Clerk's stamp:

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	MOSKOWITZ CAPITAL MORTGAGE FUND II INC.
DEFENDANTS	1631807 ALBERTA LTD., RADIENT TECHNOLOGIES INC., and RADIENT TECHNOLOGIES (CANNABIS) INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANT, MOSKOWITZ CAPITAL MORTGAGE FUND II INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DLA PIPER (CANADA) LLP** Suite 2700, Stantec Tower 10220 – 103rd Avenue NW Attn: Jerritt Pawlyk and Kevin Hoy Phone: 780.429.6835 Fax: 780.670.4329 Email: Jerritt.pawlyk@dlapiper.com / kevin.hoy@dlapiper.com File No.: 013875-00002

Commercial List Application Scheduled for Tuesday, March 21, 2023
before the Honourable Justice D.R. Mah

Table of Contents

I. INTRODUCTION

1. The Plaintiff Applicant, Moskowitz Mortgage Fund II Inc. ("**MCMF**") is a private lender. The Defendant Respondents, 1631807 Alberta Ltd. ("**1631807**") and Radient Technologies Inc. ("**Radient Technologies**" and collectively with 1631807, the "**Debtors**") are insolvent and are indebted to MCMF for in excess of $12,000,000.

2. The financial obligations owing by the Debtors to MCMF are secured by both real and personal property security. Mortgage enforcement against the Debtors' real property is already underway in these proceedings. During the course of such enforcement, it has become clear that proceeds from the forced sale of the Debtors' real property will be insufficient to satisfy the indebtedness MCMF, thus necessitating security enforcement against the Debtors' personal property.

3. The Debtors are licensed manufacturers operating in the cannabis industry. Notwithstanding their insolvency, the Debtors continue to operate.

4. Security enforcement against the high-specialized and cannabis industry specific personal property of the Debtors under the *Personal Property Security Act*,[1] would be impracticable and inefficient. Consequently, the appointment of a receiver by court order in the present matter is just, convenient, and in the best interests of MCMF, the Debtors, and the Debtors' various stakeholders.

5. MCMF, therefore, seeks to appoint MNP Ltd. as receiver certain of the Debtors' pursuant to the terms of the draft order (the "**Receivership Order**") filed together with its Application. The Receivership Order contemplates a relatively narrow appointment, with MNP Ltd. only serving as receiver of certain of the Debtors' non-essential equipment (the "**Equipment**"), and not as receiver manager of the whole of the Debtors' business and affairs.

6. MCMF files this Bench Brief to provide this Honourable Court with the relevant case law and authorities in support of its application, and to summarize its argument as to why it is just and convenient for this Honourable Court to exercise its discretionary authority to appoint a receiver under MCMF's proposed Receivership Order.

II. ISSUES

7. MCMF submits that the following issue is required to be determined by this Honourable Court:

   a. Should a receiver be appointed by the Court in these proceedings?

[1] RSA 2000, c J-2 [**PPSA**] [**Tab 3**].

III. FACTUAL BACKGROUND

8. The Debtors' are manufacturers in the cannabis industry. 1631807 is a wholly owned subsidiary of Radient Technologies.[2]

9. In May of 2018, MCMF and the Debtors entered into an agreement pursuant to which MCMF would advance $5,500,000 to Radient Technologies under a credit facility that would be guaranteed by 1631807.[3] In June of 2018, MCMF and the Debtors concluded a written amending agreement, pursuant to which the parties agreed that 1631807 would be substituted as the primary borrower and Radient Technologies would serve as the unlimited guarantor of 1631807's obligations to MCMF.[4]

10. The debtors granted collateral security to MCMF in both their real and personal property. General Security Agreements (the "**GSAs**") executed by the Debtors granted to MCMF security in all of their present and after-acquired personal property (excepting consumer goods).[5] The GSAs and mortgages executed by the Debtors included provisions entitling MCMF to appoint a receiver over the Debtors' property upon default.

