

COURT FILE NUMBER 2203-12557

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF ROYAL BANK OF CANADA

DEFENDANT FAISSAL MOUHAMAD PROFESSIONAL CORPORATION,
MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52
DENTAL CORPORATION, DELTA DENTAL CORP., 52
WELLNESS CENTRE INC., PARADISE MCIVOR
DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT
LTD., FAISSAL MOUHAMAD and FETOUN AHMAD, also known
as FETOUN AHMED

DOCUMENT **WRITTEN SUBMISSIONS OF THE DEFENDANT
FAISSAL MOUHAMAD PROFESSIONAL
CORPORATION**

ADDRESS FOR SERVICE AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT
WARREN SINCLAIR LLP
600, 4911 – 51 STREET
RED DEER, AB T4N 6V4
ATTENTION: MATTHEW R. PARK
PHONE: (403) 343-3320
FAX: (403) 343-6069
FILE NUMBER: 127984/MP

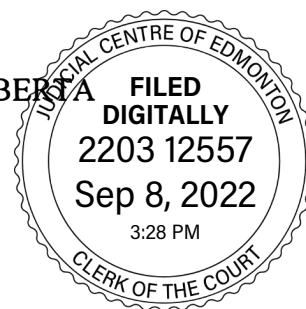


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A. INTRODUCTION

1. This is an application by Royal Bank of Canada (“**RBC**”) for an order appointing a Receiver or a Receiver and Manager over all of the current and future assets, undertakings and property of Faissal Mouhamad Professional Corporation (“**FMPC**”), Delta Dental Corp. (“**Delta Corp.**”) and 52 Dental Corporation (“**52 Dental**”).
2. These written submissions are made on behalf of FMPC.
3. Unless otherwise indicated, capitalized terms employed herein shall have the meaning given to them in RBC’s written brief filed in support of this application (the “**RBC Brief**”).

B. FACTS

I. Admissions:

4. FMPC agrees with the facts set out at paragraphs 2,4-6, 13-39, 41-43, 45-50, 53, 56-57, 59, 60, 62, 70, 75, 80, 83, 85-87, 89, 93-95, 96 (a), and 97- 99 of the RBC Brief.

II. Additional Facts:

a. The Parties

5. The defendant Dr. Faissal Mouhamad is trained as a dentist. He obtained his dental degree in Syria and practiced in that country and elsewhere prior to immigrating to Canada in or around 1996.¹

¹ Affidavit sworn by Faissal Mouhamad on August 23, 2022 (the “**First Faissal Affidavit**”) at para. 4.

6. Dr. Mouhamad is licensed by the Alberta Dental Association and College (the “College”) to practice dentistry in Alberta. As will be explained in greater detail below, he currently practices at clinics in both Red Deer, Alberta and Calgary, Alberta.²
7. FMPC is a professional corporation. Dr. Mouhamad is its sole director and voting shareholder. At times, Dr. Mouhamad has operated his dental practice through Faissal PC.³
8. Michael Dave Ltd. is an Alberta corporation. Dr. Mouhamad is its sole director and voting shareholder⁴.
9. Michael Dave Ltd. is the registered owner of real property located at 7151-50 Avenue, Red Deer, Alberta (the “**MDM Real Property**”), from which the Red Deer Dental Clinic (as hereinafter defined) operates⁵.
10. Michael Dave Ltd. is the owner of the tenant improvements made to the MDM Real Property (the “**Tenant Improvements**”), as well as the equipment used by the Red Deer Dental Clinic in its business operations (the “**Red Deer Dental Clinic Equipment**”).⁶
11. Jovica Property Management Ltd. (“**Jovica**”) and Solar Star Holdings Inc. (“**Solar Star**”) hold a security interest in Michael Dave Ltd.’s present and after-acquired personal property, including the Tenant Improvements and the Red Deer Dental Clinic Equipment⁷.
12. Jovica and Solar Star hold a first-charge mortgage against title to the MDM Real Property in the registered principal amount of \$2,200,000.00.⁸
13. Dr. Mouhamad is married to Fetoun⁹.

² First Faissal Affidavit at para. 5.

³ Affidavit sworn by Faissal Mouhamad on September 8, 2022 (“**Second Faissal Affidavit**”) at para. 5.

⁴ Second Faissal Affidavit at para. 6.

⁵ Second Faissal Affidavit at para. 7.

⁶ Second Faissal Affidavit at para. 8.

⁷ Second Faissal Affidavit at para. 9.

⁸ Second Faissal Affidavit at para. 10.

⁹ First Faissal Affidavit at para. 6.

