaim the lease.

62 If the parties are unable to agree on costs, they may be the subject of a later application.

Order accordingly.

Appendix A

Bankruptcy and Insolvency Act

46.(1) Appointment of interim receiver -

The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

(2) Powers of interim receiver -

The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Judicature Act

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

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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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

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

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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.

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APPLICATION by GM for appointment of receiver-manager.

***J.B. Veit J.*:**

Summary

1 Since 2006, Gerald Murphy has provided all of the capital funding, amounting to millions of dollars, for the CCS group of companies. In this interlocutory application, relying on 242(3) of Alberta's *Business Corporations Act* and on s. 13(2) of the *Judicature Act*, Mr. Murphy asks for the appointment of a receiver-manager on an interim basis based on evidence of what he describes as mismanagement of the companies by the respondent Margaret Cahill, Mr. Murphy's sister. The mismanagement complained of is extensive, relating both to relatively large matters - such as the funding by the companies of residences that were then put into Ms. Cahill's name - and to small ones - such as Ms. Cahill's authorization of the purchase of baby clothes for the new-born children of two employees. There is abundant evidence that Mr. Murphy's serious complaints about management raise serious issues to be tried.

2 In the originating application which commenced these proceedings, in addition to the appointment of a receiver-manager, Mr. Murphy also asks for rectification of the share register and corporate documents and for related relief.

3 The respondent Cahills have complaints relating to Mr. Murphy: they assert that Mr. Murphy has failed to recognize their equity interest in the companies and Ms. Cahill's right to manage the companies, including her right to authorize payment to others, including her adult son, for work done on behalf of the companies. The evidence on which the Cahills rely consists of corporate documents which appear to have been executed by Mr. Murphy, and which state on their face that, despite his sole funding of the companies, Mr. Murphy only has a 50% voting position with respect to the operation of, and an 80% equity stake in, the companies. In addition, according to the Unanimous Shareholders' Agreement, also apparently executed by Mr. Murphy, internecine corporate disputes must be arbitrated. There is abundant evidence that the Cahills' complaints raise serious issues to be tried.

4 The application for an interim receiver-manager is denied.

5 The court is entitled, in assessing the application, to consider the hearsay information contained in the Inspector's Third Report. However, in the circumstances of this case, the court does not attach any weight to that hearsay evidence.

6 The applicants cite Margaret Cahill in contempt for having, in the face of the court's sealing order, provided a copy of the Inspector's Third Report to a non-party, Chris Cahill Jr., who was the focus of much of the information contained in the Third Report. In the circumstances here, the sealing order was not sufficiently clear and unequivocal so as to constitute an adequate basis for contempt proceedings.

7 An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for 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

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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.

Cases and authority cited

15 *By the Applicants: Murphy v. Cahill*, 2012 ABQB 220 (Alta. Q.B.); *R. v. Canadian Consolidated Salvage Ltd.*, 2012

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ABPC 133 (Alta. Prov. Ct.); *Murphy v. Cahill*, 2012 ABQB 446 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 530 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 531 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 793 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 754 (Alta. Q.B.); *Business Corporations Act*, R.S.A. 2000, c. B-7, s. 242(3)(b) and Part 8; *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.*, 1999 ABQB 406 (Alta. Q.B.); *BCE Inc., Re*, 2008 SCC 69 (S.C.C.); *Seidel v. Kerr*, 2003 ABCA 267 (Alta. C.A.); *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.); *Kumra v. Luthra*, 2010 ABQB 772 (Alta. Q.B.); *Citibank Canada v. Calgary Auto Centre* (1989), 98 A.R. 250 (Alta. Q.B.); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Chow v. Bresea Resources Ltd.* (1997), 209 A.R. 284 (Alta. C.A.); *Garratt v. Charlton*, 2012 ONSC 1129 (Ont. S.C.J.); *Fernando v. Francis*, [2007] O.J. No. 1644, 2007 CarswellOnt 2619 (Ont. S.C.J. [Commercial List]); *781952 Alberta Ltd. v. 781944 Alberta Ltd.*, 2003 ABQB 980 (Alta. Q.B.); *Deluce Holdings Inc. v. Air Canada*, 1992 CarswellOnt 154, 98 D.L.R. (4th) 509 (Ont. Gen. Div. [Commercial List]); *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565 (Alta. Q.B.); *Connelly v. Connelly-McKinley Ltd.*, 2010 ABQB 515 (Alta. Q.B.); *Seymour Resources Ltd. v. Hofer*, 2004 ABQB 303 (Alta. Q.B.); *719946 Alberta Ltd. v. Alberta's B.E.S.T. Inc.*, 2005 ABQB 771 (Alta. Q.B.); *Such v. RW-LB Holdings Ltd.* (1993), 15 Alta. L.R. (3d) 153 (Alta. Q.B.); *Stech v. Davies* (1987), 80 A.R. 298 (Alta. Q.B.); *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, ss. 96(3), 323(1) and 330; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended, s. 227.1; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 128; *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Co.* (1978), 23 N.B.R. (2d) 261 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301 (Ont. Bktcy.); *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.* (1992), 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.) [1992 CarswellOnt 4933 (Ont. Gen. Div.)]; *Weaver v. Cahill*, 2011 ABCA 290 (Alta. C.A.); *R. v. Cahill*, 2006 ABCA 119 (Alta. C.A.).

16 *By the Respondent, Margaret Cahill: Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.), *Bennett on Receiverships*, Second Edition, pages 130-132; *Bennett on Receiverships*, Second Edition, pages 138-140; *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Murphy Oil Co. v. Predator Corp.* (2002), 7 Alta. L.R. (4th) 369 (Alta. Q.B.); *Spartan Drilling Ltd. v. Snowhawk Energy Inc.* (1986), 46 Alta. L.R. (2d) 67 (Alta. Q.B.); *Kumra v. Luthra*, [2010] A.J. No. 1581 (Alta. Q.B.); *Citibank Canada v. Calgary Auto Centre*, [1989] A.J. No. 347 (Alta. Q.B.); *Alberta Health Services v. Networc Health Inc.*, [2010] A.J. No. 627 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) (para 18); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, [2010] A.J. No. 1189 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] A.J. No. 358, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v. Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.) para 9; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.); *Goebel v. Edmonton (City)*, [2004] A.J. No. 193 (Alta. C.A.); *Monco Holdings Ltd. v. B.A.T. Development Ltd.*, [2005] A.J. No. 1218 (Alta. Q.B.); *Lindsey Estate v. Strategic Metals Corp.*, [2008] A.J. No. 1076 (Alta. Q.B.); *Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co.* (1993), 11 Alta. L.R. (3d) 222 (Alta. Q.B.).

17 *By the Respondent, Christopher Cahill (Sr.): BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

18 *By the Inspector: Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 (Alta. Q.B.). *Consolidated Enfield Corp. v. Blair*, 1995 CarswellOnt 1067 (Ont. Div. Ct.); *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2005 CarswellOnt 2193 (Ont. S.C.J.)

19 *By the court: Leggat v. Jennings*, 2013 ONSC 903 (Ont. S.C.J.); *Nicolas c. Perrier*, 2012 QCCA 99 (Que. C.A.); *St-Germain c. St-Germain*, 2011 QCCA 608 (Que. C.A.); *Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.*, 2013 ONSC 4194 (Ont. S.C.J.); F. Bennett, *Bennett on Receiverships*, 3rd ed., 2011, Carswell

Appendix A: Sections 242 and 243 of Alberta's *Business Corporations Act*

Section 13(2) of Alberta's *Judicature Act*

1. Background

a) Factual

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20 In March, 2012, under the authority of ss. 242 and 244 of Alberta's *Business Corporations Act* and s. 13 of Alberta's *Judicature Act*, and claiming oppression, Gerald Murphy brought an originating application in his personal capacity and in his capacity as trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust, hereafter "the Trust", to appoint a receiver-manager of the CCS Group of companies, to rectify the registers and records of the CCS Group to reflect that Murphy is the sole shareholder of the CCS Group, and to compensate himself for loss caused by the oppressive conduct of the respondents. This special chambers application is for the appointment of an interlocutory receiver-manager in these proceedings.

