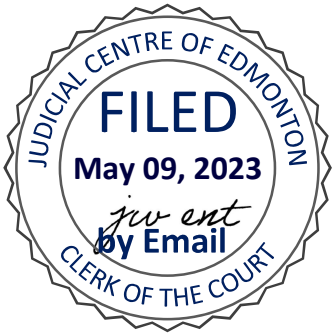

COURT FILE NUMBER	**2303-07739**
COURT	**COURT OF KING'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**EDMONTON**
PLAINTIFF	**ADDENDA CAPITAL INC.**
DEFENDANTS	**112 STREET NW EDMONTON PARTNERS LP by its general partner 112 STREET NW EDMONTON PARTNERS GP INC., 112 STREET NW EDMONTON PARTNERS GP INC., and CANDEREL ENTERPRISES INC.**
DOCUMENT	**BENCH BRIEF**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Jack R. Maslen / Myles Fish Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9790 / 9764 Facsimile: (403) 266-1395 Email: jmaslen@blg.com / mfish@blg.com File No. 292493.83

BENCH BRIEF OF THE PLAINTIFF IN SUPPORT OF APPLICATION TO APPOINT RECEIVER AND MANAGER

TO BE HEARD BY THE HONOURABLE JUSTICE M.J. LEMA
May 9, 2023 at 2:00 P.M.

Table of Contents

I. INTRODUCTION

1. This bench brief is submitted on behalf of Addenda Capital Inc. ("**Addenda**") in support of its application for the appointment of MNP Ltd. ("**MNP**") as receiver and manager (the "**Receiver**") over all the current and future assets, undertakings, and properties (collectively, the "**Property**") of the Defendants 112 Street NW Edmonton Partners LP by its general partner 112 Street NW Edmonton Partners GP Inc. ("**112 LP**"), and 112 Street NW Edmonton Partners GP Inc. ("**112 GP**" and, together with 112 LP, the "**Borrower**") (the "**Application**").

2. Addenda is the primary secured creditor of the Borrower and holds a mortgage over the Borrower's primary asset — land in Edmonton on which a 10-storey office building is situated (the "**Mortgage**"). The Borrower has defaulted on the loan issued by Addenda (the "**Loan**") and related Mortgage, which has matured.

3. Addenda has determined that the appointment of a receiver and manager, as contemplated by the Mortgage and related collateral security, is necessary to prevent further erosion of Addenda's security in the Borrower's Property.

4. Addenda therefore submits that the appointment of MNP as Receiver is just and convenient in the circumstances.

II. STATEMENT OF FACTS

5. The factual background relevant to Addenda's Application is set out in the Affidavit of Savvas Pallaris, sworn April 27, 2023 and filed in this Action (the "**Pallaris Affidavit**"). For brevity, those relevant facts will not also be set out herein. Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Pallaris Affidavit.

III. ISSUE

6. This bench brief addresses the issue of whether it is just and convenient for this Court to appoint MNP as receiver and manager of the Borrower.

IV. LAW AND ARGUMENT

Applicable Law

7. Under the *Bankruptcy and Insolvency Act* ("***BIA***"), on the application of a secured creditor who has complied with the statutory notice period, the Court may appoint a receiver over an insolvent

person. Beyond these procedural requirements, the Court may authorize the appointment of a receiver under the *BIA* where it is "just and convenient" to do so.[1]

8. Equally, the test under the *Judicature Act* for appointing a receiver considers whether it is "just and convenient" to do so.[2]

9. Justice Romaine of this Court, in *Paragon Capital Corp v Merchants & Traders Assurance Co*[3] ("*Paragon*"), set out a list of non-exhaustive factors to be considered in determining whether a proposed receiver appointment is "just and convenient" in the circumstances. These factors include:

   (a) Whether irreparable harm might be caused if no order is made;

   (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/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;

---

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1)-(1.1) **[TAB 1]**.
[2] *Judicature Act, RSA* 2000, c J-2, s 13(2) **[TAB 2]**; *BG International Limited v Canadian Superior Energy Inc,* 2009 ABCA 127 at para 17 **[TAB 3]**.
[3] 2002 ABQB 430 **[TAB 4]**.

(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; and

(p) The goal of facilitating the duties of the receiver.[4]

10. With respect to the irreparable harm consideration, Romaine J noted that it is not essential to establish irreparable harm where the appointment of a receiver is authorized by the relevant security documentation.[5] Moreover, in cases where the security documents authorize a receiver's appointment, the Court's inquiry should be whether the Court appointment of a receiver is the "preferable", not necessarily the "essential", option.[6]

The Appointment of MNP as Receiver Should be Approved

11. In this case, the Borrower is insolvent, as it has proven to be unable to pay its debts as they have come due, specifically by defaulting on the Loan and Mortgage to Addenda, which has now matured. The Borrower has failed to remedy its defaults following service of Addenda's statutory notice of intention to enforce its security.[7]

12. Accordingly, Addenda submits that it is just and convenient to appoint MNP as Receiver in this case. The Mortgage[8] and Security Agreement[9] expressly contemplate the appointment of a receiver following a default that has not been cured within three business days following notice. Thus, Addenda need not establish irreparable harm, and submits that appointing MNP as Receiver is clearly the preferable option.