14. Delta Corp. is an Alberta corporation which was incorporated in 2017. Currently, Fetoun is Delta's sole director and voting shareholder¹⁰.
15. In 2020, Delta Corp. was struck from the Alberta corporate registry for failing to file annual returns. It was revived in July, 2021, primarily for the purpose of eventually managing the Red Deer Dental Clinic's business operations¹¹.
16. 52 Dental an Alberta corporation which was incorporated in December, 2021 for the purpose of managing the Calgary Dental Clinic's (as hereinafter defined) business operations. Fetoun is 52 Dental's sole director and voting shareholder¹².
17. 52 Wellness is an Alberta corporation which was incorporated in September, 2020 for the purpose of acquiring the real property from which the Calgary Dental Clinic would operate (the "**52 Wellness Building**"). Dr. Mouhamad is 52 Wellness' sole director and voting shareholder¹³.
18. McIvor is an Alberta corporation. Dr. Mouhamad is its sole director and voting shareholder.
19. McIvor is essentially a holding company. It has no employees and does not carry on any sort of business. Its only asset is the McIvor Lands.¹⁴
20. 985 is an Alberta corporation. Dr. Mouhamad is its sole director and voting shareholder.

¹⁰ First Faissal Affidavit at para. 7.

¹¹ First Faissal Affidavit at para. 8.

¹² First Faissal Affidavit at para 11.

¹³ Second Faissal Affidavit at para. 11.

¹⁴ Supplemental Affidavit sworn by Faissal Mouhamad on September 8, 2022 ("**Supplemental Affidavit**") at para. 4.

21. 985 is the registered owner of a commercial building in Drayton Valley (the “**Drayton Valley Building**”), from which Dr. Mouhamad once operated Valley Clinic (as defined below)¹⁵.
22. Previously, 985 was the registered owner of a commercial building located in Red Deer, Alberta (the “**Red Deer Building**”) from which the Associate Dental Clinic (as hereinafter defined) once operated¹⁶.
23. 985 sold the Red Deer Building in early 2020. Its sole remaining asset is the Drayton Valley Building. At no time has 985 owned or had an interest in any tangible real property¹⁷.

b. Relationship with RBC

24. Many years ago, Dr. Mouhamad and certain corporate entities he controlled were RBC commercial banking customers. Dr. Mouhamad was also an RBC Wealth Management client¹⁸.
25. Although Dr. Mouhamad’s commercial banking relationship with RBC eventually came to an end, he continued to be an RBC Wealth Management client¹⁹.
26. In late 2015 or early 2016, RBC contacted Dr. Mouhamad in an effort to re-establish a commercial banking relationship with him and his corporations. At the time, Dr. Mouhamad’s commercial ventures, both personally and through corporations controlled by him, were as follows²⁰:

- a) 985 was the registered owner of the Drayton Valley Building, from which Dr. Mouhamad operated a dental clinic (the “**Valley Dental**”).

¹⁵ Second Faissal Affidavit at para. 14.

¹⁶ Second Faissal Affidavit at para. 15.

¹⁷ Second Faissal Affidavit at para. 16.

¹⁸ Second Faissal Affidavit at para. 17.

¹⁹ Second Faissal Affidavit at para. 18.

²⁰ Second Faissal Affidavit at para. 19.

b) 985 was the registered owner of the Red Deer Building, from which FMPC operated a dental clinic (the “**Associate Dental Clinic**”).

c) McIvor owned the McIvor Lands.

27. As of the date on which RBC initiated the contact referenced at paragraph 26 above ²¹:

a) FMPC was the owner of various pieces of dental equipment, which were used in the Associate Dental Clinic business operations (the “**Associate Clinic Dental Equipment**”). Most of that equipment was purchased through financing provided by Toronto-Dominion Bank (the “**TD Equipment Loan**”) and Toronto-Dominion Bank (“**TD Bank**”) had a first-charge security interest in the Associate Clinic Dental Equipment (the “**TD Security Interest**”).

b) Title to the McIvor Lands was encumbered with a first-charge mortgage in favour of TD Bank (the “**TD Mortgage**”).

28. By way of offer of financing dated August 4, 2016 (the “**FMPC Financing Offer**”), RBC offered to extend the following credit facilities to FMPC:²²

a) an operating line-of-credit in the amount of \$500,000.00 (the “**FMPC Operating LOC**”);

b) a fixed-rate term loan in the principal amount of \$2,600,000.00 (the “**FRT Loan**”);
and

c) a VISA credit card with a limit of \$150,000.00 (the “**VISA Facility**”).

(collectively the “**FMPC Credit Facilities**”).

²¹ Second Faissal Affidavit at para. 20.

²² Second Faissal Affidavit at para. 21.

29. The purpose of the FRT Loan was to pay out the TD Equipment Loan²³.

30. The security sought by RBC for repayment of the FMPC Credit Facilities included the following²⁴:

- a) A first-charge security interest in all of FMPC's present and after-acquired personal property;
- b) A guarantee and postponement of claim from Dr. Mouhamad;
- c) A guarantee and postponement of claim from 985, supported by a first-charge security interest in all of 985's present and after-acquired personal property; and
- d) A guarantee and postponement of claim from McIvor (the "**McIvor Guarantee**"), supported by a first-charge security interest in all of McIvor's present and after-acquired personal property.

