COURT FILE NUMBER	2201-07148
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	PRIVATE DEBT PARTNERS SENIOR OPPORTUNITIES FUND GP INC. carrying on business as PRIVATE DEBT PARTNERS
RESPONDENT	HOME SOLUTIONS CORPORATION
DOCUMENT	BOOK OF AUTHORITIES FOR THE THE BRIEF OF LAW OF THE APPLICANT IN SUPPORT OF APPLICATION FOR RECEIVERSHIP ORDER
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP 3000, 700 - 9th Avenue S.W. Calgary, AB, Canada T2P 3V4 Attention: Nicole T. Taylor-Smith Telephone: 403.298.2401 Fax: 403.262.0007 E-mail: ntaylorsmith@millerthomson.com File No.: 0252261.0002

BOOK OF AUTHORITIES

TAB

1. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243.

2. *Judicature Act*, RSA 2000, c. J-2, s. 13(2).

3. *Personal Property Security Act*, RSA 2000, c. P-7, s. 65(7).

4. *Servus Credit Union Ltd. v. Proform Management Inc.*, 2020 ABQB 316.

5. *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63.

6. *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430.

7. *Schendel Management Ltd. Re*, 2019 ABQB 545.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to February 14, 2019

Last amended on May 23, 2018

À jour au 14 février 2019

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Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

Vérification des comptes

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

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

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

Definition of *receiver*

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

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

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

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

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

Définition de *séquestre*

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

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

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

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

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

Trustee to be appointed

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

Syndic

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

Place of filing

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

Lieu du dépôt

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

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

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

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

Sens de *débours*

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

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

Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Préavis

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

Period of notice

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

Délai

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

No advance consent

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

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

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

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

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

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
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10611 - 98 Avenue
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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

TAB 3

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 13, 2016

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

1988 cP-4.05 s63

Application to Court

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

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

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

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

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

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

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

Receiver

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

(2) A receiver shall

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

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

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

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

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

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

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

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

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

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

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

(a) appoint a receiver;

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

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

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

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

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

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

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

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

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

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

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

TAB 4

2020 ABQB 316
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Proform Management Inc.

2020 CarswellAlta 903, 2020 ABQB 316, [2020] A.W.L.D. 1940, 12 P.P.S.A.C. (4th) 120, 318 A.C.W.S. (3d) 404

Servus Credit Union Ltd. (Plaintiff/Applicant) and Proform Management Inc., Proform Concrete Services Inc., and Proform Construction Products Inc., formerly known as Proform Precast Products Inc. (Defendants / Respondents)

M.J. Lema J.

Heard: May 5, 2020
Judgment: May 11, 2020
Docket: Edmonton 2003-06374

Counsel: Rick T.G. Reeson, Q.C., Patrick Harnett, for Plaintiff / Applicant
Jeffrey Oliver, D. Maréchal, for Defendants / Respondents
Adam Maerov, for Respondent / Guarantor, 285319 Alberta Ltd.
Sean E. Fleming, for Interim Monitor
J. Phillips, M. Phillips, for themselves

Subject: Corporate and Commercial; Insolvency

Headnote

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

Debtors, group of related companies, were indebted to creditor for approximately $12.6 million — There had been two forbearance periods and additional period of interim monitoring — Creditor held consent receivership order granted at onset of forbearance — Debtors believed they could arrange refinancing to pay out entire debt if they had further 30 days of monitoring — Creditor applied for appointment of receiver; debtors applied to extend interim monitoring period — Creditor's application granted; debtors' application dismissed — Debtors were in state of default, creditor's enforcement rights were engaged, and gateway for entering consent receivership order had been opened — COVID-19 pandemic did not impact debtors in material way — Debtors' defaulted on second forbearance agreement as early as March 3, 2020, but massive impact of COVID-19 only began to emerge as of March 8, 2020 — Evidence was insufficient to show that pandemic had any material impact on debtors' businesses, refinancing efforts or asset sale efforts through March 12, 2020, when second forbearance period ended, and debtors received further 19 days of no enforcement when interim monitoring order was granted and further five week stay of proceedings — By signing consent receivership order debtors acknowledged their indebtedness to creditor, their default status, triggering of creditor's enforcement options which included applying for receiver, and that appointment of receiver was warranted once period of forbearance had expired without clearance of creditor's debt — At this stage, in light of agreement, it was not open to debtors to argue why receivership order was not just or convenient — Creditor lived up to its end of deal by forbearing from taking action, and by end of forbearance periods debtors had not accomplished clearing creditor's debt in full — Creditor had not agreed to any further forbearance period, consequence that it could seek receivership order in circumstances was exactly what debtors agreed to, and debtors had blocked themselves from resisting granting of order — Court had jurisdiction to grant receivership order, debtors consented to receivership order, and consent was not tainted — Debtors conceded that, if and when forbearance period ended, consent order could be entered if they remained in default and without any substantive argument objection by them — In circumstances, and emphasizing debtors' consent to proposed receivership order, it was just and convenient that it be entered — Interim monitoring period should not be extended and receiver should be appointed.

APPLICATION by creditor for appointment of receiver; APPLICATION by debtors to extend interim monitoring period.

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

A. Introduction

1 Servus Credit Union Ltd. (Servus) seeks the appointment of a receiver of a group of related companies collectively indebted to it for approximately $12 million. This follows two forbearance periods of approximately six months and three more months, respectively, and an additional month of interim monitoring. It holds a consent receivership order granted at the onset of forbearance and submits that the debtors' ongoing defaults allow Servus to submit it for entry.

2 The debtor companies, supported by a guarantor, seek a further 30 days of monitoring, during which they believe they can make material headway on paying down their debt to Servus and in arranging refinancing to pay it out entirely. They acknowledge having provided the consent receivership order but submit (in part) that the emergence of the Covid-19 pandemic deprived it of the full benefit of the second forbearance period and that, accordingly, the order should not be entered now.

3 I find that the debtors are in state of default, that Servus's enforcement rights are engaged, that the gateway for entering the consent receivership order has been opened, that the Covid-19 pandemic did not cast a material shadow here, that the debtors' available arguments do not extend beyond those issues, that the interim-monitoring period should not be extended, and that it is just and convenient that a receiver be appointed.

B. Issues

4 The issues are:

1. the preconditions to Servus submitting the consent receivership order (CRO) for filing;

2. the impact (if any) on Servus's enforcement position of the emergence of the Covid-19 pandemic — in particular, its impact on the debtors' businesses and refinancing and asset-sale efforts, and whether it deprived the debtors of the full benefit of the combined forbearance and stay period;

3. whether the debtors are entitled, in the face of the CRO, to raise any arguments bearing on whether granting a receivership order is "just or convenient" or otherwise appropriate i.e. aside from arguments bearing on the enforceability and state of the forbearance arrangements, including the satisfaction of the triggering conditions for the entry of the CRO;

4. the Court's duty when presented with a consent order generally and in these circumstances; and

5. whether the CRO should be granted.

C. Analysis

Preconditions to Servus seeking entry of the consent receivership order

5 Servus and the debtors entered into a forbearance agreement, following default by the debtors under certain credit arrangements, which included a guarantee from a third party, anchored by real property mortgages against properties owned by that party.

