COURT FILE NUMBER	1901-11574
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp:

CLERK OF THE COURT
FILED
JUN 17 2020
JUDICIAL CENTRE
OF CALGARY

PLAINTIFF	PANTERRA MORTGAGE & FINANCIAL CORPORATION LTD.
DEFENDANTS	1075397 ALBERTA LTD., RIGSAT COMMUNICATIONS INC., PETROCRAFT PRODUCTS LTD., TERENCE PHILLIPS, and LISA PHILLIPS
DOCUMENT	**BRIEF OF LAW ON BEHALF OF PANTERRA MORTGAGE & FINANCIAL CORPORATION LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Burnet, Duckworth & Palmer LLP
2400, 525 – 8 Avenue SW
Calgary, Alberta T2P 1G1
Lawyer: David LeGeyt / Ryan Algar
Phone Number: (403) 260-0210 / 0143
Fax Number: (403) 260-0332
Email Address: dlegeyt@bdplaw.com / ralgar@bdplaw.com
File No. 49075-61

Hearing before the Honourable Justice K.M. Horner
on the Commercial List, on June 29 2020, commencing at 3:30 pm

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TABLE OF CONTENTS

I. INTRODUCTION

1. This is the Brief of Law of Panterra Mortgage & Financial Corporation Ltd. ("**Panterra**" or the "**Lender**"), in support of its application (the "**Application**") to appoint MNP Ltd. ("**MNP**") as the receiver and manager (the "**Receiver**") of the property legally described as Plan 7810519, Block 5, Lot 2, excepting thereout mines and minerals and all of 107's present and after-acquired property thereon (the "**Property**") currently owned by 1075397 Alberta Ltd. ("**107**" or the "**Debtor**").

2. As set out in greater detail below, Panterra and 107 are parties to certain secured credit facilities that were originally entered into by 107 and Paragon Capital Partners Ltd. ("**Paragon**"). 107 granted security in favour of Paragon under various instruments, which Paragon subsequently assigned to Panterra.

3. 107 is in default of its obligations to Panterra and has failed to repay the amounts owing under Loan Agreement following Panterra's demands. Panterra therefore seeks to enforce its contractual right to appoint a Receiver under the Security.

II. FACTUAL BACKGROUND

4. The facts in support of Panterra's application are set out in the Affidavit of Default sworn by Brian Beck on January 30, 2020 (the "**Affidavit of Default**") and Affidavit #2 of Brian Beck sworn on June 16, 2020 (the "**Beck Affidavit**").[1]

5. MNP is qualified, prepared and has consented to act as Receiver of the Property.[2]

A. No Defence

6. Panterra commenced this Action by way of Statement of Claim on August 20, 2019. Rather than file a Statement of Defence (a "**Defence**"), 107 and the Defendants Rigsat Communications Inc., Petrocraft Products Ltd., and Terrence Phillips, chose to file a Demand for Notice (a "**Notice**") on September 17, 2019.[3] As such, 107 and those other Defendants cannot oppose this Application.

[1] Unless otherwise indicated, capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Affidavit of Default, the Beck Affidavit and Panterra's Application, filed on June 17, 2020.
[2] Beck Affidavit, at para 25.
[3] Beck Affidavit, at para 4.

B. The Loan Agreement and Mortgage

7. On December 10, 2014, Paragon extended a secured loan of $3,200,000 in a single advance (the "**Principal Sum**") to 107, pursuant to a Loan Agreement (as amended and supplemented from time to time, the "**Loan Agreement**").

8. Under the terms of the Loan Agreement, 107 was required to repay, at the maturity date, the Principal Sum with interest thereon as provided in the Loan Agreement. The original terms of the Loan Agreement provided, among other things, the following:

a) 107 was to pay interest at a rate of 0.75% per month, calculated monthly, not in advance, as well after as before maturity; and

b) the maturity date was January 1, 2016.[4]

9. On December 16, 2014, as security for the loan, 107 granted a demand collateral mortgage to Paragon (as amended and renewed from time to time, the "**Mortgage**"), pursuant to which it mortgaged and charged the Property.[5]

10. Under the Mortgage, 107 covenanted to pay:

a) monthly interest payments of $24,000 on the 1st day of each month from and including February 1, 2015 up to and including January 1, 2016; and

b) the balance of the Principal on January 1, 2016.[6]

11. Between December 2015 and January 2018, 107 and Paragon entered into a number of extension agreements which, among other things, extended the maturity date of the Loan Agreement and the Mortgage to July 1, 2018.[7]

C. Additional Security

12. Further, 107 provided a General Security Agreement dated effective December 10, 2014, pursuant to which 107 granted a security interest in all of its present and after-acquired personal property and real property in favour of Paragon, as security for the payment and performance of any and all obligations,