31. The FMPC Financing Offer was accepted by FMPC (as borrower), Dr. Mouhamad (as guarantor, 985 (as guarantor) and McIvor (as guarantor) on August 9, 2016²⁵.

32. The financing made available to FMPC by way of the FRT Loan was used to repay the TD Equipment Loan in full²⁶.

33. Various amendments were made to the terms of the FMPC Credit Facilities, including an amendment to specifically charge the McIvor Lands (by way of the RBC Mortgage, as hereinafter defined) as collateral for repayment of any amounts payable under the McIvor Guarantee²⁷.

²³ Second Faissal Affidavit at para. 22.

²⁴ Second Faissal Affidavit at para. 23.

²⁵ Second Faissal Affidavit at para. 24.

²⁶ Second Faissal Affidavit at para. 25.

²⁷ Second Faissal Affidavit at para. 26.

34. By way of offer of financing dated August 2, 2016 (the “**McIvor Financing Offer**”), RBC offered to provide to McIvor a revolving demand loan facility in the principal amount of \$2,500,000.00 (the “**RBP Loan**”)²⁸.

35. The purpose of the RBP Loan was to pay out the TD Mortgage²⁹.

36. The security sought by RBC for repayment of the RBP Loan included the following³⁰:

- a) A first-charge security interest in all of McIvor’s present and after-acquired personal property;
- b) A first-charge collateral mortgage to be registered against title to the McIvor Lands (the “**RBC Mortgage**”);
- c) A guarantee and postponement of claim from Dr. Mouhamad;
- d) A guarantee and postponement of claim from 985, supported by a first-charge security interest in all of 985’s present and after-acquired personal property; and
- e) A guarantee and postponement of claim from FMPC (the “**Faissal Guarantee**”), supported by a first-charge security interest in all of FMPC’s present and after-acquired personal property.

37. The McIvor Financing Offer was accepted by McIvor (as borrower), Dr. Mouhamad (as guarantor, 985 (as guarantor) and FMPC (as guarantor) on August 9, 2016³¹.

²⁸ Second Faissal Affidavit at para. 27.

²⁹ Second Faissal Affidavit at para. 28.

³⁰ Second Faissal Affidavit at para. 29.

³¹ Second Faissal Affidavit at para. 30.

38. The financing made available to McIvor by way of the RBP Loan was used to repay the TD Mortgage in full³².
39. Although the purpose of the RBP Loan was to pay out the TD Mortgage, the RBC Mortgage specifically provides that it is intended to secure the repayment of all present and future indebtedness owed by McIvor to RBC, including any indebtedness incurred by way of guarantee³³.
40. Various amendments were made to the terms of the McIvor Financing Offer, including an amendment to add Paradise McIvor as a guarantor, with such guarantee to be supported by a first-charge security interest in all of Paradise McIvor's present and after-acquired personal property³⁴.

c. Sale of the Drayton Valley Clinic and the Associate Dental Clinic

41. By way of asset purchase agreement dated July 27, 2018, Dr. Mouhamad sold the Valley Dental practice. That sale closed on August 31, 2018.³⁵
42. By way of asset purchase agreement dated effective January 18, 2019, FMPC sold the Associate Dental Clinic practice, including the Associate Clinic Dental Equipment. That sale closed on January 18, 2019 and the FRT Loan was fully repaid from the sale proceeds³⁶.
43. Notwithstanding the sale of the Valley Dental practice and the Associate Dental Clinic practice, RBC did not require repayment of the FMPC Operating Line or the VISA Facility.³⁷

³² Second Faissal Affidavit at para. 31.

³³ Second Faissal Affidavit at para. 32.

³⁴ Second Faissal Affidavit at para. 33.

³⁵ Second Faissal Affidavit at para. 34.

³⁶ Second Faissal Affidavit at para. 35.

³⁷ Second Faissal Affidavit at para. 36.

44. At no time did the Associate Dental Clinic operate under the tradename “Delta Dental”.³⁸

d. The Red Deer Dental Clinic

45. Currently, Dr. Mouhamad practices dentistry at two Alberta clinics, one of which operates from the MDM Real Property (the “Red Deer Dental Clinic”)³⁹.

46. The Red Deer Dental Clinic is an operational, fully functioning dental practice. It provides dental services 7 days a week, through 6 dentists, 3 dental hygienists, 5 dental assistants, a sterilization technician and 7 administrative/support staff⁴⁰.

47. The Red Deer Dental Clinic operates under the trade name “Delta Dental”, which is owned by FMPC and Dr. Mouhamad⁴¹.

48. Originally, Dr. Mouhamad planned to manage the Red Deer Dental Clinic through Delta Corp. and that was the reason for which that company was incorporated. However, Dr. Mouhamad eventually decided to operate that clinic through FMPC under the Delta Dental tradename.⁴²

49. The Red Deer Dental Clinic opened in early January, 2018, long before the sale of the Associate Dental Clinic⁴³.

50. At all times, RBC was aware that the Red Deer Dental Clinic and the Associate Dental Clinic operated concurrently and that the Red Deer Dental Clinic continued to operate following the sale of the Associate Dental Clinic⁴⁴.