6 In that agreement, the debtors and the guarantor acknowledged owing approximately $12.4 million to Servus and that various events of default had occurred.

7 Here is the heart of the forbearance agreement:

2.1 **Forbearance period.** Subject to compliance by Borrowers and Guarantor with the terms and conditions of this Agreement, the Lender hereby agrees to forbear from exercising its right and remedies against the Borrowers and guarantor under the Loan Documents and otherwise with respect to the Existing Defaults during the period (the "**Forbearance**

> **Period**") commencing on the Effective Date [defined elsewhere] and ending on the earlier of (i) 2:00 p.m. (Edmonton Time) Friday, November 9, 2019 and (ii) the date that any Forbearance Default [defined elsewhere] occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to me under the Loan Documents, the Consent Documents (as hereinafter defined [and discussed further below]) or otherwise available to the Lender at Law.*
>
> 2.2 **Scope of Forbearance.** During the Forbearance Period, the Lender will not initiate or continue proceedings to collect or enforce the Obligations, including by repossessing, foreclosing upon, or disposing of any of the Collateral, through judicial proceedings or otherwise. [emphasis added]

8 Article 3 outlined various conditions precedent to the Forbearance Agreement taking effect, including the provision of "a duty executed consent receivership order with respect to the Borrowers and the Guarantor [limited, for the latter, in certain respects], in the form attached hereto as Schedule '*B*.'" The debtors and the guarantor signed the draft order in the required form, reflecting their consent to it.

9 In a parenthetical note tucked between subparagraphs (i) and (j), s. 3.1 defines "*Consent Documents*" as meaning various documents including the consent receivership order.

10 The application proceeded on the basis that the various condition precedents were satisfied, including the provision of the CRO, and that the initial forbearance period took effect thereafter.

11 The debtors did not clear their collective debt to Servus by the November deadline. On November 22, 2019, counsel for Servus wrote counsel for the debtors:

> Pursuant to the Forbearance Agreement . . . we confirm that the Borrowers have not repaid the Lender in full . . . its outstanding indebtedness prior to the [November 2019] expiration of the Forbearance Period as required by . . . the Forbearance Agreement. This constitutes an Event of Default under . . . the Forbearance Agreement.
>
> As you know, the Lender is currently reviewing the Borrowers' request for a further extension of the Forbearance Agreement.
>
> Notwithstanding this Notice of Default and, without in any way waiving the Event of Default or waiving any other rights of the Lender in relation to the Event of Default, the Lender acknowledges receipt of the Borrowers' request for a further extension and will advise of its decision in respect of that request in due course.

12 As it turned out, Servus decided to extend the forbearance period, via a Forbearance Amendment / Extension Agreement made with the debtors and the guarantor on December 30, 2019. One preamble of that agreement states: "The Borrowers have advised the Lender that they anticipate being able to *repay the Loans in full by March 12, 2020*, if an extension is granted" (emphasis added).

13 The extension agreement also included the debtors and guarantor acknowledging indebtedness to Servus, as of December 10, 2019, of approximately $13.6 million and the existence of various ongoing defaults under the credit arrangements.

14 The purpose of the agreement was described (in s. 1.4) as "to provide [the] Borrowers with a further period of time to restructure and refinance to *pay out the Obligations in full* . . . " (emphasis added).

15 The heart of the extension agreement is here:

> 2.1 **Forbearance Period.** The Forbearance Period, as defined in s. 2.1 of the Forbearance Agreement, is amended to end on the earlier of (i) 2:00 p.m. (Edmonton Time), Thursday, March 12, 2020 and (ii) the date that any Forbearance Default (as defined in the Forbearance Agreement) occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to it under the Loan Documents, the Consent Documents (as hereinafter defined) or otherwise available to the Lender at law.* [emphasis added]

16 Article 3 outlined various conditions precedent to the extension agreement taking effect. At the application, the parties proceeded on the basis that the agreement indeed took effect.

17 The extension agreement did not provide a particular definition for Consent Documents. However, s. 1.1 (Definitions) stated that:

> Capitalized terms [e.g. "Consent Documents" in s. 2.1] not otherwise defined herein shall have the meaning ascribed thereto in the Forbearance Agreement. . . . [As noted above, s. 3.1 of the first agreement defined "Consent Documents" as including the consent receivership order.]

18 The extension agreement also included "entire agreement" and "full force and effect" terms:

> The Forbearance Agreement, this Amendment Agreement and the Loan Documents constitute the sole and entire agreement of the parties to this Amendment Agreement with respect to the subject matter contained herein and therein and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such matter.
>
> The Forbearance Agreement and the Loan Documents shall remain unchanged, in full force and effect, and continue to govern and control the relationship between the parties hereto, except to the extent they are inconsistent with, superseded or explicitly modified herein. To the extent of any inconsistency, amendment or superseding provision, this Amendment Agreement shall govern and control

19 On March 3, 2020, counsel for Servus wrote the debtors to advise (or confirm) that certain financial reporting by the debtors was overdue per the credit arrangements and the Forbearance Agreement, and that it regarded this as an event of default under the Forbearance Agreement. It gave three days' notice to rectify, failing which it reserved its right to enforce its security and use the Consent Documents.

20 On March 10, 2020, counsel for Servus wrote counsel for the debtors reviewing certain information provided by the debtors and providing its assessment that the borrowers and the guarantor were in breach of certain margining requirements and that they continued "to be in default under the terms of the Forbearance Agreement." Servus also advised:

> [We are] not willing to discuss a further extension of the forbearance period beyond the current March 12, 2020 expiry date without having unconditional commitment letters from reputable lenders in place, and which are accepted by the Borrowers and the Guarantor, in an amount sufficient to promptly pay Servus in full. Further Servus also requires the margining deficiency to be resolved to Servus' satisfaction, before it is willing to discuss any extension to the forbearance period.
>
> Nothing in this matter constitutes a commitment from Servus with respect to any extension to the Forbearance Agreement. Servus continues to reserve al of its rights and remedies, including those under the Forbearance Agreement.

21 On March 13, 2020, counsel for Servus wrote the debtors again (stating in part):

> Further to our March 3, 2020 correspondence, this letter confirms that the Forbearance Period as set out in the Forbearance Agreement has now terminated, in accordance with its terms.
>
> Pursuant to the terms of the Forbearance Agreement, the Lender is entitled to exercise all of its rights and remedies available to it under the Loan Documents, the Consent Documents, and otherwise available to the Lender at law.
>
> We are also advised by the Lender that the Borrowers and Guarantor remain in breach of their margining requirements, and that the Borrowers and Guarantor are aware of this breach.
>
> Please take this as notice of the Lender's intention to enforce its "Servus Security" as set out in the August 8, 2019 Priority Agreement made between [various parties.]"

22 On March 31, 2020, ACJ Nielsen granted an interim monitoring order on the consent of Servus and the debtors, installing PWC Inc as the monitor. Section 4 of the order stated:

> The Interim Monitoring [Order] shall terminate on the earliest of:
>
> (a) The taking of possession by a receiver, within the meaning of subsection 243(2) [*BIA*], of the Debtor's property over which the Interim Monitor was appointed; and
>
> (b) May 5, 2020, unless renewed by further Order of this Court prior to the expiry date.