11. The lending agreements between MCMF and the Debtors were amended multiple times between May of 2018 and April of 2022. Such amendments varied interest, provided for additional advances from MCMF, and entitled MCMF to charge agreed upon fees.[6]

12. Pursuant to the most recent amendment to the lending agreements between the parties, the, the applicable interest rate on amounts owing by the Debtors to MCMF is calculated as the greater of 9.99% per annum or the Bank of Nova Scotia's Prime Rate plus 7.54% per annum. The balance owing by the Debtors as of March 8, 2023, stood at $12,067,093.27, with interest accruing on such balance at a *per diem* rate of $3,952.59 (the "**Indebtedness**").[7]

13. Radient Technologies is a reporting issuer. The most recent consolidated financial statements of Radient Technologies in that entity's public available securities filings show that, as of March 31, 2022, Radient Technologies' aggregate liabilities in the amount of ($37,860,320) far outstripped the value of its assets at $27,734,541.[8]

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[2] Affidavit of Brian Moskowitz, dated March 12, 2023, at paras 5-6.
[3] *Ibid*, at paras 7 - 8.
[4] *Ibid*, at para 11.
[5] *Ibid*, at paras 10-12.
[6] *Ibid*, at para 14.
[7] *Ibid*, at paras 14 and 17.
[8] *Ibid*, at para 18.

14. The Debtors defaulted on obligations owing to MCMF in 2022, leading to the commencement of debt and mortgage enforcement proceedings by MCMF against the Debtors in the within action, which was commenced by the filing of a Statement of Claim on August 30, 2022.

15. A Redemption Order - Listing obtained by MCMF in these proceedings prescribed a listing price for the Debtors' mortgaged lands of an amount less than the Indebtedness at $11,340,000.[9] Resultantly, MCMF determined that it would be necessary to enforce its security against the Equipment to retire the Indebtedness.[10]

16. Personal Property Registry search results show a total of 16 registrations by third parties against the personal property of the Debtors.[11]

17. Though the Debtors continue to carry on business, they have not presented to MCMF any credible plan or proposal to retire the Indebtedness.[12]

18. The Debtors have lost the ability to readily access public capital markets following the issuance of a Cease Trade Order in respect of the securities of Radient Technologies on March 7, 2023.[13]

IV. ARGUMENT

A. This Court should appoint a receiver over the Equipment

i. The Court's power to appoint receivers

19. The common law power for superior courts of inherent jurisdiction to appoint a receiver over a debtor's property on the motion of a secured creditor is codified in sections of three statutes operative in Alberta – namely, s. 243(1) of the *Bankruptcy and Insolvency Act*,[14] s. 13(2) of the *Judicature Act*,[15] and s. 65(7) of *Personal Property Security Act*.

20. Subject to certain technical requirements discussed below, section 243(1) of the BIA allows for the appointment of a receiver in any circumstance where it is "just or convenient" to do so:

> (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

[9] *Ibid*, at para 20.
[10] *Ibid*, at para 24.
[11] *Ibid* at para 16.
[12] *Ibid*, at para 19.
[13] *Ibid*, at para 22.
[14] RSC 1985, c B-3 [**BIA**] [**Tab 1**].
[15] RSA 2000, c J-2 [**JA**] [**Tab 2**].

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. [16]

21. Section 13(2) of the JA allows for the appointment of a receiver on the on similar grounds – i.e. where it is "just or convenient:"

> **(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.[17]

2. Section 65(7) of the PPSA allows for the appointment of a receiver over property subject to a security interest granted by a debtor upon the application of any interested person, absent the express inclusion of the "just or convenient" or criteria:

> (7) On application by an interested person, the court may:
> (a) appoint a receiver[18]

ii. The technical pre-requisites for the appointment of a receiver under the BIA are made out

22. Subsections 243(1)-(1.1) and 244(2) of the BIA established several preconditions that must be met in order for the Court to appoint a receiver pursuant to s. 243(1) of the BIA. These technical requirements are clearly met in the instant case.

Service of required notices

23. BIA s. 243(1.1) provides that the Court may not appoint a receiver under s. 243(1) unless notice has been sent in accordance with 244(2) of the BIA. Subsections 244(1) - (2) provide that a creditor seeking to enforce its security on all or substantially all of the business assets of an insolvent debtor is required to serve on the debtor notice of its intention to enforce its security at least 10 days prior to enforcement. MCMF complied with this requirement by delivering notices of intention to enforce security to the Debtors via their counsel on March 10, 2023.

The Debtors are "insolvent persons"

[16] BIA, *supra* note 14, at s 234(1)-(1.1) [**Tab 1**], emphasis added.
[17] JA, *supra* note 15, at s 13(2) [**Tab 2**].
[18] PPSA, *supra* note 1, at s 65(7) [**Tab 3**].