21 Between 2006 and 2008 the Trust invested between $9 and $16 million dollars in an Alberta group of companies, the CCS Group. The exact amount of the investment is known to the parties but is not repeated here because of privacy issues relating to the potential marketing of the properties. The money invested in the CCS Group was part of the proceeds of the sale by Gerald Murphy of his interest in a family-run salvage business in Ireland. Gerald Murphy is the sole funder of the Trust and the Trust is essentially the sole capital funder of the CCS Group.

22 Margaret Cahill, Gerald Murphy's older sister, had emigrated to Canada with her family in the late 1970s. In 2006, she had no experience in the management of a junk yard or a salvage yard, and, indeed, no experience in the management of a large commercial enterprise. She is, nevertheless a woman of ability, having trained as a nurse.

23 Margaret Cahill's husband, Christopher Cahill Sr., read law at Trinity in Dublin. However, there is no evidence that he was ever admitted to the practice of law either in Ireland or in Canada.

24 Although Gerald Murphy, or his representatives and agents, has visited the Edmonton business on a few occasions, Gerald Murphy continues to reside in Ireland.

25 In 2006, Gerald Murphy, an adult person with no disabilities, executed documents which established a share structure in the CCS Group in which Margaret Cahill, Gerald's sister, and Christopher Cahill Sr., Margaret's husband, each owned 10% of the equity shares and the Trust owned the remaining 80% equity shares, but Margaret and Gerald together owned 50% of the voting shares and the Trust owned the remaining 50%. Amongst the various documents Mr. Murphy executed when the company structure was set up was a Unanimous Shareholders Agreement which, among other terms, required the parties to arbitrate disputes:

> **8.02 Arbitration**
>
> If at any time during the continuance of the Corporation or after the dissolution or termination thereof, any dispute, difference or question shall arise between the Shareholders touching the Corporation, or the amounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning or effect of these presents or anything herein contained, or the rights or liabilities of the parties under this agreement or otherwise in relation to the premises, then every such dispute, difference or disagreement shall be referred to a single arbitrator, if the parties agree upon one, but should the parties be unable to agree upon the identity of such single arbitrator, then each such dispute, difference or disagreement shall be referred to a single arbitrator, to be appointed by a Judge of the Court of Queen's Bench of the Province of Alberta pursuant to *The Arbitration Act* of Alberta and every award or determination thereof shall be final and binding. Any arbitrator under this clause shall not be bound by legal precedent, nor by the rules of evidence or procedure. He shall be bound to impose the solution which is most equitable, having regard to the terms hereof, under the circumstances, and every award or determination so imposed shall be final and binding.

26 Gerald Murphy swears that he did not read any of the documents he signed, that he was not aware of their contents, and that in signing every document that was put before him he was relying on his lawyers and on his brother-in-law, Christopher Cahill Sr. - as a person who had represented to him that he was a practising lawyer, as a fellow trustee of the Trust, and as a member of the family. Mr. Murphy maintains that the documents were not explained to him by his then law firm, that he did not retain copies of the documents that he signed and that he never received the advice of the Trust's Irish lawyers with respect to those documents. Because he asserts that the USA is not binding on him, he has declined to access the arbitration provisions of the USA to resolve any corporate disputes he had with the Cahills.

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27 Mr. Murphy swears that he first became aware of the share structure in the CCS Group in 2008. In that year, his relationship with his sister changed from one of trust to one of contestation. For example, in the original corporate records, Mr. Murphy agreed to dispense with an auditor and with an annual meeting and also waived receipt of financial statements; by 2008, Mr. Murphy was demanding financial disclosure. Mr. Murphy initiated proceedings with respect to the share structure of the Group in 2010; he asserts that the period between 2008 and 2010 was taken up with settlement negotiations between himself and the Cahills.

28 After the relationship with his sister became acrimonious, the CCS Group received an unsolicited offer to purchase one of the three groups of real properties owned by them. The amount of the offer was for one property and, had the offer been accepted, it would have equalled more than half of the total amount of money invested by Mr. Murphy in the companies. Mr. Murphy refused to accept the offer.

29 In 2011, the parties agreed to the appointment of Deloitte, as a consultant to Mr. Murphy, and became vested with the role of making inquiries into various matters relating to the companies. The type of information requested by Deloitte included financial statements, real estate appraisals, corporate income tax returns, general ledgers, HR information about management and employees, inventory, insurance coverage, management fees, etc. From the beginning, there were difficulties in obtaining the requested information. For example, as a result of water damage to the premises in February 2011, it was not possible for Deloitte to actually work at the premises occupied by the companies. Deloitte eventually reported that it had not been able to obtain all of the information which it had requested.

30 In August, 2012, Mr. Murphy asked the court for additional relief, including the appointment of an interim receiver-manager. Although that relief was denied, the court did appoint an Inspector, BDO Canada Ltd., whose task was defined, in general terms, as reviewing and assessing the CCS companies' current and historical financial position and historical operating results; reviewing and assessing the group's accounting and control procedures with respect to accounts receivable, accounts payable, inventory, and in general; and, attempting to address the questions and issues arising from the Deloitte report. One of the terms appointing the Inspector provided that the Inspector's reports would be sealed. The Inspector's First Report was presented to the Court on November 22, 2012. That report stated that, despite often repeated requests for information, the information had "generally been slow in delivery, and a significant amount of information remains outstanding as at the Cut-Off Date": para. 11. The report also continues, in para. 12, however, that "there does appear to be some merit to the concerns raised by the Management of the CCS Group"; those concerns were identified by the management as: shortage of staff, limited knowledge/expertise in the area of accounting; the use of an external accounting firm for some aspects of the information requested, including compilation of financial statements and preparation of tax returns; pressures on existing personnel to comply with information requests in relation to the ongoing legal dispute; a power outage in the week of October 9, 2012 which caused the group's computer network to crash and delayed matters for approximately one week; and, the demands of ongoing management. In addition, the Inspector fairly observed that, despite requests made by it to Deloitte to obtain from Deloitte the information which it had already received from the management of the companies, the Inspector only received the information from Deloitte on October 10, 2012. The Inspector was "hesitant to try and continue the review without first having access to, and reviewing the information previously provided to Deloitte". Nevertheless, the Inspector attempted to retrieve information from the management of the group which it had previously provided to Deloitte; this "required a tremendous amount of time and effort by both the Inspector and the CCS Group": para. 13. Nor surprisingly, the CCS Group was "not pleased with the Inspector's numerous requests to provide information that they indicated had been provided previously.": para. 14. As a result of these experiences, the Inspector instituted a "Cut-Off Date" of October 23, 2012. Its First Report was based on information received from the CCS Group up to and including the Cut-Off Date.

31 On January 31, 2013, this court granted an order that required the Inspector to provide the CCS Group by February 4, 2013 with a comprehensive written list of outstanding issues from the Inspector's own work and from the work undertaken by Deloitte; that authorized the Inspector to attend the Group's premises on February 5, 2012 to attempt completion of the outstanding internal control testing and documentation referred to in the First Report, and that required the CCS Group to provide responses to the Inspector by February 14, 2013. In the event, the Inspector granted some short extension to the time allowed to the CCS Group to answer the Inspector's queries. In its Second Report, tendered on March 8, 2013, the Inspector commented:

> 20. Generally speaking, despite the efforts of the CCS Group, and the extension of time granted by the Inspector, there

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> still remains a significant amount of information outstanding and questions to be addressed/resolved as of February 19, 2013, (hereinafter referred to as the "Second Cut-Off Date"). Furthermore, the information supplied by the CCS Group up to the Second cut-Off Date as not materially altered the information previously reported to the Court by the Inspector to date.