23 The Interim Monitoring Order had the same general effect as the forbearance agreements, freezing Servus's enforcement rights, albeit temporarily:

> 15. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Monitor or with leave of this Court[,] and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court . . . .
>
> 16. All rights and remedies of any Person . . . against or in respect of the Debtor . . . or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court . . .

24 I also note the "material adverse change" provision:

> 10. Upon:
>
> (a) the Interim Monitor filing with the Court a Material Adverse Change Report;
>
> (b) the Debtor failing to pay when due any Employee-related Obligations; or
>
> (c) the Debtor otherwise being in default of any of its obligations in this Order;
>
> then Servus is at liberty to immediately apply to Court, on 3 days' notice, for a Receivership Order to appointed [PWC] as receiver in respect of the Debtor and Property.

25 On April 27, 2020, Sean Fleming of PWC Inc prepared a report of PWC's interim-monitoring activities and a snapshot of the debtors' financial picture as of that date. It also included an update on the debtors' refinancing efforts. In a nutshell, it noted that, of nine lenders they had connected with, "only one lender has provided a commitment letter to [them]", namely, a certain lender providing a commitment letter for the lending of $6.5 million against a particular property owned by the guarantor, which (in light of other borrowing against it) would yield about $5 million for application against the debtors' debts.

26 As of April 21, 2020, the debtors' debts to Servus stood at approximately $12.6 million, "plus further amounts owed in respect of costs and expenses incurred by Servus, plus further accruing interest."

27 The debtors remained in default under their credit arrangements with Servus as of that date and as of the application heard on May 6, 2020.

28 The debtors did not dispute the state of default. Neither did they assert that the forbearance period was still in effect, that the Interim Monitoring Order was still in effect, or that Servus was not otherwise in a position to enforce its security, including seeking the entry of the consent receivership order.

29 Their position, instead, was that, in light of significant progress in their refinancing efforts and also in separate efforts to liquidate certain properties, and considering the impact of the current pandemic and the partially related turmoil in the Alberta economy, they should be given another month, through to June 4, 2020, to continue those efforts, which would very likely

produce substantial paydowns — as much as $9 or $10 million — against their debts to Servus and very possibly a refinancing package to clear those debts completely.

30 In other words, as of May 6, 2020:

- Servus was still owed over $12.5 million;
- the debtors continued to be in default under their credit arrangements;
- the forbearance period (per the first and second agreements) had expired;
- no additional forbearance agreement had been put in place;
- the Interim Monitoring Order stay and suspension had expired;
- Servus had reserved its rights to enforce its security and to use the Consent Documents, including the consent receivership order;
- the debtors did not assert that any new forbearance period was in place or otherwise that Servus was not entitled to take enforcement steps, including seeking the entry of the consent receivership order;
- the debtors did not disavow that order in any fashion; and
- the debtors instead asked the Court to find it was not "just or convenient" that the consent receivership order be entered now.

31 I find, on the first issue, that the express "trigger conditions" — i.e. for Servus to seek the entry of the consent receivership order — were satisfied here: the forbearance period was over, and the debtors continued to be in default.

Impact of Covid-19 pandemic

32 The debtors argued that they did not get the benefit of the full second forbearance period, invoking the onset of the Covid-19 pandemic.

33 I do not accept this argument:

1. the debtors went into default in June 2019;
2. Servus issued notices of default to the debtors on June 4, 2019;
3. the debtors had the benefit of the first forbearance period (mid-July 2019 to mid-November 2019);
4. they received the benefit of a *de facto* forbearance period from mid-November 2019 to the end of December 2019), while the parties negotiated the second forbearance period;
5. the second forbearance period ran from December 30, 2019 to March 12, 2020;
6. the debtors defaulted on the second forbearance agreement as early as March 3, 2020;
7. Covid-19's now-massive impact was only beginning to emerge in the week of March 9-13. I take judicial notice that no provincially ordered "restrictions on gatherings" were in place by that week. (I was sitting in Grande Prairie that week; it was "business as usual" at the Court through March 13, at minimum.) The Alberta Government's Covid-19 case statistics [1] only start as of March 8, 2020. The bar-graphs are not calibrated to allow perfect counts, but, from a baseline of zero confirmed cases as of March 8, 2020, the collective number of probable and confirmed cases in those early days (March 8-12) appears to be approximately 25 people. That compares to 6,017 cases as of May 7, 2020. Another chart shows

total hospitalized cases, in those same days, at under 10 people, with one or two in intensive care; that compares to 255 "hospitalized ever" and 52 "ICU ever" cases as of May 7, 2020; and

8. in any case, the debtors' Covid-19-related evidence is silent or vague about the pandemic having any impact on their businesses before March 13. In one of his March 30, 2020 affidavits, Shaun Peesker stated (in part):

> 6. . . . the Companies are seeking an adjournment of the Receivership Application for the following reasons, among others:
>
> a. The Companies have been making substantial progress in their refinancing efforts, but the COVID-19 pandemic has temporarily prevented such efforts from being advanced to a conclusion . . .
>
> . . .
>
> 22. The majority of the Companies' customers have either temporarily shut down operations or have delayed their projects pending the resolution of the COVID-19 pandemic. [no information about when that started]
>
> 23. *As a result of the foregoing, the business operations and employee numbers of the Companies are different than they would normally be at this time of year*. A summary of the current operations and employee numbers for [one debtor company] and [another one] are summarized below:
>
> a. [neutral employment information for one debtor company]
>
> b. Prior to last week [i.e. the week of March 23-27, 2020] [another debtor company] had approximately 110 employees that had been retained throughout the winter season. However, *last Thursday [i.e. March 26, 2020], the decision was made to cease all operations all [two certain plants], other than those operations that are required to fill ongoing orders from current customers. As such, as of last Thursday, the workforce of [that company] has been further reduced to approximately 30 employees.* [major changes but no detailed indication of any Covid-19 impact before late March]

34 In his other affidavit of the same date, Mr. Peesker describes the status of various refinancing possibilities. Of the total number described, two include a Covid-19 dimension: one indicated a delay "as a result of the COVID-19 pandemic." However, that lender had only been approached around March 23. Another prospect is described as retreating from a possible commitment on account of Covid-19 concerns; however, no evidence is given of when that prospect emerged and when the retreat occurred.

35 In Mr. Peesker's follow-up affidavits sworn May 1, 2020, while updates are provided on various fronts, no mention is made of Covid-19, let alone any impact on the debtors' efforts to attract refinancing and sell assets.

36 This evidence is insufficient to show the pandemic having any material impact on the debtors' businesses, refinancing efforts, or asset-sale efforts through March 12, 2020, when the second forbearance period ended.

37 In any case, the debtors received the benefit of a further 19 days of no enforcement (between March 12 and March 31, when the Interim Monitoring Order was granted) and a further five-week stay of proceedings (March 31 to May 5) under that order i.e. almost two more months combined.

38 For all its devastating impact to date, the pandemic did not impair the debtors in any material way through March 12.

39 As for the stay period from March 31 to May 5 (i.e. the lifespan of the Interim Monitoring Order), the debtors and Servus negotiated that arrangement (and obtained the Court's blessing of it, via the March 31 consent order) with their collective eyes opened wider to the Covid-19 phenomenon. And (as noted above re their May 1 affidavits), the debtors produced no evidence about Covid-19 having any particular effect on their activities or efforts from March 31 through May 1, or thereafter.