24. A close reading of BIA s. 243 shows that that section only applies to insolvent or bankrupt debtors. *Per* the definition of "insolvent person" in the BIA, an entity will be insolvent for the purposes of that statute if it satisfies any of three disjunctive criteria:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is **for any reason unable to meet his obligations as they generally become due**;
> (b) who **has ceased paying his current obligations in the ordinary course of business as they generally become due**, or
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due…[19]

25. It is inarguable that the Debtors are insolvent persons. They have remained in default on over $12,000,000 in Indebtedness owing to MCMF and have furnished no viable plan for making payment of such amount. Furthermore, the most recent consolidated financial statements of Radient Technologies disclose that that entity's aggregate liabilities far outstrip its total assets.

iii. Appointment of a receiver is just and convenient

26. MCMF respectfully submits that this Honourable Court ought to exercise its discretion to appoint a receiver-manager by reason of it being just, equitable, convenient, and otherwise appropriate that a receiver of The Equipment be appointed.

27. In this application, MCMF bears the burden of satisfying the Court that it is just or convenient to appoint a receiver. In determining whether it is just or convenient to order the appointment of a receiver in other proceedings, courts have had regard to a number of factors. In *CWB Maxium Financial Inc v. 2026998 Alberta Ltd.*,[20] this Court recently reaffirmed that the non-exhaustive factors (the "**Bennett Factors**"), as initially identified by Frank Bennett in the oft-cited text "Bennett on Receiverships," are the criteria that must be considered by the Court in determining whether it is just or convenient to appoint a receiver:

> 210 The factors to be considered are enumerated in the oft-cited *Paragon* case, at para 27, relying on the list assembled by *Frank Bennett in Bennett on Receiverships*, 2nd edition, (1995), Thomson Canada Ltd, page 130, from various cases:
>
> a. whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm

[19] BIA, *supra* note 16, at s 2 [**Tab 1**].
[20] 2021 ABQB 137 [**Tab 4**].

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.

211 Further, at para 28, Romaine J comments on the effect of a contractual right to appoint a receiver:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry[21]

[21] *Ibid*, at para 210, citing *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 at para 27 [***Paragon***] [**Tab 5**], emphasis added.

28. In the 2020 Saskatchewan Court of Queen's Bench decision in *Pillar Capital Corp. v Harmon International Industries Inc.*,[22] Elson J. relied on the Bennett Factors and noted that "while the factors vary in their importance, no one factor is determinative.[23]" Accordingly, Elson J. stressed that the Court must take a broad, contextual approach in its analysis of the Bennett Factors.[24]

29. As it was framed in *Pillar Capital*, MCMF is only required to satisfying the Court that the appointment of the Receiver is "the 'preferable' option – not the 'essential' one.[25]" Bearing such *dicta* in mind, MCMF submits that this Court must determine whether it is preferable for enforcement against the personal property of Debtors to occur during receivership proceeds or by way of enforcement under the PPSA. For the reasons canvassed below, MCMF submits that a broad, contextual analysis of the above-emphasized Bennett Factors provide this Court with ample grounds to grant the Receivership Order.

Factors (a) and (g): MCMF has the contractual right to appoint a receiver

30. The GSAs, coupled with the mortgage security granted to MCMF by the Debtors, expressly provide MCMF with the authority to appoint a receiver over the whole of the property of the Debtors. As *per* the above-produced *dicta* of Romaine J. in *Paragon*, the presence of contractual terms expressly authorizing a creditor to appoint a receiver will negate any requirement for the Court to determine that there exist extraordinary grounds to appoint a receiver.

Factors (c) and (h): the nature of the property and difficulty of dealing with secured creditors

31. The Equipment is predominately comprised of specialized, industry-specific equipment that likely holds little commercial use outside of the cannabis and biomedical industries. Given the unique nature of the property, MCMF submits that a receiver will be in the best position to conduct a commercially reasonable sales process.

32. Additionally, there are numerous articles of the Equipment, all of which appear to be encumbered by interests of potentially over one dozen registrants in the PPR. It is submitted that dealing with multiple and potentially competing security claims of various creditors following the disposition of the Equipment will be simpler and more orderly in receivership proceedings.

Factor (e): preservation and protection of property

[22] 2020 SKQB 19 [***Pillar Capital***] [**Tab 6**].
[23] *Ibid*, at para 36.
[24] *Ibid*.
[25] *Ibid*.

33. The Debtors continue to conduct business. So as to maximize its chances of full realization and to preserve the interests of the Debtors' and their stakeholders (including the Debtors' third party creditors and employees), MCMF wishes to enable to the Debtors to continue to use the Equipment to the greatest degree as is practicable until such time as it can be sold. A receiver will be best positioned to implement protocols and controls that will enable the Debtors to continue to use the Equipment while the sales process for the same is conducted.

