COURT FILE NUMBER	**25-3015956/B301-015956**
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANTS	SHRED CONSULTING LTD., SHRED CAPITAL LTD., and LEONITE FUND I, LP
RESPONDENT	VOG CALGARY APP DEVELOPER INC.
DOCUMENT	**BOOK OF AUTHORITIES TO THE BENCH BRIEF OF THE APPLICANTS**
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Clerk's Stamp

BOOK OF AUTHORITIES TO THE BENCH BRIEF OF
SHRED CONSULTING LTD., SHRED CAPITAL LTD., AND LEONITE FUND I, LP

IN SUPPORT OF APPLICATION TO SET ASIDE STAY AND FOR THE APPOINTMENT OF A RECEIVER

TO BE HEARD BY THE HONOURABLE JUSTICE WHITLING
December 20, 2023 at 11:00 A.M.

LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c.B-3.
2.	*Atlantic Sea Cucumber Limited (Re)*, 2023 NSSC 238.
3.	*Scotia Rainbow Inc v Bank of Montreal*, 186 NSR (2d) 153, 18 CBR (4th) 114.
4.	*Baldwin Valley Investors Inc, Re*, [1994] OJ No 271, 23 CBR (3d) 219.
5.	*H & H Fisheries Ltd, Re*, 2005 NSSC 346.
6.	*Cumberland Trading Inc, Re*, 1994 CanLII 7458, [1994] OJ No 132.
7.	*Cougar Metal Industries Inc, Re*, 2004 BCSC 1258.
8.	*Com/Mit Hitech Services Inc, Re*, [1997] OJ No 3360, 43 OTC 376.
9.	*Toronto Dominion Bank v Ty (Canada) Inc*, 122 ACWS (3d) 18, [2003] OJ No 1552
10.	*Ma v Toronto-Dominion Bank*, 2001 CanLII 24076 (ON CA), [2001] OJ No 1189.
11.	*MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB.
12.	*CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137.
13.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430.

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

"common-law partnership" means the relationship between two persons who are common-law partners of each other; *("union de fait")*

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *("personne morale")*

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *("tribunal")*

"creditor" means a person having a claim provable as a claim under this Act; *("créancier")*

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"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")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Judicial Consideration (7)

Currency
Federal English Statutes reflect amendments current to October 26, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8) Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9) Extension of time for filing proposal
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual

extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11) Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to October 26, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

R.S.C. 1985, c. B-3, s. 69.4

s 69.4 Court may declare that stays, etc., cease

Currency

69.4Court may declare that stays, etc., cease

A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

Note:

S.C. 1997, c. 12, s. 65(2), provides as follows:

(2) Subsection (1) [S.C. 1997, c. 12, s. 65(1), which added ss. 69.31 and 69.41 and re-enacted s. 69.4] applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].

Amendment History

1992, c. 27, s. 36(1); 1997, c. 12, s. 65(1)

Judicial Consideration (3)

Currency

Federal English Statutes reflect amendments current to October 26, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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

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

s 243.

Currency

243.

243(1) Court may appoint receiver

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

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

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

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

243(1.1) Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

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

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

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

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

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

Judicial Consideration (8)

Currency
Federal English Statutes reflect amendments current to October 26, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

TAB 2

2023 NSSC 238
Nova Scotia Supreme Court

Atlantic Sea Cucumber Limited (Re)

2023 CarswellNS 596, 2023 NSSC 238, 8 C.B.R. (7th) 123

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Reg. Raffi A. Balmanoukian

Heard: July 17, 2023
Judgment: July 21, 2023
Docket: 45461, Estate No. 51-2939212

Counsel: Darren O'Keefe, Caitlin Fell, for Applicant, Atlantic Sea Cucumber Limited
Joshua Santimaw, for Trustee, MSI Spergel Inc.
Gavin D.F. MacDonald, Meaghan Kells, for Objecting Creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor applied for extension of time to file proposal — Application sought to have matter heard on emergency basis — Hearing took place on ex parte basis — Application dismissed — Although there were difficulties with proposal, proposal met low standard for viability — Debtor had not done due diligence — Debtor had not taken necessary steps to determine who creditors were and what status they held — Debtor appeared to expect that justice would approve initial order under Companies' Creditors Arrangement Act — Order did not meet specifications for approval — Application was not made in good faith — Applicable law as to extension was permissive rather than mandatory — Judge did not exercise discretion in favour of debtor, as conditions were not met Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).
Table of Authorities
Cases considered by *Reg. Raffi A. Balmanoukian*:
Dynamic Transport Inc., Re (2016), 2016 NBCA 70, 2016 CarswellNB 595, 2016 CarswellNB 596, 45 C.B.R. (6th) 45 (N.B. C.A.) — referred to
Entegrity Wind Systems Inc., Re (2009), 2009 PESC 25, 2009 CarswellPEI 47, 56 C.B.R. (5th) 1, 289 Nfld. & P.E.I.R. 347, 890 A.P.R. 347 (P.E.I. S.C.) — referred to
Entegrity Wind Systems Inc., Re (2009), 2009 PESC 33, 2009 CarswellPEI 63, 291 Nfld. & P.E.I.R. 175, 898 A.P.R. 175 (P.E.I. S.C.) — referred to
Kocken Energy Systems Inc., Re (2017), 2017 NSSC 80, 2017 CarswellNS 187, 50 C.B.R. (6th) 168 (N.S. S.C.) — referred to
NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — referred to
Nautican v. Dumont (2020), 2020 PESC 15, 2020 CarswellPEI 30, 79 C.B.R. (6th) 243 (P.E.I. S.C.) — referred to
R. v. Desmond (2020), 2020 NSCA 1, 2020 CarswellNS 15, 53 M.V.R. (7th) 1, 384 C.C.C. (3d) 461 (N.S. C.A.) — referred to

Royalton Banquet & Convention Centre Ltd., Re (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.) — referred to
Scotian Distribution Services Limited (Re) (2020), 2020 NSSC 131, 2020 CarswellNS 256, 78 C.B.R. (6th) 258 (N.S. S.C.) — referred to
T & C Steel Ltd., Re (2022), 2022 SKKB 236, 2022 CarswellSask 534 (Sask. K.B.) — referred to
Weihai Taiwei Haiyang Aquatic Food Co. Ltd. v. Atlantic Sea Cucumber Ltd. (2023), 2023 NSSC 27, 2023 CarswellNS 81 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 4.2(1) [en. 2019, c. 29, s. 133] — referred to
s. 50.4(9) [en. 1992, c. 27, s. 19] — considered
s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to
s. 95 — referred to
s. 137 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered
Interpretation Act, R.S.N.S. 1989, c. 235
Generally — referred to

APPLICATION by debtor in bankruptcy proceedings for extension of time to file proposal.

***Reg. Raffi A. Balmanoukian*:**

1 On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the Companies Creditors Arrangement Act, RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

2 On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

3 On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May

24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

4 On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13, 2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

5 On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

6 WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal *Interpretation Act*, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

7 That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA General Rules require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

8 I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

9 I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

10 WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

11 Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken*, (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

12 Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

13 WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

14 I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application.

In short, the "no brainer" that the Debtor thought it had in obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

15 This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

16 In Re T&C Steel Ltd. et al 2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
> > [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

17 The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

18 In summary, the test for the likelihood of a viable proposal is an objective one: Nautican v. Dumont, 2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in Re Scotian Rainbow Ltd. et al, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
> > Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken* , I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

20 That leaves us with 50.4(9)(a) — the due diligence and good faith tests — and with my discretion.

21 Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism — a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by

the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved in the file) became quite agitated when I challenged the timeline leading up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

22 The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In Re Royalton Banquet and Convention Centre Ltd. 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward — not other options.

23 Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension — not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

24 Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

25 I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test — that there is good faith; not the presence or absence of bad faith.

26 At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

27 I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

28 Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

29 In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.
>
> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will

never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

[19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

[emphases added]

30 In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

31 In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

32 Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

33 The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see Re Dynamic Transport2016 NBCA 70 at paras. 4 and 9; Re Entegrity Wind Systems Inc.2009 PESC 25 at para. 30; Re Entegrity Wind Systems Inc.2009 PESC 33 at para. 36; Royalton Banquet and Convention Centre Ltd. 2007 CanLii 1970 (Ont. SC).

34 Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

35 It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

36 As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

37 Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

38 Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Application dismissed.

2023 NSSC 238, 2023 CarswellNS 596, 8 C.B.R. (7th) 123

End of Document

TAB 3

2000 CarswellNS 216
Nova Scotia Supreme Court

Scotia Rainbow Inc. v. Bank of Montreal

2000 CarswellNS 216, 186 N.S.R. (2d) 153, 18 C.B.R. (4th) 114, 581 A.P.R. 153, 98 A.C.W.S. (3d) 1156

Bankruptcy of Scotia Rain Bow Incorporated, Escasoni Fisheries Ltd., Saddle Island Fisheries, Liscot Enterprises Inc., Madam Isle Sea Farms Ltd., Loch Bras D'or Farms Ltd., Applicants and Bank of Montreal, Respondent

Kennedy C.J.S.C.

Heard: May 17 and 18, 2000
Judgment: May 19, 2000
Docket: B2257, B22611, B22610, B22602, B22603, B22604

Counsel: *Stephen Kingston* and *R. Cluney*, for Applicant, Deloitte Touche.
Gregory Cooper, for Trout Lodge.
R. Carmichael and *Craig McCrea*, for Ernst & Young.
Tom Boyne, for Farm Canadian Commercial.
George Khattar, for Scotia Group of Companies.
Joe Wild, for E.C.B.C.
Kevin Zych, for Shur Gain.
A. Douglas Tupper and *Anthony Tam*, for Respondent, Bank of Montreal.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy --- Proposal — Practice and procedure
S.R. Inc. and affiliated companies carried on business in aquaculture industry, primarily in growing and selling trout and salmon — Interim receivership order was made against S.R. Inc., which then filed notice of intention to make proposal — Applicants hoped federal government agencies would provide substantial equity injection but government agencies decided not to do so — Applicants then pursued investment from private sources and sought extension of time to file proposal — Application for extension was supported by all of applicants' primary secured creditors except respondent bank — Bank claimed it would be materially prejudiced by extention since main asset was 8 million fish costing $200,000 per week to feed — Bank claimed such loss would continue to escalate as long as it was prevented from realizing on security — Application for extension granted — Given quality, experience and expertise of supporting creditors, it was likely reorganization would be successful — Also, time frame given by bank for marketing security was greater than extension sought by applicants — Order granting extension was to permit bank to commence marketing security immediately — Order would allow applicants one further effort to save S.R. Inc. and permit such extension without material prejudice to bank — Extension to be granted until June 30, 2000.
Table of Authorities
Cases considered by *Kennedy C.J.S.C.*:
Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — applied
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — referred to
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) [rep. & sub. 1992, c. 27, s. 16(1)] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to

Words and phrases considered

viable proposal

. . . the phrase a viable proposal as set out in subsection (b) of s. 50.4(9) [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] . . . should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. . . . this ignores the possible idiosyncrasies of any specific creditor.

APPLICATION by trustee for order for further extension of time for filing proposals.

***Kennedy C.J.S.C.*:**

1 This is an oral decision, I would ask counsel to bear with me. It is somewhat convoluted. I reserve the opportunity to add to, but not subtract from this decision, should I consider it to be necessary. I do that because of the time constraints that I have had to deal with in trying to get this decision done, so that a matter that needs to be addressed is addressed as quickly as possible.

2 This is an application brought on behalf of Scotia Rainbow and its affiliated companies. It is brought by its Trustee in bankruptcy, Deloitte Touche, seeking a further extension of time for filing proposals pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2 that further extension that they now wish is until June 30th, 2000.

3 The applicants are supported by the primary secured creditors of the company, with the notable exception of the Bank of Montreal (the Bank), which strongly opposes the application. I will review some of the facts that are not contested.

4 Scotia Rainbow is based in Arichat, Cape Breton. It and its five wholly owned subsidiary companies carry on business in the aquiculture industry. They are primarily active in growing and selling trout and salmon.

5 On March 2nd, 2000, Justice Moir of this Court issued an interim receivership order regarding Scotia Rainbow Incorporated, pursuant to s. 47(1) of the *Act*. The application was brought by the Bank. Ernst and Young was appointed Interim Receiver. Further orders were issued by the court on March 10th and 14th, 2000, extending the interim receivership to the subsidiary companies of Scotia Rainbow. The interim receivership continues in place and Scotia Rainbow continues to operate under it.

6 Scotia Rainbow filed a notice of intention to make a proposal under the *Act* on March 9th, 2000. Its subsidiary companies filed similar notices on March 17th, 2000, and Deloitte Touche was Trustee under these notices.

7 On April 10, 2000, I issued an order extending the time for Scotia Rainbow to file its proposal by 18 days to April 28th, 2000. Similar orders were issued with respect to the subsidiary companies on April 10th, 2000, extending the time for filing proposals in those cases by 11 days and to the same date, April 28th, 2000. The Bank did not oppose any of these applications to extend time. The Bank did not oppose any of the applications at that time.

8 On April 26th, 2000, pleadings were filed with this Court for an application to be heard on April 28th, 2000, for a further extension of time for filing proposals. The company sought to extend the time to May 29th, 2000.

9 The Bank, through its solicitors, advised that it now would be opposed to the application. Justice Goodfellow of this Court, who was to preside on April 28th, 2000, determined that the application should be adjourned to May 10, 2000, and ordered that such adjournment were deemed to be extensions pursuant to the *Act*.

10 On May 10th, 2000, Justice Stewart of this Court, adjourned the applications and extended the time until May 15th, when with the consent of all parties, I adjourned and extended the matter until May 17th, so that the consent in the case of the bank was only to extend it from May 15th to May 17th.

11 At the commencement of this hearing on May 17th, Scotia Rainbow indicated that because of recently changed circumstances, which I will speak of later, it was now asking the Court to extend the time for filing proposals to June 30th, 2000. In response, the Bank argued that they couldn't change that date from May 29th until June 30th, 2000, without notice, sufficient notice, the Bank suggested that they did not receive sufficient notice. I am satisfied that I have discretion in circumstances such as these, to allow such a change to be made and in the circumstances that it was requested, I am going to exercise my discretion and allow that to take place.

12 The creditors who are in support of the application have agreed to a memorandum of understanding, a copy of that memorandum is attached as schedule "A" to the supplementary affidavit of Karen Cram. The memorandum sets out the arrangements by which these primary secured creditors are prepared to work towards the reorganization of the principal secured debt of Scotia Rainbow and the finalization of the Scotia Rainbow proposal. If you will bear with me I will read s. 50.4(9) for the record, it provides as follows:

> The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under the subsection, apply to the court for an extension, or further extension as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding the aggregate of five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor will be materially prejudiced if the extension being applied for were granted.

13 The burden lies on the applicant, Scotia Rainbow to show that the three requirements set out in s. 50.4(9) are satisfied, if it is to succeed on this application. It is acknowledged that this burden is on the balance of probabilities.

14 As to subsection (a), that requirement, the requirement that the insolvent person has acted and is acting in good faith and with due diligence, this is a non issue in this matter.

15 The Bank, the creditor opposing, has not questioned the evidence that the applicant has been so acting and I find on sub (a) that the requirement is addressed and satisfied on the balance of probabilities.

16 There remain then, two main issues to be determined by this Court. Those being whether the applicant can satisfy the requirements of sub (b) and (c) on the balance of probabilities.

17 As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]). In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable

proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:

> Might well happen or turn out to be the thing specified.

18 Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 The applicant argues that it is likely to be able to make a viable proposal if the extension is granted. It does so, notwithstanding that one of its key suggestions in its brief, and then the memorandum of agreement, that is, that there was going to be support from federal agencies, no longer is going to happen.

20 Prior to the March 17th application date, the applicant expected that the federal government agencies would provide a substantial equity injection into Scotia Rainbow, in return for a majority of shares. The applicant has indicated, disclosed at the start of this hearing, that after more recent negotiation with the agencies involved, it now concludes that this is not going to happen, or at least it will not be a component of a proposal to the creditors, and it was this changed circumstance that caused the applicant to change the request with respect to the length of the extension.

21 Scotia Rainbow now says it is pursuing investment from private sources, but does so with the assistance of the secured creditors who are in support of the application. Ms. Karen Cramn, the senior vice-president of the Trustee, Deloitte Touche is able to tell this Court that she is "cautiously optimistic", that such funding from private sources will be available. Notwithstanding the changed circumstances, counsel for the applicant submits that the memorandum of agreement shows that the primary creditors are prepared to work with Scotia Rainbow to make significant monetary commitments as part of the accepted proposal, including the provision of a line-of-credit and the delay of the repayment of loans. This, says the applicant, is evidence that Scotia Rainbow is likely to be able to make a viable proposal if the extension is granted.

22 The Bank of Montreal, though, argues otherwise. It says that the applicant's submission is wishful thinking: For instance, the Bank of Montreal argues that the suggested proposal, the memorandum, understanding of agreement, refers to a new bank that will provide funds to pay out the Bank of Montreal's line-of-credit and obtain a release of the Bank of Montreal's security.

23 Counsel for the Bank of Montreal asks this Court the question, what new bank? Where is the bank that is prepared to go where the Bank of Montreal has been? The applicant has produced a letter from a bank, that at this time constitutes I guess what might be described as an expression of interest, but no more than that.

24 The Bank of Montreal says, where is the private source of money likely to come from when federal agencies mandated to support Cape Breton Industry won't commit to the proposal. If you can't get the feds involved, what is the likelihood of getting private money?

25 The Bank of Montreal says the applicant has had both the time permitted by the *Act* and a number of extensions to put together a viable proposal and has not been able to do so. The Bank argues that there comes a time when reality must be faced and the Bank says that time is now and the reality is that no proposal of this nature is going to make it. The Bank says the time is now, that this is the time to face that reality because the Bank claims that it is materially prejudiced to the delay in realizing against its security. Which brings us to s. 50.4(9)(c), the requirement that the applicant show that no creditor would be materially prejudice if the extension being applied for is granted.

26 This issue of material prejudice, in this case is characterized by the unique nature of the Bank's security. Fish, 8 million fish, fish that have to be fed, fish that are subject to disease, fish that have been known at least in the Province of Alberta they tell me, to escape, fish that eventually have to be sold in a fluctuating market.

27 The Bank points out that, to protect and maintain this perishable and fragile asset, the Interim Receiver, on behalf of the Bank, has incurred substantial costs. The Interim Receiver has estimated the costs to continue to operate and protect the asset to be approximately $200,000.00 a week. $200,000.00 a week that the Bank covers and will be forced to continue to cover during any extension.