Whether the debtors are generally blocked from contesting the receivership order

40 The debtors made various other arguments, not akin to the unexpected circumstance of Covid-19, about why no receivership order should be granted. They focused on the "just or convenient" requirement in ss. 13(2) of the *Judicature Act* [2], addressing progress made to date in reducing their indebtedness to Servus, the state of various financing "irons in the fire", the sale of certain properties, and the overall prospect of making major headway against the debt if more time is given to them. They also point to evidence that Servus is over-secured and will or should recover its entire claim eventually i.e. even if more time (up to June 4, 2020, at minimum) is given to them.

41 This raises a question: was it open to the debtors to make such (substantive) arguments in the face of the consent receivership order? I examine this question next.

Consent orders provided as part of forbearance or standstill agreements

42 In *Octa Hage Enterprises Ltd. v. Bank of Credit & Commerce Canada* [3], the Alberta Court of Appeal examined a consent-order-in-exchange-for-more-time scenario:

> [2] In this mortgage foreclosure action the defendants filed a statement of defence by a law firm. In response to the plaintiff's motion for an order nisi, *the defendants' solicitors negotiated a settlement agreement under which more time was purchased in return for a form of final order of foreclosure with the endorsed consent of the defendants' solicitors of record. The plaintiff held this form and in due course when the agreed time had elapsed, presented it to a Master in chambers, with notice to the defendants*. The Master granted a final order of foreclosure in the same terms but with a stay of execution for an additional six months. The defendants appealed that order to a Queen's Bench justice and now to us.
>
> . . .
>
> [4] The defendants also argue that section 41(2) of the Law of Property Act impliedly forbids going directly to final order without passing the previous step and collecting an order nisi. Two decisions to that effect were cited, the latter being Canada Trustco Mortgage Co. v. Coleman (M 1985) 1985 CanLII 1132 (AB QB), 59 A.R. 367. But neither involved a consent order, and in our view nothing in section 41 prevents such a consent. Subsection (5) on waivers or releases is referring only to the situation before suit or even before default. It is not necessary here to determine whether the consent operated under subsection (3) of section 41, or under subsection (4), or under the general law on consents to judgment. ***The most that could be said of any requirement for an order nisi (if there is one) is that it would a matter of substantive law, not jurisdiction. And consent judgments are expressly designed to bypass substantive defences***.
>
> [5] That in turn is an answer to a number of substantive defences which the defendants now suggest, including want of formal demand for payment and certain interpretations of the mortgages and the interaction of their amounts. That applies even more strongly to some suggested flaws in the wording of the statement of claim. ***A consent to judgment would be worthless if the plaintiff still had to prove his case in full and negative every defence. It might be (as the defendants argue) that the Master or judge is not always required to grant the order consented to and reserves some power to refuse or vary it. But we need not decide that, for the Master and chambers judge both decided to grant it***, except for the stay of which the defendants do not complain.
>
> [6] ***The defendants also sought to argue that later facts made the final order unjust. For example, they try to argue that their equity in the lands has risen substantially. Given the 16 months which have now elapsed since the consent was given, any injustice is hard to see. But in any event when more time is purchased by a consent judgment the defendant takes the risk of whether the future will be kinder to him or to the plaintiff.*** [emphasis added]

43 The apparent matter-of-fact entry of a consent receivership order, after forbearance, is reflected in *Smith v. Pricewaterhousecoopers Inc.* [4], where Rowbotham JA (in chambers) commented:

> [31] The draft statement of claim also alleged that Servus acted negligently or unreasonably and in bad faith in putting Caliber into receivership at the time that it did. The applicant failed to identify any evidence that could support his

allegations. He acknowledged that Caliber was in "a cash flow crisis." *It was never seriously disputed that Caliber had been in a constant state of default for the nine-month period leading up to the receivership.* ***The terms of the final forebearance agreement executed between Caliber and Servus, which the applicant personally signed on behalf of Caliber, made it explicit in clauses 3.4 and 3.5 that Servus was at liberty to make immediate use of the Consent Receivership Order that had previously been signed by Caliber's legal counsel on the company's behalf.*** The applicant's counsel conceded that it would have been easy to undo the receivership order if any of Caliber's other creditors or another third party would have come forward to rescue the company. It was demonstrably false that the trustee and Servus refused to meet with the restructuring group as alleged in the proposed statement of claim. Accordingly, it was reasonable for the chambers judge to have concluded, as she did, that the negligence claim was spurious. [emphasis added]

44 In *741431 Alberta Ltd. v. Devon (Town)* [5] , Watson J. (as he then was) kept a defaulting party to a consent-judgment-to-be-held arrangement:

[40] Ultimately there was a settlement of the action reached which, in sum, provided that (a) the *Applicant would endorse a Consent Judgment to the Respondent's motion for Summary Judgment granting all relief sought*, and (b) the Applicant would provide Counsel for the Respondent with a suitable Transfer and (c) the Applicant would pay the legal costs of the Applicant to a maximum of $4,600.00.

[41] *As part of this settlement*, ***the Respondent did agree that it would make no use of the Consent Judgment and Transfer unless the Applicant failed to reach the roof stage deadline by July 1, 2001 at which point the Respondent could proceed to use the Transfer and Consent Judgment.*** The Respondent also agreed, however, to discontinue its action if the Applicant reached the roof stage by that date. The Applicant would have to pay all fees related to the project promptly upon submission of its plans.

[42] The Respondent's Counsel prepared the Consent Judgment and Transfer and forwarded it to Abbey for execution. Ultimately, *Abbey signed the Consent Judgment and returned it along with the Transfer to Counsel for the Respondent by letter dated December 29, 2000.* ***That letter imposed trust conditions as to the Respondent's holding off on use "unless 741431 Alberta Ltd. fails to meet the roof stage level of construction by July 1, 2001".***

. . .

[117] In the case at bar, the Applicant's Notice of Motion effectively sought an indefinite period of time within which to enable it to decide when to get on with this project. Its argument, in my view, came down to the proposal of a series of estoppels by acquiescence by the Respondent allowing the Applicant to evade the consequences of a series of separate promises, defaults, re-promises and re-defaults. This history does not persuade me of an entitlement of the Applicant on the equities of this case.

. . .

[119] . . . the Applicant has failed to prove the existence of an alleged settlement contract overriding the Consent Judgment and Transfer agreement, such as to require this Court to enforce the latter.

. . .

[136] ***In my view, the Respondent is not acting punitively to enforce the old agreement as in the concept of the liquidated damages cases. The Respondent is seeking merely to enforce the terms of their agreement as to the Consent Judgment and Transfer.*** [emphasis added]

45 As did Macklin J. in *Mraiche v. Sander* [6] :

[27] In my view, this is simply a contractual matter and the Court needs only to review the facts and the agreements between the parties. All of the agreements were voluntarily entered into between sophisticated parties. The Defendant

Shirley Sander describes herself as a businesswoman. She owns a number of properties in B.C. When Ms. Sander entered into the Purchase Contract, she utilized the services of a realtor. When she entered into the Affirming Agreement, she did so in the presence of her lawyer. The transfer back was signed by her in the presence of her lawyer. In Clause 10 of the Affirming Agreement, Ms. Sander acknowledged that "she has had the time to review, and has reviewed, this Agreement and that she has received independent legal advice prior to the execution and delivery of this Agreement".