Factor (f): balance of convenience

34. The Receivership Order only contemplates the proposed receiver taking constructive possession of the Equipment for the purpose of facilitating its sale. It does not require the Debtors' management team to give up control of the Debtors' business and operations. Furthermore, the Debtors may have some ability to continue to use the equipment if the proposed receiver is able to implement protocols allowing for the Equipment's use pending its disposition. No provision of the PPSA would allow the Debtors to retain effective position of the Equipment following its seizure. Thus, the appointment of a receiver will minimally disruptive to the Debtors', relative to an enforcement process involving seizure by a civil enforcement agency under the PPSA.

35. Should MCMF proceed to seize the Equipment using the procedure for doing so under the PPSA, MCMF will be required to conduct a complicated and cumbersome sales process for 168 articles of the Equipment. MCMF therefore submits that the balance of convenience plainly favours the appointment of a receiver.

Factor (m): length of time the receiver may be in place

36. MCMF seeks to appoint a receiver with a narrow mandate to deal with the Equipment, as opposed to a receiver manager under an expansive open-ended mandate to manage the Debtors' business for an indefinite period. Given the scope of the Receivership Order, it logically follows that, once the Equipment has been disposed of and the proceeds thereof have been appropriately distributed, the receiver will have fulfilled its mandated and will be in a position to seek a discharge order. Consequently, this Court may infer that the length of time the receiver may be in place is likely to be short in duration, lasting no longer than the time required to complete a sales process for the Equipment and to distribute the proceeds from sale.

Factor (o): likelihood of maximizing returns

37. Sales in an orderly sales process in receivership proceedings may maximize returns. A sale facilitated in receivership proceedings with the approval of this Court will enable purchasers to acquire articles of the Equipment with the knowledge that legal and beneficial title to the same is vested in them free and clear of any interest of the debtor, other creditors, or any other party under

this Court's template sale approval and vesting order. MCMF submits that certainty of title is of value to sophisticated purchasers and that facilitating a sale in process that will culminate in the granting of a sale approval and vesting order is likely to increase the value of the Equipment by eliminating risk and uncertainty for prospective purchasers.

V. CONCLUSION

38. In light of all of the foregoing, MCMF respectfully submits that it is just, convenient, and in the best interests of the stakeholders of the Debtors for this Honourable Court to exercise its discretionary authority to grant the Receivership Order, thereby enabling the Equipment to be seized and disposed of in an orderly and predictable sales process supervised by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of March, 2023.

DLA PIPER (CANADA) LLP

Per:

Jerritt R. Pawlyk and Kevin Hoy,
Counsel to Moskowitz Mortgage
Fund II Inc.

VI. INDEX OF EVIDENCE AND AUTHORITIES

TAB 1 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 2 & 234.

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

TAB 3 *Personal Property Security Act,* RSA 2000, c J-2, s 65(7).

TAB 4 *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at para 210.

TAB 5 *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27.

TAB 6 *Pillar Capital Corp. v Harmon International Industries Inc.,* 2020 SKQB 19 at para 36.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to February 22, 2023

Last amended on September 1, 2022

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income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

Moneys applied to judgment

(4) All moneys recovered as a result of proceedings taken pursuant to paragraph (3)(a) after payment of costs incurred thereby shall be paid into the court and shall be applied to the credit of the judgments against the debtor appearing in the register.

Proceedings where continuing default

(5) Where a debtor defaults in making any payment into court required to be made under a consolidation order and the default continues for a period of three months, all the registered creditors are entitled to proceed forthwith, each independently of the others and without reference to the court, for the enforcement of their claims under the consolidation order, unless the court otherwise directs on being satisfied, on application by the debtor, that the circumstances giving rise to the default and to its continuation were beyond the control of the debtor.

Debtor not entitled to relief

(6) Where any order has been made under paragraph (3)(b) or any proceedings have been commenced under subsection (5), the debtor under the consolidation order is not, without the leave of the court, entitled to any further relief under this Part during the currency of any claim against him entered in the register.

R.S., 1985, c. B-3, s. 233; 1997, c. 12, s. 116.

Re-examination of debtor

234 (1) A debtor or any registered creditor may at any time apply *ex parte* to the clerk for a further examination and hearing of the debtor in respect of his financial circumstances.