28 The Bank says that had the realization process been able to be commenced as early as April 13 th of this year, the Interim Receiver has estimated that even back then the Bank had already lost approximately $800,000.00. A loss that the Bank says will continue to escalate as long as it is prevented from realizing on that security.

29 The Bank has argued that to allow the stay, the extension sought by the applicant, would increase the Bank's risk by approximately, approximately being the operative word, 2 million dollars.

30 I have listened to two days of hard numbers, of past and present fact, speculations, projections and counter projections. I do not intend to try to reconcile the contradictions or to recap or summarize that evidence at this time. I heard it all. It is the nature of this type of application that this Court is being asked to consider, both what will happen, what could happen. Also what is not ever likely to happen. The Court is asked to predict the future. Let me say that after having considered all of the evidence, and please understand that I mean all of the evidence, all of the arguments, it is the balance of probabilities that I attempt to get at, that I attempt to establish, that I attempt to discover. And I repeat, the onus is on the applicant.

31 I will address then, the requirement under s. 50.4(9) of the *Act* that the applicant show on the balance of probabilities that Scotia Rainbow would likely be able to make a viable proposal if the extension applied for was granted. I find that the applicant has met this requirement. I do so, mindful of the Bank's insistence that the applicant's predictions are unrealistic given Scotia Rainbow's inability to put together a viable proposal, despite the best efforts of these people for 11 weeks since the filing of the notice of intention. I am aware of that argument. I was though, impressed by the evidence of Karen Cramn on behalf of the Trustee and I find that her "cautious optimism" was a sincere statement of her belief, that were the process to be allowed to continue, the applicant and its supporting creditors would be able to reorganize the principle secured debt of the companies.

32 These creditors, in support have been described as sophisticated companies, understanding the reality of the task required to be accomplished over limited time. This is the essence. It is relevant and proper for this Court to consider the quality, the experience and the expertise of the people attempting to accomplish the proposal. It is proper for me to look at who is trying to do this, who are these people. And having done so, considering all of the various factors, I conclude that it is likely that they will, based on the framework of the memorandum of understanding, memorandum of agreement, succeed. I so find.

33 The Bank has argued that despite the best efforts of the applicant, it is in a position to veto any proposal made under the *Act*. The Bank cites *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). which is another decision of Justice Farley of the Ontario Court of Justice (General Division). I am satisfied, however, that such claim to a veto is not established before me, because it is dependant upon an estimate of total Scotia Rainbow indebtedness to the Bank which includes a third party guarantee of 2.2 million referred to as the Viramair Guarantee. The viability of this guarantee is uncertain at this time. I am told by the applicant counsel, specifically Shur Gain, I remember counsel for Shur Gain and also Mr. Kingston, on behalf of Scotia, I am told by those counsel that the enforce ability of this guarantee is presently a live issue and they have explained why, and I believe it is a live issue. It would have to be established, the enforce- ability of that guarantee would have to be established to put the Bank in a veto position. It is not for this Court, on the evidence before me, to determine the quality of that guarantee. I cannot find that the Bank then, is in a position to veto at this time. I do not so find.

34 Let's then move on to the requirement that the applicant show that on the balance of probabilities, no creditor will be materially prejudice if the extension sought is granted, subsection (c). It is, of course, material prejudice that we speak of, not simple prejudice. While acknowledging the Interim Receiver's expenditures during the stay period, the applicant asks this Court to consider that the bulk of these expenditures actually do benefit the Bank, because they are directed to the maintenance and growth of the fish inventory over which the Bank claims first charge. The expenditures say the applicant not only keeps the

company operating, which is a good thing, according to the applicant, but those expenditures increase the market value of the fish, and as a result, the quality of the Bank's security.

35 Central to the debate on this issue therefore, was the disagreement as to the effect that a further stay would have on the Bank and that was the issue that took much of the day and a half of the argument that was made before this Court. There is disagreement as to the effect that the stay has on the Bank. There is disagreement as to what the costs feeding the fish amounts to in the sense that who gets the benefit, what is the extent of the benefit to the various parties, there was debate as to the nature of the contract with the American/Japanese company, with respect to additional monies that might be forthcoming from that company, and how that situation was affected by the potential stay. There was the issue raised in relation to the Bank's agreement with C.C.C., the federal agency that is involved with supporting Canadian Exports. How a stay would affect the Bank's relationship with that agency, given the contract, the arrangement between the two, with respect to guarantees made by the agency, specific to the Bank.

36 A very significant question raised by the Bank was that, should the extension be accomplished, it would further set back the Bank's ability to realize on and market its security and that this delay, this further delay cause the Bank material prejudice.

37 The Bank estimated that it would take, should a proposal not succeed, it would take 10 to 12 weeks to realize on its assets from the date the extension had ended. It is, of course, a given that during that period of time the fish would continue to eat, cost would continue to rise.

38 The applicant offered a response to this suggestion of prejudice and I find that that response not only addresses the issue of delay in the commencement of the marketing process, but it addresses the entire suggestion of material prejudice to the Bank.

39 The applicant has pointed out that the time frame for marketing the security, that the Bank suggests, and that I repeat was 10 to 12 weeks from commencement, is greater than the extension sought by the applicant.

40 The applicant has suggested, I think it was initially counsel for Shur Gain and certainly joined in and further argued by Mr. Kingston on behalf of the applicant, has suggested that this Court draft an order for extension that allows the receiver to commence the marketing of the Bank's security immediately. An order that would allow both the applicant's effort to develop a viable proposal and the Bank's effort to market its security to be carried on simultaneously. Thus allowing the applicant one further effort to save this company, and at the same time addressing the Bank's suggestion of prejudice caused by a further stay, which prejudice of course the applicant does not admit.

41 The Bank countered by asking how the Interim Receiver could be expected to organize a sale of this nature when it had no authority to sell until such time as this process had ended; until the stay had expired. The Bank asked the question, who is going to deal with the Receiver who has no authority to sell? The response to that counsel, again on behalf of Shur Gain, said that just such orders, orders of this nature, have been crafted in other jurisdictions and it was his suggestion at least, that there are indeed people who would negotiate given that contingency, given that situation. Common sense tells me that there is likely to be. Frankly, notwithstanding the obvious compromise that has to be acknowledged in relation to the process, given the time frames involved, I am satisfied that it is possible that there would be people interested in negotiating under those circumstances. Possible purchaser. Although this marketing process would be imperfect, until the proposal possibility was exhausted, I am satisfied that the suggestion has merit and significantly, I am further satisfied that an order that allows the marketing process to take place during the term of the extension period, would permit such extension to be accomplished without material prejudice to the Bank.

42 The suggestion made by the applicant, therefore, in combination with all of the evidence, has satisfied this Court that an extension that allows the Bank this option would not materially prejudice the Bank on the balance of probabilities. Being satisfied that all of the prerequisite requirements as set out by s. 50.4(9) have now been shown to be true to be so on the balance of probabilities, I will grant the order sought, extending the period for the filing of proposal pursuant to s. 50.4(9) of the *Act* until June 30th, 2000. It will be a term of that order that the Interim Receiver will be permitted, at the request of the Bank, to

market the Bank's security during that period of extension, seeking purchasers should the sale of that security become available to the Bank. I will review an order when drafted. Should there be costs requested I will receive briefs.

Application granted.

End of Document

TAB 4

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.
Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.
The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .
The companies appealed.
Held:
The appeal was dismissed.
The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).
Table of Authorities
Cases considered:
Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(9)

s. 50.4(11)

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

> (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question.
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

> *likely* 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

TAB 5

2005 NSSC 346
Nova Scotia Supreme Court

H & H Fisheries Ltd., Re

2005 CarswellNS 541, 2005 NSSC 346, [2005] N.S.J. No. 513, 144 A.C.W.S. (3d) 407, 18 C.B.R. (5th) 293, 239 N.S.R. (2d) 229, 760 A.P.R. 229

In the Matter of H & H Fisheries Limited

Goodfellow J.

Heard: December 14, 2005
Judgment: December 19, 2005
Docket: SH B259148

Counsel: Victor J. Goldberg, Martha L. Mann for H & H Fisheries Limited
Stephen J. Kingston, Bob Mann (articled clerk) for Bank of Nova Scotia

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor agreed to maintain all operating accounts with bank as condition of financing — Debtor breached agreement by depositing funds with other bank — Debtor had net loss of nearly $600,000 for fiscal year ending June 30, 2005 — Debtor applied for 45-day extension to file proposal — Application granted — Debtor met requirements of s. 50.4(9) of Bankruptcy and Insolvency Act — Debtor acted in good faith notwithstanding breach of agreement — Debtor acted to stay in operation as bank would have used funds to pay down debt — Debtor's good faith was supported by respected trustee — Debtor was likely to make viable proposal in sense of reasonable one to reasonable creditor — Bank as largest secured creditor should not be able to veto proposal at this early stage — Bank would not be unduly prejudiced by extension given debtor's current receivables of nearly $1 million were double its indebtedness to bank.
Table of Authorities
Cases considered by *Goodfellow J.*:
Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — referred to
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc. (1997), 1997 CarswellOnt 1524, 46 C.B.R. (3d) 280, 36 O.T.C. 76 (Ont. Bktcy.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 1 [rep. & sub. 1992, c. 27, s. 2] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 54(2.2) [en. 1992, c. 27, s. 22] — considered

s. 54(3) — considered

s. 62(1.2) [en. 1992, c. 12, s. 39] — considered

s. 62(2) — considered

Interpretation Act, R.S.C. 1985, c. I-21

Generally — referred to

s. 10 — considered

s. 12 — considered

APPLICATION by debtor for extension of time for filing proposal under Bankruptcy and Insolvency Act.

***Goodfellow J.*:**

Backgound

1 H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

2 Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

3 HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

4 In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

5 In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

6 In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio

account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

7 In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of $300,000 which would be partially set off by an SR&ED refund of $200,000, leaving a net loss of $100,000 for the fiscal year 2005.

8 In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of $596,043. This compared with a net loss of $21,003 for the year ending June 30, 2004.

9 HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

Legislation

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Ss. 50.4(9)

> **Extension of Time for Filing Proposal**
>
> In order to obtain an extension, the debtor must establish the following three items
>
> (a) that it is acting in good faith and with due diligence;
>
> (b) that it would likely be able to make a viable proposal if an extension were granted; and
>
> (c) that no creditor would be materially prejudiced.

S. 54(2.2)(3)

> **Related creditor** — A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2)

> **On whom approval binding** — A proposal accepted by the creditors and approved by the court is binding on creditors in respect of
>
> (a) All unsecured claims, and
>
> (b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.
>
> but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

Interpretation Act, R.C.C. 1985, c. I-21

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Application

10 HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

Onus

11 The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

12 The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

13 This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

14 **Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

15 There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

16 Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

17 The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to ones family or a pay-down on a mortgage or judgment on ones home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

18 It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

19 The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

> 14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the representation made in oral argument that Mr. Hartlen has probably advanced $90,000 to $95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

20 The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

21 **Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

22 "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])). Again, the court must be satisfied on a balance of probabilities that HHFL **would likely**. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.

23 Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.). In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

> ...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future.

24 The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

25 There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been $7,000 and it appears to be approximately $19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort to be BNS or the court as to being a probable element of a viable proposal.

26 Paragraph 5 of Francesco Amoruso's affidavit merely states:

> I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of $400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

27 To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

28 HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent $6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is preforming the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another

example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

29 BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

30 BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

31 In *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]), wherein Farley J. stated at para. 4:

> Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

32 In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted secured creditors and here the math appears to give BNS a virtual veto. HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately $170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately $90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced *if* it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

33 In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

34 The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately $95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the Bank which has as its security a first charge on trade receivables and inventory.

What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

> 11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

35 I struggle with what constitutes material prejudice and there is some guidance in *Cumberland Trading Inc., Re* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

36 In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

37 This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

Conditions

38 During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

Application granted.

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Flasha Holdings Ltd (Re) | 2021 ABQB 435, 2021 CarswellAlta 1349, 332 A.C.W.S. (3d) 19, [2021] A.W.L.D. 2181 | (Alta. Q.B., Jun 2, 2021)

1994 CarswellOnt 255
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Cumberland Trading Inc., Re

1994 CarswellOnt 255, [1994] O.J. No. 132, 23 C.B.R. (3d) 225, 45 A.C.W.S. (3d) 199

Re proposal of CUMBERLAND TRADING INC.

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Miscellaneous
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.
A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.
The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.
Held:
The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.
The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Table of Authorities

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Motions by secured creditor for declaration that stay provisions of *Bankruptcy and Insolvency Act* no longer operated to prevent it from enforcing its security, for declaration that 30-day period to file proposal had terminated and for order allowing substitution of trustee.

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith

> and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination*. In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.
>
> [emphasis added]

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently

estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

TAB 7

2004 BCSC 1258
British Columbia Supreme Court

Cougar Metal Industries Inc., Re

2004 CarswellBC 2339, 2004 BCSC 1258, 5 C.B.R. (5th) 23

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF COUGAR METAL INDUSTRIES INC.

Morrison J.

Heard: September 14, 2004
Judgment: September 14, 2004
Docket: Vancouver 11-247445

Counsel: John Grieve for Applicant
Christopher Ramsay for Cougar Metal Industries Inc.
Michael Howcroft for Wilkinson Steel

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Termination of time period
Creditors supplied TNS Inc. with steel — TNS Inc. filed notice of bankruptcy — Creditors alleged that TNS Inc. made large orders of steel shortly before filing for bankruptcy — Creditors brought application to terminate period for making proposal — Application dismissed — Although ordering patterns of TNS Inc. were suspicious, proof of bad faith was not made out — Termination of time to make proposal was extraordinary remedy.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(11)(a) [en. 1992, c. 27, s. 19] — considered
Rules considered:
Rules of Court, 1990, B.C. Reg. 221/90
App. B, s. 2(2)(c) — referred to

APPLICATION by creditors to terminate time period for proposal.

***Morrison J.*:**

1 This is an application by Terra Nova Steel Incorporated, one of the creditors of Cougar Metal Industries Inc. that the time for Cougar Metal industries Inc. to make a proposal be terminated and that Cougar Metal Industries Inc. be deemed to have made an assignment as of today or the date this order is pronounced.

2 There are three creditors who have filed affidavit evidence before me. They are basically in the steel and metal distribution service and they have provided steel products to Cougar Metal. They are particularly concerned because, as Mr. Howcroft has

said, there has been a significant spike in the ordering pattern by Cougar Metal in the month of August 2004 just prior to the execution and the filing of the notice under the *Bankruptcy Act*.

3 On August 27th, 2004, Cougar Metal executed a notice of intention to make a proposal. That was filed a few days later on September 2nd, 2004. The three creditors who are before me include Wilkinson Steel and Metals, a division of Premetalco Inc., known as Wilkinson Steel, and the affidavit from Carol Bouck, the manager of that company, indicates that the amount of product ordered by Cougar Metal from Wilkinson Steel in August 2004 was 500 percent more than was ordered by Cougar Metal during the previous calendar year, 2003.

4 Terra Nova Steel Inc., another creditor of Cougar Metal, has been supplying steel metal products since 1989 to Cougar Metal. The affidavit of Rhonda Caldwell, credit manager of Terra Nova, indicates that in August 2003, because of Cougar Metal defaulting on its account, they reduced Cougar Metal's credit line from $50,000 to $30,000 and at that point Cougar Metal essentially stopped purchasing from Terra Nova. However, they commenced again in February 2004 and by August 10th, 2004 or beginning on that date, August 10th, they placed some six orders which totalled $32,019.75.

5 The shipping dates were provided in the affidavit although the exact dates that the orders were placed were not. The same goes for the affidavit of Caroline Bouck, which affidavit indicates invoice dates and delivery dates all in August except for the last one, September 1st delivery date and September 2nd invoice date for the last amount but again there were no order dates given there.

6 The third creditor before me is Russel Metals Inc. and the credit manager Rinardo Ramey has deposed that as of August 2004 Cougar Metal had ordered Forsyth had delivered — sorry, Russel Metals I gather is known as A.J. Forsyth — and Forsyth had delivered $67,737.98 in metal products.

7 All three creditors want the right to go on to the premises of Cougar Metal and retrieve as much of the goods as they can under the circumstances. They have thus made their application under s. 50.4(11) of the *Bankruptcy Act* which states that:

> Court may terminate the period for making proposal and that is that the court may on application by the trustee, the interim receiver, if any, appointed under s. 47.1 or a creditor declare terminated before its actual expiration the 30-day period mentioned in subsection 8 or any extension thereof granted under subsection 9 if the court is satisfied that;
>
> A) the insolvent person has not acted or is not acting in good faith and with due diligence.

8 And that is the subsection under which the application is made.

9 I believe the 30-day period is now 11 days into that period and Mr. Ramsay, counsel for Cougar Metal, argues that there would be severe and serious prejudice to all if such a termination were to be allowed. That would mean Cougar Metal would go immediately into bankruptcy with serious and I suppose devastating consequences to the company itself, to the employees and to other creditors.

10 There is an affidavit filed by Mr. Huska, who is president of Cougar Metal Industries Inc., and he has in his affidavit dealt with the jobs and invoices for which Cougar Metal required the steel products from each of the three creditors who are before the court today.

11 The dates of certain bids have been provided by Mr. Huska. The dates of contracts that were awarded to Cougar Metal have been provided in his affidavit and the dates of the orders, which gives this court a more complete picture along with the invoice dates and delivery dates that have been provided in the affidavits on behalf of the applicants.

12 The standard of proof is that of a balance of probabilities and the argument is that there has been bad faith because of the timing of the execution of the notice and the sudden spike in the ordering pattern that has been referred to by the applicant. I am left with some suspicion, but I am not satisfied on a balance of probabilities that bad faith has occurred under the circumstances.

13 The application is not granted, accordingly. In saying that, I am aware that it is an unusual remedy and a serious one. The allegations of bad faith are not made frivolously but on all of the evidence before me I do not have the required satisfaction that I should have with regard to the test of balance of probabilities. Suspicion does not amount to what is required. The application is dismissed.

(Submissions)

14 THE COURT: I do not think this is a case for special costs. I think Scale 3 is appropriate and payable within seven days.

Application dismissed.

TAB 8

1997 CarswellOnt 2753
Ontario Court of Justice, General Division (In Bankruptcy)

Com/Mit Hitech Services Inc., Re

1997 CarswellOnt 2753, [1997] O.J. No. 3360, 43 O.T.C. 376, 47 C.B.R. (3d) 182, 73 A.C.W.S. (3d) 444

In the Matter of the Proposal of Com/Mit Hitech Services Inc. of the City of Ottawa, in the Province of Ontario

Farley J.