³⁸ Second Faissal Affidavit at para. 37.

³⁹ Second Faissal Affidavit at para. 38.

⁴⁰ First Faissal Affidavit at para. 17.

⁴¹ Second Faissal Affidavit at para. 39.

⁴² Second Faissal Affidavit at para. 40.

⁴³ Second Faissal Affidavit at para. 41.

⁴⁴ Second Faissal Affidavit at para. 42.

51. None of the equipment that was used at the Associate Dental Clinic was ever used at the Red Deer Dental Clinic. That equipment remained at the Associate Dental Clinic following the sale of that business, as did all tenant and leasehold improvements⁴⁵.
52. At no time did any of the Defendants seek financing from RBC to purchase any of the Tenant Improvements or the Red Deer Dental Clinic Equipment.⁴⁶
53. At no time did Dr. Mouhamad represent to RBC that FMPC was the owner of any of the Tenant Improvements or the Red Deer Dental Clinic Equipment⁴⁷.
54. Michael Dave Ltd. leases the MDM Real Property to FMPC and Dr. Mouhamad pursuant to the terms of a written lease agreement (the “**Written Lease**”).⁴⁸
55. Prior to the execution of the Written Lease, FMPC and Dr. Mouhamad leased the MDM Real Property from Michael Dave Ltd. pursuant to the terms of a verbal lease, the material provisions of which were substantially the same as the material provisions of the Written Lease. The lease was unwritten because FMPC and Michael Dave Ltd. are corporations which Dr. Mouhamad controls. Given the sale of the Red Deer Dental Clinic to Hadi PC (as particularized below), Dr. Mouhamad felt it prudent to have the Written Lease prepared.⁴⁹
56. Although the written lease does not formally address this, it is understood by the relevant parties that the rent payable under that lease includes the use of the Tenant Improvements and the Red Deer Dental Clinic Equipment.⁵⁰
57. When the Red Deer Dental Clinic commenced operations, it was managed through FMPC, in the sense that all billing occurred through that professional corporation, and it paid all clinic-related expenses⁵¹.

⁴⁵ Second Faissal Affidavit at para. 43.

⁴⁶ Second Faissal Affidavit at para. 44.

⁴⁷ Second Faissal Affidavit at para. 45.

⁴⁸ Second Faissal Affidavit at para. 46.

⁴⁹ Second Faissal Affidavit at para. 47.

⁵⁰ Second Faissal Affidavit at para. 48.

⁵¹ Second Faissal Affidavit at para. 49.

58. In or about late 2021, the management structure of the Red Deer Dental Clinic changed somewhat, such that Delta Corp. assumed responsibility for paying many of the clinic's business-related expenses, including remuneration to Fetoun for the management functions she exercised on behalf of Delta Corp. (the "**Structural Change**")⁵².
59. Until mid-July, 2022, all or substantially all of the revenue generated by the Red Deer Dental Clinic operations was deposited to the FMPC Deposit Account⁵³.
60. By way of letter dated July 14, 2022, RBC informed FMPC that it was no longer prepared to provide banking services to FMPC and that FMPC was required to seek alternate banking arrangements. In accordance with RBC's direction, the revenue generated from the Red Deer Dental Clinic practice began to be deposited to an account held by Delta Corp. with Bank of Nova Scotia⁵⁴.
61. In the fall of 2021, Dr. Mouhamad met with Karen Herbst (the "**Fall Meeting**"). At the time, Ms. Herbst was an RBC employee and, more specifically, was FMPC's account manager. The Fall Meeting took place at the MDM Real Property and was also attended by the Red Deer Dental Clinic's office manager, Sheena Price⁵⁵.
62. Dr. Mouhamad's purpose in calling the Fall Meeting was to determine if RBC would agree to the Structural Change. Dr. Mouhamad specifically advised Ms. Herbst that FMPC wished to transfer some of the Red Deer Dental Clinic managerial functions, as particularized at paragraph 58 above, to Delta Corp. He further informed Ms. Herbst that Delta Corp. was a corporation that would be controlled by Fetoun⁵⁶.
63. Ms. Herbst advised Dr. Mouhamad that RBC would agree to the Structural Change, provided that FMPC kept its RBC credit facilities in good standing and continued to deposit its receivables to the FMPC Deposit Account⁵⁷.

⁵² Second Faissal Affidavit at para. 50.

⁵³ Second Faissal Affidavit at para. 51.

⁵⁴ Second Faissal Affidavit at para. 75 (a).

⁵⁵ Second Faissal Affidavit at para. 52.

⁵⁶ Second Faissal Affidavit at para. 53.

⁵⁷ Second Faissal Affidavit at para. 54.