[28*] The agreements expressly contemplate remedies which were agreed to between the parties in the event either failed to complete the contract according to its terms. In the event that Ms. Sander, as the buyer, failed to complete, the agreements contemplated, among other things, a transfer back of the Edmonton property to the Plaintiff, and the filing of the Consent Order granting the Plaintiff immediate possession of the Edmonton property.*

[29] There is no suggestion, nor on these facts could there be, of *non est factum*. Ms. Sander understood the terms of each agreement, she had the advice of a realtor, and, importantly, she had the advice of legal counsel.

[30] ***It is not the function of this Court to rewrite Agreements negotiated and executed by sophisticated business people. It is also not the function of this Court to examine such Agreements to see whether the consideration flowing from one side to the other is appropriate. The parties made those decisions.***

[31] *Ms. Sander has clearly defaulted on payment under the agreements. She has still not paid, or even tendered, the amounts due on the extended date of March 26*. Ms. Sanders' allegations concerning alleged interference by the Plaintiff in her efforts to obtain financing do not have the air of reality or accuracy. The lender advised Ms. Sander's representative that he was declining the loan and would not be providing financing three days before counsel for the Plaintiff spoke to the lender.

[32*] Ms. Sander's lawyer executed a Consent Order in November of 2009 knowing of all of the terms and conditions set out in the various agreements. The Consent Order was entered after Ms. Sander had received an extension of one week by Justice Verville of this Court and after she had failed to make payment as required by that Order. The Consent Order was entered after Ms. Sander's representative had clearly been advised that the lender would not be providing financing.*

. . .

[35] At the commencement of the Appeal, counsel for Ms. Sander provided the Court with a new affidavit sworn by Ms. Sander and filed the same day (May 12, 2010). She now claims to have received a commitment for bridge financing from a company called Kennedy Financing, Inc. located in New Jersey. ***This new evidence does not impact on the fact that Ms. Sander is still in default and does not justify granting any further relief to her***. I would point out, however, that the supposed commitment appears to be conditional only, both as to the granting of a loan and as to amount. [emphasis added]

46 And Morawetz J. (as he then was) in *Royal Bank v. Walker Hall Winery Ltd.* [7] :

[18] Counsel to the Receiver also points out that the receivership application was commenced in November 2009 and Walker Hall retained Mr. Duncan. Mr. Duncan and counsel to RBC reached agreement on a timetable to have the application heard on December 16, 2009, but the day before such hearing Mr. Duncan contacted counsel to RBC to request an adjournment. ***Counsel agreed that, in exchange for Walker Hall's consent to the Receivership Order, the hearing would be adjourned to December 23, 2009, to provide time for Walker Hall to obtain refinancing***. Mr. Lukezic signed the consent on behalf of Walker Hall. ***Walker Hall did not obtain refinancing and, acting on Mr. Lukezic's consent, counsel to RBC obtained the Receivership Order on December 23, 2009.***

. . .

[36] ***The central issue is whether circumstances exist that would make it appropriate to nullify or remove the Receivership Order***. A secondary issue is whether the damage claim against RBC is more properly pursued in CV-10-399090.

[37] The Receivership Order was made on consent.

[38] Mr. Macfarlane submits that a party who seeks to have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed. In this case, Mr. Macfarlane submits that there is no evidence of fraud. Further, the application was resolved when the respondents consented to the Receivership Order which they did not appeal.

[39] Counsel also submits that, in the absence of fraud or collusion, a consent order cannot be set aside. See ***Houston v. Bousquet***, (1965) CarswellMan 20 (M.C.Q.B.) and Sjogren v. Lamson, (1922) CarswellMan 12.

. . .

[41] Mr. Lukezic has stated that his consent was premised on the $150,000 promised advance***. In my view, it follows that in order to succeed on this motion, the Court has to be satisfied that the consent was not a true consent***. The Court has to be satisfied that there was an agreement under which the Receiver or RBC would advance $150,000 to Walker Hall.

. . .

[46] *In my view, even overlooking evidentiary deficiencies, Mr. Lukezic has failed to persuade me that it is appropriate to set aside or vary the Receivership Order.*

[47] ***Mr. Lukezic consented to the Receivership Order on December 23, 2009.***

[48] ***In my view, there is no evidence of fraud or that there was an arrangement under which $150,000 would be advanced by the Receiver or RBC to Walker Hall***. [various evidence reviewed]

. . .

[63] ***Mr. Lukezic has failed to provide any basis to have the Receivership Order set aside or varied. He has alleged that the Receiver or BDO promised to advance $150,000 to Walker Hall at the time of the Receivership Order and that, in response to this promise, he consented to the Receivership Order. The allegations set out in his factum are, simply put, not supported by the evidence***. No credible alternative to the receivership has been put forth by Mr. Lukezic. [emphasis added]

47 In contrast, see *Western Surety Co. v. Hancon Holdings Ltd.* [8] , where a creditor had received a consent judgment as part of a work-out arrangement, but the trigger clause was found to be ambiguous. The clause was as follows:

4. As security for the performance and fulfillment of their respective obligations under the General Indemnity Agreement, Moh Creek and the Indemnitors will execute an Appearance and *Consent to Judgment* in an action under the General Indemnity Agreement in an amount which includes the anticipated Advances, Expenses and Interest *to be held by counsel for WSC on the basis that it will not be entered unless Moh Creek does not make payment of the Advances, Expenses and Interest in accordance with a payment schedule to be agreed upon by Moh Creek and WSC prior to September 30, 2000 and in any event payment in full shall be made by December 31, 2001 or make such other agreement to extend that period*. [emphasis added]

48 The parties were unable to agree on a payment schedule; eventually, the creditor filed the consent to judgment and registered it against title to various properties. Per Gerow J.:

[20] On March 13, 2002, the defendants brought an application to have the Consent Judgment removed from the titles. In opposing the application, *Western Surety argued that it was entitled to file and register the Consent Judgment because the defendants were in default under the Agreement for failing to provide a payment schedule as required by paragraph 4 of the Agreement. However, Morrison J. set aside the Consent Judgment on the basis that it was premature. In her reasons,*

> *Morrison J. stated that paragraph 4 of the Agreement was uncertain and ambiguous.* [consent judgments were removed from the titles] [emphasis added] [9]

49 Similarly, in contrast, see *Skagen v. Canadian Imperial Bank of Commerce* [10], where Williams J. found that the trigger condition (default) did not exist:

> [6] The plaintiffs say the Bank has breached its agreement and that the Consent Judgment which was entered against both Skagen and the numbered company should be set aside.
>
> . . .
>
> [48] *With respect to the consent judgment that was provided to the Bank, it constitutes valuable consideration provided by the plaintiffs on the understanding that it would be entered in the event that the plaintiffs defaulted on their contractual obligations.* When the October payment was not received, the Bank entered the judgment. In my view, *that must be set aside, as the pre-condition for its entry, default by the plaintiffs of their obligations under the Agreement, did not occur*. When the consent judgment was entered, the repudiation had been accepted and there was no further obligation owing by the plaintiffs, hence there could be no default. The decision of Koenigsberg J. in ***Harbelah Enterprises Ltd. v. O'Neil*** (1994), 1994 CanLII 16671 (BC SC), 94 B.C.L.R. (2d), 26 C.P.C. (3d) 315, [1994] 9 W.W.R. 162 (paras. 22-25) establishes that a consent order can be set aside in circumstances such as these. [emphasis added]

Applying those principles here

50 By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and *that the appointment of a receiver was warranted* i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.