Judgment: July 25, 1997
Docket: Ottawa 33-097110

Counsel: *Michael J. MacNaughton*, for The Toronto-Dominion Bank.
Frank Bennett, for Com/Mit Hitech Services Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Financial institutions
VI Loans and discounts
VI.11 Miscellaneous
Headnote
Bankruptcy --- Proposal — General
After banking relationship of 14 years, bank reviewed debtor company's financial position and offered amended arrangement — Rather than meeting bank's conditions, debtor company became involved in new enterprise — Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Bank applied for termination of 30 day period for debtor to file proposal under s. 50.4(8) of Act prior to expiration of 30 days — Debtor company was cautioned by bank, and by not heeding bank's conditions they had not acted in good faith — Bank, as major creditor, had lost all faith in debtor company that was eroding its assets at considerable rate and 30 day period was terminated prior to its expiration — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50.4(8), 50.4(11)(d), 244.
Banking and banks --- Loans and discounts — General
Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Debtor company filed notice of intention to file proposal — Debtor company cross-applied for continuation of line of credit from bank — Debtor company was in material breach of terms of demand loan — Bank was not required to continue line of credit intact given breach and demand — Bank was not required to advance any further money or credit under s. 65.1(4)(b) of Act and debtor's application was dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 65.1(4)(b), 244.
The bank advised the debtor that it was in breach of its credit conditions in that the debtor's investment in leases exceeded 125 per cent of the total bank debt. It required the debtor to restore the debt to equity ratio by repatriating money invested in a bar, a carpet cleaning service, and two retail discount stores. The debtor complied with respect to the bar, but made additional investments in the acquisition of the assets of another carpet cleaning business.
The bank called its loan and sought a s. 244 notice under the *Bankruptcy and Insolvency Act*. The bank was the debtor's main creditor apart from a small tax liability. The bank sought a declaration under s. 50.4(11) that the 30 day period be terminated, or, alternatively, an order that s. 69 no longer operated in respect of the bank. The debtor cross-applied for an order restraining the bank from interfering with the banking relationship pending further order or the failure of the debtor to make a proposal

and allowing the debtor to draw on its line of credit up to its limit. It also sought a reference to determine damages alleged to have been suffered because of the bank's action.

Held: The bank's motion was allowed; the cross-motion was dismissed.

Since the erosion of the debtor's assets would be no more than $35,000-40,000, no material prejudice to the bank was made out under s. 50.4(11)(d) or s. 69.4. Given the bank's position as 90 per cent creditor, it was in a veto position. In addition, the debtor had not been diligent nor had it acted in good faith in ignoring the conditions imposed by the bank.

The debtor was in material breach of the terms of a demand loan. The bank had continued to honour cheques for six days after its demand. The bank was not required to advance any more money or credit.

Table of Authorities

Cases considered by *Farley J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — referred to

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — referred to

Doaktown Lumber Ltd., Re (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(d) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(2) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

s. 69.4 [en. 1992, c. 27, s. 36] — considered

s. 69.4(b) [en. 1992, c. 27, s. 36] — considered

s. 244 — referred to

s. 244(2) — considered

APPLICATION by bank for termination of 30 day period for debtor to file proposal; CROSS-APPLICATION by debtor for continuation of line of credit.

***Farley J.*:**

1 Both sides requested that this motion and cross motion be heard on an urgent basis today. The motion by The Toronto-Dominion Bank ("Bank") was for an order pursuant to s. 50.4(11) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3,

as amended ("BIA") for a declaration that the 30 day period provided for in s. 50.4(8) be terminated, or in the alternative for an order pursuant to s. 69.4 declaring that s. 69 no longer operates in respect of the Bank. Com/Mit Hitech Services Inc. ("Debtor") crossmotioned for an order (a) restraining the Bank from interfering with its banking relationship with the Debtor pending further order of the Court or upon failure of the Debtor to make a proposal pursuant to BIA; (b) allowing the Debtor to draw upon its line of credit up to the established present level of $2.75 million with the Bank including allowing the Debtor to issue cheques to its employees and retained cheques for services rendered and to be rendered by the proposal trustee and lawyers; and (c) directing a reference to determine the amount of damages caused by the Debtor by the (alleged) breach of the Bank's obligations pending the operation of the stay of proceedings. As to costs, the Bank's counsel advised that he felt $1,500 either way was appropriate; the Debtor's counsel (acknowledged that if the Bank were successful, the question of costs would be a Pyrrhic victory) advised that it should be $4,500 either way. In light of the very pressing situation I advised counsel that I would give my decision and reasons later today (alterting them by phone). Given that I am otherwise involved in an all day hearing, these reasons will of necessity have to be short or rambling.

2 After a banking relationship of some 14 years, the Bank issued a request for repayment of its outstanding loan of $2.6 million on July 10, 1997 and a s. 244 notice pursuant to the BIA. On July 18th, the Debtor filed a Notice of Intention to File a Proposal. The Debtor as advised in its material "is in the business of leasing small equipment and has over approximately 700 leases in its portfolio extending over 5 years. In addition, it operates 2 stores [Crazy Chesters] which sell used computer equipment, office equipment and retail clothing at reduced prices." It also had an $174,000 investment in a bar called The Station and a $1.14 million investment in Clean Net Inc. ("Clean") which was involved in carpet cleaning equipment. These investments appear to have been made within the last year as no investments were shown on the May 31, 1997 balance sheet for the previous year (i.e. May 31, 1996). Thus the character of the Debtor as a borrower from the Bank changed significantly from when the banking relationship commenced and far more importantly from when the then existing loan arrangements were made in 1994. On Dec. 12, 1996 the Bank advised the Debtor that it was in breach of the credit conditions including that the Debtor's investment in leases be not less than 125% of the total Bank debt. On Jan 15, 1997 the Bank, after a review of the Debtor's financial position, offered an amended arrangement, which was accepted by the Debtor (and its President, Kim Gottdank, the majority shareholder, as guarantor). The new arrangement required that the "debt to equity level is to be restored to 3:1 by way of cash infusion/repatriation by March 31, 1997 of monies invested in other related investments/ventures." The 125% ratio above was to be restored as well. The Station bar was to repatriate $150,000 by January 15, 1997 (apparently this did occur then or shortly after). Clean was to repatriate $1.2 million by March 31, 1997. The Debtor was to provide the Bank with a detailed plan for the liquidation of Crazy Chesters' inventory over the short term. None of these conditions except the Station one has occurred. Rather instead of divesting, it appears that the Debtor is in some way to be involved in a new carpet cleaning enterprise through the proposed acquisition by Clean.net Inc. ("New Clean") of the Easy Off assets. As Mr. Gottdank advised:

> 9. I am finalizing the purchase of a business known as "Easy Off" from an American public company. The business comprises the placing of carpet cleaning equipment on consignment to primarily major food chains which in turn rent the equipment to its customers and concurrently sell these customers cleaning solutions. "Easy Off" is well known in Canada for over 30 years and has an 80% share of the market place. It operates in over 2700 locations in Canada. The financing of the purchase is with Coventry Financial Corporation. The purchase will produce to COM/MIT a cash flow of a minimum of a $1,000,000.00 per year. This cash flow will be used to continue to service the Toronto Dominion Bank debt as well as pay some of its principal. I have made this known to the Bank on numerous occasions and supplied them all the documentation in connection with the purchase of "Easy Off". As a result of the demand and notice, the closing has been postponed to a date in August, 1997.
>
> 13. COM/MIT is prepared to grant the Bank additional security for its loan for a period of one year to obtain a new lender.
>
> 14. By giving the Bank increased first security over the new assets including accounts receivable and inventory, except for assets acquired through lease financing, the Bank will be in a better position than if the company were bankrupt.

3 Notwithstanding to my view ample evidence on the face of the material and by way of correspondence and by way apparently of discussion in a meeting, Mr. Gottdank advises:

15. Neither the Bank nor its lawyer, have given particulars of the defaults despite many requests.

4 It should be noted that aside from a very small tax liability, the overwhelming creditor is the Bank (given that there appears to be a negative accounts payable situation which may reflect prepayments of accounts). On any basis the Bank is in the position of being a 90% plus creditor of the Debtor. The Bank is very close to being in essence "all the creditors" of the Debtor.

5 S. 50.4(11) provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not be likely able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not be likely able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

6 S. 69.4 provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

7 I considered the question of material prejudice as to s. 50.4(11) and s.69.4 in *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). In this present case, there was no evidence as to value either on a going concern, liquidation or other basis. Based upon the worst cash flow information given by the Debtor, the erosion of assets would be approximately $50,000 per month. Thus before the Bank would have the opportunity of opposing an extension of time to make the proposal would only be another three weeks (with a possible erosion on that basis of some $35,000-$40,000). Given the relative magnitudes, I do not see that the Bank has made out the aspect of material prejudice. There was no specific argument as to s. 69.4(b) regarding "it is aquitable on other grounds to make such a declaration." Thus it would not appear to me that the Bank should succeed on the basis of s. 50.4(11)(d) or its alternate request for relief under s. 69.4.

8 However it should be noted that s. 50.4(11) is disjunctive as to its four grounds. As to (a), ordinarily one would not think it appropriate to terminate the situation after just one week if the Bank had pulled the plug without any prior cautioning. However, one must look at this in context. The Debtor was cautioned as far back as December 1996; a new banking relationship was forged in January 1997. Rather than trimming one's sails to accommodate the prevailing wind (aside from disposing of the bar), the Debtor did not pay heed to the other conditions imposed in January, 1997. Rather to the contrary, there is a proposal that there be a further investment in the carpet cleaning field and that the Bank should not expect to receive anything with respect to its loan except that which might evolve out of the cash flow of New Clean which might in some way be made available to Clean (the financing proposal of Coventry Financial Corporation is unclear as to how this is to be accomplished and what exactly the

relationships would be). In going essentially in a 180º way against what was agreed to in January 1997, it appears to me that the Debtor is not acting in good faith and with due diligence.

9 As for (b) and (c), it must be recognized that the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor (and Mr. Gottdank). It was acknowledged by the Debtor that what it had proposed to date (see paragraphs 9, 13, 14 of Mr. Gottdank's affidavit above) was insufficient to sway the Bank and therefore there was no viability there. Nothing was even alluded to as to anything else that might be done; rather what was proposed was to wait until the 30 day period was up to give the Debtor breathing room. I would note that the question of additional assets coming under the security of the Bank was a somewhat elusive concept notwithstanding the Coventry term sheet which suggested that half of its $4 million funding for the Easy Off assets would be funded by subordinated security. It would not seem to me that the Debtor can make out any valid case for opposing the Bank on the basis of s. 50.4(11)(b) or (c). See also *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at pp 221-2; *Doaktown Lumber Ltd., Re* (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) at pp. 136-7.

10 Thus on any of the grounds (s. 50.4(11) (a), (b) or (c)) I am of the view that the Bank has made out its case for termination of the 30 day period.

11 As to the Debtor's cross motion, I will deal with this more generally given the conclusion I have reached with respect to the Bank's motion. The Bank's extension of credit was on a demand basis. The Debtor is in material breach of the terms of that demand loan. There would not appear to me in the circumstances to be any requirement of continuing the line of credit intact including allowing the Debtor to call upon the unused portion thereof given the breach and additionally because of the demand. Section 244(2) of the BIA is aimed at providing enforcement of security not at the provision of new money. Section 65.1(4)(b) provides that s. 65.1(1),(2) and (3) do not require "the further advance of money *or* credit" (emphasis added). In respect of the demand, it should be noted that I am not commenting upon whether the line of credit should continue to exist during the "reasonable period of time to repay" period. However, in that regard I would note that the Bank continued to honour cheques for 6 days after its demand. But as well to my mind it is important to appreciate that there were material breaches of a number of important covenants and that it was a demand as opposed to term loan. I do not see that there is any validity to the Debtor s claim for relief; I would dismiss its cross motion.

12 The Bank is entitled to its requested costs of $1,500 payable forthwith.

Application granted; cross-application dismissed.

End of Document

TAB 9

Most Negative Treatment: Check subsequent history and related treatments.

2003 CarswellOnt 1371
Ontario Superior Court of Justice

Toronto Dominion Bank v. Ty (Canada) Inc.

2003 CarswellOnt 1371, [2003] O.J. No. 1552, 122 A.C.W.S. (3d) 18, 42 C.B.R. (4th) 142

The Toronto-Dominion Bank (Applicant) and Ty (Canada) Inc. (Respondent)

Pitt J.

Heard: April 11, 2003
Judgment: April 16, 2003 *
Docket: 03-CL-4899

Proceedings: additional reasons at (2003), 2003 CarswellOnt 1976 (Ont. S.C.J.)

Counsel: Jeffrey C. Carhart for Toronto-Dominion Bank
Conor D. O'Hare for Ty Inc.
Steven J. Weisz, Michael McGraw for Respondent, Ty (Canada) Inc.
Daniel R. Dowdall for Interim Receiver BDO Dunwoody Limited

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Headnote
Bankruptcy --- Practice and procedure in courts — Stay of proceedings
Pursuant to trademark licence agreement and exclusive distribution agreement with supplier, distributor was sole Canadian distributor of plush toys — Supplier terminated distribution arrangement — Distributor filed notice of intention to file proposal — Interim receiver was appointed — Distributor was granted extension of time to file proposal and stay of proceedings was granted — Supplier brought motion for order to lift stay of proceedings — Motion dismissed — Genuine issue existed whether distributor was indebted to supplier — Supplier's objective in pursuing proceeding was to penetrate and control market developed by distributor — Supplier did not show quantitatively any material prejudice it would suffer if stay were not lifted — Delay supplier would experience was outweighed by effects to administration of distributor's estate — Receiver was in position to purchase products from supplier and distribute them to distributor's customers — Supplier's intention to sell directly to distributor's customers was to detriment of all of distributor's stakeholders.
Table of Authorities
Cases considered by *Pitt J.*:

Acepharm Inc., Re, 1998 CarswellOnt 1801, 4 C.B.R. (4th) 19 (Ont. Bktcy.) — referred to
Campeau v. Olympia & York Developments Ltd., 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to
Canadian Airlines Corp., Re, 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.) — referred to
Cosgrove-Moore Bindery Services Ltd., Re, 2000 CarswellOnt 1561, 48 O.R. (3d) 540, 17 C.B.R. (4th) 205 (Ont. S.C.J. [Commercial List]) — referred to
Cumberland Trading Inc., Re, 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — referred to
Ingles, Re, 1997 CarswellBC 1030, 46 C.B.R. (3d) 202, 33 B.C.L.R. (3d) 380 (B.C. S.C. [In Chambers]) — referred to

People's Department Stores Ltd. (1992) Inc., Re (1994), 37 C.B.R. (3d) 28, [1995] R.J.Q. 224, 1994 CarswellQue 151 (C.S. Que.) — referred to

Wychreschuk v. Sellors (Trustee of), 71 C.B.R. (N.S.) 37, 55 Man. R. (2d) 89, 1988 CarswellMan 32 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 65.1 [en. 1992, c. 27, s. 30] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — considered

s. 65.1(1)-65.1(6) [en. 1992, c. 27, s. 30] — considered

s. 65.1(2) [en. 1992, c. 27, s. 30] — considered

s. 65.1(3) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 65.1(5) [en. 1992, c. 27, s. 30] — considered

s. 65.1(6) [en. 1992, c. 27, s. 30] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4(a) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4(b) [en. 1992, c. 27, s. 36(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 11 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

MOTION by supplier for order to lift stay of proceedings.

***Pitt J.*:**

1 By notice of motion dated *March 27, 2003*, Ty Inc. (also known as Ty US) moved for:

(a) The advice and direction of this Honourable Court with respect to the exercise by Ty Inc. of its right to terminate the distributorship arrangements and the trademark license agreement between Ty Inc. and Ty (Canada) Inc.

(b) An order that the stay of proceedings granted pursuant to the order of the Honourable Mr. Justice Ground dated *March 12, 2003* be lifted to permit Ty Inc. to terminate the distributorship arrangements and the trademark license agreement between Ty Inc. and Ty (Canada) Inc.

(c) An order that any termination of the distributorship arrangements and the trademark license agreement is without prejudice to the rights of the parties under such distributorship arrangements and trademark license agreement and at law.

2 In its factum dated April 9, 2003, Ty Inc. requests the following relief:

(a) An order declaring that the stay of proceedings imposed by section 69.(1) of the *Bankruptcy & Insolvency Act* no longer operates in respect to Ty US.

(b) In the alternative, an order declaring that subsections (1) and (3) of section 65.1 of the *Bankruptcy & Insolvency Act* do not apply to Ty US, or apply only to the extent declared by the court.

(c) An order that the stay of proceedings granted pursuant to the order of the Honourable Mr. Justice Ground dated March 12, 2003, be lifted to permit Ty US to terminate the distributorship arrangements and trademark license agreement between Ty US and Ty (Canada) Inc.

3 Section 65.1(1) - (6) of the *Bankruptcy & Insolvency Act* is as follows:

65.1(1) *Certain Rights limited* — Where a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person, or claim an accelerated payment under any agreement with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

(2) *Idem* — Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

(3) *Idem* — Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

(4) *Certain acts no prevented* — Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if on notice of intention was filed; or

(b) as requiring the further advance of money or credit.

(5) *Provisions of section override agreement* — Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

(6) *Powers of court* — The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

4 The relevant sections of section 69 of the *Bankruptcy & Insolvency Act* are as follows:

69.(1) *Stay of proceedings — notice of intention* — Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency;

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty the in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the Income Tax Act, or

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that

(A) refers to subsection 224(1.2) of the Income Tax Act, and

(B) provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

69.4 *Court may declare that stays, etc., cease* — A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

The Facts

5 On March 10, 2003, Ty (Canada) Inc. filed a notice of intention to file a proposal ("NOI") pursuant to subsection 50.4(1) of the *Bankruptcy & Insolvency Act* in consequence of what its principals, in unchallenged affidavit evidence, describe as the oppressive and unreasonable recent business practices of Ty Inc., the sole supplier of Beanie products to Ty (Canada) Inc. for the latter's exclusive Canadian distributorship that has operated for approximately the last 12 years.

6 On *March 12, 2003*, the Honourable Mr. Justice Ground appointed BDO Dunwoody Limited interim receiver, receiver and manager of all the property, assets and undertaking of Ty (Canada) Inc.

7 On *April 4, 2003* in spite of the objections of Ty Inc., the Honourable Mr. Justice Lederman decided that a proposal suggested by the receiver "is likely to be viable", and granted an extension of the time to file a proposal to *May 23, 2003*.

Background

8 Ty (Canada) Inc.'s business is the wholesale distribution of plush toys known as "Beanie Babies", "Beanie Buddies", "Beanie Kids" and other products (collectively, the "products") manufactured by Ty US and distributed by Ty (Canada) Inc. under a trademark license agreement between Ty (Canada) Inc. and Ty US dated *September 7, 2000* (the "trademark license agreement") and an exclusive distribution agreement between such parties (the "distribution agreement").