[4] Exhibit "B" to the Affidavit of Default, at ss 2.3 and 1.1.
[5] Beck Affidavit, at paras 5-6.
[6] Beck Affidavit, at para 9.
[7] Exhibit "A" to the Affidavit of Default, at ss 2(a) and 2(c).

indebtedness and liabilities of 107 to Paragon (the "**GSA**", and together with the Mortgage, the "**Security**").[8]

D. The Assignment to Panterra and Further Mortgage Extension

13. On August 9, 2018, Paragon assigned to Panterra, among other things, its entire right, title, estate and interest in the Loan Agreement and all indebtedness of 107 thereunder, the GSA, and the Mortgage (the "**Assignment**").[9]

14. Following the Assignment, Panterra agreed to further extend the maturity date under the Loan Agreement and the Mortgage to March 1, 2019.[10]

E. 107's Defaults and Panterra's Remedies

15. As at June 9, 2020, 107 is indebted to Panterra in the amount of CAD$3,571,792.15, in respect of funds borrowed under the Loan Agreement, plus all interest and legal costs which continue to accrue (the "**Indebtedness**").[11]

16. The Loan Agreement and the Mortgage have matured and the Indebtedness is now due and owing to Panterra.[12] Additionally, 107 has failed to:

a) make scheduled payments to Panterra in accordance with the Loan Agreement and the Mortgage; and

b) pay all amounts due and owing by March 1, 2019, being the maturity date for the Loan Agreement and the Mortgage.

17. Both the GSA and the Mortgage provide that if 107 is in default of its obligations thereunder, Panterra may appoint or apply to this Honourable Court to appoint a receiver and manager over all, or a portion of, the assets, undertakings and properties of 107.

[8] Exhibit "A" to the Affidavit of Valerie Anasco dated June 17, 2020.
[9] Beck Affidavit, at para 10.
[10] Beck Affidavit, at para 11.
[11] Beck Affidavit, at para 12.
[12] Beck Affidavit, at para 13.

F. Demands and Failure to Make Payment

18. On May 24, 2019, Panterra demanded repayment of the Indebtedness and provided notice of the foregoing defaults and a notice of intention to enforce its Security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act* (a "**244 Notice**").[13]

19. On August 8, 2019, as a result of 107's refusal or failure to pay the Indebtedness, Panterra served 107 with an updated demand letter whereby Panterra again: (a) provided notice of 107's continuing defaults; (b) demanded repayment of the Indebtedness; and (c) issued a second 244 Notice.[14]

III. ISSUES

20. The following issue is before this Honourable Court:

a) Should this Honourable Court appoint a Receiver over the Property?

IV. PANTERRA'S POSITION

21. Panterra respectfully submits that it is just and convenient to appoint MNP as the Receiver of the Property in the present circumstances.

V. LAW AND ARGUMENT

A. 107 has no defence to Panterra's Application.

22. Rule 3.30(c) allows a defendant who is served with a Statement of Claim to file and serve a Defence or a Notice.[15] Simply, where a defendant chooses to file and serve a Notice, the defendant has no "right to contest liability."[16]

23. In *Richardson*, the Alberta Court of Appeal explained the consequences of choosing to file a Notice as opposed to a Defence:

> As set out in R. 3.34(4), the defendant who files a demand for notice cannot 'contest liability', but is entitled to notice of any application or proceeding. The plaintiff, on the other hand, can only obtain judgment against the defendant on application, and on notice to the defendant. A defendant who only files a demand of notice effectively admits liability on the terms alleged in the statement of claim.[17] [emphasis added]

---

[13] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), at s. 244(1) [**Book of Authorities ("Authorities"), Tab 1**]; Beck Affidavit, at para 16.
[14] Beck Affidavit, at para 17.
[15] Rule 3.30(c).
[16] Rule 3.34(4).
[17] *Richardson v Richardson*, 2018 ABCA 327 ("***Richardson***") at para 8 [**Authorities, Tab 2**].

24. In *Lupkoski*, the Court reviewed the early Alberta authorities governing Notices and concluded that a Notice results in the admission of liability by a defendant while only preserving the defendant's ability to dispute the amount sought:

> In *Can. Mortgage Investment Co. v. Baird* [1916], 10 W.W.R. 1195, 34 W.L.R. 985, 30 D.L.R. 275 (Alta.), the late Mr. Justice Beck said that if the defendant had filed merely a demand of notice he would have been entitled to notice of the taking of the accounts. It would surely be an idle thing to give him such a notice if when he appeared pursuant to it he was not allowed to point out and to prove any errors in the plaintiff's claim. This practice of delivering a demand of notice is so peculiar to this jurisdiction that there is no authority under it except in the judgments of our own Court, and the above case is the only one that I can find. Its purpose, I should say, is to give to a defendant who admits his liability under the cause of action sued on a chance to see that he is not held for more than he should be for that purpose and to present, if necessary, to the Court anything that may be helpful it in that respect.[18] [emphasis added]