51 The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."

52 I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.

53 It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

54 Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.

55 Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.

56 Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

Court's duty when presented with a consent order

57 What, then, is the Court's duty when presented with a consent order, as here? Many cases confirm it is not simply to act as a rubber stamp: see, for instance, *G. (C.T.) v. G. (R.R.)* [11], where Popescul CJQB held:

> [11] Where parties have had their agreement sanctioned by the court by incorporation of the child support terms into a judgment or order, a judicial determination has been made. The courts have a duty to scrutinize agreements and consent orders or consent judgments that are submitted by the parties in order to ensure that they comply with the law and are in accordance with the best interests of the child or children who are subject to the order or judgment. ***The process is more than just a "rubber stamp".*** See ***Hayes v Hayes*** (1987), 6 RFL (3d) 138 (Sask QB).

58 In *Fisher v. Fisher* [12], McDonald J. (as he then was) held:

> [65] On June 23, 1993 Ostapowich [defendant in ***BMO v Ostapowich (Trustee of)*** (1996) 144 Sask R 207 (CA)] made an assignment into bankruptcy. Shortly thereafter the Bank brought an application by way of Notice of Motion seeking to set aside the vesting order and other portions of the consent judgment claiming it represented a settlement or fraudulent conveyance. Ostapowich opposed the application, claiming that it was in substance a collateral attack on a valid judgment of the Court. The Court agreed, holding at paras. 11-13:
>
> > *The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment*. See: The Hardy Lumber Co. v. The Pickerel River Improvement Co. (1899) 1898 CanLII 16 (SCC), 29 S.C.R. 211; City of Toronto v. Toronto R.W. Co. (1917) 39 O.L.R. 310 at p. 313. ***Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it.*** See Peterson v. Bishop et al., 1923 CanLII 356 (SK CA), [1923] 3 W.W.R. 25; Hope Hardware et al. V. Fields Stores Ltd. et al. (1978), 1978 CanLII 254 (BC SC), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement ***the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement.*** *The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.*
>
> > . . .
>
> [66] While Georgette Fisher is proceeding pursuant to the provisions of Section 10 of the *Matrimonial Property Act* in advancing her claim to a larger interest in the Haysboro property than stipulated in the Hawco Order, the reasoning in *Ostapowich* is applicable. ***The Hawco Order is more than just a mere agreement between Suzanne Fisher and Morris Fisher; it represents a final determination of their respective interests in the Haysboro property as sanctioned by this Court.*** [emphasis added]

59 For a supportive American perspective, see "Six Degrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation" [13], where Anthony DiSarro wrote:

> V. A CONSENT DECREE IS THE COURT'S DOCUMENT
>
> . . . a consent decree "contemplates judicial interests apart from those of the litigants." ***Courts have an interest in the contents of their orders***. Absent a statutory obligation to approve the terms of settlement, courts have no interest in the contents of private settlement agreements.
>
> *A. Consent Decree as Both Contract and Order: Entry of the Decree*

A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree. A court should not unilaterally alter a proposed consent decree that has been submitted to it for entry." Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.

However, a court does have the prerogative to at least make the "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree". A consent decree should bear some relationship to the case and pleadings that have invoked the federal court's jurisdiction in the first place'" and "further the objectives of the law upon which the complaint was based." The decree should not undermine judicial integrity.

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.

The court's role here is discretionary, not mandatory. A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry. As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions." Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement. [footnotes omitted] [emphasis added]

Distillation of principles

60 On how to approach a consent order, the guiding principles are as follows:

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

61 The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.

62 At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

63 A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside. [14]

Whether it is "just or convenient" to appoint a receiver in these circumstances

64 The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

65 The question becomes whether it is indeed "just or convenient" to appoint a receiver here.

66 Here is where (as confirmed by the "consent-order-and-forbearance" cases) the debtors' consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

67 The debtors' core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs — continuing default — in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

68 In other words, even acknowledging significant progress to date, and even acknowledging the likelihood of more such progress over the next month, the debtors have *already agreed* that, if and when Servus decided against further grace (i.e. after the expiry of the latest hold period), it could move for the order *with no "merits" objection by them*.

69 Accordingly, on the "merits" review i.e. whether it is "just or convenient" to appoint a receiver here, I focus on the circumstances outlined by Servus.

70 Here it cites Romaine J.'s decision in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [15], in particular her helpful catalogue of appointment factors. I reproduce the *Paragon*-factors review from Servus's application brief:

> (a) Servus is a secured creditor of the Debtors and holds a security interest in of all the present and after-acquired property of the Debtors, subject to certain provisions of priority agreements entered into by Servus. Servus holds a first- ranking security interest in the Alberta Lands and NWT Lands;
>
> (b) The Debtors have demonstrated losses for the past 3 years;
>
> (c) the nature of the Debtors' property includes mobile equipment potentially located across Alberta, the Northwest Territories, British Columbia, Saskatchewan. There is also a risk of these mobile assets being subject to unauthorized sale and removal. The Debtors' also own two parcels of land located in Alberta and one parcel of land located in the Northwest Territories subject to Servus' security;

(d) given that the Debtors' property includes multiple parcels of land, and that the Debtors' property is located across multiple jurisdictions, a receiver is a cost effective mechanism to organize the sale of the property;

(e) an organized sale by a Receiver is likely to maximize recovery for secured and unsecured creditors rather than secured creditors individually seeking to enforce their securities;

(f) the balance of convenience is in favour of Servus. The most recent consolidated financial statements of the Debtors indicates a net loss of $1,137,511 for the month of January 2020. This is indicative of the serious financial distress facing the Debtors;

(g) the conduct of the Debtors is supportive of the granting of the Order requested, as:

(i) Servus first demanded payment from the Debtors in June 2019, and Servus has since entered into a lengthy forbearance period between July 2019 and March 2020 to assist the Debtors in making alternative arrangements to pay Servus in full. To date, the Debtors have failed to pay their obligations to Servus in full, which includes the Indebtedness; and

(ii) the large net loss reported in the January 31, 2020 consolidated financial statements of the Debtors, the Debtors cannot sustain their current operations on an ongoing basis without a material injection of capital or refinancing. Such refinancing has not materialized, despite this additional time to obtain it; and

(iii) the Debtors have consented to the Consent Receivership Order;

(h) the Securities granted by the Debtors and Forbearance Agreement authorize Servus to appoint a Receiver over the Debtors upon default, which is further supported by the Consent Receivership Order provided for in the Forbearance Agreement;

(i) a court appointment is necessary to enable the Receiver to carry out its duties more effectively and efficiently given the nature of the Debtors' property and assets;

(j) a Receivership Order would place all creditors and stakeholders of the Debtors on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

(k) while there is a cost of appointing a Receiver, all indications to date indicate that the appointment of a Receiver will be the most cost effective means of dealing with the estates of the Debtors;

(l) it is likely that the value of the property of the Debtors will be maximized by establishing a level and transparent process administered by this Honourable Court; and

(m) Servus is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver, particularly in giving the Debtors since July 2019 to make arrangements to pay Servus in full.