32 The Second Report states that the bulk of the information requested in the Deloitte Report has been provided: see para. 36.

33 At paras. 22 and 23 of the Second Report, copies of which are in the hands of each of the parties, the Inspector sets out three key facts and an opinion with respect to the issues which it was asked to address. Because of privacy concerns relating to the market position of the companies, the court will not reproduce the Inspector's identification of key facts or its opinion. However, it is crucial to note that the Inspector identifies systemic problems rather than problems attributable solely to Margaret Cahill. Indeed, Margaret Cahill is not in a position to unilaterally remedy the problems identified by the Inspector. On the contrary, one of the main problems identified by the Inspector is a problem to which Margaret Cahill proposed a solution some time ago, but which Gerald Murphy declined to accept.

34 The Inspector's Concluding Comments in the Second Report include the following:

> Notwithstanding the significant volume of information that remains outstanding as at the Second Cut-Off Date, at this stage in the proceedings, the Inspector feels that continued work and expense under its current mandate will not result in any additional benefit to the Court or the Parties as it is clear that ....

35 For the privacy reasons mentioned earlier, the court does not reproduce all of the Inspector's Comments. Nonetheless, it is clear that one of the problems identified by the Inspector is the significant weakness in the Companies' internal controls. The cause of that weakness is not spelled out and is not attributed to delinquency on the part of Margaret Cahill.

36 In addition to the current proceedings, there has been parallel litigation involving the same parties involving, on the one hand, an apartment building in Edmonton, and, on the other, debt actions alleging a failure of the CCS Group to repay a debt owing to the Trust. In July 2012, Mr. Murphy made a first receivership application, which was dismissed: see 2012 ABQB 446 (Alta. Q.B.) . The existence of parallel proceedings can legitimately be taken into account when assessing the ability of the respondents to answer requests for information from Mr. Murphy at the same time as it was defending other lawsuits.

b) Legislative

37 The oppression provisions of the *Business Corporations Act* and the authority under the *Judicature Act* to appoint a receiver or receiver manager are set out in Appendix A.

2. How should the material contained in the Inspector's Third Report be treated?

38 On June 11th, 2013, i.e. 5 days after the conclusion of the three day special chambers application in the month of June, the Inspector was advised by Mr. Murphy that Mr. Murphy had become privy to new information relative to the affairs of the companies which was relevant and material. The Inspector contacted my office stating that the new information raised serious concerns with respect to the information previously provided by the Inspector. Discussions then ensued with all the parties relating to this development.

39 Although there is not yet any evidence before the court with respect to the exact circumstances concerning the tendering of this new information, it appears that the individual who brought the information to Mr. Murphy had been, from some date which is not yet clear on the information before the court up to the time of the special chambers hearing in early June, employed on a contract by the CCS companies to assist in answering various queries from the Inspector, especially with respect to the period during which she had been employed by the companies. It may be that, shortly after the June

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special chambers meeting, she had had a meeting with the lawyer for Ms. Cahill and that a difference of opinion had arisen between them. In any event, the individual shortly after June 6 attended at the offices of the lawyers for Mr. Murphy.

40 On June 12, 2013, this individual entered into an agreement of indemnity with Gerald Murphy's Children's Parallel Life Interest Settlement Trust pursuant to which the individual requested, and the Trust agreed to provide: the costs of fully furnished accommodation for a period which has been redacted from the agreement included in the Third Report, must which term "may be extended as necessary depending on the status of the lawsuit and upon the request of the Indemnified Party to the Indemnifier; the costs of a rental vehicle for a term similar to the term relating to the accommodation; all costs and damages which may be incurred by the Indemnified party related to any lawsuit commenced by any of the Cahills relating directly to the provision of the information; and, all legal fees and disbursements for the provision of independent legal advice to the Indemnified party. The solicitors for the Trust in these proceedings executed the agreement on behalf of the trust.

41 The solicitors for Mr. Murphy and the Trust have advised this court that they asked the individual to present her information to the Inspector direct, rather than through the law firm representing Mr. Murphy, because they were concerned that Rule 4.03 of the Law Society of Alberta's Code of Conduct may have prevented them from interviewing the witness themselves. In particular, the law firm was concerned about the Commentary to the rule which highlights the fact that, although there is generally no property in a witness, there are certain recognized exceptions to that rule.

> **Interviewing witnesses**
>
> 4.03 Subject to the rules respecting communication with a represented party set out in Rule 6.02 (8-10), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter.
>
> **Commentary**
>
> There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.
>
> In Alberta, there are certain recognized exceptions to the rule:
>
> . . .
>
>> (b) Decision makers within a corporate client. Since a corporation must act through human agents, it is necessary to identify those within a corporate client having authority to act on its behalf. Generally, all directors and officers, as well as management level personnel with decision-making authority, have sufficient identity with the corporation to be considered equivalent to the client for the purposes of this Rule.

42 In this context, it is potentially useful to note that the person who presented herself to Mr. Murphy's lawyer had been, until 2011, employed as a book-keeper for the companies. She had never been a director or officer of the companies. On the other hand, on an undated letter sent some time after December 3, 2010 but prior to the termination of her initial employment, she had sent a letter on CCS letterhead in which she had signed herself "Executive Assistant". Also in this context, it might be useful to note that the Inspector referred to the management team with whom it met as being composed of Margaret Cahill and Mr. Filipiak who, in August 2011, appears to have assumed the position previously occupied by the individual who went to Mr. Murphy's lawyer. It will be seen, therefore, that the concern expressed by Mr. Murphy's lawyer in dealing with this potential witness was understandable.

43 On July 16th, 2013, the Inspector provided to the court and to the parties a Third Report consisting of allegations made by a former book-keeper of CCS, whose employment with the companies had ceased in 2011. Recently, the individual had been retained by Margaret Cahill, on a contract basis, to answer the various questions put to the management of the CCS

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companies by the management. That individual told the Inspector that while she had not provided erroneous information to the Inspector in her previous dealings with them, she had deliberately withheld relevant and material information, in part at the request of Margaret Cahill and Chris Cahill Jr.

44 The Inspector prudently advised the court that it had not had either the time or the opportunity to test the allegations made by the former book-keeper. Indeed, in response to the court's questions at the August 6 hearing, the Inspector candidly advised that there was relatively little that it could do in the relatively short term to assess the validity of the allegations made by the former book-keeper.

45 It goes without saying that the Inspector acted in an entirely appropriate fashion in ensuring that the court had access to the hearsay material with a view to determining what use should be made of that material.

46 As to the use which the court should make of the Third Report, Ms. Cahill acknowledged, on the authority of *Principal Group Ltd.*, that even though information in an Inspector's report was, typically, hearsay, it was the kind of hearsay which could be tendered in evidence and considered by the court.

47 This raises a procedural issue that is relevant to the issue of contempt which must be addressed by the court. The *Principal Group Ltd.* decision emphasizes that an Inspector's report, albeit hearsay, can become evidence. While Canadian case law generally holds that Inspectors, as court officers, are to be shielded from cross-examination on their reports - see, for example, *Consolidated Enfield Corp.*, that does not mean that the reports should not be filed as court exhibits. Here, because of an earlier decision in these proceedings which provided for the sealing of the Inspector's reports, the Reports have not in fact been introduced as exhibits. The court hereby orders that each of the three reports shall forthwith be entered as exhibits in the proceedings, and, according to the order of Lee J., shall be sealed until further order of the Court.

48 Although the respondents do not object to the Court's consideration of the Inspector's Third Report, they ask the court to consider the content of the report to be mere hearsay, even contested hearsay, and to give it no weight.