25. Further, courts have noted that the meaning of "liability" may differ depending on the context of the application. For instance, in *Derryl Toews*, the plaintiff brought an application in a builders' lien action. In that case, the Court found that by filing the Notice, the defendant admitted that the plaintiff had a valid lien. Specifically, the Court noted:

> Any party served with a copy of the statement of claim who delivers a demand of notice admits "liability". In this situation it would be an admission that the Plaintiff has a valid lien. That party cannot then come in and take the position that the Plaintiff does not have a valid lien, for whatever reason. The most that party can do with a demand of notice is to see that the amount that the lien is for is not more than what is properly owing to the Plaintiff (i.e., quantum only): *Canada Permanent Trust Company v. King Art Developments Ltd.*, (Judgment no. 1, April 2, 1984, Calgary C.A. 17085 and 17196).[19]

26. Panterra filed its Statement of Claim in August of 2019 and pleadings closed on September 17, 2017, the day 107 filed its Notice. As at the filing of the Application, 107 has not applied to file a Defence. As a result, 107 has admitted the facts set forth in the Statement of Claim.

27. The present application does not determine or turn on the quantum of 107's liability under the Loan Agreement or Mortgage. 107 has admitted its liability and is unable to oppose Panterra's Application.

B. Appointing a Receiver is just and convenient.

28. Panterra satisfied the procedural prerequisite to seeking appointment of a Receiver on May 24, 2019 and August 8, 2019 when it served 107 with the 244 Notices.

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[18] *Lupkowski v Lupkowski*, [1974] 3 W.W.R. 377 (ABCA) ("***Lupkowski***") at para 9 [**Authorities, Tab 3**]; citing *Stone v. Vulcan Municipal Hospital District*, [1930] 1 W.W.R. 839 at page 842.
[19] *Derryl Toews Construction Ltd. v Jun*, [1984] AWLD 1051 (ABQB) ("***Derryl Toews***") at para 33 [**Authorities, Tab 4**].

29. Each of section 243 of the BIA[20] and section 13(2) of the *Judicature Act*[21] vest in this Honourable Court the authority to appoint a Receiver where it is just and convenient to do so.

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

31. In considering whether or not to appoint a receiver, courts have often relied upon the same test to determine whether an interlocutory injunction is appropriate,[22] but have also lowered the threshold in cases where "the dictates of fairness are so overwhelming".[23] In *Murphy*, the Alberta Court of Queen's Bench confirmed that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Test are not met.[24]

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

> In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:
>
> a. whether irreparable harm might be caused if no order is made;
>
> b. the risk to the parties;
>
> c. the risk of waste of the debtor's assets;
>
> d. the preservation and protection of property pending judicial resolution; and
>
> e. the balance of convenience.[25]

33. As recently as July 2019, in its decision *Schendel*, the Alberta Court of Queen's Bench affirmed the oft-cited, non-exhaustive list of factors set forth in *Bennett on Receiverships* to be considered in courts' decisions to appoint a receiver,[26] originally consolidated in by Justice Romaine in *Paragon* (the "***Paragon***

[20] BIA, at s. 243 [**Authorities, Tab 1**].
[21] *Judicature Act*, RSA 2000, c J-2, as amended (the "***Judicature Act***"), at s. 13(2) [**Authorities, Tab 5**].
[22] the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**"); *RJR — MacDonald Inc. v Canada (Attorney General)* [1994] 1 SCR 311 (SCC) at paras 83-85 [**Authorities, Tab 6**].
[23] *Murphy v Cahill*, 2013 ABQB 335 ("***Murphy***") at para 8 [**Authorities, Tab 7**].
[24] *Murphy* at para 62 [**Authorities, Tab 7**].
[25] *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("***Lindsey***") at para 32 [**Authorities, Tab 8**].
[26] *Re Schendel Management Ltd.*, 2019 ABQB 545 ("***Schendel***") at para 44 [**Authorities, Tab 9**].

Factors").[27] The *Paragon* Factors include two of the three elements of the Injunction Test (omitting the "serious issue to be tried" element) and all five factors from *Lindsey*.