9 Pursuant to the trademark license agreement, Ty US granted to Ty (Canada) Inc. an exclusive right and license, for the term of the trademark license agreement and throughout Canada, to conduct business relating to the sale and distribution of the products under the name "Ty (Canada) Inc." and/or "Ty Canada". The trademark license agreement also granted Ty (Canada) Inc. the exclusive right to select authorized dealers in Canada of the products.

10 As indicated earlier, Ty (Canada) Inc. is the sole Canadian distributor licensed to sell the products.

11 In late 2000, Ty (Canada) Inc. became engaged in a dispute with Ty US, which as noted earlier, is Ty (Canada) Inc.'s sole supplier of the products and the sole supplier internationally of the products. In *January, 2003* Ty US cut-off Ty (Canada) Inc.'s supply of product. On *February 28, 2003*, Ty US gave notice of its intention to terminate its distribution arrangement and trademark license agreement with Ty (Canada) Inc.

Discussion and Analysis

12 It is clear that a genuine issue exists as to whether Ty (Canada) Inc. is indebted to Ty Inc., and if it is, the extent of its indebtedness.

13 Ty Inc. has made it abundantly clear that its objective in pursuing this proceeding is penetration, and indeed control of the market, developed in Canada by Ty (Canada) Inc. for the Beanie products.

14 There have been negotiations as late as *February 2003* between Ty Inc. and Ty (Canada) Inc. for the purchase by the former of the shares or assets of the latter.

15 Notwithstanding the receiver's willingness to sell products on behalf of Ty Inc. in Canada, the core of Ty Inc.'s submission in this proceeding can be found in paragraph 28 of the affidavit of its Chief Financial Advisor and Chief Operating Officer sworn on *March 27, 2003*,

> Ty has a very narrow window within which to sell new seasonal product that was purchased for, but not shipped to, Ty Canada. The value of the new product is about US $600,000.00. After about the first week in April, this Easter and Mother's Day product becomes virtually worthless given the time it will take to sell to retailers and the time it will take to ship it to them

16 Ty Inc.'s inability to achieve the objective outlined in that paragraph is what Ty Inc.'s counsel describes as the kind of material prejudice contemplated in section 69.4 of the Act. It is such prejudice because it would result in unfair and different treatment of Ty Inc. from that suffered by other creditors. See *Ingles, Re* (1997), 46 C.B.R. (3d) 202 (B.C. S.C. [In Chambers]).

17 What is more, Ty Inc.'s ability to estimate the value of the product that it would be unable to sell, at $600,000.00 (U.S.) meets the requirement for quantifying the prejudice. See *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]).

18 With due respect, I find that argument rather unconvincing in a proceeding of this nature, where such fundamental issues remain unresolved, and in respect to which one week before this hearing, this court saw fit to extend the time to file a proposal to *May 23, 2003*.

19 In addition to which, I do not agree that paragraph 28 can be treated as a quantification of prejudice, for among other reasons the ambiguity of the meaning of "value" in the context, and there is nothing on the record to demonstrate that the receiver could not produce the desired result.

20 The applicant has not satisfied, in my view, the threshold for relief, set out in 69.4 (a) or (b) of the Act.

21 With regard to the application of section 65.1, Ty Inc.'s case is put in the following paragraphs of its factum:

> (a) Section 65.1 of the *Bankruptcy & Insolvency Act* is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or a lease on a continuing basis to a person who files an NOI or a proposal. The purpose of section 65.1 is to provide for a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time, to give those creditors obligated to supply goods or services some protection during the proposal period.
>
> *Cosgrove-Moore Bindery Services Ltd., Re* (2000), 48 O.R. (3d) 540 (Ont. S.C.J. [Commercial List])
>
> (b) The receiver's stated objective is three-fold:
>
> (i) to supervise Ty (Canada) Inc.'s sale of inventory;
>
> (ii) to collect Ty (Canada) Inc.'s accounts receivable; and
>
> (iii) to solicit offers for sale of Ty (Canada) Inc.'s sales network and retail consumer list.
>
> (c) Ty US respectfully submits that section 65.1 has no application to the case at bar as there has been no attempt by the receiver to require the provision of new inventory, nor has Ty US agreed to have the receiver supervise on its behalf the sale of new inventory. Moreover, Ty US has rejected the granting of distribution rights or a license to a prospective purchaser of Ty (Canada) Inc. Ty (Canada) Inc.'s operations are strictly limited and are able to continue in the absence of the trademark license agreement.

(d) In the event that section 65.1 is the applicable section of the *Bankruptcy & Insolvency Act*, Ty US respectfully submits that in addition to incurring damages as a result of the continuing erosion of goodwill, Ty US will suffer substantial financial hardship if the distribution arrangement and the trademark license agreement are not terminated to permit the sale of the US $600,000.00 in new seasonal inventory.

22 I do not agree, and find more convincing the submissions of the receiver set out in its factum as follows:

(a) The prejudice in section 69.4(a) and 65.1(6) is objective prejudice, not subjective prejudice; it refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor as a person, organization or entity. To succeed under section 69.4(a) or 65.1(6), the creditor must be able to show quantitatively the prejudice that it will suffer if the stay is not removed.

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), at 7.

Acepharm Inc., Re, 1998 CarswellOnt 1801, 4 C.B.R. (4th) 19 (Ont. Bktcy.), at 4.

Cosgrove-Moore Bindery Services Ltd., Re (2000), 48 O.R. (3d) 540, 17 C.B.R. (4th) 205 (Ont. S.C.J. [Commercial List]).

(b) Other than a delay in pursuing its strategy of direct selling to Canadian customers, the applicant has not demonstrated quantitatively any material prejudice it may suffer with respect its indebtedness and security if the stay is not lifted allowing the applicant to terminate its agreements with Ty (Canada) Inc.

(c) The stay should not be lifted where the only effect in the refusal to lift the stay is to delay the moving party. The court should also take into account the effect of the lifting of the stay on the administration of the estate and the prejudice to other stakeholders.

Acepharm Inc., Re, supra, at 7 and 14.

(d) Any delay to Ty US in terminating the agreements and pursuing its own agenda in Canada is significantly outweighed by the effects to the administration of the receivership estate, the proposal proceedings and the interests of the general body of creditors.

(e) The receiver believes that relative prejudice to Ty US from a delay in terminating its agreements with Ty (Canada) Inc. is limited. On the issue of making new products available to "customers", the receiver has offered to assist and was rejected by Ty US in its efforts to accommodate the demand of new products. Notwithstanding the stated position of Ty US, the receiver is still prepared to distribute new products and has the financial resources to purchase new products from Ty US pursuant to its borrowing powers under the receivership order. The receiver believes that it is important to emphasize that the "customers" which Ty US seeks to service are in fact customers of Ty (Canada) Inc.

(f) In order for a stay to be lifted, an applicant must demonstrate to the court that there exist compelling reasons to do so.

Wychreschuk v. Sellors (Trustee of), 1988 CarswellMan 32, 71 C.B.R. (N.S.) 37, 55 Man. R. (2d) 89 (Man. Q.B.), at 3.

(g) Even where there is no doubt that the applicant would suffer prejudice because of the stay of proceedings, the court has refused to lift the stay for a creditor where it would have prevented the debtor from making a proposal which the court believed would benefit the general body of creditors in the end.

People's Department Stores Ltd. (1992) Inc., Re, 1994 CarswellQue 151, 37 C.B.R. (3d) 28, [1995] R.J.Q. 224 (C.S. Que.), at 3.

(h) It is not equitable "on other grounds" to lift the stay. The applicant has not shown compelling reasons, but has merely stated that the prejudice to it of the continuation of the stay is only the delay in pursuing its strategy of direct selling into

Canada and the windfall it would receive by assuming Ty (Canada) Inc.'s customers without any cost. Further, even if there was no doubt that Ty US would suffer prejudice, the lifting of the stay may prevent Ty (Canada) Inc. from having the opportunity to make a proposal. Since the court has already, extended the stay under the NOI to give Ty (Canada) Inc. a change to file a viable proposal, lifting the stay would be contrary to such extension order.

(i) Unlike the proposal provisions of the *Bankruptcy & Insolvency Act*, there is no statutory test under the *Court of Justice Act* to guide the court in deciding whether an order should be made lifting the stay order with respect to a particular creditor or creditors. Nevertheless, case law in cases of a stay of proceedings imposed by court order has held that the court should consider a balancing of the interests of all affected parties in determining whether a stay order should be lifted.

Canadian Airlines Corp., Re, 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.), at 15.

(j) The court refused to exercise its jurisdiction and lift a stay granted under section 11 of the CCAA to allow the plaintiff's action to proceed where the balance of convenience was in favour of maintaining a stay, and there was no material prejudice to the plaintiffs.

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339, 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

(k) Ty US's only interest in its application to lift the stay is to terminate existing agreements for the purpose of pursuing a strategy of direct selling into Canada and inevitably to take over the customers of Ty (Canada) Inc. This course of action would be detriment of all of the stakeholders of Ty (Canada) Inc., including the purported position of Ty US as a creditor of Ty (Canada) Inc. In such circumstances, a balance of the interests and the equities favour a maintenance of the stay as against Ty US for a limited period in order that the receiver and Ty (Canada) Inc. may maximize realizations and determine whether the "business" can be sold or restructured.

Disposition

23 In the result, the motion is dismissed.

Costs

24 Brief written submissions on costs are to be made within 20 days of the release of these reasons.

Motion dismissed.

Footnotes

* Additional reasons at (2003), 2003 CarswellOnt 1974, 42 C.B.R. (4th) 152 (Ont. S.C.J.)

TAB 10

2001 CarswellOnt 1019
Ontario Court of Appeal

Ma, Re

2001 CarswellOnt 1019, [2001] O.J. No. 1189, 104 A.C.W.S. (3d) 261, 143 O.A.C. 52, 24 C.B.R. (4th) 68

In the Matter of the Bankruptcy of James Hoi-Pang Ma, of the City of Mississauga, in the Regional Municipality of Peel, in the Province of Ontario

James Hoi-Pang Ma (Bankrupt (Appellant)) and Toronto Dominion Bank (Applicant (Respondent))

Abella, Charron, Sharpe JJ.A.

Judgment: March 23, 2001
Judgment: April 4, 2001 (Written Reasons)
Docket: CA C34958

Proceedings: affirming (2000), 20 C.B.R. (4th) 267 (Ont. Bktcy.); affirming (2000), 19 C.B.R. (4th) 117 (Ont. Bktcy.)

Counsel: *Chi-Kun Shi*, for Appellant
Bruce S. Batist, for Respondent
William J. Meyer, *Q.C.*, for Trustee in Bankruptcy

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.3 Discovery and examinations
XVII.3.c Evidentiary issues
Headnote
Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave
Creditor of undischarged bankrupt brought motion for order lifting stay of proceedings to permit creditor to commence and continue fraudulent misrepresentation action against bankrupt — Creditor's motion was granted — Deputy registrar held creditor's proposed action was type of claim that should be allowed to proceed — Deputy registrar held examination of merits of claim was not appropriate — Bankrupt's appeal was dismissed — Presence in proposed action of defendants other than bankrupt was sufficient prejudice to justify lifting stay — Bankrupt appealed — Appeal dismissed — Reviewing judge correctly concluded deputy registrar was correct in finding sufficient prejudice to creditor to justify lifting stay — No requirement existed

to establish prima facie case — Onus was on creditor to establish basis for order lifting automatic stay under s. 69.4 of Bankruptcy and Insolvency Act — Deputy registrar's finding accorded with s. 69.4 of Act and was supported by record — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

Table of Authorities

Cases considered:

Bowles v. Barber (1985), 36 Man. R. (2d) 209, 60 C.B.R. (N.S.) 311, 1985 CarswellMan 33 (Man. C.A.) — considered

Cases considered by *Abella J.A., Sharpe J.A., Charron J.A.*:

Arrojo Investments v. Cardamone (1995), 33 C.B.R. (3d) 46, 1995 CarswellOnt 315 (Ont. Gen. Div.) — referred to

Francisco, Re (1995), 19 C.L.R. (2d) 146, 32 C.B.R. (3d) 29, 1995 CarswellOnt 363 (Ont. Bktcy.) — applied

Francisco, Re (1996), 40 C.B.R. (3d) 77, 1996 CarswellOnt 2176 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 69.4 [rep. & sub. 1997, c. 12, s. 65(1)] — considered

APPEAL by bankrupt from order lifting stay of proceedings against bankrupt, 2000 CarswellOnt 4416, 20 C.B.R. (4th) 267 (Ont. Bktcy.).

Endorsement. *Per curiam*:

1 The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. (N.S.) 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.), at 29-30, a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

4 In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

Appeal dismissed.

End of Document

TAB 11

2010 ABQB 647
Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.a General principles
Business associations
II Creation and organization of business associations
II.2 Partnerships
II.2.b Relationship between partners
II.2.b.ii Membership
II.2.b.ii.A Introduction and expulsion
Contracts
VII Construction and interpretation
VII.7 Miscellaneous
Contracts
XIV Remedies for breach
XIV.6 Injunction
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles
Debtors and creditors --- Receivers — Appointment — General principles
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not

to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.

Contracts --- Remedies for breach — Injunction

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.

Contracts --- Construction and interpretation — Miscellaneous

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.

Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion

M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to

fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — considered

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — referred to

Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd. (1997), 1997 CarswellAlta 1233 (Alta. Q.B.) — referred to

Janco (Huppe) v. Vereecken (1982), 40 B.C.L.R. 106, 1982 CarswellBC 500, 44 C.B.R. (N.S.) 211 (B.C. C.A.) — referred to

Kitnikone, Re (1999), 2 C.P.R. (4th) 86, 13 C.B.R. (4th) 76, 1999 CarswellBC 2114 (B.C. S.C.) — referred to

New Era Nutrition Inc. v. Balance Bar Co. (2004), 2004 ABCA 280, 2004 CarswellAlta 1200, 47 B.L.R. (3d) 296, 357 A.R. 184, 334 W.A.C. 184, 245 D.L.R. (4th) 107, 33 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

***B.E. Romaine J.*:**

Introduction

1 By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");
>
> (c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;
>
> (d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

2 By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

> (a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and
>
> (b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

3 The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

4 By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

5 After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

7 Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

8 Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

9 Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

10 While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The

question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) 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?

B. Injunctive Relief

12 The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.), as follows:

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

(i) Strength of the Applicant's Case

Breach of Agreements

13 Matco and Statesman set up a structure and entered into a series of agreements in order to develop the Project, which is to be a residential project in the Inglewood area of Calgary. In total, the Project is to include 615 apartments and 71 townhouses in six phases. Matco owned the land and Statesman was to provide the development services.

14 The Partnership was created, the units of which are held by a trust. Other investors invested in the trust, but Matco and Statesman hold the largest interests through corporate, individual, family and employee investments. The General Partner is SRQL, a corporation that Matco and Statesman own equally.

15 The USA provides that Matco and Statesman have equal representation on the board of directors of the General Partner and that all major decisions require unanimous directors' approval. Such decisions include approving related party transactions, executing any contract more than $100,000 and requiring capital contributions. The USA also provides that, to the extent development financing is available on reasonable market terms, it would be obtained rather than utilizing shareholders' equity. Matco submits that the result is that, while Statesman has day-to-day control of the General Partner's operations, Matco retains the ability to restrain the pace of development, to fund it through borrowing rather than equity and to oversee Statesman's management of the Project.

16 Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development, any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

17 Under the Limited Partnership Agreement, SRQL as General Partner agrees to discharge its duties honestly, in good faith, and in the best interests of the Partnership. If the General Partner breaches its obligations in such a way as would have a materially adverse effect on the business, assets or financial condition of the Partnership, the Limited Partner (being the trust) is entitled to remove and replace the General Partner by resolution.

18 While there is some confusion over terminology, it is clear that development of the Project was planned in phases. Subject to conditions for each phase, bank financing was obtained for land acquisition and infrastructure, and for construction of the first two phases of residential units (the Bank of Montreal Credit Agreement dated April 21, 2008).

19 Land acquisition and infrastructure (including a parkade for Phases 1 and 2) were funded by the Bank and are complete. Phase 1 of the residential unit construction was also funded and is essentially complete. Phase 1 is comprised of 124 residential condominium units and an amenities centre.

20 Phase 2 is to consist of a second building of 122 residential condominium units, plus two townhouses.

21 Only nine units in Phase 1 remained unsold as of July 20, 2010, although 14 sales were pending. As of that date, 57 units in Phase 2 had been pre-sold. The Credit Agreement was revised on June 9, 2010 to provide that, as a condition precedent to the Bank providing financing for Phase 2, there must be satisfactory evidence of not less than 166 eligible purchase agreements under Phase 1 and Phase 2. Statesman submits that sales agreements for 169 units have been submitted to the Bank for review.

22 Matco submits that Statesman has begun to disregard its obligations under the agreements. It asserts breaches of various agreements, some of which it submits amount to misappropriation and misapplication of funds. It alleges that, without seeking the necessary directors' or Management Committee approval, Statesman or one of its affiliates executed more than $12.5 million worth of construction contracts in excess of $100,000 each, and commenced Phase 2 of the development. Matco also alleges that Statesman instructed trades to carry out more than $2 million of Phase 2 construction work without first having met the Bank's funding requirements.

23 Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

24 Initially, Statesman submitted that the construction that was the subject of Matco's complaints was part of Phase 1 and that there had been no improper commencement of Phase 2 construction. It was now clear, from evidence from the architects, the City, the banking documents, the Statesman Project Manager, tradespeople, the Statesman Chief Financial Officer and even cross-examination of the President of Statesman, that Phase 2 construction has commenced and that more than $12.5 million of contracts that relate to Phase 2 have been executed by Statesman.

25 Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2 budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

26 Statesman does not deny that it did this. It submits, however, that, since the construction of Phase 2 of the Project is not an event outside the ordinary business of the General Partner or the Partnership, consent of all the directors of SRQL to the commencement of construction on Phase 2 is not required under the USA.

27 Statesman argues that under the USA, the development of the Project as a whole has been approved and that there is therefore no need to obtain approval of each phase. These submissions do not deal with the alleged breaches of specific terms of the DMA and the USA.

28 Statesman submits that, at any rate, Matco's failure to give consent is not commercially reasonable. That is not within the province of this court to decide: Matco is not under any contractual obligation to act in a commercially reasonable manner in

giving or withholding its consent, and Matco's motives or judgments in respect of its decision are not properly at issue before me, except to the extent that they may relate to considerations of irreparable harm or balance of convenience.

29 Statesman submits that, pursuant to the by-laws of SRQL's board of directors, the President of Statesman, Garth Mann, has a casting vote as Chairman of the board, and therefore effectively a determining vote with respect to construction matters.