49 Mr. Murphy asks the court to give full weight to the hearsay evidence contained in the Inspector's report. He states that the court has not required other individuals to provide sworn evidence before it could be considered by the Inspector.

50 I have concluded that, because they are not sworn and been subject to cross-examination, I should give no weight to the allegations made by the CCS's former book-keeper. Although an Inspector's report is admissible, even if it contains hearsay, the court retains the discretion to give the hearsay content of the report little weight: *Envirodrive Inc.*, at para. 38.

51 In coming to that conclusion, I have taken the following into account:

• although it is obvious that the Inspector has not required all individuals who have provided information used as the basis for the First and Second Reports to provide that information by way of affidavit or equivalent. However, much information in these proceedings, and certainly most of the information which is contested, has in fact been provided by affidavit or equivalent and there has been the opportunity to cross-examine on that evidence. Both Mr. Murphy and Ms. Cahill have been subject to questioning with respect to the affidavits they have provided;

• the evidence before the court on this application establishes that there was a personal relationship between the former book-keeper and Chris Cahill Jr. which may provide an explanation for the former book-keeper's current information. This is not a situation where the source of the new information is disinterested;

• on the basis of the very information provided by the former book-keeper to the Inspector, that individual has acknowledged that, in the past, she has not been forthright with the Inspector. When a witness admits to having deliberately withheld evidence in the past, that individual's current statements must be assessed in light of her acknowledged past lack of candour. It is reasonable to require the new information to be provided under oath and to be subject to questioning.

3. Should Ms. Cahill, or her lawyer, be found in contempt, and sanctioned, for having disclosed to Chris Cahill Jr. the contents of the Inspector's Third Report which dealt principally with allegations against Chris Cahill Jr.?

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52 I have concluded that, in the circumstances here, no finding of contempt should be made with respect to the distribution to Chris Cahill Jr. of the Inspector's Third Report.

53 The hearsay information which constitutes the content of the Inspector's Third Report centers on Chris Cahill Jr. It appears that the individual who provided the information to the Inspector had had at the very least an emotional, as opposed to a purely professional, relationship with Chris Cahill Jr. Although the information provided to the Inspector relates in part to Margaret Cahill, the focus of the disclosure is on Chris Cahill Jr. and the allegations against him of assault and of other personal impropriety as well as of business impropriety. Clearly, Margaret Cahill provided her son with a copy of the Third Report; indeed, Chris Cahill Jr. - who is identified in the materials before the court as part of the management team of the CCS Group -has filed affidavits responding to the allegations made in the Third Report. The fact that a person affected by a sealing order would likely have obtained disclosure of the sealed document in the interests of fairness had an application been made to lift the order does not resolve the issue of whether a contempt of the order has occurred, although such a background may affect the sanction imposed for contempt. However, before getting to that issue, the court must begin by determining whether the circumstances here justify a contempt citation.

54 The test for contempt has recently been articulated by Quinn J. in *Cassels Brock & Blackwell LLP* - a decision chosen only because of its recency -in a format which, in my view, represents the weight of the jurisprudence on the issue:

> 60 In *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27, a three-pronged test for contempt was articulated: (1) "the order that was breached must state clearly and unequivocally what should and should not be done"; (2) "the party who disobeys the order must do so deliberately and wilfully"; (3) "the evidence must show contempt beyond a reasonable doubt."
>
> . . .
>
> (c) is the Order for Assessment clear and unequivocal?
>
> 62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:
>
> "It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see *Bell ExpressVu Limited Partnership v. Torroni* (2009), 94 O.R. (3d) 614 (C.A.), at para. 22, citing *Hobbs v. Hobbs* (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.
>
> "The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.), at para. 13.

55 In the circumstances of this case, I have concluded that the sealing order was not sufficiently clear and unequivocal so as to provide a basis for a contempt finding. As I understand it -in the absence of a transcript of the proceedings that led to the making of the sealing order - the sealing clause of the order appointing the Inspector was not the subject of real discussion amongst the parties. No notice of the application to request a sealing order was brought pursuant to the provisions of R. 6.29 for a restricted court access order; therefore, there was no elucidation on the record of the intended objective of the sealing order. In those circumstances, the parties may understandably have been of the view that the obligation to prevent disclosure of the order and its terms rested essentially on the Inspector. Such an interpretation would have been reasonable, given the type of information which the Inspector was to uncover, relating for example to real estate appraisals; such information, if publicly disclosed, might have put the companies at a disadvantage in dealing with the properties and the corporate disadvantage would have had negative consequences for all the shareholders.

56 Incidentally, the existence of the sealing order would also limit the Inspector's ability to approach outside sources for information. That reality is reflected in the Inspector's answer to the court's query about which, if any, of the allegations made in the Third Report could be effectively assessed by the Inspector: the Inspector could not, as suggested by Mr. Murphy, merely go to a lawyer and ask that lawyer if s/he is driving a vehicle leased to the companies, and, if so, under what

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authority.

4. What test applies to a request for the appointment of an interim receiver-manager?

57 Mr. Murphy asserts that a strong *prima facie* case of oppression constitutes a sufficient basis for the appointment of an interim receiver- manager under the *Business Corporations Act* and that a test comparable to the tripartite test for interlocutory injunctive relief is the test that should be applied in relation to the *Judicature Act* application. Mr. Murphy adds that deadlock is sometimes mentioned as a justification for the appointment of a receiver-manager and that Lee J. has, in these very proceedings, made a finding of deadlock even though that finding did not result in Lee J.'s acquiescence to the request for the appointment of an interim receiver-manager.

58 The respondents assert that the test for the appointment of an interim receiver-manager under the *Business Corporations Act* is akin to the test for the issuance of an interlocutory injunction, i.e. the tripartite test set out in *RJR-MacDonald Inc.*

59 In essence, the difference between the parties on this issue is whether proof of irreparable harm is a necessary hurdle for an applicant requesting the relief requested here.

60 In my view, the respondents are more nearly correct on this issue than is the applicant: as the applicant himself recognizes, this court has, in *MTM Commercial Trust*, noted with approval the decision in *Anderson v. Hunking* [2010 CarswellOnt 5191 (Ont. S.C.J.)] which stated, among other things, that "the test for the appointment of a receiver is comparable to the test for injunctive relief". Indeed, it may be useful to quote from that decision more extensively:

> 15 Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> > (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
> >
> > (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
> >
> > (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
> >
> > (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
> >
> > (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;
> >
> > > (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.);

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(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.

64 In order to provide as straightforward as possible an expression of the legal test applicable here, I would slightly reframe the test in this way: An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, brought by a person who is not a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the tripartite test for obtaining an interlocutory injunction: it must establish that there is a

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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. Exceptionally, the dictates of fairness may be so overwhelming that interim relief is justified even where one or more terms of the tripartite test have not been met.

65 In coming to the above-noted formulation of the test, I begin with the view that the fact that what is requested in interlocutory relief, i.e. relief without hearing the substantive application on the merits, is a key factor which cannot be ignored.

66 Next, I emphasize that the remedy requested by the applicant is an important component of the test which the applicant has to meet: what must be proved in order to obtain the appointment of an inspector can, in my view, differ from what is necessary to obtain the appointment of a receiver-manager. Indeed, because the role of an Inspector is so markedly different from that of a receiver-manager, the evidence required for the appointment of an Inspector can legitimately, as Lee J.'s decision in this very case has already demonstrated, be materially less than the evidence required for the appointment of a receiver-manager.

67 Nor, in my view, should a court generally explore on its own whether a remedy set out in 242(3) other than the remedy requested by the applicant should be awarded: the parties opposite only have notice of, and can only be expected to respond to, a specific application. It would be unfair to the respondents to consider granting relief which had not, at least impliedly, been requested. Moreover, if a court were, for example, to appoint a Monitor where an applicant had requested the appointment of a receiver-manager, the court might only be imposing an onerous expense without any commensurate benefit on the applicant.