64. The Structural Change was undertaken primarily was to shift Dr. Mouhamad's focus away from the day-to-day management of the Red Deer Dental Clinic's operations so that he could concentrate his attention on servicing patients⁵⁸.
65. Furthermore, Fetoun wished to have more involvement in the operation of the Red Deer Dental Clinic, and Fetoun and Dr. Mouhamad envisioned the possibility of Fetoun carrying on other business ventures unrelated to the Red Deer Dental Clinic through Delta Corp⁵⁹.
66. Fetoun is not a dentist, licensed or otherwise⁶⁰.
67. However, the ownership of dental clinics in Alberta is not limited to licensed dentists. Rather, the College requires a licensed dentist to have care and control over patient files/charts and over any drugs, medications and controlled substances. At all times, Dr. Mouhamad complied with the College's requirements in that regard⁶¹.

e. The Calgary Dental Clinic

68. In addition to the Red Deer Dental Clinic, Dr. Mouhamad provides dental services to a clinic operating from the 52 Wellness Building (the "**Calgary Dental Clinic**")⁶².
69. The Calgary Dental Clinic opened in June, 2022. As noted above, it operates from the 52 Wellness Building, which 52 Dental leases from 52 Wellness⁶³.
70. The equipment used in the Calgary Dental Clinic is all owned or leased by 52 Dental. The equipment purchased by 52 Dental was financed by Bank of Nova Scotia and Paterson Dental Canada Inc.⁶⁴

⁵⁸ Second Faissal Affidavit at para. 55.

⁵⁹ Second Faissal Affidavit at para. 56.

⁶⁰ Second Faissal Affidavit at para. 57.

⁶¹ Second Faissal Affidavit at para. 57.

⁶² Second Faissal Affidavit at para. 58.

⁶³ Second Faissal Affidavit at para. 59.

⁶⁴ Second Faissal Affidavit at para. 60.

71. 52 Dental also manages the Calgary Dental Clinic, in the sense that all of the clinic's billing occurs through 52 Dental, and it pays all of the clinic-related business expenses⁶⁵.

72. The Red Deer Dental Clinic and the Calgary Dental Clinic are separate and distinct operations. They overlap only in the sense that Dr. Ghalib Hadi and Dr. Mouhamad provide services to both clinics. Additionally, the Red Deer Dental Clinic has always treated patients who live at or near Calgary. Some of those patients now attend the Calgary Dental Clinic instead.⁶⁶

73. At no time has any equipment or inventory used in the operation of the Red Deer Dental Clinic been used in the operation of the Calgary Dental Clinic⁶⁷.

74. Given its large Arabic community, for many years, Dr. Mouhamad has had an interest in providing dental services in Calgary⁶⁸.

75. At all times, RBC was aware of Dr. Mouhamad's intention to provide dental services in Calgary. In particular⁶⁹:

- a) In 2017, RBC financed the purchase of a building in Calgary, from which Dr. Mouhamad intended to operate a dental practice. At all times, RBC was aware of the reason for which this building was purchased.
- b) As part of the process for this financing, RBC prepared a business plan and projections for the contemplated practice.

⁶⁵ Second Faissal Affidavit at para. 61.

⁶⁶ Second Faissal Affidavit at para. 62.

⁶⁷ Second Faissal Affidavit at para. 63.

⁶⁸ Second Faissal Affidavit at para. 64.

⁶⁹ Second Faissal Affidavit at para. 65.

f. Sale of the Red Deer Clinic

76. An unconditional agreement has been entered into to sell the Red Deer Dental Clinic to Ghalib Hadi Professional Corporation (the “**Asset Purchase Agreement**”), the principal of which is Dr. Hadi, with whom Dr. Mouhamad has practiced dentistry for many years⁷⁰.

77. The purchase price payable by Ghalib Hadi Professional Corporation (“**Hadi PC**”) under the Asset Purchase Agreement is \$2,115,000.00 (the “**Clinic Purchase Price**”), which includes an allocation of \$915,000.00 for technical and professional goodwill⁷¹.

78. The Clinic Purchase Price is payable by Hadi PC as follows⁷²:

- a) An initial deposit of \$100,000.00, which is non-negotiable, non-refundable and fully releasable at the time of payment.
- b) A lump sum payment of \$475,000.00, which is due on or before September 30, 2022 and which is non-negotiable, non-refundable and fully releasable at the time of payment.
- c) A final payment of \$1,540,000.00, which is due on or before December 21, 2022.

79. The Initial Deposit has been made by Hadi PC⁷³.

80. Jovica and Solar Star support the sale of the Red Deer Dental Clinic to Hadi PC.⁷⁴

⁷⁰ First Faissal Affidavit at para. 18; Second Faissal Affidavit at para. 66.

⁷¹ Second Faissal Affidavit at para. 67.

⁷² Second Faissal Affidavit at para. 68.

⁷³ Second Faissal Affidavit at para. 69.

⁷⁴ Second Faissal Affidavit at para. 70 (i).

g. Sale of Dewinton Property

81. In early September, 2020, McIvor listed the McIvor Lands for sale with Steve Seiler, a commercial realtor affiliated with KDI Commercial Inc. (the “**KDI Listing**”)⁷⁵.