30 However, Section 3.5 of the USA provides that each shareholder shall use its best efforts to cause its nominees to the SRQL board to act in such a way to ensure that the provisions of the USA shall govern the affairs of the corporation, and provides that if there is any conflict between the provisions of the USA and the articles or by-laws of SRQL, the articles or by-laws will be amended. The nature of a USA does not allow its provisions to be trumped by a procedural by-law, and the provisions of the USA that require approval by all directors of certain major decisions cannot in effect be vitiated by such a by-law.

31 Statesman also submits that Matco has no entitlement to halt construction until shareholders' loans are repaid (which it submits is the reason for Matco's reluctance to agree to the next stage of construction), citing section 8.1(d) of the USA which provides for equity injections by shareholders in certain circumstances. Matco rightly points out that additional capital contributions to the Partnership require the unanimous consent of the directors of SRQL.

32 Statesman submits that Matco was aware that construction had commenced on Phase 2. It appears from the evidence that Matco had begun to suspect that construction on Phase 2 had commenced in May of 2010, although there may have been general discussion of Phase 2 requirements in the months leading up to May. It also appears that Matco became aware of what it asserts are other breaches and misconduct of Statesman at about the same time. The Originating Notice was filed on July 8, 2010. Matco therefore acted with reasonable dispatch once it became suspicious that breaches had occurred.

33 Matco also submits that Statesman has beached the DMA in other ways. By the terms of the DMA, the Manager is a fiduciary to the Partnership, and the DMA "shall terminate upon any of" certain events. One such event is said to occur when the "Manager misappropriates any amounts or defrauds the Partnership in any manner whatsoever".

34 The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

35 Matco submits that, in breach of the express terms of Clause 5.06 of the DMA, SMBI misapplied Partnership funds to pay unauthorized sales commissions, salaries and fees to its staff. The amounts improperly taken appear to total about $51,328 not including an additional $6,000 of what Matco asserts are improper referral fees.

36 Statesman does not deny that SMBI paid such amounts to its sales staff, nor does it assert that it had Matco's approval or consent, but it claims that its actions represented good and necessary business decisions. Statesman also submits that the amounts paid are reasonable out-of-pocket costs and expenses under Clause 5.09 of the DMA and thus do not require Matco's consent.

37 Statesman says that these payments have been disclosed to Matco or its representatives in the Construction Superintendent Reports, and that, in any event, these issues should be dealt with by arbitration. Statesman submits that if the amounts paid are not permitted under the DMA, it will reimburse the Partnership.

38 The June 9, 2010 Management Committee Meeting minutes state the following with respect to this issue:

> Mr. Mathison queried commission payments apparently made contrary to the agreed formula and in excess of budget. Mr. Mann acknowledged that higher commission payments had been made to Statesman salespeople. He stated that MLS Resale Listing fees were forgiven to stimulate sales where a purchaser had a product to sell, therefore, offset the higher commission payments with a zero net result. Mr. Mathison repeated that this decision was again made unilaterally without notice or the approval of Matco.

39 It therefore appears that Matco did not agree to this alleged breach, by silence or otherwise.

40 Matco also submits that Statesman breached the provision of the USA that requires approval by the SRQL directors of the execution of any contract involving more that $100,000.

41 Statesman submits that the DMA gives the Manager the responsibility of awarding construction contracts. That responsibility, however, is subject to the specific terms of the DMA agreement, which includes the provision that the Manager shall submit construction contracts to the Management Committee for approval, provided that in any disagreement Statesman has the determining vote. There is no evidence that these contracts were submitted to the Management Committee for approval. Statesman points out, however, that Phase 1 construction contracts were not all submitted to the Management Committee.

42 There is a certain amount of ambiguity in the agreements with respect to the concept of a Management Committee. The DMA does not define the structure of the Management Committee, but merely states it shall be "as constituted and subject to the Partnership Agreement" (Section 1.03). The Limited Partnership Agreement does not reference a Management Committee. The recitals to the DMA provide that the Partnership wishes to engage the Manager and Matco as to certain strategic management decisions and Section 1.15 of the DMA engages Matco as a "strategic manager" for the Project. However, the DMA clearly requires Management Committee oversight and approval of numerous matters, and the parties have operated with a Management Committee with equal representation from Matco and Statesman. Whether the Management Committee is a committee of the directors of SRQL or of SRQL as Manager and Matco as "strategic manager" is not entirely clear.

43 While this ambiguity exists, the issue is less the conduct of Statesman in entering into individual contracts, and more the complaint that it commenced construction on Phase 2 without Management Committee approval.

44 Section 4.4(f) of the USA provides that all directors of SRQL must approve "related party transactions and major decisions with regard to those transactions".

45 There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

46 Matco also submits that Statesman is guilty of misconduct that amounts to fraud and dishonesty, apart from alleged breaches that simply relate to breach of contractual provisions.

47 Matco submits that Mr. Mann committed the Partnership to a US $732,600 promissory note to pay an unrelated debt of an American affiliate of Statesman. It also submits that Statesman signed up a number of tradespeople to agreements to purchase residential units on the understanding that they would not be required to close such purchases.

48 There is conflicting affidavit and cross-examination on affidavit evidence with respect to these serious allegations. With respect to the allegation that Mr. Mann on behalf of Statesman used SRQL to guarantee a settlement obligation of a Statesman affiliate that had nothing to do with the Project, Matco alleges Statesman did not just commit SRQL as a co-promissary on a promissory note that had nothing to do with the Project, but attempted to block the Applicants from obtaining information about this.

49 Statesman asserts that this was an innocent and inadvertent clerical error that was remedied within a few days, but at any rate by June 16, 2010. There are serious issues of credibility that arise from the documentation and the evidence of Mr. Mann and others on this issue. Given the serious nature of the allegation and the conflicting evidence, this issue requires *viva voce* evidence before a determination can be made.

50 With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called "investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

51 Matco complains of a number of other breaches and irregularities in the management of the Project. Given the conclusion I have reached on the alleged breaches described, it is not necessary to review all of these allegations.

52 While the first factor of the test set out in *RJR-MacDonald* only requires a serious issue to be tried, the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial. I am satisfied that in this case Matco has established a strong *prima facie* case of breach of contract with respect to the question of whether Statesman proceeded with the construction of Phase 2 of the Project without the necessary approvals of Matco as required under the various agreements.

53 I am also satisfied that these breaches amount to a breach of a negative obligation, which is in substance the obligation not to proceed to the next phase of construction without obtaining Management Committee approval or the approval of all of directors of SRQL under the USA.

54 The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

55 The contractual interpretations that Statesman submits would lead to the conclusion that approval of construction of Phase 2 of the Project is not necessary or that Mr. Mann has a casting vote that would allow Statesman to make the decision to proceed in the face of Matco's opposition do not address the structure of the development agreements as a whole, and ignore or fail to give effect to specific provisions to the contrary.

(ii) Irreparable Harm

56 While there are authorities that suggest that it is unnecessary to establish irreparable harm or that less emphasis will be placed on this factor in the context of an injunction application involving a negative context (see John D. McCamus, *The Law of Contracts*, Irwin Law Inc., 2005 at page 995, note 197), I have considered the application with reference to this factor. To show that it would suffer irreparable harm, Matco must establish either that failure to enjoin Statesman's continued breach of contract would give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured.

57 Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk.

If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

58 In the usual case of an application for injunctive relief, the moving party would provide an undertaking in damages in the event it is not ultimately successful. Given the manner in which this application has proceeded, Matco has not had an opportunity to address this requirement. If Matco is unwilling to supply the usual undertaking as to damages, it has leave to apply to be relieved from such an obligation. Such an undertaking should be supplied or an application to relieve from the undertaking should be made within two weeks, and Statesman will of course be allowed an opportunity to respond to the application.

(iii) Balance of Convenience

59 This factor requires the Court to consider which of the parties would suffer the greater harm from the granting or refusal of an interlocutory injunction.

60 It is clear that failure to enjoin Statesman from continuing to breach the agreements by continuing construction on Phase 2 of the Project would nullify Matco's right to a say in whether construction on the Project should continue at this time. As noted by Matco, Statesman has indicated no commitment to discontinue the alleged breaches: rather, by its response to the application, it asserts its right to proceed without consultation or approval and applies to be relieved of its voluntary undertaking to stop construction and for confirmation of what it says is its right to proceed.

61 The enforcement of the negative obligation not to continue construction on Phase 2 without Matco's consent would not required Court supervision and has in fact already been effected through the voluntary shut-down of the Project. It is possible to readily define what Statesman should be enjoined from doing. There is no issue that permanent injunctive relief may not have been an available remedy to Matco after trial, given the nature of the obligation as a negative obligation.

62 Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

63 It is noteworthy that Matco does not propose that the Project be abandoned or that development cease on a permanent basis: what is involved is a difference of opinion between two experienced partners to a development with respect to the timing of development, the structure and availability of financing and the use of funds. Whether Matco or Statesman is correct with respect to these matters is not a question to be decided by this Court. What the Bank may do in the face of a failure to recommence construction on Phase 2, what various tradespeople or purchasers who have entered into pre-sale agreements may do is only speculative at this point, and does not tip the balance of convenience in favour of one party or the other.

64 It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

65 I find that the balance of convenience favours Matco in this case, as failure to grant the injunction would nullify its contractual right to be part of the decision to proceed. If the remedy was withheld, that right would be so impaired by the time the issues could be ultimately determined on their merits by unilateral action by Statesman that it would be too late to afford Matco complete relief.

C. Should There Be an Order Confirming the Termination of SMBI as Manager of the Project?

66 As previously indicated, the DMA provides that it shall terminate if the Manger "misappropriates any monies or defrauds the Partnership in any manner whatsoever." Matco submits that misappropriation does not require fraud or even dishonesty and that it is sufficient if there is a failure by a fiduciary to meet an obligation, even where the fiduciary believes the reasons for his failure to be valid, citing *Kitnikone, Re* (1999), 13 C.B.R. (4th) 76 (B.C. S.C.) at 77 -78 and *Janco (Huppe) v. Vereecken* (1982), 44 C.B.R. (N.S.) 211 (B.C. C.A.) at 213 -214.

67 Matco submits that the alleged misappropriation by SMBI of partnership funds to pay unauthorized sales commissions to its staff is a misappropriation that has terminated the DMA. Statesman's response to this submission has been set out previously in these reasons. While Matco has established a strong *prima facie* case of contractual breach, the issue of whether this alleged breach is a misappropriation is not entirely without doubt.

68 It will also not be clear until the issue of whether SRQL remains the General Partner of the Partnership who has authority to act for the Partnership in order to instigate termination of the DMA.

69 For these reasons, and since the issue of the removal and replacement of the General Partner remains to be determined on its merits for the reasons set out later in this decision, I make no final determination of this issue at this time.

D. Should There Be an Order Confirming the Removal of SRQL as General Partner?

70 By the terms of the Limited Partnership Agreement, SRQL was appointed as initial General Partner. Statesman has had day to day authority over the operation of SRQL, but the USA provides that all "Major Decisions", including the approval of related party transactions and the execution of any contract involving more than $100,000, require the approval of all directors. SRQL itself specifically committed to act exclusively as General Partner of the Partnership and to comply with these approval requirements. By the Limited Partnership Agreement, SRQL covenanted to discharge its duties honestly, in good faith and in the best interests of the Partnership.

71 The Limited Partnership Agreement provides that "the Limited Partners may remove the General Partner and appoint a successor by Extraordinary Resolution" where the "General Partner has breached its obligations under this Agreement in such a manner as would have a material adverse effect on the Business, assets or financial condition of the Limited Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010, the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

72 Matco submits that SRQL's actions in commencing over $2 million of Phase 2 construction and committing the Partnership to over $12.5 million of Phase 2 construction contracts without the approval of the directors of SRQL as required by the USA and without meeting the Bank's requirements for funding of the Phase 2 credit facility, SRQL's involvement in the alleged "dummy trades" scheme and the use of SRQL as a co-signatory on a promissory note unrelated to the Project all justify the removal of SRQL as General Partner of the Partnership.

73 While the Limited Partner of the Partnership, being MTM Commercial Trust, may remove the General Partner and appoint a successor by Extraordinary Resolution, Section 15.1(b) provides that if a breach is capable of being cured, the General Partner can only be removed if such breach continues unremedied for a period of twenty business days after the General Partner has received written notice of such breach from any Limited Partner, which in this case means MTM Commercial Trust.

74 The alleged breaches with respect to the "dummy trades" and the promissory note problem have been addressed by the General Partner, although it may be an issue whether a fiduciary may cure a breach of trust of this kind. As indicated previously, these allegations, however, raise issues of credibility that cannot be determined in an application of this kind. The alleged breach of proceeding with construction of Phase 2 without required approval is less subject to credibility issues, and the question is whether it is appropriate to made a final determination of the issues of whether Statesman has breached the agreements in this respect, whether such breaches have had a material adverse effect on the business or financial condition of the Partnership,

whether such breaches are capable of being cured and it so, whether proper notice has been given and thus whether the Limited Partner was justified in removing the General Partner as part of this summary application.

75 The interlocutory injunction granted in this application achieves the purpose of enjoining further alleged breaches while preserving Statesman's rights to fully present evidence and argument on these issues of contractual authority. While Matco has established a strong *prima facie* case, there are ambiguities in the agreements and submissions made with respect to contractual interpretation that do not make the matter entirely without doubt. I therefore decline to confirm the removal of SRQL as General Partner of the Partnership at this stage of the proceedings. It follows that confirmation of the appointment and confirmation of 1358846 Alberta Ltd. as new General Partner is premature.

76 For the same reasons that I decline to make a final order with respect to SRQL as General Partner and SMBI as Manager of the Project on the motion by the Applicants, I decline to confirm SRQL as General Partner and SMBI as Manager of the Project in accordance with Statesman's counter motions.

E. Should the SMBI Issue Be Stayed and an Arbitrator Appointed Pursuant to the Terms of the DMA?

77 I agree that the parties have gone too far down the litigation trail for some of the inter-related issues to be now referred to arbitration.

78 While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA. It would be undesirable to have a multiplicity of proceedings where there is clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 (Alta. C.A.) at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Alta. Q.B.) at paras. 6-9.

Conclusion

79 Statesman is enjoined from continuing construction on the Project until the issues of alleged breach of contract and other misconduct can be resolved on their merits or until the parties agree otherwise. I will remain seized of the matter as case management judge to hear applications to have the matters in issue proceed to a full hearing on an expedited basis and to hear any other related motions.

80 If the parties are unable to agree on costs of these applications, they may be addressed.

Application granted in part; cross-application dismissed.

TAB 12

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Sergio Grillone (Re) | 2023 ONSC 5710, 2023 CarswellOnt 15978 | (Ont. S.C.J. [Commercial List], Oct 12, 2023)

2021 ABQB 137
Alberta Court of Queen's Bench

CWB Maxium Financial Inc v. 2026998 Alberta Ltd

2021 CarswellAlta 392, 2021 ABQB 137, [2021] 7 W.W.R. 299, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 25 Alta. L.R. (7th) 3, 331 A.C.W.S. (3d) 229, 88 C.B.R. (6th) 196

CWB Maxium Financial Inc. and Canadian Western Bank (Plaintiffs) and 2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder (Defendants)

Douglas R. Mah J.

Heard: January 11-12, 2021
Judgment: February 23, 2021
Docket: Edmonton 2003-04457

Counsel: Terrence M. Warner, Spencer Norris, for Plaintiffs
Jim Schmidt, for Defendants
Ryan F.T. Quinlan, for Interim Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.2 Application by only creditor
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.5 Practice and procedure on application
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.2 Orders
Bankruptcy and insolvency
XX Miscellaneous
Estoppel
IV Practice and procedure
IV.3 Miscellaneous
Evidence
VI Witnesses
VI.4 Credibility

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Petition by only creditor

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Application of good faith doctrines in contractual context may lead to finding that transgressing party was liable in damages for breach of contract, and adopting those doctrines to inform good faith requirement in s. 4.2 of Bankruptcy and Insolvency Act (BIA) may lead to invocation of broad discretionary authority to grant "any order that it considers appropriate in the circumstances" — Secured creditor seeking Receivership Order was "interested person" subject to good faith requirement, and its conduct in events preceding application was covered by that requirement, where that conduct was factually and temporally connected to proceedings, i.e. such conduct is "with respect to" BIA proceeding — Remedy, at least in this case and given broad discretion of court under s. 4.2 of BIA, may include denial of Receivership Order, and conduct of party alleged to have breached good faith requirement should be assessed in light of intent and policy objectives of BIA .

Personal property security --- Nature and scope of legislation — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one

outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Defendants relied on s. 66(1) of Alberta Personal Property Security Act (PPSA) regarding good faith requirement, and requirement of good faith here was joined with concurrent duty to act in commercially reasonable manner — Requirement as it appeared in s. 66(1) of PPSA, with regard to secured creditor acquiring or discharging right as described in that section, would not be different than good faith requirement in s. 4.2 of BIA, as it pertained to conduct of creditors, i.e. it prohibited dishonesty and misrepresentation in acquisition or exercise of right — Since standards of good faith and commercial reasonableness were conjunctive, breach of one of them was enough to attract consequences .

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Evidentiary issues

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Evidentiary objection was valid with respect to some of documents, as hearing of matter was cast as summary trial — It was ruled that viva voce evidence was not necessary and that trial would be on record and evidence that was extraneous to record should not be entered — In summary trial of this nature, record consisted of various affidavits filed by parties, transcripts of questioning that occurred on those affidavits, exhibits entered or referred to during questioning and responses to undertakings, if any, and, accordingly, court was confined to record.

Evidence --- Examination of witnesses — Cross-examination — Effect of failure to cross-examine

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid

from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Plaintiffs brought application for final receivership order — Application granted — L was cross-examined on core contradictory matters, which included origin of residual indebtedness, whether he had been misled in 2019-2020 about whether restructuring would occur, and what he knew about roles of M Inc. and CWB in approving restructuring — It was found that much of objection related to detail, not necessarily central issue, plaintiffs' counsel chose not to cross-examine but rather to challenge L's evidence with reference to other evidence, and uncontradicted evidence did not necessarily mean that it must be accepted for its truth — It was found that M Inc. did not engage in misrepresentation or dishonesty in dealing with L's refinancing request, M Inc. did approve restructuring, and it was just not on terms that L wanted, and in particular, in end, L rejected concept of using forbearance agreement as framework for restructuring.