68 It is true that, in *HSBC Capital Canada Inc.*, the court described the test under then s. 234 of the Business Corporations Act as "a strong *prima facie* case": para. 44. There was no consideration in that case of irreparable harm or of the balance of convenience. However, to my mind a crucial difference between the situation in that case and the one here is that, in that case, the actual relief requested was "only" the appointment of an Inspector. In other words, the relief that was granted in that case was exactly the relief which has already been granted in this case prior to the bringing of this application. The decision in that case cannot, therefore, serve as justification for the appointment of an interim receiver-manager in this case. The difference is that the applicants now want additional relief - the appointment on an interim basis of a receiver-manager, and the question is whether the same test that applies to the appointment, on an interim basis, of an inspector also governs the appointment of an interim receiver-manager. In my view, the answer is no.

69 In concluding that the nature of the relief requested is a factor in determining the test that must be met, I also take comfort in McDonald J.'s decision in *Citibank Canada*, where the court again referred to *Bennett* as authoritative, but added the following at para. 31:

> In the present case, I think that, again bearing in mind that the <u>limited order</u> which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, <u>the order will not irreparably harm</u> the interests of the defendants.
>
> (Emphasis added)

70 Similarly, in *Leggat*, a recent Ontario court decision, Coats J. outlined the varying circumstances which must be taken into account in determining what test the applicant must meet to justify the relief:

> 24 The Respondents have filed several cases with respect to the test to be applied for interim relief. In my view, none of these cases are of assistance in the determination of the issues before me. In *1384034 Alberta Ltd. v. 1180263 Alberta Ltd*, 2011 ABQB 599, the Court granted some interim relief, including access to financial statements of the corporation consisting of weekly accounting reports and monthly financial statements. No test for interim relief was articulated. In *Dee Ferraro Ltd. v. Pellizzari*, 2010 ONSC 3013, again no test for interim access to financial records was set out. On a short motion list it was not possible to make such a determination. In *Padda v. 2074874 Ontario Inc.*, 2010 ONSC 2872, the interim relief requested was the appointment of a receiver. This is completely different than a request for a declaration enforcing a statutory right to access to books and records. I do note that in *Padda v. 2074874* at para. 20 it is clear that Justice Gray had ordered as a term of the previous adjournment that business records in the possession of

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either party were to be provided to the other party forthwith. In *Le Maitre Ltd. v. Segeren*, [2007] O.J. No. 2047 (SCJ) the interim relief sought was to restrain the Respondents from concluding a transaction. The relief sought before me is completely different. The Applicants are not seeking interim relief under the oppression remedy section at this stage of the proceeding. The Applicants are seeking a declaration permitting access to books and records, documents to which Mr. Leggat as a director has a statutory right to access. The relief is available under s. 247 of the CBCA and this issue easily lends itself to summary disposition. The primary issue before me is not in the nature of an injunction. In *PADP Holdings Inc. v. Information Balance Inc.*, [2006] O.J. No. 5518 (O.S.C.), the primary interim relief sought was the reinstatement of employment and the standard test for injunctive relief was applied. Once again, the primary issue before me is not of an injunctive nature.

71 In *Paragon*, adopting a list established in *Bennett on Receiverships*, 2nd ed., the court approved some factors which a court may consider in determining whether it is appropriate to appoint a receiver. At least three points can be made in relation to that decision: first is that the reference to Bennett, which is undoubtedly useful, should be updated to the 3rd ed, 2011, where the comparable list is found starting at p. 156. There are a few additional comments made in the third edition which may be of interest here: the current 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". From that perspective, the factor appears to be an example of what might not constitute irreparable damage. One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds "... where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity". In reviewing the 18 factors currently mentioned in Bennett, I have concluded that each of those factors, other than factor 10 which emphasizes that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly and part of factor 18 which refers to the principles of equity, can be seen as a particularization of one of the three branches of the tripartite test; factor 10 and part of factor 18, while not part of the tripartite test constitute the often only implied basis for granting equitable relief such an the appointment of an interlocutory receiver. As to the remainder of the factors, irreparable harm is not only mentioned as the first factor, but is also explicitly addressed in factors 2 and 5. The balance of convenience is not only an explicit factor on its own, but also constitutes the substance of factors 11, 12, 14, 15, 16 and 17.

72 Second, it must be noted that, in *Paragon*, the application before Romaine J. was brought by a security holder in reliance on its explicit right in the security documents to have a receiver appointed, a situation which does not apply here. Bennett emphasizes that, where a security holder's instrument provides for the appointment of a receiver, the security holder is *prima facie* entitled to that relief on proof of the required default.

73 Third, Bennett does address the type of situation which has arisen here, i.e. one where the applicant is not a security holder relying on an instrument. At page 159 of the third edition, the learned author states:

> If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v Canada (Attorney General)*.

74 The reference at p. 159 to "creditor" can, in light of the case law, for example *Segeren* which is discussed herein, apply to a person with Mr. Murphy's status. This conclusion does, however, raise another issue: the reference in the Bennett text at the locations indicated above refer essentially to the appointment of a receiver at the request of a security holder. Indeed, most of that text deals with the security holder situation. However, some comments about the appointment of a receiver under business corporations legislation can be found commencing at p. 823 of the text. In dealing with the grounds of appointment

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of a receiver under business corporations legislation, the text states: "The test ... requires the applicant to have a strong *prima facie* case but not to the same degree as in the test for a *Mareva* injunction. Much of the case law relating to situations where a liquidator would be appointed can be considered in an application under section 241 (of the *Canada business Corporations Act*). For example, 'deadlock companies' may be considered unfairly prejudicial to each side, such that a court may appoint a receiver for the protection of all parties." There is no mention at that point in the text of the *BCE Inc., Re* oppression decision of the Supreme Court; indeed, it might be fairly said that the Bennett text does not focus on receiverships under business corporations legislation.

75 In *Kumra*, a similar, albeit shortened, set of Bennett factors is set out at para. 61.

76 The decision of our Court of Appeal in *Chow* merely confirms the appointment of a receiver-manager without analysis of the justification for that appointment because justification was not necessary in the appeal decision. Similarly, the decision in *Alberta's B.E.S.T. Inc.* is not of assistance in determining the appropriate test because that decision does not deal with the appointment of a receiver-manager and that decision relies on a decision of our court in a case management situation where the case manager ordered 5 representative claims to be tried - a situation which is in no way comparable to the situation here.

77 The legal analysis in the *Such* decision on which the applicant relies heavily has been overtaken, so far as the legal content of oppression is concerned, by the Supreme Court of Canada decision in *BCE Inc., Re*. Insofar as the interlocutory nature of the remedy is concerned, the judge in that case did not analyse the requirements for obtaining an interlocutory remedy; it seems likely, given the analysis that was made, that the judge merely came to the conclusion that, in contemporary terms, the dictates of fairness were overwhelming. In other words, that decision is important insofar as it is fact-driven, not for the legal analysis of the remedies available.

78 In my view, in light of the evidence in this particular case which will be reviewed shortly, it is not necessary to determine whether or not the existence of deadlock is a sufficient basis for the appointment of an interim receiver-manager if the tripartite test cannot be satisfied.

79 Finally, I note that - for reasons that are obvious - an undertaking in damages is typically required on applications for interlocutory injunctions in commercial matters. I agree with Romaine J's approach in *MTM Commercial Trust* that it is equally useful to establish such a standard with respect to the interim application for a receiver-manager in a corporate context.

5. How does the test apply in the circumstances here?

80 Before commencing an analysis of each branch of the tripartite test and of the dictates of fairness in the situation here, I remind myself that the remedy requested is equitable relief, in other words that the court has a discretion to grant the relief requested - rather than an obligation to grant the relief upon proof of the underlying requirements - although that discretion must, of course, be exercised judicially. I also remind myself that the relief requested here is interlocutory in nature, i.e. it is requested prior to the trial of highly contested factual issues.

a) The tripartite test

(i) Is there a serious issue to be tried?