34. In *Paragon*, Justice Romaine held that parties' contractual interests should be honoured above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm if a court does not appoint a receiver:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.[28]

35. In *Kasten*, the applicant was a secured creditor who brought an application to appoint a receiver pursuant to the terms of its relevant security documentation. The Court held:

> The security documentation in the present case authorizes the appointment of a Receiver […]. Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed.[29]

36. Having regard for the *Paragon* Factors, Panterra submits that:

a) the GSA and Mortgage authorize the appointment of a Receiver. It is an express term of the contracts that, upon default, one of the remedies available to Panterra is the appointment of receiver over all, or any portion, of 107's property. Panterra submits that this Honourable Court ought to give substantial weight to the explicit contractual remedy agreed upon by the parties;[30]

b) the balance of convenience weighs in favour of Panterra in light of the issuance of Panterra's demands, the ongoing breaches of the Loan Agreement by 107, Panterra's lack of confidence in 107's management, and 107's admission of liability and implied consent by filing a Demand for Notice;

c) the appointment of a Receiver is necessary for the preservation and protection of the Property;

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[27] *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("***Paragon***") at para 27 [**Authorities, Tab 10**].
[28] *Paragon* at para 28 [**Authorities, Tab 10**].
[29] *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63 ("***Kasten***") at para 21 [**Authorities, Tab 11**].
[30] Beck Affidavit, at para 20.

d) the nature of the Property is such that judicial assistance will be required to maximize the value of the Property; and

e) the risk to Panterra is significant, given that the Indebtedness is in excess of CAD$3,571,792.15 and based on the evidence before the Court the value of the Property is no more than $3.0 million.

VI. CONCLUSION

37. For the reasons set forth above, this Honourable Court ought to grant Panterra's Application in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF JUNE, 2020.

BURNET, DUCKWORTH & PALMER LLP

Per: _____
David LeGeyt
Solicitors for Panterra Mortgage & Financial Corporation

BOOK OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2.	*Richardson v Richardson*, 2018 ABCA 327.
3.	*Lupkowski v Lupkowski*, [1974] 3 W.W.R. 377 (ABCA).
4.	*Derryl Toews Construction Ltd. v Jun*, [1984] AWLD 1051 (ABQB).
5.	*Judicature Act*, RSA 2000, c J-2.
6.	*RJR — MacDonald Inc. v Canada (Attorney General)* [1994] 1 SCR 311 (SCC).
7.	*Murphy v Cahill*, 2013 ABQB 335.
8.	*Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242.
9.	*Re Schendel Management Ltd.*, 2019 ABQB 545.
10.	*Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430.
11.	*Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63.

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

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

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

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

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

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

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

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

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

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

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

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

Currency
Federal English Statutes reflect amendments current to May 27, 2020
Federal English Regulations are current to Gazette Vol. 154:11 (May 27, 2020)

End of Document

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

s 244.

Currency

244.

244(1)Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

244(2)Period of notice

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

244(2.1)No advance consent

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

244(3)Exception

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

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

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

244(4)Idem

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

Amendment History

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

Currency

Federal English Statutes reflect amendments current to May 27, 2020
Federal English Regulations are current to Gazette Vol. 154:11 (May 27, 2020)

End of Document

TAB 2

2018 ABCA 327
Alberta Court of Appeal

Richardson v. Richardson

2018 CarswellAlta 2260, 2018 ABCA 327, [2018] A.W.L.D. 4137,
297 A.C.W.S. (3d) 53, 32 C.P.C. (8th) 166, 75 Alta. L.R. (6th) 1

David Matthew Richardson (Respondent / Plaintiff) and Judith Lucy Richardson (Appellant / Defendant)

Frans Slatter, Myra Bielby, Michelle Crighton JJ.A.

Heard: October 1, 2018
Judgment: October 5, 2018
Docket: Edmonton Appeal 1803-0095-AC

Proceedings: reversing *Richardson v. Richardson* (2018), 2018 ABQB 184, 2018 CarswellAlta 453, R.A. Jerke J. (Alta. Q.B.)

Counsel: S.D. Hennessy, for Respondent
A.D. Taunton, for Appellant

Subject: Civil Practice and Procedure; Family; Property

APPEAL by wife from judgment reported at *Richardson v. Richardson* (2018), 2018 ABQB 184, 2018 CarswellAlta 453 (Alta. Q.B.), allowing husband to discontinue action without leave of court.

***Per curiam*:**

1 The appellant appeals an order allowing the respondent to discontinue his matrimonial property claim: *Richardson v. Richardson*, 2018 ABQB 184 (Alta. Q.B.). A discontinuance would have the effect of precluding any division of the remaining matrimonial property.

Facts

2 The parties were married in 1991 and separated in 2008. The respondent issued a Statement of Claim for Divorce and Division of Matrimonial Property on November 18, 2008. With respect to relief under the *Matrimonial Property Act*, RSA 2000, c. M-8, he claimed the following:

> (a) an Order for the distribution of all of the property acquired by the Plaintiff and the Defendant, either jointly or separately, in such manner as the Court deems just and equitable.

The appellant did not file a Statement of Defence or Counterclaim.