Evidence --- Witnesses — Credibility — Duty of judge in assessing

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Plaintiffs brought application for final receivership order — Application granted — It could not be seen in evidence where L was promised particular form of restructuring, and evidence showed that M Inc., throughout fall of 2019 and into early 2020, was working assiduously toward restructuring that L was seeking — It was also apparent that there were concerns expressed at M Inc. about pharmacy's ongoing viability which resulted in ultimate decision-maker at CWB approving revised form of restructuring premised on executed forbearance agreement — McG, who was manager at M Inc., was also clear that any refinancing proposal required higher approval, and while McG certainly made recommendation to credit committee, it could not be seen where either M Inc. or McG promised specific outcome to refinancing request — It was found that M Inc. did what it said it would do and did not take steps to enforce its demands until it had reached tend of road with L with regard to restructuring discussions, and when such discussions failed, both sides expected, as reasonable commercial parties would expect, that suspension of enforcement action would end.

Guarantee and indemnity --- Guarantee — Contract of guarantee — Consideration — Forbearance to sue

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to

$970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found that when M Inc. said it would not resile from major components, L's signing of forbearance agreement was left on "take it or leave it" basis — From M Inc.'s perspective, L wanted M Inc. to strip away some of core components which, it seemed, it felt was necessary to protect its interests — It was not believed that M Inc., in failing to give in to L's objections to forbearance agreement, engaged in bad faith, as M Inc. was entitled to do what it felt was reasonably necessary, such as insist on "essence" of agreement, to protect its interests — L was similarly entitled to do what he believed was necessary to protect his interests, and both did so, and that was why matter was now in litigation.

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found satisfactory that statement made by M Inc.'s counsel before Associate Chief Justice, concerning retention of management during period of Interim Receivership, was not misleading, intended to mislead or recklessly made — It aligned with what happened with regard to day-to-day management of pharmacy, and it was acknowledged that L did lose his salary as result of business decision made by Interim Receiver — In these circumstances, it could not be seen how failure to disclose exact steps involved in internal approval process or levels of authority within organization, in case of private lender, amounted to breach of good-faith requirement — Good faith in private commercial relations was not same as duty of fairness and transparency with regard to decision-making in public law realm.

Estoppel --- Practice and procedure — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed

interim receiver — Plaintiffs brought application for final receivership order — Application granted — Defendants relied on M Inc.'s promise of restructuring and McG's advice to L that October 2019 demands would not be enforced as constituting words and conduct that altered existing legal relationship — Context was that parties were in midst of restructuring discussions and McG was in process of putting together restructuring proposal, and those words could not possibly be construed by reasonable commercial persons as meaning that M Inc. had forever relinquished its enforcement rights — Estoppel failed as defence in this case.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was accepted that transparent, Court-supervised process under which Receiver uses its expertise and professional contacts provided best option for selling pharmacy as going concerned and maximizing recovery for all concerned, including L and it was just and convenient to appoint receiver — It was found that L's allegations against M Inc., did not constitute grounds on which to refuse final order of receivership based on "just and convenient" test — Given factual findings, it was further found there had been no breach of good-faith requirement in either context because neither M Inc. nor its representatives engaged in dishonesty or lying in its dealings with L, either at time of initiating loans in 2017 or during restructuring talks.

Bankruptcy and insolvency --- Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found that M Inc. had failed to disclose that CWB had ultimate decision-making authority with regard to restructuring, however it was also found that L would have some general understanding, as businessperson of his experience, that there was approval process beyond McG — In result, there was no defence based on lack of good faith, and no remedy was available to defendants under s. 4.2

of BIA or s. 66(1) of PPSA, and conclusion regarding s. 4.2 took into account intent and policy objectives of BIA — Here, proceedings have not been invoked for some oblique or improper purpose but rather to subject assets of insolvent debtor to orderly, Court-supervised process for benefit of interested parties — These reasons should not be read as ringing endorsement of M Inc.'s conduct and gaps in communication no doubt contributed to L's suspicions and what now has been year's worth of costly litigation.

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCS 1884, 2020 CarswellQue 5543 (Que. Bktcy.) — considered

B & R Development Corp. v. Trail South Developments Inc. (2012), 2012 ABCA 351, 2012 CarswellAlta 2016, 72 Alta. L.R. (5th) 336, [2013] 3 W.W.R. 706, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.)* 539 A.R. 157, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.)* 561 W.A.C. 157, 27 R.P.R. (5th) 177 (Alta. C.A.) — referred to

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — considered

Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) — considered

C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45, 2020 CSC 45, 2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 452 D.L.R. (4th) 44, 10 B.L.R. (6th) 1 (S.C.C.) — considered

E Dehr Delivery Ltd v. Dehr (2018), 2018 ABQB 846, 2018 CarswellAlta 2288, 75 Alta. L.R. (6th) 380, 64 C.B.R. (6th) 39, 9 P.P.S.A.C. (4th) 65, [2019] 2 W.W.R. 360 (Alta. Q.B.) — considered

MTM Commercial Trust v. Statesman Riverside Quays Ltd. (2010), 2010 ABQB 647, 2010 CarswellAlta 2041, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198 (Alta. Q.B.) — followed

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

R v. Sawatzky (2017), 2017 ABCA 179, 2017 CarswellAlta 1031, 55 Alta. L.R. (6th) 260, 352 C.C.C. (3d) 37 (Alta. C.A.) — considered

R. v. Lyttle (2004), 2004 SCC 5, 2004 CarswellOnt 510, 2004 CarswellOnt 511, 17 C.R. (6th) 1, 180 C.C.C. (3d) 476, 316 N.R. 52, 235 D.L.R. (4th) 244, 184 O.A.C. 1, 115 C.R.R. (2d) 172, 70 O.R. (3d) 256 (note), [2004] 1 S.C.R. 193 (S.C.C.) — considered

R. v. MacKinnon (1992), 72 C.C.C. (3d) 113, 12 B.C.A.C. 302, 23 W.A.C. 302, 1992 CarswellBC 1093 (B.C. C.A.) — considered

R. v. Neilson (2019), 2019 ABCA 403, 2019 CarswellAlta 2260 (Alta. C.A.) — referred to

R. v. Quansah (2015), 2015 ONCA 237, 2015 CarswellOnt 4940, 19 C.R. (7th) 33, 125 O.R. (3d) 81, 331 O.A.C. 304, 323 C.C.C. (3d) 191 (Ont. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — considered

Uniforêt Inc., Re (2002), 2002 CarswellQue 2472, 40 C.B.R. (4th) 251, [2003] R.J.Q. 161 (C.S. Que.) — considered

Uniforêt Inc., Re (2002), 2002 CarswellQue 2546, 40 C.B.R. (4th) 281 (C.A. Que.) — considered

Vision West Development Ltd. v. McIvor Properties Ltd. (2012), 2012 BCSC 302, 2012 CarswellBC 465 (B.C. S.C.) — referred to

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District (2021), 2021 SCC 7, 2021 CSC 7, 2021 CarswellBC 265, 2021 CarswellBC 266, [2021] 2 W.W.R. 193, 9 M.P.L.R. (6th) 1, 44 B.C.L.R. (6th) 215, 454 D.L.R. (4th) 1, 12 B.L.R. (6th) 1 (S.C.C.) — considered

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — considered

Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — considered

s. 244 — referred to
Code civil du Québec, L.Q. 1991, c. 64
en général — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered
Personal Property Security Act, R.S.A. 2000, c. P-7
s. 66(1) — considered
Rules considered:
Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.5-7.11 — referred to
Words and phrases considered:

Good faith

Requirement of good faith as expressed in s. 66 (1) of the *PPSA* relates to a secured creditor's acquisition of or exercise of rights under a security agreement. In relation to section 4.2 of the *BIA*, the good-faith requirement relates to a secured creditor's invoking and conduct of insolvency proceedings under the *BIA*.

APPLICATION by plaintiff creditors for final receivership order.

***Douglas R. Mah J.*:**

A. Background

1 The plaintiff lenders seek a final order of receivership against the defendant debtors. An interim receivership order has been in place since March 2, 2020 and extended several times, pending a final determination. MNP Ltd was appointed as Interim Receiver under that order.

2 The hearing of this matter was delayed for two primary reasons. The first was this Court's response to the COVID pandemic, which resulted in a temporary suspension of some Court proceedings, including this one. The second was my direction that this matter proceed by way of summary trial, in light of the defences to the receivership action raised by the debtors. My oral reasons delivered October 6, 2020 fully set out my thinking in this regard and, in particular, how I felt the record at that time was insufficient to decide the case fairly.

3 The defendants collectively own and operate a pharmacy in St. Albert, Alberta, although Grandin Prescription Centre is the operating entity and 202 is the main borrower. The pharmacy has continued to conduct business under the watchful auspices of MNP Ltd as Court-appointed Interim Receiver of the corporate defendants.

4 In the meantime, Mr. Loder, the principal of the corporate defendants and the personal defendant and guarantor, has been actively trying to sell the pharmacy as a going concern. He deposed in his September 29, 2020 affidavit of his efforts of in that regard. The possibility of sale was mentioned in my October 6, 2020 reasons and discussed at the conclusion of the summary trial on January 12, 2021. A collateral consequence of the delay in the final determination of the receivership has been to give Mr. Loder more time to sell the business.

5 As of the completion of this decision on the evening of February 18, 2021, I have not been advised that he was successful in doing so.

B. A Brief History of the Plaintiffs

6 In these reasons, I refer to the plaintiff CWB Maxium Financial Inc as Maxium and the plaintiff Canadian Western Bank as CWB.

7 Maxium is a wholly owned subsidiary of CWB.

8 Maxium was incorporated in Ontario in February 2016 in conjunction with CWB's acquisition of certain assets of Maxium Financial Services Inc (MFSI) and DeSante Financial Services (DFS).

9 MFSI and DFS were related companies but operated as one larger enterprise. DFS was the specialty healthcare lender, and MFSI did the other business.

10 Following the partial divestiture to CWB, MFSI and DFS were amalgamated and continued as 195. DFS had a portfolio of accounts not acquired by CWB. However, DFS's former staff and infrastructure were absorbed by CWB and, by agreement, shared with 195 so that 195's accounts could be serviced.

11 Mr. Gilchrist and Mr. Wyett, both Maxium vice-presidents, stated during questioning that 195's accounts were in "run-off mode", which meant that the loans were being serviced and collected but that no new loans were initiated.

12 Mr. Gilchrist, Maxium's vice-president of sales, related in his questioning that following the acquisition by CWB, Maxium had a loan approval limit. Maxium's local credit committee (in Toronto) would vet the loan proposal and could approve it if it fell within the limit. If a proposed loan exceeded that limit, the credit committee could recommend support but the proposal then had to be sent to CWB's head office in Edmonton for review and final approval.

C. The Defendants

13 Each of the defendants had these roles in the operation of the pharmacy and its relationship with its lenders:

- 202 is the primary debtor for two loans: the first is a debt, in the form of two promissory notes in favour of Maxium, with a current balance of slightly more than $3.4 million and relates to the purchase of the pharmacy, and the second is comprised of a series of operating loans for the pharmacy made by CWB in an aggregate amount slightly exceeding $251,000;

- Grandin Pharmacy Centre owns the pharmacy assets, operates the pharmacy, and is a guarantor of both loans;

- the other numbered companies are related to 202 through the ownership structure and each are also guarantors of both loans;

- Mr. Loder is the principal of all the corporate defendants and a personal guarantor of both loans;

- Mr. Loder was also part of the management of the pharmacy business (although not a pharmacist himself) and did the deliveries, receiving a salary of $180,000 per annum from the pharmacy;

- 202 and each of the guarantors, among other security, provided a general security agreement to each lender to support their obligations in respect of the two loans.

14 The form of GSA in each case contractually provides for the appointment of a receiver in the event of default, as a remedy.

15 Mr. Loder was 67 years old when he swore his March 2, 2020 affidavit. He has 25 years of experience in the pharmacy industry on both the wholesale and retail sides. Mr. Loder operated the business of Grandin in conjunction with a licensed pharmacist.

D. Background related to the Loder Group

1. Mr. Loder's history and founding of the Loder Group

16 Mr. Loder's 25 years of experience in the pharmacy business includes:

- 14 years with McKesson Canada, a national pharmaceutical distributer, ultimately becoming the director of sales and marketing for western Canada;
- founding the Loder Group of pharmacies in 2008, and operating it until its receivership in 2016;
- acquiring Grandin in 2017 and operating it until the interim receivership in March 2020.

17 The Loder Group owned and operated a series of pharmacies in Alberta, including one in Consort. DFS financed all of the Loder Group stores except for the two locations in Sundre, Alberta, which were financed by CIT.

2. Loder Group moves to BMO

18 In 2014, Mr. Loder was persuaded to move the entirety of the Loder Group's loan portfolio to BMO. Mr. Loder acknowledges having granted personal guarantees to BMO, guaranteeing the Loder Group's indebtedness to BMO.

19 Within a few months of this move, Mr. Loder described how a confluence of negative events conspired to reduce the Loder Group's cash flow, prompting him to request that BMO consider refinancing. BMO was not agreeable and commenced recovery action against the various corporate debtors and Mr. Loder personally.

20 Mr. Loder entered into a forbearance agreement with BMO and engaged a consultant to assist in finding a lender willing to refinance the Loder Group loans, but was unsuccessful. On the eve of BMO's receivership application, 195 acquired BMO's debt and security.

3. Proper nomenclature for Maxium entities

21 195, at the time, was operating under the name Maxium Financial Services. Mr. Loder testified that he did not appreciate that there is a distinction between 195 (which also called itself Maxium) and CWB Maxium, one of the present plaintiffs. The use of the name "Maxium" to describe several different entities involved in this case has been a source of confusion.

22 During the proceedings, 195 operating as Maxium Financial Services was referred to as "old Maxium" and CWB Maxium (which I refer to as simply "Maxium" in these reasons) was referred to as "new Maxium".

23 They are different entities but related by the fact that CWB owns new Maxium and by virtue of CWB's sharing agreement with 195.

4. Missed Balloon Payment on Consort Pharmacy

24 One of the DFS loans acquired by BMO related to the purchase by the Loder Group of the Consort pharmacy. When BMO refinanced the Loder Group portfolio, DFS provided a payout figure that included an amount owed in respect of the Consort pharmacy but, through oversight (only discovered by way of later audit), had quoted only the remaining monthly payments and had omitted a balloon payment of $751,504.

25 As explained in Mr. Gilchrist's October 15, 2020 affidavit, rather than have Mr. Loder request BMO for further funds or reverse the entire transaction with BMO, it was agreed between DFS and Mr. Loder that 114 (the Loder Group company that owned the Consort pharmacy) would execute a new promissory note for $741,501 (the amount owed less $10,000 for legal and administrative costs), which would be guaranteed by Mr. Loder personally. The promissory note and guarantee were in fact executed and delivered and due to be paid on the original due date in July 2014.

26 When the amount owing was not paid, DFS brought separate proceedings against 114 and Mr. Loder. Those proceedings were subsumed into the receivership proceedings that 195 would later bring.

5. McKesson Indemnity

27 Mr. Loder explained that the drug supplier, McKesson, was concerned about independent pharmacies being bought up by the Shoppers Drug Mart chain, which would cause McKesson to lose business. As an incentive to pharmacies to remain independent, McKesson initiated an indemnity program whereby it would provide loan guarantees to the lenders of independent pharmacy owners. He stated that he himself, while a McKesson employee, had been partially responsible for setting up the program.

28 Mr. Loder testified that at the time BMO called its loans, McKesson had only one outstanding loan guarantee to BMO in respect of only one Loder Group pharmacy, that being the North East Pharmacy. That McKesson guarantee was part of BMO's security for the Loder Group indebtedness, and was assigned to 195.

6. Receivership of Loder Group and Residual Indebtedness

29 Having acquired BMO's debt and security, 195 carried on with BMO's receivership application, causing PwC to be Court-appointed as Receiver over the Loder Group on August 26, 2016.

30 In its second and final report to the Court on November 14, 2017, PwC reported that at the conclusion of the receivership, the shortfall to 195 was $2.37 million. Maxium says the amount remaining unpaid from the Consort Pharmacy, that had been converted to the unpaid new promissory note, was part of the shortfall.

31 That amount was reduced to $970,000, after 195 reached a settlement of $1.4 million with McKesson in respect of its $2.0 million guarantee of the Loder Group in November 2017.

E. The Plaintiffs' Application for a Final Receivership Order

32 The plaintiffs say that the defendants have defaulted on their loans. They base their application on these events:

- Maxium issued demands for payment of its loans on both the principal debtor, 202, and the guarantors on October 18, 2019 and concurrently served Notices of Intention to Enforce Security under section 244 of the BIA. CWB served its demands, through counsel, on 202 as debtor and on Grandin as guarantor on February 26, 2020, concurrently serving section 244 Notices of Intention to Enforce Security.

- Neither or Maxium nor CWB have been paid.

- On February 27, 2020 CWB received a Requirement to Pay from Canada Revenue Agency with respect to 202's unremitted source deductions to July 31, 2019 for the sum of $301,188.69. On February 28, 2020, Maxium received an RTP for 202's unpaid income taxes for the sum of $14,074.59. Maxium says that the effect of receipt of these RTPs was to freeze the operating accounts of the corporate defendants, thereby depriving 202 of operating funds.

- The Second Report of the Interim Receiver (MNP Ltd), covering the period March 2, 2020 to August 25, 2020, shows the Grandin Pharmacy would have an unfunded operating loss of $277,515.96 if it had been required to pay the Maxium loan payments for that period, even after the costs of the Interim Receiver and its legal counsel are factored out.

• The loss does not include amounts payable to CWB during the period nor any of the pre-interim receivership arrears to either Maxium or CRA.

• Despite his efforts, Mr. Loder, as of this writing, has been unable to find a buyer for the pharmacy as a going concern.

33 The plaintiffs contend that the pharmacy's operation is unsustainable and that, in the absence of receivership or a sale of the pharmacy, Mr. Loder has no plan for dealing with defendants' obligations to any of Maxium, CWB and CRA. They say that not placing the pharmacy in receivership would put their security in grave jeopardy, that a Receiver is best positioned to sell the pharmacy at the most advantageous price and that, having regard to the factors set out in Paragon Capital Corp v Merchants & Traders AssuranceCo, 2002 ABQB 430 at para 27, it is "just and convenient" for the Court to exercise its discretion in favour of granting the receivership order.

F. The Defendants' Position

34 For the defendants, this case is about misrepresentation by or on behalf of the plaintiffs, whether deliberate or reckless, which:

• with respect to entering into the Maxium loans in the first place, induced the defendants to take on liability which they say was already paid;

• with respect to restructuring of the loans, lulled Mr. Loder into a false sense of security and prevented him from taking steps by which the defendants could have avoided the current predicament of this litigation; and

• finally, with respect to what was said in Court when the Interim Receiver was appointed on March 2, 2020, caused Nielsen ACJ to make the Interim Receivership Order.