81 There are two main issues that must be tried here: has Mr. Murphy been oppressed by the respondents in the way in which they have conducted the CCS business and has he been oppressed by the respondents in the way in which the share register and corporate documents have been executed..

82 All parties agree that there are serious issues to be tried.

83 The point of this branch of the test is to weed out applicants for interlocutory relief who don't have a serious claim to the final relief which they are seeking. This case is somewhat unusual in that, although it is clear that Mr. Murphy has serious grievances which must be explored relating to the way in which his multi-million dollar investment is being managed, it is

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equally clear that the respondents have serious grievances which must be explored relating to the way in which the corporate structure is being used. The application is ironic: Mr. Murphy complains, essentially, about the lack of record keeping by Margaret Cahill and her management, whereas Margaret Cahill complains that Mr. Murphy refuses to recognize the corporate records which are extant.

84 What is also clear is that this is not a case like *Seymour Resources Ltd.*, cited by the applicant, where the court is able to make determinations on the basis of affidavit evidence. On the contrary, the affidavit evidence here is highly contested.

85 As explained above, in my opinion contemporary Canadian corporate law does not suggest that an applicant who establishes a strong *prima facie* case of oppression can expect that a court will grant the request for the appointment of an interim receiver-manager. On the contrary, for the reasons given above, I am of the view that the real test is, on the one hand, a lesser one than the one advanced by the applicant: an applicant need only prove that there is a serious issue to be tried, not that the applicant need prove a strong *prima facie* case of oppression. On the other hand, however, the real test is more onerous than the one advocated by the applicant: in addition to the serious issue branch, an applicant must also prove irreparable harm and the balance of convenience.

86 The applicant has greatly emphasized the evidence which he asserts constitutes a strong *prima facie* case of oppression. Because of the view which I have taken of the applicable law, I will not exhaustively review the applicant's argument in support of his strong *prima facie* case argument. As I have said, Mr. Murphy has amply established that there are serious oppression issues to be tried. Really, no more needs to be said with respect to the first branch of the tripartite test. Nevertheless, I will add that all of the evidence advanced by Mr. Murphy in relation to the establishment of oppression - the failing to hold formal shareholder meetings, the failure to provide information, the loss of money, the misuse of corporate assets, the way in which private residences were acquired, the payment of professional fees which may not relate to corporate business, incurring penalties for late payment of taxes, shoebox accounting generally, etc., etc. - does not constitute in the circumstances here, a strong *prima facie* case of oppression. Rather, in light not only of the affidavit evidence provided by the respondents but also the comments of the Inspector with respect to the Inspector's assessment of the respondents' responses, the court is left with only the realization that the oppression issue must be tried because there are serious credibility issues on both sides. To take one small example: Mr. Murphy complains about his inability to get financial information about the companies. However, he does not acknowledge the fact that he originally was content to receive only the barest possible information about the operation of the companies and that when his change of attitude arose he often made it impossible for the shareholders to act and for there to be effective interaction between the directors. To take another small example: even if it were true that the companies initially paid for some expenses that were later properly characterized as personal rather than corporate expenses, the initial recording of expenses as corporate does not, by itself, constitute *prima facie* evidence of oppression. It only constitutes evidence of possible oppression which must be tried.

87 In the end, however, having recognized that there are serious issues to be tried, Mr. Murphy cannot expect to receive the relief which he seeks unless he satisfies the remaining two branches of the tripartite test.

(ii) Will Mr. Murphy, or the Trust, suffer irreparable consequences if an interim receiver-manager is not appointed?

88 Mr. Murphy argues that he and the trust are at risk of irreparable harm if an interim receiver-manager is not appointed.

89 I cannot accept that argument.

90 The first aspect of this issue is the risk of need for immediate corporate action. No such need is apparent on this application. The companies have neither initiated actions nor are being compelled to take action in the relatively near future, and certainly not before the triable issues could be fully heard on their merits.

91 In this context, I note that the applicant has complained of the lease proposal authorized by Margaret Cahill in relation to some of the lands owned by the companies. The applicant strongly objected to the leasing initiative, even though he placed Margaret Cahill in charge of the day to day operation of the companies, even though the leasing of the property would presumably conform to the overall objective when the applicant first invested money in the Edmonton properties, and even though the applicant refuses to take the steps set out in the USA to resolve disputes between himself and Margaret because he denies the validity of the USA which he appears to have signed. At his request, this leasing initiative has now been

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abandoned. Nothing of importance is therefore on the horizon in terms of the need for corporate decision making.

92 The second aspect of this issue is the risk of financial loss if the relief requested is not granted. Mr. Murphy has not established that he or the Trust will suffer irreparable financial harm unless an interim receiver-manager is appointed. In coming to that conclusion, I rely on the following:

• Mr. Murphy's objective in funding the Edmonton investment is disputed. As strange as it may appear, it may be that Mr. Murphy was not concerned with an operating profit from the salvage business but was, instead, intent upon making a profit as a result of the increase in the value of the real property in which he invested. The evidence available on this application is not overwhelming on one side or the other of the objective issue. On the one hand, Mr. Murphy put his older sister who had no experience in the management of an operating salvage business in charge of the day to day operations of the business and invested heavily in land, but did not invest heavily in operating capital. On the other hand, Mr. Murphy did invest in acquiring machinery presumably for the better operation of the business. In any event, however, the opinion of the Inspector is that the business outlook for the companies is at least as dependent on the actions of Mr. Murphy as on the actions of Ms. Cahill. For example, the problem identified at para. 22(b) of the Second Report is, as to the first half of the sentence, something which may be attributable in part to Ms. Cahill, but, as to the second half of the sentence, is attributable to Mr. Murphy;

• the various real property appraisals provided by the parties establish that, even using the lowest appraisals, the lands have appreciated considerably in value since the date of investment. Indeed, an unsolicited offer for the purchase of one of the three property groups establishes that the appraisals are, generally, reliable; had Mr. Murphy accepted the offer for the one property, the companies would have recovered a little over half of the original investment. There is no suggestion in any of the materials before me that the land values are likely to decrease in the foreseeable future;

• given the increase in the value of the property owned by the companies, and the apparent equity interest of Margaret Cahill as shown on the face of documents apparently executed by Mr. Murphy, Ms. Cahill's equity stake in the companies is high enough that, if it were eventually found that she has caused financial harm to the companies, the damages found against her could be offset from her equity interest. Mr. Murphy suggests that an analysis of this sort is tantamount to condoning theft from the company; with respect, I disagree. I don't disagree with the principle that theft should not be condoned merely because the thief has the financial resources to repay the theft; the whole of the criminal law relating to theft and fraud makes that abundantly clear. The point on which I disagree is whether theft has been proved here. The evidence available on this application does not establish theft by Ms. Cahill from the company. I accept that the salvage business is a cash business and that such a business must, therefore, have adequate cash management systems and that this group of companies did not have such adequate systems. Whether that was due to ineptitude or lack of operating capital is not yet clear. Whether the vulnerability of the system to material misappropriation in fact came to pass is one of the questions of fact which remains to be determined.

93 In summary, therefore, I conclude that Mr. Murphy has not established that he and/or the Trust will suffer irreparable harm if an interim receiver-manager is not appointed.

(iii) Does the balance of convenience favour the appointment of an interim receiver-manager?