3 An order was made on August 13, 2010 to sell the matrimonial home, and to sever the claim for divorce from the corollary and matrimonial property relief. On June 1, 2011 the appellant's lawyer was suspended from practising by the Law Society, commencing September 1, 2011. That lawyer filed a Demand for Notice on July 29, 2011. A desk divorce was granted on August 18, 2011. It seems probable that the Demand for Notice was filed at that time in order to facilitate and expedite the desk divorce procedure.

4 The matrimonial home was sold, certain debts were paid, and there were allegations that the appellant's former counsel had misappropriated some of the sale proceeds. As noted, the Law Society was involved. The appellant received some of the

proceeds of the sale. By order dated October 19, 2017, other proceeds of sale were distributed to the respondent, but about $29,000 remains in court.

5 An order of October 10, 2012 directed that the respondent was to provide further financial disclosure. When he did not comply, a further order of November 14, 2012 directed that if he did not comply by January 11, 2013 the action could proceed in his absence.

6 By November 2017 the respondent still had not provided the necessary disclosure, and objected to the appellant filing any applications because she had only filed a Demand for Notice. The appellant accordingly brought an application to find the respondent in contempt for not having complied with the two disclosure orders, and for leave to file a Statement of Defence and Counterclaim. The respondent then indicated that he intended to discontinue his action. The appellant accordingly amended her application to include an order preventing the discontinuance.

7 The chambers judge concluded that, absent an abuse of process, a plaintiff has a right to discontinue an action, following *De Shazo v. Nations Energy Co.*, 2006 ABCA 400, 68 Alta. L.R. (4th) 57, 401 A.R. 142 (Alta. C.A.). A party that does not properly defend a matrimonial property claim runs the risk of the claim being discontinued after the limitation period has expired. In this case there had been delay, and the action had not significantly advanced to trial. There was no basis to prevent the respondent from discontinuing the action. This appeal resulted.

The Effect of a Demand for Notice

8 The *Rules* set out the consequences of filing a demand for notice, as opposed to a statement of defence:

> **3.34 (4)** If the defendant files a demand for notice and serves it on the plaintiff, the defendant must be served with notice of any application or proceeding in which the defendant is named as respondent, but filing and service of the notice does not give the defendant a right to contest liability.
>
> (5) If a defendant files a demand for notice and serves it on the plaintiff, the defendant may subsequently file a statement of defence only with the Court's permission.
>
> (6) Judgment or an order may be given against a defendant who has filed and served a demand for notice only if
>
> (a) the plaintiff applies to the Court for judgment or an order, and
>
> (b) notice of the application is served on the defendant.
>
> **12.11(2)** Where a defendant wishes to receive notice of any hearing but does not wish to oppose a statement of claim referred to in this Part [*Family Law Rules*], the defendant must file a demand for notice in Form 13.

As set out in R. 3.34(4), the defendant who files a demand for notice cannot "contest liability", but is entitled to notice of any application or proceeding. The plaintiff, on the other hand, can only obtain judgment against the defendant on application, and on notice to the defendant. A defendant who only files a demand of notice effectively admits liability on the terms alleged in the statement of claim. If a defendant in a family law claim "does not wish to oppose" the relief claimed, R. 12.11(2) provides that a demand of notice is sufficient.

9 What was the effect of the Demand for Notice filed by the appellant? As previously set out, the respondent's statement of claim claimed a division of matrimonial property "in such manner as the Court deems just and equitable". When the appellant filed her demand for notice, she effectively admitted that the respondent was in fact entitled to that relief: *Simbajon v. Leduc*, 2015 ABCA 321 (Alta. C.A.) at para. 20. When pleadings closed, both the plaintiff and the defendant had joined issue, and admitted that a "just and equitable" judicial distribution of all of the matrimonial property was required. The relief claimed by the respondent, however, was not unilaterally to his benefit, because a "just and equitable distribution" would provide relief to both parties.

TAB 3

1974 CarswellAlta 39
Alberta Supreme Court [Appellate Division]

Lupkoski v. Lupkoski

1974 CarswellAlta 39, [1974] 3 W.W.R. 377, 16 R.F.L. 105, 42 D.L.R. (3d) 154

Lupkoski v. Lupkoski

McDermid, Allen and Prowse JJ.A.

Judgment: February 28, 1974

Counsel: *L. W. Wildeman*, for petitioner.
F. L. Scott, for respondent.

Subject: Family

The judgment of the Court was delivered by *McDermid J.A.*:

1 There are two questions to be resolved in this appeal. Should a respondent in a petition for divorce, who has filed no answer but has filed a demand of notice, on the question of the amount of maintenance to be ordered payable to the petitioner and on the question of his right of access to his children, be allowed to cross-examine the petitioner and, secondly, himself to give evidence?