Idem

(2) The further hearing referred to in subsection (1) may only be held

(a) with the leave of the clerk; or

(b) in the event of the refusal of the clerk, with leave of the court.

Notice of hearing

(3) The clerk shall give all parties to the consolidation order at least thirty days notice of the time appointed for the hearing referred to in subsection (1).

Montants affectés au jugement

(4) Tous les montants d'argent recouvrés à la suite des procédures prises en conformité avec l'alinéa (3)a), après le paiement des frais subis à cet égard, sont payés au tribunal et portés au crédit des jugements contre le débiteur inscrit au registre.

Procédures si l'omission se prolonge

(5) Lorsqu'un débiteur omet de faire au tribunal un paiement qu'une ordonnance de fusion lui enjoint de faire et que l'omission dure trois mois, tous les créanciers inscrits ont droit de procéder sans délai, indépendamment les uns des autres et sans renvoi au tribunal, à la mise à exécution de leurs réclamations aux termes de l'ordonnance de fusion, à moins que le tribunal, à la demande du débiteur, n'en ordonne autrement après avoir été convaincu que les circonstances qui ont occasionné l'omission et sa continuation étaient indépendantes de la volonté du débiteur.

Recours ouvert au débiteur

(6) Lorsqu'une ordonnance a été rendue aux termes de l'alinéa (3)b) ou que des procédures ont été entamées en application du paragraphe (5), le débiteur selon l'ordonnance de fusion n'a pas le droit, sans la permission du tribunal, à un autre redressement prévu par la présente partie tant qu'une réclamation contre lui inscrite au registre n'a pas été satisfaite.

L.R. (1985), ch. B-3, art. 233; 1997, ch. 12, art. 116.

Nouvel examen du débiteur

234 (1) Un débiteur ou un créancier inscrit peut demander *ex parte* au greffier de procéder à un nouvel examen et à une nouvelle audition du débiteur sur sa situation financière.

Idem

(2) La nouvelle audition mentionnée au paragraphe (1) ne peut avoir lieu :

a) qu'avec la permission du greffier;

b) si le greffier refuse, qu'avec la permission du tribunal.

Avis de l'audition

(3) Le greffier donne à toutes les parties visées par l'ordonnance de fusion un avis d'au moins trente jours les informant de la date fixée pour l'audition mentionnée au paragraphe (1).

Clerk may vary order, etc.

(4) Where after considering the evidence presented at the further hearing referred to in subsection (1) the clerk is of the opinion that

(a) the terms of payment set out in the consolidation order, or

(b) the decision that the circumstances of the debtor do not warrant the immediate settling of any amounts or times of payment thereof,

should be changed because of a change in the circumstances of the debtor, he may

(c) vary the order with respect to the amounts to be paid by the debtor into court or the times of payment thereof, or

(d) on notice of motion refer the matter to the court for settlement.

Application of section 227

(5) Section 227 applies, with such modifications as the circumstances require, to a decision of the clerk under subsection (4).

R.S., 1985, c. B-3, s. 234; 1992, c. 1, s. 19.

Disposition of moneys paid into court

235 (1) Subject to subsection (3), the clerk shall distribute the moneys paid into court on account of the debts of a debtor at least once every three months.

Idem

(2) The clerk shall distribute the money paid under subsection (1) rateably, or as nearly so as is practicable, among the registered creditors.

Payments less than five dollars

(3) Except in the case of a final payment under a consolidation order, the clerk is not required to make a payment to any creditor if the amount thereof is less than five dollars.

R.S., c. B-3, s. 206.

Oaths

236 (1) The clerk may for the purposes of this Part examine any person under oath and may administer oaths.

Le greffier peut modifier une ordonnance, etc.

(4) Lorsque, après examen de la preuve présentée lors de la nouvelle audition mentionnée au paragraphe (1), le greffier est d'avis :

a) ou bien que les modalités de paiement prévues dans l'ordonnance de fusion;

b) ou bien que la décision selon laquelle les circonstances où se trouve le débiteur ne justifient pas la détermination immédiate des montants et des dates de versement de ceux-ci,

devraient être modifiées à cause d'un changement survenu dans les circonstances où se trouve le débiteur, il peut :

c) soit modifier l'ordonnance en ce qui concerne les montants que le débiteur doit verser au tribunal ou les dates de ces versements;

d) soit, sur avis de motion, renvoyer l'affaire au tribunal pour qu'il en soit décidé.

Application de l'art. 227

(5) L'article 227 s'applique, compte tenu des adaptations de circonstance, à une décision du greffier rendue sous le régime du paragraphe (4).