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[4] *Ibid* at para 27, citing Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada, 1995) at 130.
[5] *Ibid*.
[6] *Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19 [***Pillar***] at para 37 **[TAB 5]**.
[7] Affidavit of Savvas Pallaris, sworn April 27, 2023 [**Pallaris Affidavit**] at paras 33-39.
[8] Pallaris Affidavit at para 14, Exhibit "C" at s. 6.1.
[9] Pallaris Affidavit at para 19, Exhibit "H" at s. 7.1-7.2.

13. Further, in accordance with the above *Paragon* factors, Addenda submits that the appointment of MNP as Receiver over the Property should be approved. Among other things:

(a) Risk to the Security Holder: It appears that the Borrower has no equity remaining in the Mortgaged Lands, on account of the current debt balance exceeding the assessed value of the Mortgaged Lands. Accordingly, Addenda is the primary economic stakeholder of the Borrower's Property.[10] Further, the Borrower's apparent failure to pay other claimants, leading to a builders' lien being registered against the Mortgaged Lands, presents further risk to Addenda;[11]

(b) The Nature of the Property: The Property consists primarily of a commercial office tower, which MNP has considerable experience in operating as receiver and manager;

(c) Waste of the Debtor's Assets/Preservation and Protection of the Property: The Borrower has failed to undertake necessary capital improvements to Compass Place and, by virtue of its insolvency, will not be able to do so, making the property less desirable for commercial tenants.[12] Moreover, Compass Place is operating at a significant net loss and the Borrower has failed to maintain sufficient occupancy rates to meet its debts as they have come due;[13]

(d) Balance of Convenience to the Parties: The Borrower and Canderel have expressed a willingness to "cooperate and act reasonably with any operational transitions", and do not appear to oppose the relief.[14] The interests of all parties concerned support the appointment of MNP;[15]

(e) Right to Appoint Receiver under Security: As noted above, Addenda has the right to appoint a receiver pursuant to the security granted by the Borrower; and

(f) Necessity of Appointment: The appointment of MNP as Receiver is the most efficient means of protecting the interests of tenants at Compass Place while steps are taken to realize on the property.

---

[10] Pallaris Affidavit at para 41(d), Exhibit "T".
[11] Pallaris Affidavit at para 35(b), Exhibit "D".
[12] Pallaris Affidavit at paras 27-28, Exhibits "L"-"M".
[13] Pallaris Affidavit at paras 27, 29, Exhibit "N".
[14] Pallaris Affidavit at para 32, Exhibit "P".
[15] *Pillar, supra* at para 36 **[TAB 5]**.

V. RELIEF REQUESTED

14. Addenda respectfully requests that this Honourable Court grant its Application for the appointment of MNP as Receiver over the Borrower's Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2023.

BORDEN LADNER GERVAIS LLP

Per: _____

Jack R. Maslen / Myles Fish
Counsel for Addenda Capital Inc.

TABLE OF AUTHORITITES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3.
2.	*Judicature Act*, *RSA* 2000, c J-2.
3.	*BG International Limited v Canadian Superior Energy Inc,* 2009 ABCA 127.
4.	*Paragon Capital Corp v Merchants & Traders Assurance Co,* 2002 ABQB 430.
5.	*Pillar Capital Corp v Harmon International Industries Inc,* 2020 SKQB 19.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to April 20, 2023

Last amended on September 1, 2022

À jour au 20 avril 2023

Dernière modification le 1 septembre 2022

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http://lois-laws.justice.gc.ca

Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

Vérification des comptes

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

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

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

Definition of *receiver*

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

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

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

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

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

Définition de *séquestre*

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

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

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

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

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

Trustee to be appointed

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

Syndic

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

Place of filing

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

Lieu du dépôt

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

Orders respecting fees and disbursements

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

Ordonnances relatives aux honoraires et débours

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

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 15, 2022

Office Consolidation

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

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

TAB 3

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

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

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

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

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

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

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

Headnote

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

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

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

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

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

already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

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

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

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

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

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

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

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

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

Appeal dismissed.

TAB 4

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

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

Headnote

Receivers --- Appointment — General

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

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that

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.

TAB 5

2020 SKQB 19
Saskatchewan Court of Queen's Bench

Pillar Capital Corp. v. Harmon International Industries Inc.