2 The right to file a demand of notice is peculiar to the Province of Alberta. Counsel were unable to refer us to any other jurisdiction in which the same is used.

3 In her petition for divorce the wife, as well as asking for a divorce from her husband, asked for custody of the children, and for maintenance for herself and the children of the marriage.

4 At the trial when the counsel rose to cross-examine the petitioner, he stated, "the only points I am seeking to question is the access, the definition of what it should be and the monthly payments for the petitioner."

5 The learned trial Judge asked if he could cite any authority for the proposition that he should be allowed to cross-examine when the defendant had filed only a demand for notice, and when counsel could produce none, except, as he stated, it was the practice of the court to allow such questions, he was refused the right to cross-examine or call the respondent to give evidence.

6 There are few cases dealing with rights of a defendant who has filed a demand for notice. In *Can. Mortgage Investment Co. v. Baird* (1916), 10 W.W.R. 1195, 34 W.L.R. 985, 30 D.L.R. 275 (Alta.), Beck J. said that where damages only were in question, by filing a demand of notice, a defendant would be entitled to have notice of a taking of account on a mortgage. He said at p. 1196:

> In my opinion all these questions would have been open for discussion on a motion for judgment and if the proper direction were then given, on the taking of the account of the amount owing under the mortgage, and the mortgagor would have been entitled to have had notice of the taking of the account, if he had filed merely a demand of notice. The costs of both parties would thereby have been considerably less than under the method adopted, viz., of putting in a defence and having the points of law set down for hearing.
>
> A mortgage action is one in which, in face of a demand of notice judgment by default cannot be entered. If a demand of notice is served, there must be notice of motion for judgment. These questions ought to have been raised and dealt with on such a motion or have been left with a proper direction to be dealt with on a reference to take the account, with the right on the part of the referee to refer these points of law to a judge.

7 In *Bowen v. Can. Northern Ry. Co.*, [1918] 1 W.W.R. 417 (Alta.), Blain M.C. said at p. 418:

> Two issues were raised by the statement of claim, *viz.*, the liability of the defendant to pay damages and the amount of the damages to be paid. The defendant by not delivering a statement of defence admits liability and so disposes of that issue, but the other issue, the amount of damages to be awarded, still remains to be determined.
>
> It is only on default of delivery of a defence or a demand of notice that a plaintiff may note a defendant in default. (Rule of Court 156.) The defendant in this action could not be noted in default as a demand for notice had been delivered and Rule of Court 157 does not apply. The remaining issue in the action, the determining of the amount to be paid the plaintiff for damages, has been directed to be set down for trial by a Judge and jury.
>
> Rule of Court 234 provides that a Judge may order any party to an action to be examined for discovery. Examinations for discovery are usually after delivery of the statement of defence, and directed on the hearing of the application for directions, but the rule does not require delivery of a defence before examination can be ordered. I think the demand of notice might, in this case, be treated as a joinder of issue. I will make an order for examination of the plaintiff for discovery. I think the examination should be granted on the ground of expediency if for no other reason, as it may lead to a settlement and so save expense of a trial. The examination will of course be confined to the matters raised by the issue.

8 In *McCallum v. Mosher*, [1919] 3 W.W.R. 537 (Alta.), Clarry M.C. directed that a defendant who had filed only a demand of notice might be examined for discovery by the plaintiff.

9 In *Stone v. Vulcan Municipal Hospital District*, [1930] 1 W.W.R. 839, [1930] 3 D.L.R. 210 (Alta.), Walsh J. at p. 842 decided that where a defendant has filed a demand of notice,

> The defendant having given its demand of notice became entitled to 'notice of all motions against him subsequently made in the action' (Rule 161). The only purpose of this can be to give him an opportunity to appear upon it and his appearance would be a futile thing if he could not be heard upon the motion. Under the order for directions this case will be set for trial at the next jury sittings at Calgary and I am assigned to that Court. Because of this I think it proper to say that I will permit counsel for the defendant to appear and cross-examine the plaintiffs' witnesses and to adduce evidence for the defence on the question of damages and to address the jury. In *Can. Mortgage Investment Co. v. Baird* (1916), 10 W.W.R. 1195, 34 W.L.R. 985, 30 D.L.R. 275 (Alta.), the late Mr. Justice Beck said that if the defendant had filed merely a demand of notice he would have been entitled to notice of the taking of the accounts. It would surely be an idle thing to give him such a notice if when he appeared pursuant to it he was not allowed to point out and to prove any errors in the plaintiff's claim. This practice of delivering a demand of notice is so peculiar to this jurisdiction that there is no authority under it except in the judgments of our own Court, and the above case is the only one that I can find. Its purpose, I should say, is to give to a defendant who admits his liability under the cause of action sued on a chance to see that he is not held for more than he should be for that purpose and to present, if necessary, to the Court anything that may be helpful to it in that respect.