82. Throughout the KDI Listing, the listing price for the McIvor Lands was \$6,000,000.00.⁷⁶

83. In November, 2021, McIvor accepted an offer made by Samer Altalaj to purchase the McIvor Lands (the “**Altalaj Offer**”).⁷⁷

84. The Altalaj Offer was the only offer made to purchase the McIvor Lands during the KDI Listing.⁷⁸

85. The Altalaj Offer is now unconditional and is slated to close on November 10, 2022.⁷⁹

86. The purchase price payable under the Altalaj Offer is less than \$6,000,000.00 but appears to be in an amount sufficient to pay the Indebtedness in full.

87. The registrations against title include to the McIvor Lands include:⁸⁰

- a) The RBC Mortgage;
- b) A mortgage in favor of FMPC and 985;
- c) A caveat in favour of Mahmoud Mohamad (the “**Caveat**”); and
- d) A Certificate of *Lis Pendens* in favor of Mahmoud Mohamad (the “**CLP**”).

⁷⁵ First Faissal Affidavit at para. 21.

⁷⁶ Supplemental Affidavit at para. 5.

⁷⁷ First Faissal Affidavit at para. 22.

⁷⁸ Supplemental Affidavit at para. 6.

⁷⁹ First Faissal Affidavit at para 22.

⁸⁰ First Faissal Affidavit at para. 23.

88. In addition to the registrations mentioned above, there is a Certificate of *Lis Pendens* in favor of Mahmoud Mohamad (“Moe”) in the Pending Registration Que at the Land Titles Office (the “Pending CLP”), as well as discharge of a utility right of way or right of way agreement and a purchaser’s lien caveat in favour of Mr. Altalaj⁸¹.
89. The Caveat, CLP and Pending CLP relate to disputes between various defendants named in this action (including McIvor) and Moe (who is Dr. Mouhamad’s brother), which have resulted in contested lawsuits. Copies of the pleadings filed in the action to which the CLP relates (the “Dewinton Property Action”) are exhibited to the Beriault Affidavit and to the First Faissal Affidavit.⁸²
90. The Statement of Claim to which the Pending CLP relates has not yet been served.⁸³
91. In his pleadings filed in the Dewinton Property Action, Moe does not allege that the RBC Mortgage is invalid or unenforceable, nor does he allege that his registrations have any sort of priority to the RBC Mortgage.⁸⁴
92. On August 10, 2022, McIvor filed materials in the Dewinton Property Action in support of an application for an order discharging the Caveat, CLP and Pending CLP from title to the Dewinton Property (the “Discharge Application”).⁸⁵
93. The Discharge Application was originally returnable on September 7, 2022 but has been adjourned to October 28, 2022 to allow for questioning on the affidavit filed in support of the Discharge Application.⁸⁶

⁸¹ First Faissal Affidavit at para. 24.

⁸² First Faissal Affidavit at para. 26.

⁸³ First Faissal Affidavit at para. 27.

⁸⁴ First Faissal Affidavit at para. 28.

⁸⁵ First Faissal Affidavit at para. 29;

⁸⁶ First Faissal Affidavit at para. 29; Second Faissal Affidavit at para. 73.

94. There is a Consent Procedural Order in place to ensure that steps preliminary to the Discharge Application are undertaken in a timely way.⁸⁷

h. Interim Receivership Order

95. RBC's application for a Receivership Order was originally returnable on August 23, 2022.⁸⁸

96. Unfiled copies of the materials relied upon by RBC in support of the Receivership Application were served on legal counsel to FMPC at approximately 5:30 pm on August 19, 2022.⁸⁹

97. On August 23, 2022, an Interim Receivership Order was granted in this action and RBC's application for a Receivership Order was adjourned to September 14, 2022.⁹⁰

C. ISSUES

98. FMPC agrees that the issue to be resolved by the Court on this application is accurately stated at paragraph 100 of RBC's Brief.

⁸⁷ Second Faissal Affidavit at para. 74.

⁸⁸ Second Faissal Affidavit at para. 86.

⁸⁹ Second Faissal Affidavit at para. 87.

⁹⁰ Second Faissal Affidavit at para. 88.

D. LAW AND ARGUMENT

I. FMPC's General Position:

99. In this case, FMPC submits that RBC's primary goal is the repayment of the Indebtedness through the liquidation of its collateral. RBC also seeks a mechanism for ensuring the preservation of its collateral pending the disposition of the same.

100. Certainly, the appointment of a Receiver or Receiver-Manager would serve to accomplish RBC's goals. However, a receivership goes well beyond what is necessary in order to meet RBC's objectives and is in fact prejudicial to FMPC in terms of its primary objective, which is to maintain the operation of the Red Deer Dental Clinic on relatively normal terms pending the closing of the Asset Purchase Agreement.