71 I also note the following comments by the interim monitor (from his April 27 report):

6. STATUS OF PROFORM'S REFINANCING EFFORTS

6.1 At paragraph 35 of the Peesker Affidavit and at paragraph 10 of the Confidential Peesker Affidavit, Mr. Peesker provides a summary of nine lenders the Company was pursuing for financing.

6.2 The Interim Monitor understands that only one lender has provided a commitment letter to Proform:

6.2.1 Lender : Lender 2 has provided a commitment letter in the total amount of $6.5 million to be financed against the Old Brew Property owned by 285. This property has an existing mortgage registered by Servus to secure

approximately $1.43 million due to Servus from 285. Therefore, the net amount that would be available to be applied against Proform's indebtedness to Servus is approximately $5.07 million.

6.3 With respect to the balance of the potential lenders identified in the Peesker Affidavit, the Company advised the Interim Monitor that many were not prepared to provide commitment letters due to the current economic environment, while one significant potential lender apparently advised Proform that it did not meet the lender's mandate to lend to businesses in rural communities.

6.4 In summary, as at April 27, 2020 the Company has secured only one financing commitment. This is not sufficient to repay Servus in hill as illustrated below.

	$
Estimated Proform indebtedness to Servus	(12,750,000)
Lender 2 - net ATB financing available to Servus on Old Brew	5,070,000
Remaining outstanding Proform indebtedness	(7,680,000)

6.5 On April 27, 2020, the Company provided the Interim Monitor with an executed real estate purchase contract with respect to the sale of the NWT Property ('NWT Sale Contract'). The NWT Sale Contract is included in the confidential appendix noted below. Management advise that the full amount of the sales proceeds would be applied against the Servus debt, of which approximately $790,000 relates to a Servus mortgage registered against the NWT Property. Regardless, there remains a significant shortfall to Servus.

6.6 The Company advised that it anticipates the receipt of a number of commitment letters in the next several days that will address this shortfall. While the Interim Monitor is hopeful, it should be noted that the Company has stated this on various occasions over the last several weeks and months. For various reasons, including those noted above, commitment letters have not been obtained.

EVALUATION OF THE ASSETS

7.1 As set out in paragraph 9 of the Interim Monitor Order, the Interim Monitor is to conduct a review and evaluation of the Property (as defined in the Interim Monitor Order) and file a report to the Court in respect of the same.

7.2 To assist in its evaluation of the Company's major assets and to assess Mr. Peeskers claim that 'the value of collateral held by Servus is several multiples in excess of the $12 million outstanding", the Interim Monitor immediately engaged the previous real estate appraisers utilized by the Company and 285 seeking the previous real estate appraisers utilized by the Company and 285 seeking updated appraisals for the Burnt Lake Property, the NW' Property, the Gasoline Alley Property and the Old Brew Property. In addition, the Interim Monitor sought a high — level valuation of the Company's major pieces of equipment, rolling stock and concrete plant assets from Century.

7.3 With respect to the real estate, on April i6, 2020, SWM delivered its NWT Property appraisal to the Interim Monitor. Subsequently, on April 21, 2020, Soderquist delivered to the Interim Monitor appraisals of the Burnt Lake Property, the 01(1 Brew Property and the Gasoline Alley Property.

7.4 With respect to the Company's equipment, rolling stock, and concrete plant assets, on April 23, 2020 Century provided the Interim Monitor with its estimated valuation on these assets.

7.5 It is the Interim Monitor's view that Proform's assets subject to the security of Servus are insufficient to repay Servus in full. The Interim Monitor estimates the shortfall to be in range of $1.94 million to $6.81 million. Accordingly, it will he necessary for Servus to look to the additional collateral pledged to Servus by 285 to address shortfall.

D. Conclusion

72 In these circumstances, and emphasizing the debtor's consent to the proposed receivership order, it is "just *and* convenient" that it be entered and, accordingly, that the debtors' application to extend the interim-monitoring period to June 4, 2020 be dismissed.

Creditor's application granted; debtors' application dismissed.

Footnotes

1 https://covid19stats.alberta.ca. I am using these statistics as a proxy for the general state of the Covid-19 pandemic in Alberta in the first part of March.

2 Servus also invoked s. 243 *BIA*, ss. 65(7) *PPSA*, and "Part A of the [*ABCA*]."

3 1988 ABCA 109 (Alta. C.A.)

4 2013 ABCA 288 (Alta. C.A.)

5 2002 ABQB 870 (Alta. Q.B.)

6 2010 ABQB 341 (Alta. Q.B.)

7 2010 ONSC 4236 (Ont. S.C.J. [Commercial List]) affd 2011 ONCA 314 (Ont. C.A.) leave denied 2011 CanLII 65628 [*Chegancas v. Lukezic*, 2011 CarswellOnt 10873 (S.C.C.)]

8 2007 BCSC 180 (B.C. S.C.)

9 See also the judgment of Mahoney J. in *Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc.*, 2019 ABQB 732 (Alta. Q.B.)

10 2004 BCSC 602 (B.C. S.C.)

11 2016 SKQB 387 (Sask. Q.B.)

12 2008 ABQB 170 (Alta. Q.B.)

13 (2010) 60 Am U L Rev 275 at 317-320

14 See, for example, *K. (T.E.H.) v. S. (C.L.)*, 2011 ABCA 252 (Alta. C.A.). See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 ("Judgments, Orders, and Settlements), R. ("Consent Orders or Judgments"), 7. ("Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 ("Consent Orders as Evidence of a Contract Between Parties" and "Binding Effect of Consent Orders") at p 303.

15 2002 ABQB 430 (Alta. Q.B.)

TAB 5

2013 ABQB 63
Alberta Court of Queen's Bench

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

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

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

Donald Lee J.

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

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

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

Headnote

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

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

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

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

APPLICATION seeking order for appointment of receiver and manager of company's assets and undertaking.

***Donald Lee J.*:**

Introduction

1 This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

Facts

2 Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

3 Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

4 The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of $567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

5 On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

6 By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

7 As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

8 On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

9 At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

10 On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58 which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

11 The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

12 The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

> 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.

Parties' Positions and Analysis

13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

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

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

Kasten's Submissions

14 The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

15 Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

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

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

Shamrock's Submissions

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

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

Should a Receiver be Appointed in this Case?

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

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a

creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

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

23 In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

24 In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

25 Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

26 After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

27 Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

28 Shamrock agrees that a Receiver could only be appointed over its personal property, which includes the oil when it is produced and removed from the ground. However, it contends that the authority of the Receiver does not extend to the lease or the sale of Sawn Lake Well since Kasten has no security over the PNG lease under the GSA and can only

receive revenue from the Well. Shamrock takes the position that the oil and gas lease is a *profit à prendre*, which is an interest in land excluded under Alberta's *PPSA*, s 4(f).