94 The balance of convenience does not favour the appointment of an interim receiver-manager. In coming to this conclusion, I rely on the following:

• the appointment of a receiver-manager would deal only with the management concerns raised by Mr. Murphy; it would not deal with the corporate structure concerns of the Cahills. Moreover, the information before the court on this application is that Mr. Murphy has access to considerable financial resources as established not only by the size of his initial investment in the CCS Group, but also by the indemnity agreement which he has made with the former employee of the CCS Group. In comparison, although the evidence on this application is that Ms. Cahill has clear title to the home in which she resides, she has no source of income other than the full time work she has done for the CCS Group since 2006. If Mr. Murphy were to be successful in obtaining the appointment of a receiver-manager, that official might conceivably terminate both Ms. Cahill's employment and that of her son Chris Cahill Jr. While Mr. Murphy would then

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have unimpaired resources to deal with the corporate structure dispute, the Cahills would find themselves with minimal resources with which to advance their position. Even though the Cahills have executed documents in support of their position, without significant financial resources to maintain their position in legal proceedings, they might not be financially able to put forward their best position;

• at para. 36 of the Inspector's Third Report, there is a comment about the financial position of the CCS Group. The exact words used by the Inspector are not reproduced here for the privacy concerns alluded to earlier. I accept the Inspector's assessment of the financial position of the CCS Group with respect to its ongoing operations; indeed, I am of the view that all of the information provided to the Inspector amply supports the Inspector's conclusion. It is true that an interim receiver-manager could do many things the Inspector cannot do. However, the appointment of a receiver-manager would not solve the crucial problem of the CCS Group which is the resolution of the dispute about the corporate structure;

95 In summary with respect to the tripartite test, although Mr. Murphy has satisfied the first branch of the test, he has failed to satisfy the remaining two branches.

b) The equitable issues

96 As indicated above, I am of the view that, in addition to the tripartite test, a court which is asked to appoint an interim receiver-manager for a corporation must also consider the equities, and not only the narrow legalities, of the situation. However, in my view the case law establishes that, with the exception of the potential relief from compliance with the tripartite test arising out of the application of equitable principles, the general approach to the appointment of a receiver-manager of a corporation under the provisions of the *Judicature Act* are, generally, the same as those which apply to the granting of such relief under corporate legislation.

97 I accept that another way of referring to the equitable issues would be to say that where the evidence of oppression is overwhelming, an applicant for relief in Mr. Murphy's position need not satisfy the tripartite test.

(i) Are the dictates of fairness so overwhelming that they require the appointment of a receiver-manager?

98 In my view, the dictates of fairness are not so overwhelming in the circumstances here that they compensate for Mr. Murphy's inability to satisfy the last two branches of the tripartite test.

99 In coming to that conclusion, I have taken the following into account:

• the reasonable expectations of the parties would not be served by the appointment of an interim receiver-manager. When Mr. Murphy appointed Ms. Cahill as the day to day manager of the CCS Group, he was aware of her lack of business experience. Since there is no evidence that, under Ms. Cahill's management, the CCS Group abandoned or modified the internal controls that were in place when Mr. Murphy acquired the businesses and there is no evidence that Mr. Murphy provided funding to improve the internal controls that were practicable given the operating structure at the time of the acquisition, it is not reasonable for Mr. Murphy to expect that Ms. Cahill would prove to be a sufficiently sophisticated manager to be able to deal adequately with an under-funded operation;

• the only deadlock which has arisen in the circumstances here has been created by Mr. Murphy. The executed documents relating to the corporate structure provide a mechanism for resolving deadlock - the decision of an arbitrator. It would be unfair for Mr. Murphy to both refuse to comply with executed documents which provide a mechanism for dealing with deadlock and at the same time to insist on receiving the benefit of a court order based on deadlock which he has created;

(ii) Timing

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100 Finally, I note that the applicant concedes that he could be ready for trial almost immediately. The respondents agree that they are also virtually ready for trial. This straightforward admission by Mr. Murphy attracts the application of the following commentary made by Sharpe J. in his authoritative text as reproduced in *Connelly*:

> 2.110 Ideally, the problem could be avoided were it possible to devise procedures to provide for immediate final resolution of such cases on the merits. However, in the absence of immediate and final resolution, the task of the court is to balance the risk of harm to the defendant, inherent in granting remedial relief before the merits of the dispute can be fully explored, against the risk that the plaintiff's rights will be significantly impaired in the time awaiting the trial.

101 Here, the fact that all parties agree that they can be ready for trial in very short order is a strong factor militating against the granting of interlocutory relief where there is no immediate danger to the applicant's interests and where the facts are so hotly contested that only a trial can safely resolve the contested issues.

102 In summary, therefore, the dictates of fairness are not so overwhelming in the circumstances here that they relieve Mr. Murphy with the obligation to satisfy the second and third branches of the tripartite test.

6. Costs

103 If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Application dismissed.

Appendix A

Sections 242 and 243 of Alberta's *Business Corporations Act* read as follows:

Relief by Court on the ground of oppression or unfairness

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

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

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

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

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

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

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

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(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by

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reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

Section 13 of Alberta's *Judicature Act* reads as follows; Mr. Murphy relies on 13(2).:

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.

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2010 ABQB 647
Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.a General principles

Business associations
II Creation and organization of business associations
II.2 Partnerships
II.2.b Relationship between partners
II.2.b.ii Membership
II.2.b.ii.A Introduction and expulsion

Contracts
VII Construction and interpretation
VII.11 Miscellaneous

Contracts
XIV Remedies for breach
XIV.6 Injunction

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

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Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles

Debtors and creditors --- Receivers — Appointment — General principles
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.

Contracts --- Remedies for breach — Injunction
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.

Contracts --- Construction and interpretation — Miscellaneous
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.

Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion
M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership

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Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

Table of Authorities

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

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — considered

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.) — referred to

Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd. (1997), 1997 CarswellAlta 1233 (Alta. Q.B.) — referred to

Janco (Huppe) v. Vereecken (1982), 40 B.C.L.R. 106, 1982 CarswellBC 500, 44 C.B.R. (N.S.) 211 (B.C. C.A.) — referred to

Kitnikone, Re (1999), 2 C.P.R. (4th) 86, 13 C.B.R. (4th) 76, 1999 CarswellBC 2114 (B.C. S.C.) — referred to

New Era Nutrition Inc. v. Balance Bar Co. (2004), 2004 ABCA 280, 2004 CarswellAlta 1200, 47 B.L.R. (3d) 296, 357 A.R. 184, 334 W.A.C. 184, 245 D.L.R. (4th) 107, 33 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 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 (S.C.C.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9
Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

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***B.E. Romaine J.*:**

Introduction

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

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");
>
> (c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;
>
> (d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

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

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

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

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

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

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

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short

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term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

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

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

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

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

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

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

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

(i) Strength of the Applicant's Case

Breach of Agreements

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

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

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

16 Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development, any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

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

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

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

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

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

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

23 Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its

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own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

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

25 Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2 budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

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

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

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

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

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

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

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

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

34 The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic

Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

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

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

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

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

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

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

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

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

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

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

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

45 There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from

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time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

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

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

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

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

50 With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called "investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

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

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

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

54 The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more

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predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

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

(ii) Irreparable Harm

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

57 Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk. If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

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

(iii) Balance of Convenience

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

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

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

62 Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does

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not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

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

64 It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

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

C. Should There Be an Order Confirming the Termination of SMBI as Manager of the Project?

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

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

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

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

D. Should There Be an Order Confirming the Removal of SRQL as General Partner?

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

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

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Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010, the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

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

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

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

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

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

E. Should the SMBI Issue Be Stayed and an Arbitrator Appointed Pursuant to the Terms of the DMA?

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

78 While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA. It would be undesirable to have a multiplicity of proceedings where there is clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 (Alta. C.A.) at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Alta. Q.B.) at paras. 6-9.

Conclusion

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

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any other related motions.

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

Application granted in part; cross-application dismissed.

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2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court*[1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario[2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*.[3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re*[4] where it was concluded that the court's discretion to grant such orders should only be exercised

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in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate[5] and that such consequences would have irreparable harm.[6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re*[7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,[8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*[9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,[10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*[11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."[12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne[*]

Table of Authorities

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

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

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

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

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

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

Should the ex parte order now be set aside?