101. FMPC does not deny that it is in default of its payment obligations owed to RBC, nor does it dispute that RBC is entitled to enforce its security in the circumstances. It may well be that short of a voluntary sale of the Red Deer Dental Clinic (which has already been achieved), a receivership in respect of the corporations having some involvement with the Red Deer Dental Clinic is the most appropriate remedy.

102. However, the relief sought by RBC, namely the appointment of a Receiver or Receiver-Manager, has long been described by this court as an extraordinary remedy⁹¹ and one which should not be lightly granted⁹².

103. FMPC submits that the appointment of a Receiver or Receiver-Manager is not appropriate in this case. In conjunction with the Interim Receivership Order, there is an alternative, less drastic remedy available that would serve to protect RBC's interests while at the same

⁹¹ *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, [2002] CarswellAlta 1531, 2002 ABQB 30 ("*Paragon*") at para. 27. RBC Book of Authorities, Tab 9

⁹² *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] CarswellAlta 469, 2009 ABCA 469 ("*BG*") at para 16. [Tab 1]

time better balancing RBC's rights and those of FMPC. That remedy is a judicial listing of the McIvor Lands by way of a Redemption Order-Listing.

104. FMPC submits that the redemption period provided for by the proposed Redemption Order-Listing should expire no earlier than November 11, 2022 to allow for the Discharge Application to be heard and, if the order sought on that application is granted, to for the sale of the McIvor Lands to Mr. Altalaj to close.

II. The Relevant Law:

105. The appointment of a Receiver is a discretionary remedy. In *Paragon*, Madam Justice Romaine noted that the factors a court may consider in determining whether it is appropriate to appoint a Receiver include the following⁹³:

- 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;

⁹³ *Paragon*, at para. 27.

- 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; and
- p) the goal of facilitating the duties of the receiver.

106. In *Murphy v. Cahill*, [2013] CarswellAlta 1490, 2013 ABQB 335 (“*Murphy*”), Madam Justice Veit updated this list of factors, noting that⁹⁴:

⁹⁴ *Murphy* at para. 71.

... 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.”

107. Further, in considering an application for a Receivership Order, the court should be mindful of the Alberta Court of Appeal’s comments in *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] CarswellAlta 469, 2009 ABCA 469:

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...

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.

[Emphasis added]

III. The Conduct of the Relevant Parties:

108. The justifications offered by RBC in support of its receivership application are largely conduct-based and include concerns related to: (1) the misuse of the FMPC Operating LOC, (2) the unauthorized transfer of collateral and business operations, (3) unauthorized

changes to the Red Deer Dental Clinic business structure, (4) the diversion of accounts receivable and (5) payments to parties outside of the ordinary course of the Red Deer Dental Clinic's business (the "**Conduct-Based Concerns**").

109. The Conduct-Based Concerns are largely addressed by FMPC in the affidavit sworn by Dr. Mouhamad on September 8, 2022. FMPC submits that those concerns are mostly without merit and appear to have arisen from assumptions made by RBC based on nothing more than a review of the relevant FMPC Deposit Account statements, with no attempt made to discuss those concerns with any of the relevant defendants prior to the filing and service of the receivership application materials.

110. Further, FMPC questions the cleanliness of RBC's hands in making this application. In particular:

- a) By way of letter dated July 14, 2022, RBC advised FMPC that it was terminating its banking relationship with FMPC and that FMPC had until August 15, 2022 to make alternate banking arrangements. In response to RBC's direction, FMPC essentially ceased use of the FMPC Deposit Account. RBC now relies on the lack of deposits to that account as a justification for the appointment of a Receiver⁹⁵.

- b) In response to the demands for payment issued by RBC, FMPC and Michael Dave Ltd. arranged for a sale of the Red Deer Dental Clinic to Hadi PC. The payment structure of the Asset Purchase Agreement was designed to ensure payment of the FMPC Direct Indebtedness (excluding the Canadian Emergency Business Account loan, repayment of which was not demanded) by September 30, 2022. Upon its receipt of a copy of the Asset Purchase Agreement, RBC took the position that it would not support the sale, in part because the purchase price was not in amount sufficient to pay the Indebtedness in full, even though repayment of the McIvor Guaranteed Indebtedness had not been demanded.⁹⁶

⁹⁵ Second Faissal Affidavit at para. 75.

⁹⁶ Second Faissal Affidavit at para. 70 (e).

- c) On August 17, 2022, RBC caused all of the personal property, including inventory, located at the Red Deer Dental Clinic premises to be seized. Through legal counsel, FMPC informed RBC that the seized inventory was necessary for the operation of the dental practice and sought confirmation from RBC that it could be used in the order course of the clinic's business. RBC declined to provide that permission, to the potential prejudice of not only FMPC but of its own interests as well.⁹⁷

IV. RBC's Collateral is Not Imperiled:

111. The RBC collateral would not be imperiled in the event the Court declined to appoint a Receiver or Receiver-Manager.
112. Even if the Court accepts the validity of the Conduct-Based Concerns, FMPC submits that those concerns are addressed in their entirety by the Interim Receivership Order, which FMPC proposes remain in place, at least insofar as FMPC and Delta Corp. are concerned, until such time as a Receivership Order is granted/becomes operable or the Indebtedness is paid in full, whichever first occurs.