10 In *Knoll v. Wright*, [1945] 1 W.W.R. 552 (Alta.), Edmanson L.J.S.C. referred to use of a demand of notice as being a procedure in a partially defended action". In *Mareen Homes Ltd. v. Malcher* (1966), 57 W.W.R. 733 (Alta.), Farthing J. allowed a defendant who had filed a demand of notice to subsequently file a statement of defence.

11 A question arose as to the right of a respondent in a divorce action in British Columbia to be heard when he had not filed an answer. Munroe J. stated in *Trousdell v. Trousdell* (1971), 6 R.F.L. 5, 20 D.L.R. (3d) 347 at 348:

> The respondent now seeks leave to be heard upon the said hearing, before the District Registrar and upon any subsequent proceedings arising therefrom and upon the taxation of costs. Counsel for the petitioner submits that since the respondent did not file an answer, he is not entitled to be heard. I cannot agree. Divorce Rule 17 provides that a respondent who wishes to oppose the petition shall file an answer and serve a copy upon the petitioner or his solicitor. The respondent herein did not file an answer because he did not wish to oppose the petition, that is, he did not object to a divorce nor did he object to payment of maintenance nor did he object to payment of costs. He wishes now to be heard only upon

TAB 4

1984 CarswellAlta 506
Alberta Court of Queen's Bench

Derryl Toews Construction Ltd. v. Jun

1984 CarswellAlta 506, [1984] A.W.L.D. 1051, 28 A.C.W.S. (2d) 316, 56 A.R. 308

Derryl Toews Construction Ltd., Plaintiff, v. Daniel Jun and Shion Enterprises Ltd., Turbo Resources Ltd., Horne & Pitfield Food Ltd., Pioneer Trust Company. D.S.C. Investments Ltd., Daniel Jun, Toronto Dominion Bank and Mohawk Oil, Defendants

M. Funduk [Master In Chambers]

Judgment: 9 October, 1984
Docket: Doc. Wetaskiwin No. 8312-001025

Counsel: *J. Power, Esq. Lucas, Edwards* Agent for Messrs. Pike, Sockett & Yake For the Plaintiff.
M. Olsen, Esq. Stuffco, Olsen & Lovatt For Pioneer Trust Company.
L. Whittaker, Esq. Department of the Attorney-General For Registrar of Land Titles.

Subject: Contracts; Corporate and Commercial

***M. Funduk*, [Master In Chambers]:**

MEMORANDUM OF DECISION

1 This is an application by the Plaintiff in a builders lien action. According to the notice of motion the Plaintiff asks for:

> 1. A decree to direct the Registrar of the North Alberta Land Registration District to correct, rectify or substitute the registration date to be August 22nd, 1983, in respect of a certain Certificate of Lis Pendens registered as Document No. 832202426, together with such further decree or order as may be necessary to give effect to the said Certificate of Lis Pendens.

2 The notice of motion also states:

> AND FURTHER TAKE NOTICE that the grounds upon which this application is made are as follows:
>
> > a) The Registrar, through accident, inadvertence or oversight, effected registration of the Certificate of Lis Pendens one day following submission of the document for registration;
> >
> > b) The Applicant will rely on Sections 180 and 180.1 of the Land Titles Act.

3 The application is unusual because the Plaintiff is raising an issue that none of the Defendants have yet raised. One might ask why a plaintiff would raise an issue that the defendants do not raise. The proceeding is unusual in other respects.

4 In the amended statement of claim the Plaintiff alleges that Jun is the registered owner of the land.

5 The Plaintiff alleges that it entered into a contract with Jun and Shion whereby it, the Plaintiff, "would supply services and material supplied (sic) with respect to the construction of a building".

6 The Plaintiff alleges that it supplied "building services (sic) and material" to Jun and Shion.

> was an assignment of an account or debt receivable. Notwithstanding that the action was pleaded in debt, the judgment awarded was for damages for breach of contract, without amendment of the pleading to fit the evidence. This discrepancy between the award of damages and the pleading in debt was raised before us but apparently not before the trial judge.
>
> While I do not propose to decide this appeal on that fundamental irregularity because of the conclusion which I have reached on other grounds, I wish to caution that this judgment should not be interpreted as an acquiescence by this court in the irregular procedure followed at trial. *I underline that a trial court's jurisdiction to award judgment is restricted to the relief sought on the issue placed before it by the pleadings*, as amended, if need be, at trial, pursuant to the rules.
>
> (emphasis mine)

30 This is a builders lien action. As I have already indicated, there is no proof of service on file of the statement of claim on Jun or on some of the other persons who should be served. There is no proof of service of the amended statement of claim on anyone. Until the amended statement of claim is served it is not possible to know if any party will contest the Plaintiff's lien on the ground an action was not commenced and a certificate of lis pendens registered within 180 days. Unless that is raised as an issue by a party it does not become an issue.