29 I note that the Supreme Court of Canada in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58, [2008] 3 S.C.R. 166 (S.C.C.) [Saulnier] discussed the term "property" in the context of a commercial fishing licence under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 [*BIA*] and *Nova Scotia's Personal Property Security Act*, SNS 1995-96, c 13 [*PPSA*]. The provision of the relevant section of Nova Scotia's *PPSA* is identical to that of *Alberta's Personal Property Security Act*, RSA 2000, c P-7.

30 The Supreme Court in *Saulnier* held that the *BIA* and *PPSA* should be interpreted in a way best suited to enable them accomplish their respective commercial purposes. Binnie, J, writing for the Court, observed that:

> [28] ... [A] fishing licence ... bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds ...
>
> [29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) ... The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.
>
> [30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on The Law of Real Property (4th ed. 1975), at p. 779:
>
> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree.
>
> And at p. 822:
>
> A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.
>
> [31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in ***Harper v. Minister for Sea Fisheries*** (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:
>
> A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]
>
> . . .
>
> [33] In my view these observations are helpful ... there are important points of analogy between the fishing licences issued to the appellant ***Saulnier*** and the form of common law property called a *profit à prendre* ...
>
> [34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.
>
> (emphasis added)

31 In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in *Saulnier*. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: *Saulnier* at para 29. The right to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": *Saulnier* at para 34.

32 In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: *Saulnier* at para 34; *Stout & Co. LLP v. Chez Outdoors Ltd.*, 2009 ABQB 444 (Alta. Q.B.) at para 39, (2009), 9 Alta. L.R. (5th) 366 (Alta. Q.B.) [*Chez Outdoors*]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": *Chez Outdoors* at para 15. That right is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

33 This Court has the authority to make an Order either "unconditionally or on any terms and conditions" it thinks just, including a restriction of the powers of a Receiver and Manager if necessary in the circumstances of the case before it: *Judicature Act*, s 13(2).

34 Kasten seeks a court-appointed Receiver who is a court officer owing a fiduciary duty to all parties, including the debtor: *Philip's Manufacturing Ltd., Re* (1992), 92 D.L.R. (4th) 161 (B.C. C.A.) at para 17, [1992] 5 W.W.R. 549 (B.C. C.A.) (WL). It argues that the court-appointed Receiver would take instructions from the Court and not from Kasten. The Receiver would be bound to act in the best interests of all parties. In a *volte-face*, Kasten seeks in its supplemental brief that this Court should appoint it as a Receiver. There was no reason specifically advanced by Kasten for its new position.

35 Shamrock submits that a Consent Receivership Order should be granted and the Receiver should not be conferred with a power of sale. It wants the Order held in abeyance until April 1, 2013 or when Shamrock/Stout fails to make a payment of interest as scheduled, whichever occurs first, in order to allow for the sale of Sawn Lake Well.

36 The Respondent notes that Kasten now seeks to be appointed as the Receiver and Manager instead of the earlier proposed independent body corporate, MNP Ltd. which had given its consent to act as Receiver and Manager of Shamrock, the debtor.

37 In the absence of any clear objection to the appointment of MNP Ltd., an independent and neutral entity in this matter, an Order will issue to name MNP Ltd. as the court-appointed Receiver and Manager of all the current and future assets, undertakings and properties of Shamrock Oil and Gas Ltd. until Kasten and other creditors (secured and unsecured) are paid in full. The Receiver and Manager will have no power of sale, except as approved by an Order of this Court. However its authority is suspended until April 1, 2013 in order to accommodate any potential sale of Sawn Lake Well by Shamrock. To be clear, if Sawn Lake Well is not sold on or before April 1, 2013, the power and authority of the Receiver and Manager is to become effective immediately on that day.

38 If parties are unable to agree on costs, they should arrange to speak to me within 30 days of the issue of this decision.

Application granted.

End of Document

TAB 6

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

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

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 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[*]

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.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

> a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;
>
> b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;
>
> c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;
>
> d) an assignment of mortgage-backed debentures;
>
> e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;
>
> f) $250,000 to be held in trust by Paragon's counsel; and
>
> g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [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 authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

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

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

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

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

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

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

Should the order be stayed?

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

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application.

Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

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TAB 7

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

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

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

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

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

M.J. Lema J.

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

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

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — General principles

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

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming

joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

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

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

A. Introduction

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

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

B. Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Issues

4 The issues are:

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

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

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

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

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

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

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

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

D. Analysis

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

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

7 My reasoning is outlined below.

ATB veto

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

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

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

- it is effectively being asked to take a 50 per cent discount on its claim;
- the "secured" portion of its claim will be replaced by two unsecured promissory notes, the payment of one of which depends on the (uncertain) outcome of certain events;
- the unsecured portion of its claim may be effectively blocked by the proposal mechanics;
- ATB already has first-position security on the assets out of which Schendel proposes to pay it under the proposal;
- it undercuts ATB's recourse against five guarantees provided by individuals associated with the Schendel; and
- overall, ATB believes it will fare better under a bankruptcy.

Uncertainty over possible amendments

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

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

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

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

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

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

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

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

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

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

Subsection 50(12) exists for a reason

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

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

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

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

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

Same approach taken under CCAA

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

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).
>
> *In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved*. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the

> secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

Good faith

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

- its ATB account manager advising over the course of fall 2018 to spring 2019 that ATB would work cooperatively with Schendel to restructure its loan commitments;
- Schendel believing, in late February 2019, that its account with ATB was still in the hands of the account manager i.e. not under the effective control of ATB's special-credit group i.e. ATB did not make plain to it that the special-credit group was involved;
- an early March 2019 meeting where ATB advised that it was patient, was working through the issues, and was considering parking Schendel's debt;
- at a Schendel-ATB meeting on March 13, 2019, ATB outlining restructuring steps for Schendel with a three- to six-month horizon, starting later in March, once Schendel had provided certain information to ATB;
- at the same meeting, ATB advising Schendel that "this [was] not the end", instead, was part of the process and restructuring;
- at that meeting, and although ATB did disclose an intention to seek a receivership if certain conditions of the three- to -six month restructuring period were not achieved, it making no mention then of an intention to issue payment demands;
- ATB obtaining payables information requested at that meeting (understood by Schendel to assist in working through the restructuring period) and using it as evidence of Schendel's inability to carry on business; and
- later on March 13, 2019, ATB issuing demand letters and s. 244 *BIA* (intention to enforce security) notices.

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

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

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.*[3] and *Toronto-Dominion Bank v. Rismani*[4], as well as *Good Faith as an Organizing Principle in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back*, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

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

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

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

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

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

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

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

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

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

Conclusion on "proposal deemed refused" application

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

E. Appointment of receiver

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

Test for appointing a receiver

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

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

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

> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the

Paragon list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

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

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

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";
- per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";
- ATB has not provided evidence to support its receiver-related arguments; and
- more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

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

In any case, I rely on these factors:

- Schendel is a large enterprise with complex construction projects underway;
- coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;
- recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;
- ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;
- Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;
- ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and
- as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

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

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

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

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

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

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

G. Closing note

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

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

Application granted.

Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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