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

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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

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2012 ABQB 292
Alberta Court of Queen's Bench

Strategic Financial Corp. v. 1402801 Alberta Ltd.

2012 CarswellAlta 1845, 2012 ABQB 292, [2013] A.W.L.D. 610, 221 A.C.W.S. (3d) 852

Strategic Financial Corp., Plaintiff and 1402801 Alberta Ltd., Defendant

T.F. McMahon J.

Heard: April 27, 2012
Judgment: May 2, 2012
Docket: Calgary 1201-03137

Counsel: Sean F. Collins, Walker W. MacLeod, for Plaintiff
Christopher D. Simard, for Defendant
Josef G.A. Kruger, Q.C., for 571764 Alberta Ltd., Newel Post Developments Ltd.
Travis Lysak, for Proposed Receiver, Price Waterhouse Cooper

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Numbered company 140 Ltd. owned abandoned property and building — S Corp. held first mortgage on property — N Ltd. had previously owned property and retained encumbrance against title — Numbered company 571 Ltd. was lessee of building and lease was registered against title — Registered instruments of N Ltd. and 571 Ltd. were postponed by first mortgage — First mortgage was in default and despite demands made by S Corp. no payment was forthcoming — S Corp. brought application to appoint receiver-manager for property — N Ltd. and 571 Ltd. opposed application — Application granted — Building had health and safety issues and 140 Ltd. did not have $2 million required to finance remedial work — Both N Ltd. and 571 Ltd. were in significant litigation with 140 Ltd., which was at deadlock — Without injection of capital building would deteriorate further — It was not apparent how N Ltd. or 571 Ltd. would be damaged by appointment of receiver-manager — As no evidence was provided as to appraised value of property, it could not be determined if receiver-manager's priority charge would jeopardize remaining competing interests — Given that property, particularly building, was in state of disrepair and litigation between interest holders was progressing slowly, appointment of receiver-manager was required — It was just and convenient to appoint receiver-manager to protect and preserve property.

Table of Authorities

Cases considered by *T.F. McMahon J.*:

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.) — referred to

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

Statutes considered:

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — considered

APPLICATION by mortgagee corporation to appoint receiver-manager for property.

***T.F. McMahon J.*:**

1 The Plaintiff, Strategic Financial Corp. ("Strategic Financial"), applies for the appointment of a Receiver-Manager for land and a building known as the Barron Building in downtown Calgary, Alberta. The building is 11 storeys in height and is vacant but for a movie theatre which is not currently operating. The Defendant, 1402801 Alberta Ltd. ("140"), owns the land and building. When it purchased the land in 2008, it assumed a first mortgage in the principle amount of $16 million. Strategic Financial now holds that mortgage by assignment from a prior holder.

2 Both Strategic Financial and 140 are controlled by one Riaz Mamdani who is also a director of both companies. 140 is separately represented on this application and, while consenting to it, does not advocate for or against the appointment of a Receiver-Manager.

3 The application is opposed by Newel Post Developments Ltd. ("Newel Post") and 571764 Alberta Ltd. ("571"). Newel Post was the previous owner of the building. It retains an encumbrance against title pursuant to a development agreement. 571 is the lessee of the theatre premises which lease is registered against the title. Both the registered instruments of Newel Post and 571 have been postponed to the first mortgage held by Strategic Financial. There are also second and third mortgages held by companies related to Strategic Financial.

4 The first mortgage of Strategic Financial is in default and remains outstanding in the approximate amount of $14.340 million as at March 1, 2012 with interest accruing thereafter. Newel Post and 571 argued that the first mortgage may not be in default but the only evidence on this application is clear. 140 is in default in making the required interest payments as well as a $5 million dollar payment in principle due January 19, 2012. As a result of that default, Strategic Financial made demand for payment of the entire amount as it was permitted to do under the terms of the mortgage. No payment was forthcoming.

5 The uncontradicted evidence is that the theatre premises have health and safety issues including asbestos being present and an absence of an operating sprinkler system. 140 has no other assets to finance remedial work which it estimated to cost $2 million.

6 There is significant litigation between the parties which has created an effective deadlock. 571 and 140 are in litigation regarding the lease and their respective obligations under it. Newel Post and 140 are in litigation regarding the encumbrance held by Newel Post against the title. Without an injection of capital, the building will remain vacant and deteriorate. Litigation costs will continue to mount.

Respondent's position

7 The essential position of Newel Post and 571 is that the applicant Strategic Financial can not meet the just and convenient test having regard to the principles stated in authorities such as *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.). Newel Post and 571 say that they will be damaged further by the appointment of a Receiver-Manager, though just how is not clear. The Receiver-Manager will be obliged to act in the best interests of all the interest holders so far as he is able.

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8 The authorities do say that a lesser remedy should be searched for. The remedy suggested by Newel Post and 571 is that the shareholder of 140 should inject additional money into the company in order to remediate the building. However that is not an appropriate remedy, though it may be a solution. A non-party shareholder can not be compelled to inject money into a corporate litigant merely to avoid the appointment of a Receiver-Manager.

9 Newel Post and 571 then say that the land could be transferred to Strategic Financial which has the wherewithal to effect repairs. Once again, however, that's not an alternate remedy to the appointment of a Receiver-Manager.

10 A main complaint raised by 571 is that its litigation with 140, if it continues, would be funded by the Receiver-Manager who would then have a priority charge against the building. I have no evidence as to the appraised value of the land and building and so have no means of determining if such a charge would jeopardize anyone.

11 Lastly, Newel Post and 571 invite this court to pierce the corporate veil and regard the Plaintiff and the Defendant as one entity, personified by their controlling shareholder. There is in my view no basis for that approach here. There is no evidence of wrong-doing or deliberate conduct to injure the respondents, or of a shareholder treating the body corporate as though its property belongs to him personally. This is merely a case of one corporation in default in its debt to a related corporation, which is secured against the debtor's property and so is subject to enforcement.

Decision

12 The Court has jurisdiction to grant this relief pursuant to section 13(2) of the Judicature Act, RSA 2000, c J-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.

13 As well, the First Mortgage expressly provides for the appointment of a Receiver by article 26:

> It is declared and agreed that at any time and from time to time when there shall be default under the provisions of this mortgage, the Mortgagee may at such time and from time to time and with or without entry into possession of the Land or any part thereof, appoint a receiver or a manager or a receiver and a manager of the Land or any part thereof and of the rents and profits thereof and with or without security, and may from time to time remove any receiver and appoint another in his stead and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor. Such appointment may be made at any time either before or after the Mortgagee shall have entered into or taken possession of the Land or any part hereof.

14 The Alberta Court of Appeal addressed the issues in BG International at para. 17:

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

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15 Some of the factors to consider in the appointment of a Receiver have been collected and repeated by this Court in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.).

16 On the evidence before me, the disrepaired state of the building and the ongoing litigation between the interest holders strongly supports the need for a Receiver-Manager to protect and preserve the building until further court order. All those issues must be resolved before the building's value can be enhanced so the interest holders can maximize their return. It is therefore just and convenient that a Receiver-Manager be appointed to protect and preserve the property in question until further court order. The Receiver-Manager will have security for its fees and disbursements and monies properly borrowed in the course of the receivership. The parties may apply within 15 days to address the specific terms of the order if need be. Costs may also be addressed.

Application granted.

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2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

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

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

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

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

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

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement

Headnote

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

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

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

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Cases considered:

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

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

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

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

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

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

***Per curiam*:**

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

Facts

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

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effectively acquired a part of the appellant's interest, which would trigger its obligations.

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

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

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

Standard of Review

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

Appointment of the Receiver

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

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

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

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

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

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to

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protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

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