31 The Plaintiff cannot have an adjudication on *any* substantive matter until the pleadings are closed. They are not closed until the Plaintiff serves a copy of the amended statement of claim on all persons who should be served and all parties who do not enter an appearance are noted in default.

32 If a party who is served does not enter an appearance he should be noted in default. That party then has admitted the facts alleged in the statement of claim: *Sulef v. Parkin*, [1966] 57 W.W.R. 236 (Alta. C.A.). In addition, that party cannot come in and dispute the validity of the Plaintiff's lien, on whatever ground. A party who wants to dispute the validity of the Plaintiff's lien, on whatever ground, would have to deliver a statement of defence.

33 Any party served with a copy of the statement of claim who delivers a demand of notice admits "liability". In this situation it would be an admission that the Plaintiff has a valid lien. That party cannot then come in and take the position that the Plaintiff does not have a valid lien, for whatever reason. The most that party can do with a demand of notice is to see that the amount that the lien is for is not more than what is properly owing to the Plaintiff (i.e., quantum only): *Canada Permanent Trust Company v. King Art Developments Ltd.*, (Judgment no. 1, April 2, 1984, Calgary C.A. 17085 and 17196).

34 If any defendant served with a copy of the statement of claim delivers a statement of defence the issues will be those raised by the pleadings. If any defendants who do defend do not raise as an issue that the action was not commenced and a certificate of lis pendens registered within 180 days there is then no issue on that point. If there is no issue on that point there is nothing for the Court to adjudicate on. I emphasize, from *Creditel of Canada*, that the issues are those placed before the Court *by the pleadings*.

35 The Plaintiff is, by this application, anticipating. Plaintiffs should never anticipate what defences might be raised. The time to face issues is when they are raised by the pleadings, not before.

36 Until the pleadings in the action are closed the Plaintiff cannot obtain any adjudication on any substantive matter.

37 Casting this application as an application under section 180 of the Land Titles Act is a transparent attempt to have an adjudication on whether the action was commenced and a certificate of lis pendens registered within 180 days before any defendant has raised it as an issue and before the pleadings are closed. This is a builders lien action and the matter should be decided in that context, and only if it is raised as an issue.

38 Once the pleadings are closed the Plaintiff should come back on a pre-trial application. Whatever issues are raised by the pleadings will be looked at by the Court *at that time*.

39 I would also point out that litigants and their counsel do not decide whether a particular issue should be split out and dealt with first and an adjudication given on it.

TAB 5

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

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

s 13. Part performance

Currency

13.Part performance

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

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

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

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

Currency

Alberta Current to Gazette Vol. 116:6 (March 31, 2020)

End of Document

TAB 6

1994 CarswellQue 120
Supreme Court of Canada

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

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

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

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

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

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

Proceedings: Applications for Interlocutory Relief

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

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

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

I. Factual Background

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

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

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

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub lic interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* , it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

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

E. Summary

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

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

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely

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

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

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

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

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter* . The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103 , to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional

TAB 7

2013 ABQB 335
Alberta Court of Queen's Bench

Murphy v. Cahill

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

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

J.B. Veit J.

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

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

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

Summary

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

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

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

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

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

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

7 An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

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

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

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

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

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

13 In considering the equities of the overall application, Mr. Murphy has not established that this is a situation where the dictates of fairness are so overwhelming that they justify the appointment of a receiver-manager. Mr. Murphy's legitimate expectations do not justify the appointment of a receiver-manager on an interim basis: there has been no material change of management style of the CCS group since Mr. Murphy acquired the companies and put Ms. Cahill in charge of the day to day

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

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

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

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

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

(Emphasis added)

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

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

30 It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty

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

(Emphasis added)

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

64 In order to provide as straightforward as possible an expression of the legal test applicable here, I would slightly reframe the test in this way: An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, brought by a person who is not a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the tripartite test for obtaining an interlocutory injunction: it must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief. Exceptionally, the dictates of fairness may be so overwhelming that interim relief is justified even where one or more terms of the tripartite test have not been met.

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

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

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

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

TAB 8

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

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

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

G.C. Hawco J.

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

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

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

APPLICATION by investors for receivership and attachment orders.

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

Introduction

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

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

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

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

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

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

b. the risk to the parties;

c. the risk of waste debtor's assets;

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

e. the balance of convenience.

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

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

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

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

Attachment Order/Mereva Injunction

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

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

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements

TAB 9

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, 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

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;

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

TAB 10

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

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.

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.

TAB 11

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

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.

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,