35 In my October 6, 2020 oral reasons, I summarized the allegations as follows:

• First, that Maxium mischaracterized to Mr. Loder the purpose of the $500,000 promissory note signed by 202 on June 29, 2017, saying it was to settle Mr. Loder's indebtedness to McKesson related to his former Loder Group enterprise. In reality, Maxium was recovering what it calls a residual liability related to the receivership of the Loder Group which had been originally financed by DFS, then taken over by BMO and then assigned to 195.

• Second, Mr. Loder says that, even so, the so-called residual indebtedness did not exist. It had been paid off in the previous receivership by specific allocation made by the previous Receiver.

• Third, Mr. Loder says that Maxium represented to him in 2019 and into 2020 that his entire loan portfolio would be restructured. Such a restructuring contemplated re-amortization of the $5000,000 loan segment from a three-year to a ten-year term and increase of the LOC with CWB from $75,000 to $150,000, along with an overall restructuring of the main debt and funds to cover CRA. Mr. Loder contends that he relied upon these representations by not seeking alternative financing elsewhere.

• Fourth, he says that Maxium told him the first set of demands of October 18, 2019 were a mere formality and would not be acted upon, which of course turned out not to be the case, as evidenced by these proceedings.

• Fifth, Mr. Loder alleges that the forbearance agreement he was asked to sign in February 2020 was sprung on him out of the blue, presented to him as a *fait accompli* and he had no opportunity to negotiate its terms.

• Sixth, Mr. Loder says there is a discrepancy between what was said in Court on March 2, 2020 as part of the plaintiffs' counsel's submissions as to what would happen in the interim receivership and what actually happened. The representation made by counsel that current management would remain in place during the interim receivership is wholly contradicted, Mr. Loder contends, by the fact that he (Mr. Loder) was terminated as the pharmacy's manager by the Interim Receiver.

36 Counsel were unable to agree to the language of an Order emanating from my October 6, 2020 decision, and no Order was entered. As a result, submissions during the summary trial were not restricted to the matters outlined above. Mr. Loder's counsel also argued:

> • Seventh, Maxium's failure to disclose to Mr. Loder that it did not have the authority on its own to approve the restructuring of 202's loans in 2019-2020, but had to obtain approval from CWB's head office in Edmonton, was a material omission that is also indicative of bad faith.

37 Legally, Mr. Loder contends that:

> • Maxium's promises to re-amortize the smaller loan, increase the LOC and restructure 202's overall financing lulled him into a false sense of security. Had Maxium not made those commitments, or had he known they would not be honoured, he would have taken steps to refinance the pharmacy operation elsewhere and would not currently be staring down this receivership application. In other words, the defendants have established an estoppel by words or conduct that precludes the plaintiffs from relying upon their strict legal rights under their security: Vision West Development Ltd v McIvor Properties Ltd 2012 BCSC 302 at paras 63-65.
>
> • Maxium's conduct, in the form of misrepresentations and material omissions, disentitle the plaintiffs from the remedy of a final order of receivership because of lack of good faith, invoking section 4.2 of the BIA and section 66(1) of the PPSA.
>
> • Finally, because receivership is an equitable remedy, having regard to the equities, it would not be just and convenient to grant the remedy in this case.

G. What does 'Good Faith' mean in this case?

1. Section 4.2 of the BIA

38 The defendants invoke section 4.2 of the BIA to say a receivership order should not be granted. This recently enacted provision has two components:

> • first, any interested person in any proceedings under the *BIA* shall act in good faith with respect to those proceedings; and
>
> • second, if the Court is satisfied that an interested person fails to act in good faith, on application by any interested person, the Court may make any order that it considers appropriate in the circumstances.

39 Here, the defendants say that the plaintiffs have through misrepresentation, mistruth or omission not acted in good faith and that the remedy that flows should be a denial of the receivership order.

40 As a new provision, there is a dearth of case law to guide its application. However, it is obvious that the debtors and the secured creditors here are interested parties within the meaning of the section and that "with respect to" means invoking and conducting insolvency proceedings under the *BIA*.

41 It is less obvious what is meant by "good faith" itself. There is no statutory definition. In the insolvency context, the Supreme Court of Canada in Century Services Inc v Canada (Attorney General) 2010 SCC 60 at para 70 said that good faith, along with appropriateness and due diligence, are "baseline considerations" for the Court when exercising authority under the *CCAA*, without elaborating on the nature of good faith.

42 More specifically, the duty to act in good faith in Court-supervised proceedings under Quebec's Civil Code, was recently considered by the Supreme Court of Canada in *9354-9186 Québec Inc. v Callidus Capital Corp*, 2020 SCC 10. In that case, the Court held a secured creditor's refusal to value its security before a proposal vote, so as to enable it to vote as an unsecured creditor and control the outcome of the vote, was done for an improper purpose and therefore in bad faith. The result in *Callidus*

is consistent with the earlier decision of the Court of Appeal of Quebec in *Uniforêt Inc, Re*, (2002), 119 ACWS (3d) 185, another restructuring case, to deny special status to a debenture-holder's group due to self-serving motives.

43 In both of these Quebec cases, it can be fairly said that the respective Courts in impugning the motives of the unsuccessful parties were concerned with upholding the intent and policy objectives of the *CCAA*: *Callidus* at paras 78 and 79; Uniforêt Inc, Re (2002), QJ No. 5457 (Quebec Superior Court) at para 95 aff'd by Quebec CA.

44 The Quebec cases shed some light on acceptable creditor behaviour during the course of restructuring proceedings. Overall, given the comments of the Supreme Court of Canada in Callidus, I am prepared to say that the intent and policy objectives of the *BIA* should inform the Court's consideration of the propriety of creditor behaviour in invoking and during receivership proceedings.

45 I need to comment on one further Quebec case concerning *when* the good faith requirement arises. The addition of section 4.2 to the BIA was concurrent with insertion of the identically-worded section 18.6 in the *CCAA*. In *Arrangement Relating to Nemaska Lithium Inc*, 2020 QCCS 1884, Gouin JCS held at paras 23-25 that the good faith requirement in section 18.6 arises only *after* the proceedings (in this case, restructuring) are initiated. This runs counter to my statement above that the good faith requirement in the section 4.2 covers previous conduct where it involves events precipitating Court involvement.

46 Importantly, in *Nemaska*, Gouin JCS was dealing with an application by an unsecured creditor for payment of an unpaid account for the manufacture of custom equipment, incurred prior to the granting of the initial Order under the *CCAA*, which Order included the usual stay provision. The applicant alleged that Nemaska's representatives had engaged in bad faith during the negotiations for the manufacturing contract and relied on section 18.6 to avoid operation of the stay and get paid before any other creditors.

47 Gouin CJS, in my view, rightly rejected the application on the basis that awarding payment to the creditor at this stage would seriously thwart the reorganization effort and was antithetical to the purpose of the *CCAA*. The creditor's remedy was to file a claim in the proceedings, not to skirt the proceedings by means of section 18.6.

48 In *Nemaska*, the conduct of Nemaska alleged by the creditor was unconnected to the *CCAA* proceedings. Here, the defendants are saying, in effect, that the *bringing* of a receivership application, in the circumstances they allege, lacks good faith. Within this context, I am prepared to say that section 4.2 of the BIA applies.

49 Still, the effect of section 4.2 should not reach back into time indefinitely. The conduct in question must be connected to the proceedings. The prospect of receivership proceedings first materialized with the sending of the first set of demand letters in October 2019. The sending of the demand letters and Maxium's conduct in relation to the loans thereafter, when receivership loomed, can be said factually and temporally to be connected to or "in respect of" the proceedings.

50 The next question is: where does one look to find the content of this good faith requirement?

51 In the contractual context, in Bhasin v Hrynew 2014 SCC 71 at para 33, the Court recognized good faith as a general organizing principle under the common law of contract, which (at para 66):

> ... manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed ...

52 In this context (at para 65), the Supreme Court of Canada comments that the duty of good faith does not require one party to serve the interests of the other but rather not to undermine the other's interests in bad faith. It is not elevated to a fiduciary duty. Then at para 73, the Court imposes a duty of honesty in contractual performance as a key aspect of the duty of good faith:

> ... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a

> simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; ***Greenberg v. Meffert*** (1985), 1985 CanLII 1975(ON CA), 50 O.R. (2d) 755 (C.A.), at p. 764; Gateway Realty, at para. 38, *per* Kelly J.; ***Shelanu Inc. v. Print Three Franchising Corp***. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: ***Wallace***, at para. 98; ***Honda Canada***, at para. 58.

53 A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in *CM Callow Inc v Zollinger*, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

54 In *Callow*, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

55 In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., ***Yam Seng Pte Ltd. v. International Trade Corp. Ltd.***, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half- truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. ...

56 The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

57 The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the BIA may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

58 At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in *Bhasin* and developed in *Callow* [1] , as cited above, to give content to the notion of "good faith" as found in section 4.2 of the BIA. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

59 I summarize and conclude on this point as follows:

• Interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings.

• A secured creditor seeking a Receivership Order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings, i.e. such conduct is "with respect to" *BIA* proceedings.

• Based on previous caselaw, the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.

• Further, since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the BIA in the present circumstances, that is, the relationship between lender and borrower being essentially contractual in nature and, in this case, the contract includes a right on the lender's part to appoint a receiver or to seek such appointment.

• The duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.

• Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.

• A remedy, at least in this case and given the broad discretion of the Court under s. 4.2, may include denial of the Receivership Order.

• The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*.

60 I emphasize that I am dealing here only with a situation of allegations of lack of good faith in respect of a secured lender's conduct in the events that precipitated the bringing of an application to appoint a receiver. The content or degree of the good faith requirement will necessarily vary with different *BIA* actors and different facts.

2. Section 66(1) of the PPSA

61 The defendants also cite and rely on section 66(1) of PPSA, which provides that all rights, duties or obligations arising under a security agreement must be exercised or discharged in good faith and in a commercially reasonable manner. Again, there is no statutory guidance as to what is meant by "good faith". The authorities have considered the good faith requirement in section 66(1) of Alberta's *PPSA* in these contexts:

• Whether a supposed *bona fide* purchaser for value had a role in improperly discharging a true secured creditor's security interest registration, so as to acquire clear title to stolen trucks, was a question of good faith for determination at trial: E Dehr Delivery Ltd v Dehr 2018 ABQB 846 at para 71;

• The duty informs the exercise of a secured party's manner of disposing of the collateral: Edmonton Kenworth Ltd v Kos 2018 ABQB 439 at paras 80-81; and whether such realization is provident or improvident: Farm Credit Canada v Fenton 2008 ABQB 268 at paras 11-16;

• The good faith requirement applies to the way a Court-appointed Receiver conducts a bid process: Cobrico Developments Inc v Tucker Industries Inc 2000 ABQB 766 at para 35;

• Professor Rod Wood gives this example in his 2017 paper "A Guide to the Alberta Personal Property Act" [2] at para 8.2.3:

> Subsection 66(1) imposes an obligation on parties to act in good faith and in a commercially reasonable manner. A failure to meet the good faith standard might occur where the secured party misled the other secured party into thinking that its security interest was properly perfected (by misrepresenting the name of the debtor) or by performing some act which had the effect of delaying the perfection of the other party's security interest. In such a case, the failure to act in good faith will preclude the secured party from relying upon the priority that would otherwise be available to it.

62 I note that the requirement of good faith here is joined with a concurrent duty to act in a commercially reasonable manner. The latter seems particularly apt for cases where improvident realization is alleged. Apart from that, the specific examples relating to good faith in *E Dehr* and by Professor Wood lead me to conclude that the requirement as it appears in section 66(1) of the PPSA, with regard to a secured creditor acquiring or discharging a right as described in that section, would not be different than the good faith requirement in section 4.2 of the BIA, as it pertains to the conduct of creditors, i.e. it prohibits dishonesty and misrepresentation in the acquisition or exercise of a right.

63 Since the standards of good faith and commercial reasonableness are conjunctive, the breach of one of them is enough to attract consequences. In this case, I am concerned only with the good faith standard.

H. Evidentiary Objections

64 As part of its case at the summary trial, the defendants took the position that some of the evidence relied upon by the plaintiffs was inadmissible, and therefore the submissions based on that evidence should be given no weight.

65 The objections broadly took two forms:

- First, that certain documents relied on were not part of the record before the Court; and
- Second, that some of the conclusions urged upon the Court with respect to Mr. Loder's state of mind should be disregarded because he was not cross-examined on those specific points as required by the rule in *Browne v Dunn*, (1893), 6 R 67 at 70 (UK HL).

1. Documents Not in the Record

66 In the first respect, the objection is valid with regard to some of the documents. The hearing of this matter was cast as a summary trial. Although the Rules set out in some detail the process for applying for summary trial (see Rules 7.5 through 7.11), there is nothing that dictates precisely what is to happen at a summary trial.

67 At one point in the lead-up to the summary trial, I ruled that *viva voce* evidence was not necessary and that the trial would be on the record. In fact, the very reason for ordering a summary trial was so that a more robust record could be produced.

68 Mr. Schmidt argued that a summary trial is still a trial, and only admissible evidence should be entered. Evidence that is extraneous to the record should not be entered. In a summary trial of this nature the record consists of the various affidavits filed by the parties, the transcripts of the questioning that occurred on those affidavits, the exhibits entered or referred to during the questioning and responses to undertakings, if any.

69 I agree with Mr. Schmidt that the Court is confined to the record. Mr. Warner, on behalf of the plaintiffs, appeared to mostly agree with that proposition and conceded that some of the documents included in the plaintiff's evidence book were not part of the record and therefore not properly before the Court.

2. The Rule in Browne v Dunn

70 With regard to the second class of objections based on the rule in *Browne v Dunn*, I acknowledge that a witness should generally be confronted during cross-examination, with the contrary version of the facts, if the adverse party intends to rely on

that contrary version. The intent behind the rule is to give notice to a witness of cross-examining counsel's intention to later impeach. The Supreme Court of Canada says in R v Lyttle 2004 SCC 5 at para 64:

> The rule in ***Browne v Dunn*** requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:
>
> > Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

71 In this regard, as revealed in the transcript, Mr. Loder was cross-examined on the core contradictory matters, namely:

- The origin of the residual indebtedness (whether it stemmed from his McKesson guarantee or not);
- Whether he had been misled in 2019-2020 about whether a restructuring would occur, including his version of the discussion about the re-amortization of the $500,000 debt and the increase to the LOC;
- Whether Mr. Loder had been told the October 2019 demands would not be acted upon;
- The circumstances of the tendering of the draft forbearance agreement;
- What he knew about the roles of Maxium and CWB in approving the restructuring;

72 Here, counsel for the plaintiffs submits that Mr. Loder is not telling the truth about his state of mind on certain points. The cross-examination of Mr. Loder was directed at the plaintiffs' contrary factual theory of the main points listed just above.

73 Another important aspect is whether the point is core or merely detail. Ontario Court of Appeal Justice David Paciocco and his co-author Dean Lee Stuesser in their text *The Law of Evidence* (Toronto, Irwin Law:2015) at page 473 say:

> In order to comply with the rule, counsel is not required to slog through every single detail to be contradicted. The necessary unfairness that triggers the rule only arises where there is a failure to cross-examine on central features or significant matters. Arguably all of the examples above concern "central" issues. The fundamental question is whether the witness was given an opportunity to respond to the cross examiner's contrary position and not necessarily all the details.

74 The objection on this score was premised on the lack of cross-examination, or the perceived lack of adequate cross-examination, on certain factual points in dispute, and then plaintiffs' counsel's reliance upon contrary evidence advanced by the plaintiff and making of submissions based on that contrary evidence. However, the trier of fact is not required by any rule of law to accept a party's evidence on which there has been no (or no adequate cross- examination). The Court of Appeal of Appeal observes in R v Nielson 2019 ABCA 403 at para 37:

> [37] Choosing not to cross-examine a witness, but instead asking the trier of fact to disbelieve a witness based on other evidence adduced in the trial, is a valid exercise and does not invoke the rule from ***Browne v Dunn***. It is illogical for a trier

of fact to be expected to accept evidence which they disbelieve just because it has not been subject to cross-examination: ***R v Mete*** (1971), [1973] 3 WWR 709 at 712, 1971 CanLII 1422 (BCCA).

75 Further, at para 38, the Court of Appeal notes that the rule in *Browne v Dunn* has its limitations:

> [38] This was not a case where Crown counsel "ambushed" the appellant by impeaching his credibility in closing argument. As stated in ***R v Quansah***, 2015 ONCA 237 at para 82, 125 OR (3d) 81:
>
> > [i]n some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining party does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

76 As acknowledged in *R v Neilson* at para 53, the rule in *Browne v Dunn* can also apply to final argument. The Court of Appeal noted in *R v Sawatzky*, 2017 ABCA 179 (at paras 26 and 69), the Court has many options to deal with a breach of *Browne v Dunne* and the trial judge is left with discretion as to remedy. The nature of the remedy depends on the severity of the breach and the degree to which it prejudices the witness or the opposing party: R v Quansah 2015 ONCA 237 at para 117.

77 The Court's discretion includes whether to weigh the failure to cross-examine against the cross-examining party. It may, but as a matter of law, is not obliged to do so: Pacciocco and Stusser at pp 473-474, citing *R v McKinnon*, (1992), 72 CCC (3d) 113 (BCCA). The discretion inherent in the rule is described by the Supreme Court of Canada at para 65 of *R v Lyttle* as follows:

> The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. See ***Palmer v The Queen***, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at pp. 781-82; J. Soyinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 954-57.

78 By far the bulk of the evidentiary objections related to *Browne v Dunn*, can be answered on these grounds:

- Mr. Loder was cross-examined on the core contradictory matters;
- Much of the objection relates to a detail, not necessarily a central issue;
- Plaintiffs' counsel chose not to cross-examine but rather to challenge Mr. Loder's evidence with reference to other evidence (both documentary and other witness evidence);
- Mr. Loder's view on contradictory matters was generally known (from his affidavits);
- Mr. Loder was not ambushed or surprised by plaintiffs' counsel final argument, since the plaintiffs' position on the contradictory matters was clearly set out in their evidence; and
- Uncontradicted evidence does not necessarily mean that it must be accepted for its truth.

79 Finally, when encountering a breach of the rule in *Browne v Dunn* on a central issue, I will exercise discretion in weighing the evidence against the plaintiffs or not.

I. Credibility

80 Both sides say that this case will be decided on its facts and the facts rest on the credibility of the individuals involved.

81 The plaintiffs say that Mr. Loder, for himself and on behalf of the corporate defendants, as an experienced businessman could not have misapprehended the basis for the $500,000 promissory note, nor the state of his relationship with Maxium as it approached the initiation of the receivership application, as Maxium and CWB were as open and transparent with him as required. The plaintiffs say that the evidence put forward by their representatives should be preferred.