V. RBC is Well Secured:

113. The evidence before the Court on this application establishes that RBC is well-secured.
114. As of August 10, 2022, the FMPC Direct Indebtedness amounted to \$632,627.73, plus costs. That figure includes the CEBA Facility, the repayment of which has not been demanded.⁹⁸
115. As of August 15, 2022, the McIvor Direct Indebtedness, the repayment of which FMPC has guaranteed, amounted to \$2,504,407.54, plus costs.⁹⁹

⁹⁷ Second Faissal Affidavit at para. 85.

⁹⁸ Affidavit sworn by Jocelyn Beriault on August 19, 2022 ("Beriault Affidavit") at para. 22.

⁹⁹ Beriault Affidavit at para. 23.

116. FMPC submits that the market is the best indicator of the value of real property. As noted above, the McIvor Lands were listed for sale with a commercial realtor for a period of approximately 14 months before the Altalaj Offer was made. The market has been appropriately tested in this case.
117. The amount offered by Mr. Altalaj for the McIvor Lands exceeds the Indebtedness by more than \$1,000,000.00. Even considering: (1) ongoing interest, (2) RBC's legal costs and (3) the costs of the interim receivership, there is little reason to believe that RBC will not be made whole by the eventual sale of the McIvor Lands, be it to Mr. Altalaj or some other purchaser.

VI. Alternative Relief

118. In the alternative to the continuance of the interim receivership and the granting of a Redemption Order – Listing, FMPC proposes that the application to appoint a Receiver or Receiver-Manager be adjourned to a date after November 10, 2022, with the interim receivership to continue as proposed at paragraph 112 above.
119. An adjournment on the terms proposed would allow for the Discharge Application to be heard and the sale of the McIvor Lands to Mr. Altalaj to close while also ensuring the preservation and protection of any security RBC holds.
120. As a further alternative, FMPC proposes that a Receivership Order be granted, with the operation of that order to be stayed/suspended until a date after November 10, 2022. The interim receivership would remain in place as proposed at paragraph 112 above.
121. As a final alternative, FMPC proposes that a Receivership Order be granted, to be operational immediately, without a power of sale (except as authorized by further order of the Court).
122. As the Court is aware, pursuant to section 13 (2) of the *Judicature Act*, R.S.A. 2000, c. J-2, it was the power to grant a Receivership Order “unconditionally or on any terms and

conditions”, which includes the power to suspend or stay the operation of any order granted and the jurisdiction to limit the powers of sale found in the usual form of Receivership Order¹⁰⁰.

F. RELIEF SOUGHT

123. The remedy sought by RBC is one which the Court has regularly described as drastic and extraordinary and one which should be granted sparingly.

124. A receivership is a discretionary form of relief. In considering the exercise of its discretion, the Court should explore whether there are other remedies, short of a receivership, that would serve to protect the interests of the applicant while balancing the rights of the relevant parties.

125. In this case, such an alternative remedy exists in the form of a Redemption Order-Listing, coupled with the continuance of the interim receivership. This remedy allows for the disposition of some of the RBC collateral while at the same time affording protections to RBC in terms of the preservation of its other collateral. Equally, it serves FMPC’s interest in maintaining the operation of the Red Deer Dental Clinic on relatively normal terms pending completion of the Asset Purchase Agreement.

126. As such, FMPC seeks the dismissal of RBC’s application, with leave given to RBC to re-apply should circumstances warrant.

127. Alternatively, FMPC seeks:

- a) an adjournment of RBC’s application to a date after November 10, 2022;
- b) An order appointing a Receiver or Receiver-Manager in respect of FMPC, with the operation of that order to be stayed or suspended until a date after November 10, 2022; or

¹⁰⁰ *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, [2013] CarswellAlta 153, 2013 ABQB 63 at paras. 33 and 37. **RBC Book of Authorities, Tab 8.**

- c) An immediate Receivership Order, but without a power of sale (except as authorized by further order of the Court).

ALL OF WHICH is respectfully submitted this 8th day of September, 2022.

WARREN SINCLAIR LLP

Per:



Matthew R. Park (counsel to FMPC)

LIST OF AUTHORITIES

- Tab 1. *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] CarswellAlta 469, 2009 ABCA 469.

TAB 1

LIST OF AUTHORITIES

- Tab 1. *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] CarswellAlta 469, 2009 ABCA 469.

TAB 1

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

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

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

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

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

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

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

Related Abridgment Classifications

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

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

Headnote

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

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

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.

Table of Authorities

Cases considered:

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

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

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

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

Statutes considered:

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

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

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

Per curiam:

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

Facts

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

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

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

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

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

Standard of Review

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

Appointment of the Receiver

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

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

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

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

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

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

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

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

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

Conclusion

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

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.