2020 CarswellSask 34, 2020 SKQB 19, 314 A.C.W.S. (3d) 470

PILLAR CAPITAL CORP. (APPLICANT) and HARMON INTERNATIONAL INDUSTRIES INC. (RESPONDENT)

R.W. Elson J.

Judgment: January 22, 2020
Docket: Saskatoon QBG 1401/19

Counsel: Michael J. Russell, Kevin N. Hoy, for Applicant
Jared D. Epp, for Respondent

Subject: Corporate and Commercial; Evidence; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondent debtor had been engaged in manufacture of various equipment, it had carried on business for almost 30 years, but it stopped operating as going concern — Applicant creditor specialized in providing short-term loans for companies that required non-traditional debt financing, and it advanced secured loan of $3.3 million to debtor — Debtor defaulted on its payments, and it owed funds exceeding $3.7 million to creditor — Creditor applied for appointment of receiver of all of assets and properties of debtor pursuant to s. 243 of Bankruptcy and Insolvency Act (BIA) — Application granted — Debtor was insolvent person within meaning of s. 2 of BIA — There was more than enough evidence to establish insolvency through circumstances listed in ss. 2(a) and (b) of BIA, being unable to meet obligations as they generally became due, and ceasing to pay current obligations in ordinary course of business as they generally became due — Debtor's failure to pay creditor or to meet its property tax obligations was sufficient to establish insolvency — It was both just and convenient for court to appoint receiver — Most of relevant factors favoured court appointment of receiver — Given that debtor had not carried on active business for some time, with no stated intention of doing so, balance of convenience clearly favoured granting application — Nature and condition of property, appropriately described as "catastrophe of asset", factored heavily in favour of court-appointed receiver in preference to one appointed under security agreement Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 243.

APPLICATION by creditor for appointment of receiver of all of assets and properties of debtor.

***R.W. Elson J.*:**

Introduction

1 In a brief fiat, dated January 16, 2020, I directed the issue of an order for the appointment of a receiver of all assets, undertakings and property of Harmon International Industries Inc. [Harmon]. In that fiat, I stated that reasons would follow in a published decision. This fiat contains those reasons.

2 Harmon is a Saskatoon company that has been engaged in the manufacture of various equipment, including light agricultural equipment. It stopped operating as a going concern on an undisclosed date, in late 2018 or early 2019. Before that, it had carried on business for almost 30 years.

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

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

36 In the consideration of the non-exhaustive factors cited in *Kasten*, it is important to observe that, while the factors vary in their importance, no one factor is determinative. This includes the presence, or not, of irreparable harm to the applicant or the applicant's security. See Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.199530 C.B.R. (3d) 49(Ont. Gen. Div. [Commercial List]). By and large, courts have taken a contextual approach to the consideration of these factors. A court is expected to have consideration for all attendant circumstances, including the interests of all concerned, in the "just or convenient" analysis.

37 A question that often arises in the "just or convenient" analysis pertains to whether a court should appoint a receiver where the applicant's security provides for the private appointment of a receiver, as the security does in the present case. While the right to make such an appointment is a factor, the real inquiry is whether a court appointment is the "preferable" option — not the "essential" one. This point was also addressed in *Carnival*, where, at para. 27, Newbould J. recited the following passage from the decision of Blair J. in Bank of Nova Scotia v. Freure Village on Clair Creek199640 C.B.R. (3d) 274(Ont. Gen. Div. [Commercial List]):

27 ...

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplate, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

38 Turning to the application at bar, I am satisfied that it is both just and convenient that the requested application be granted. In my view, most of the factors identified in *Kasten* favour court appointment of a receiver. Given that Harmon has not carried on active business for some time, with no stated intention of doing so, the balance of convenience clearly favours the application.

39 More importantly, however, I am persuaded that the nature and condition of the property factors heavily in favour of a court appointed receiver — in preference to one appointed under the security agreement. It is now reasonably clear that the sanguine picture Mr. Moneo painted in his first affidavit does not bear up to the image now presented in the most recent evidence. In his most recent submission, Mr. Hoy described Harmon's property as a "catastrophe of an asset". As unfortunate as that description is, I am satisfied that it is apt.

Conclusion

40 In the result, the Court appoints Hardie & Kelly Inc. as receiver, without security, of all assets, undertakings and properties of Harmon. The order may issue in the form of the draft order filed by Pillar, subject to one modification. That modification, which counsel for Pillar agreed to in chambers, is the removal of the reference to the assets of Harmon's principals, Victor Moneo and Calvin Moneo, in para. 2 of the draft. In all other respects, the order may issue in the form of the draft.

41 In the event there are any matters related to the issuance of this order, or its terms, I shall consider myself seized with those matters.

Application granted.