L.R. (1985), ch. B-3, art. 234; 1992, ch. 1, art. 19.

Affectation des montants versés au tribunal

235 (1) Sous réserve du paragraphe (3), le greffier distribue les montants versés au tribunal au titre des dettes d'un débiteur au moins une fois tous les trois mois.

Idem

(2) Le greffier distribue ces montants au prorata, ou selon une méthode qui s'en rapproche le plus possible, entre les créanciers inscrits.

Paiements de moins de cinq dollars

(3) Sauf dans le cas d'un paiement final aux termes d'une ordonnance de fusion, le greffier n'est pas tenu de faire à un créancier un paiement dont le montant est inférieur à cinq dollars.

S.R., ch. B-3, art. 206.

Serments

236 (1) Pour l'application de la présente partie, le greffier peut examiner toute personne sous serment et peut faire prêter le serment.

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

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

TAB 3

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of November 16, 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

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

(a) appoint a receiver;

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

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

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

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

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

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

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

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

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

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

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

TAB 4

Court of Queen's Bench of Alberta

Citation: CWB Maxium Financial Inc v 2026998 Alberta Ltd, 2021 ABQB 137

Date: 20210223
Docket: 2003 04457
Registry: Edmonton

Between:

CWB Maxium Financial Inc. and Canadian Western Bank

Plaintiffs

- and -

2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987 Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder

Defendants

Reasons for Decision
of the
Honourable Mr. Justice Douglas R. Mah

L. Should the Final Order of Receivership be granted on "just and convenient" grounds?

[209] Even though I have rejected the defendant's defences, the onus remains on the plaintiffs to establish that a final order of receivership is "just and convenient". Romaine J in ***MTM Commercial Trust v Statesmen and Riverside Quays Ltd***, 2010 ABQ B647 at para 11 described the test in this manner:

> As has been noted in ***Anderson v. Hunking*** 2010 ONSC 4008 (CanLII), [2010] O.J. No. 3042 at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the Court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: ***BG International*** at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the Court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

[210] The factors to be considered are enumerated in the oft-cited ***Paragon*** case, at para 27, relying on the list assembled by Frank Bennett in *Bennett on Receiverships*, 2nd edition, (1995), Thomson Canada Ltd, page 130, from various cases:

> 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.

[211] Further, at para 28, Romaine J comments on the effect of a contractual right to appoint a receiver:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: ***Bank of Nova Scotia v. Freure Village on Clair Creek***, 1996 CanLII 8258 (ON SC), [1996] O.J. No. 5088, paragraph 12.

[212] Having regard to the ***Paragon*** factors, I note:

- Service of the Requirements to Pay has effectively eliminated the pharmacy's cash flow. The receivables were intercepted. No new advances or draws are permissible unless the funds are sent to CRA to satisfy its indebtedness. There is no evidence before the Court as to how Mr. Loder intends to pay off the CRA indebtedness, in order to procure release of the bank accounts or any other receivables that may be payable.
- The pharmacy has only been able to operate during the Interim Receivership because the order stays the RTPs and allows operations to be financed through the Interim Receivers' borrowings.
- The information before the Court shows the prospects for the pharmacy's continuing viability are grim. As noted in the Interim Receiver's Second report, during the first six months of operation following the Interim Receivership order, the pharmacy would have sustained an operating loss of $277,515.96 if it had been required to make monthly loan payments to Maxium, even after the Interim Receiver's costs and professional fees are backed out. This loss does not account for the arrears owed to Maxium or the CRA indebtedness.
- There is no information before the Court as to any plan on Mr. Loder's part to pay out either Maxium or CRA. Mr. Loder raised prospects for take out of Maxium and CWB by refinancing with another lender back on February 28, 2020. A year has gone by and there is no further information, let alone a feasible refinancing

TAB 5

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

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

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

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp.***, 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

TAB 6

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 19**

Date: **2020 01 22**
Docket: QBG 1401 of 2019
Judicial Centre: Saskatoon

BETWEEN:

PILLAR CAPITAL CORP.

APPLICANT

- and -

HARMON INTERNATIONAL INDUSTRIES INC.

RESPONDENT

Counsel:

Michael J. Russell and Kevin N. Hoy for the applicant

Jared D. Epp for the respondent

FIAT ELSON J.
January 22, 2020

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.

> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

[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.* (1995), 30 CBR (3d) 49 (Ont Ct J). 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.