82 Mr. Loder and the other defendants contend (through counsel) that the affidavit evidence of the plaintiffs' representatives does not align with their actual recollection of the events as shown in cross-examination. The defendants also say that the plaintiffs' representatives attempt to gloss over or minimize what they did or said to mislead Mr. Loder. Much of their evidence, says Mr. Loder, therefore cannot safely be relied upon by the Court.

83 In considering credibility in a commercial case, the trier of fact may have regard to factors such as:

- what reasonable commercial parties acting in good faith might do or say;
- whether a person's words or actions align with what the Court knows about the individuals and institutions in question, and the way the world works;
- whether the evidence is internally consistent, that is, whether the evidence changes or evolves from one telling to the next;
- whether the evidence is externally consistent, that is, whether the evidence aligns with other witness evidence or facts that are accepted;
- whether there has been an embellishment or tailoring, or whether the evidence sounds convenient or coincidental;
- whether the witness can adequately explain things that are or should be within that witness's knowledge.

84 It is an exercise in determining what is more likely than not to have happened, based on the documents presented to the Court and the testimony of witnesses. The factors named above are generally applicable to a credibility inquiry in any case, with regard paid in a commercial case to the knowledge and experience of the particular commercial actors, their relationship with one another and what is overall plausible in terms of to how reasonable commercial parties would act.

J. Factual Findings

1. Was Mr. Loder told by Maxium that the $500,000 promissory note was to pay back the McKesson indebtedness?

85 The gist of Mr. Loder's position on this issue is that the $500,000 promissory note was extracted from 202 (and guaranteed by him) based on false pretenses. In effect, he says, Maxium misrepresented to him that he was required to resolve some pre-existing indebtedness to McKesson (by way of this $500,000 promissory note in favour of Maxium) as a condition of the $3 million loan for the acquisition of Grandin.

86 Maxium is clear that the $500,000 promissory note was proposed in compromise of Mr. Loder's pre-existing debt to 195, in relation to the residual indebtedness remaining from the previous receivership, and by virtue of his guarantees to 195 and BMO.

87 Mr. Loder's own evidence evolves on this point. At para 10 of his March 2, 2020 affidavit, Mr. Loder deposes:

> However, quite late in the process, CWB-Maxium told me that, in order for the financing to go forward, I needed to pay out $500,000 CWB-Maxium alleged was owing by me in the context of a previous pharmacy business I operated. It was put to me that CWB would loan the $500,000 to discharge what was allegedly owed to Maxium, and this amount would be "tacked on" to what was owed in connection with the financing of the purchase of the Pharmacy.

88 This is Mr. Loder's evidence about his telephone conversation with Mr. Gilchrist in June 2017 concerning resolution of the residual indebtedness as part of the financing transaction for Grandin. What is notable about this evidence is that it aligns exactly with Maxium's position, that is, the current lender required the promissory note to deal with indebtedness to the previous lender in relation to the previous business. Earlier in that same affidavit (at para 4), Mr. Loder correctly distinguishes between the current lender and the previous lender and comments that they are related. This affidavit shows that Mr. Loder, by his own words, clearly differentiated between old Maxium and new Maxium and understood the origin of the $500,000 loan. It also shows he was not mistaken, as has been argued on his behalf, about to whom the residual indebtedness was owed.

89 In his subsequent affidavit of September 29, 2020, Mr. Loder makes the transition to his McKesson indebtedness as the reason given by Maxium for requiring the $500,000 promissory note. He says at para 11:

> In fact, in 2017 I was told by Dan Gilchrist, Maxium's representative dealing with the financing of the Pharmacy (i.e. the Grandin Prescription Centre), that the Secondary Loan was related to Maxium's take-out of all or part of a debt allegedly owing by me, as guarantor, to the McKesson organization ("McKesson").

90 In his November 24, 2020 questioning on affidavit, Mr. Loder was asked whether it made sense to him that Maxium would be seeking payment on a guarantee that Mr. Loder had given to a third party. He responded that he did not make a judgment and made no further inquiries. He said he simply accepted it, and was more concerned about the amortization period than anything.

91 McKesson's guarantee to BMO was assigned to 195. Mr. Loder's guarantee to McKesson was not assigned. We know that because McKesson still held Mr. Loder's guarantee and later tried to collect on it.

92 The defendants' theory is that Maxium, on behalf of 195, was collecting the shortfall on the guarantee that McKesson had given to BMO (and then assigned to 195). Since 195 had settled with McKesson for $1.4 million on a $2.0 million guarantee, it was seeking the balance form Mr. Loder. The problem with this theory is that Mr. Loder agreed to the $500,000 promissory note in June 2017, some five months before 195 settled with McKesson and before 195 knew there would be a shortfall and what amount it would be.

93 Further, Mr. Loder knew that 195 had reached a settlement with McKesson with regard to the indemnity which McKesson had given to BMO in respect of the Loder Group's former North East Pharmacy. He knew this because he was provided with a copy of the settlement details in an email from Tracy Babiuk of McKesson on November 16, 2017 (which date was, incidentally, prior to the date of the issuance of the promissory note). Ms. Babiuk's email indicates that McKesson sustained a $1.4 million loss and reminded him that he had given personal guarantees to McKesson, including for the store in question that had generated the loss. The subject line of that email was: "Doug Loder personal gtee recovery."

94 One would expect that Mr. Loder would have contacted either Maxium or McKesson to say that he had already agreed to pay $500,000 to Maxium to retire that personal guarantee indebtedness. There is no such communication in evidence. Certainly, there should also have been hesitancy on Mr. Loder's part to sign the promissory note (which he did on December 1, 2017) since McKesson itself, around the same point in time, had signalled that it was looking to him to pay on his guarantee for that store.

95 As it turns out, McKesson and Mr. Loder are now engaged in litigation on that guarantee.

96 The June 8, 2017 credit application submitted by Mr. Gilchrist to Maxium states that

> CWB Maxium Financial ("CM") has been requested to provide (i) $3,000M in loan financing to assist with the share purchase of Grandin Prescription Centre Inc. and 517751 Alberta Inc. located in St Albert, AB and (ii) $500,000 to clear personal obligations of the principal of the Borrower owing to Maxium Financial Services.

97 Both Mr. Gilchrist's affidavit and the credit application contain calculations indicating that Grandin's proposed cash flow was sufficient to service both the $3 million facility and the $500,000 facility. Mr. Gilchrist says in his affidavit that he made it clear to Mr. Loder since June 2017 that dealing with the previous indebtedness stemming from the Loder group was part of the financing of the acquisition of Grandin. Maxium's documents bear out this position.

98 Mr. Loder recalls only one conversation about the $500,000 indebtedness. He says that it took place on June 20, 2017 and it was with Mr. Gilchrist. It is quite possible that one party or the other mentioned McKesson since 195 was still looking to McKesson on its guarantee to reduce the Loder Group shortfall. However, I cannot and do not conclude that Mr. Gilchrist mistakenly or deliberately told Mr. Loder that Maxium required another $500,000 commitment from him on account of his guarantee to McKesson, for the following reasons:

• The first iteration of the conversation as recounted in Mr. Loder's first affidavit aligns with Maxium's position. Mr. Loder's evidence then changes as he provides a second and different version, now invoking McKesson, in the second affidavit.

• Why Maxium would call on Mr. Loder to pay on a liability he had to a third party does not make sense. This is particularly so because Mr. Loder, besides being an experienced businessman in the retail drug sector, was himself in part responsible for designing McKesson's indemnity program for independent pharmacies. He understood the program well. He also understood what a personal guarantee is and how it works. In this regard, 195 did not hold Mr. Loder's guarantee to McKesson. It was retained by McKesson. It is totally unclear why he thought Maxium could collect on his guarantee to McKesson. His only response is that he didn't question it. That is not a plausible answer to me.

• The defendants' theory that Maxium was attempting to collect the shortfall from the McKesson guarantee to BMO by making Mr. Loder sign the promissory note does not work because the timing does not line up. Maxium asked Mr. Loder for the promissory note in June 2017. It did not know until November 2017 that there would be a shortfall.

• He was notified by McKesson on November 16, 2017, about two weeks before he signed the promissory note, that McKesson still held his personal guarantee. In the very least, this should have prompted some inquiry on his part to ensure he was not being asked to pay the same debt twice.

• Furthermore, Mr. Loder was represented by counsel at Bishop & McKenzie LLP in respect of the acquisition and financing of Grandin. He had access to legal counsel with regard to the promissory note at the relevant time. After learning on November 16, 2017 of McKesson's settlement with Maxium and McKesson's interest in looking to his McKesson guarantee, Mr. Loder still signed the promissory note on December 1, 2017, without apparently raising any alarm.

• Maxium's documents support Maxium's position.

99 To be sure, in terms of customer service, Maxium could have done more to document the transaction with Mr. Loder by, for example, sending him a letter in or after June 2017 confirming the purpose of the loan. Nonetheless, it cannot be said that factually Maxium misled Mr. Loder as to the purpose of the loan.

2. Did the residual indebtedness actually exist?

100 Mr. Loder takes exception to the notion, first expressed in Mr. Wyett's affidavit of March 16, 2020, that he owed any money in respect of the Consort pharmacy that could comprise the residual indebtedness. He notes in his own affidavit of September 29, 2020 that a purchase price $994,964 was allocated to the Consort pharmacy. Mr. Loder asserts that this amount extinguishes any debt owing in respect of that pharmacy.

101 In response, the plaintiff's counsel points out that the allocation figure comes from the purchaser of the Consort pharmacy, in the form of a schedule attached to the purchase and sale agreement. Counsel says there is no evidence before the Court as to the actual allocation made by the Receiver (PwC) in respect of that pharmacy.

102 The remaining shortfall of $2.4 million from that receivership, as said, was reduced by the $1.4 million payment by McKesson under its guarantee in November 2017, leaving a final shortfall of $970,000.

103 Maxium's evidence concerning the residual indebtedness also underwent somewhat of an evolution. In Mr. Wyett's affidavit of March 16, 2020, it was deposed that the residual indebtedness stemmed from the missed balloon payment. Mr. Gilchrist expanded on that evidence in his affidavit, indicating that Mr. Wyett's evidence was not quite accurate. While the missed balloon payment (via the new promissory note for $741,500 and Loder guarantee) was folded into the Loder Group receivership, the resulting shortfall was an overall shortfall in the receivership, attributable in some measure but not in total to the missed Consort balloon payment.

104 Mr. Wyett came on the scene in the latter part of 2019 and his evidence about the residual indebtedness came from a review of historical credit files, and discussions with Mr. Gilchrist and Mr. MacLellan. Mr. Gilchrist, on the other hand, had

worked for Maxium or its predecessors for all the relevant years and had first-hand knowledge of all of Mr. Loder's accounts through the years.

105 While it requires some digging through the evidence, I accept that on December 1, 2017 when Mr. Loder issued the promissory note for $500,000 to Maxium, that there was a shortfall of $970,000 to 195. Although the money did not pass through Mr. Loder's or 202's hands, I accept that by way of direction to pay, the sum of $500,000 was in fact advanced and paid to retire residual indebtedness of $970,000.

106 I do not think that Mr. Loder can deny the fact that the balloon payment on the Consort pharmacy had been missed because he had that debtor company sign a further promissory note and he signed a new guarantee, both in favour of 195, to cover that indebtedness. As the director of the Loder Group of companies, he should have been aware of the state of the Loder Group receivership and the final amount that remained unpaid. That would have been the reason for providing him with information about 195's settlement with McKesson.

107 There are some small points that can be argued. For example, Mr. Schmidt disputes that there was ever a "negotiation" by Maxium with Mr. Loder. I do note that $500,000 was deemed sufficient by Maxium to settle a remaining debt of what eventually turned out to be $970,000. Further, Mr. Loder had requested a certain amount of financing so he could acquire the Grandin pharmacy. In the course of those discussions, the question of residual indebtedness was raised and the $500,00 loan proposed by Maxium. Mr. Loder was free to walk away at any time before making a commitment. There may have been no course of negotiations but no-one forced him either.

108 Mr. Schmidt also disputes that Mr. Loder was informed about the residual indebtedness from the outset. He notes that Mr. Loder first contacted Mr. McGillivray in January 2017 about financing the purchase of Grandin, and that the residual indebtedness was not raised until June 2017. This is semantical. It depends on what one means by "outset". Mr. Gilchrist was brought into the discussions in June 2017. Mr. McGillivray had told Mr. Loder that Mr. Gilchrist wanted to talk to him. When the two were finally able to connect, Mr. Gilchrist raised the matter of the residual indebtedness. I accept that Mr. McGillivray may not have discussed the residual indebtedness with Mr. Loder and that Mr. Gilchrist raised it in his first encounter with Mr. Loder concerning the Grandin acquisition. Neither of these points causes me to question the veracity of Maxium's position that it required the $500,000 promissory note to retire the residual indebtedness from the previous receivership.

109 Although Mr. Schmidt chose not to pursue the duress line of argument at the summary trial, it was nonetheless urged upon me that Mr. Loder was pressured into agreeing to the $500,000 promissory note in June 2017 because of the deadline for making a commitment to the vendors of the Grandin Pharmacy. There may well have been pressure on Mr. Loder to make a commitment, or lose the deal, but that was not placed on him by Maxium. Further, the transaction did not close until November 2017 and he did not sign the promissory note until December 1, 2017. I do not know what other options, if any, apart from Maxium that Mr. Loader may have had to finance this transaction, but certainly if he thought the $500,000 was of suspect validity, he did not have to go through with the transaction. In fact, he says at para 11 of his September 29, 2020 affidavit that regardless of any pressure he might have felt, he would never have signed a document obligating him to pay money that he did not owe.

110 It may well be that Mr. Gilchrist did not specifically mention the Consort pharmacy to Mr. Loder in their June 2017 telephone conversation. However, from Mr. Loder's own recounting of that conversation at para 10 of his March 2, 2020 affidavit, he clearly understood why the request for the additional $500,000 obligation was made.

111 Mr. Wyett's not completely accurate rendition of the origin of the $500,000 obligation should not have occurred and the history should have been more definitively researched before being put in an affidavit before the Court. With Mr. Gilchrist's additional information, the picture is complete. The deficiency in Mr. Wyett's affidavit in 2020 does not mean that Mr. Loder was misled in 2017 or that the residual indebtedness did not exist.

112 Overall, I do not find that there was misrepresentation, misstatement or dishonesty on Maxium's part so as to constitute bad faith under section 66 (1) of the PPSA in the acquisition of its rights in the assets of the corporate debtors in this action.

I further conclude that what happened in June 2017 is too remote in time to constitute lack of good faith for the purposes of section 4.2 of the BIA, but even if not, is insufficient to be bad faith.

113 Mr. Wyett's affidavit evidence about the Consort pharmacy is an example of mistaken or incomplete research but is not an attempt to mislead the Court in these proceedings. It has been corrected by Mr. Gilchrist.

114 Finally, 202 and Mr. Loder did receive value for the promissory note, namely the advance of $500,000 to 195 to retire Mr. Loder's personal obligation to 195. Whether it was the guarantee given to BMO or the guarantee given to 195 for the balloon payment, or more likely some combination, Mr. Loder was still indebted to 195 for the whole of the residual indebtedness. As Mr. Loder rightly points out, but for executing this promissory note of $500,000, 202 would not have been granted the $3 million in financing to buy Grandin.

3. Did Maxium mislead Mr. Loder regarding the restructuring of the loan portfolio?

115 It is clear from the evidence that Mr. Loder and Maxium (first, through Mr. McGillivray, and then subsequently through Mr. Wyett) held serious discussions regarding a restructuring of 202's entire loan portfolio.

116 By 2019, Mr. Loder perceived that the servicing of the $500,000 loan was an undue drag on the pharmacy's cash flow, confirming his earlier fears. He says the burden of this loan was the proximate cause of the business' default on its CRA obligations. Mr. Loder did his own calculations and suggested that a re-amortization of the $500,000 segment from a 3-year term to a 10-year term would reduce the pharmacy's finance costs by more than $10,000 per month. By way of illustration, Mr. Loder said the business paid over $318,000 in respect of this loan since its exception, exceeding what was owed to CRA.

Line of Credit

117 A series of emails were exchanged between Mr. Loder and Mr. McGillivray in the latter half of 2019 in pursuance of this restructuring. From the tenor of these emails, it is apparent that both sides were serious about a restructuring. Mr. Loder had made Mr. McGillivray aware that the pharmacy owed some $200,000 in source reductions to CRA. Mr. McGillivray in turn created a restructuring proposal that included the main acquisition loan, the secondary loan for the previous indebtedness, the CRA liability and an increase in the LOC to $300,000, the latter facility to be carried by CWB not Maxium. The entirety of this restructured indebtedness would be amortized over 10 years. All of this is contained in an email from Mr. McGillivray to Mr. Loder of October 21, 2019.

118 As this email discussion was carried out, Maxium required further and better information from Mr. Loder concerning the pharmacy's financial situation. Maxium submits that Mr. Loder was reticent in providing this information which resulted in delay in getting the restructuring proposal approved. Mr. Loder says he provided all the information that was requested. It does appear that there was some delay in getting accountant-prepared financial information to Maxium but in the end, a restructuring was approved.

119 Email communication does show that Mr. Loder was told that the proposal would be considered by Maxium's credit committee and that the increase to the LOC had been approved. Mr. McGillivray's email of February 1, 2019 to Mr. Loder is clear that the increase to the LOC had been approved. I do not find the email to be cryptic as Maxium's counsel and representatives have suggested.

120 Mr. Thomas, a CWB senior manager at the virtual branch who was in charge of the LOC account, contacted Mr. Loder later in February 2019 and advised that finalization of the increase required receipt of further financial information. Mr. Thomas sent Mr. Loder emails on February 22, 2019 and then March 5, 2019. The first of the February 22 emails is an introductory email. The second of the February 22 emails states:

> Hi Doug, I forgot to remind you in my introductory email that I will require the April 30, 2018 financial statements for the pharmacy. Thanks, Neil Thomas.

121 The March 5, 2019 email requests even further information about the pharmacy business and 202.

122 Over the course of the next few months, Mr. Thomas continued to request further information in support of the request for increase. These emails are exhibited to Mr. Thomas's affidavit of October 15, 2020. It is clear that as late as May 2019, CWB was still not satisfied with the state of the information provided. Mr. Thomas says that it was never fully provided.

123 Mr. Thomas was cross-examined closely about the February 2019 telephone conversation and the emails sent on February 22, 2019 and March 5, 2019. Mr. Schmidt submits that Mr. Thomas' evidence that he told Mr. Loder the LOC increase approval was conditional upon receipt of other information should be rejected outright. He says that Mr. Thomas is simply not believable.

124 Logically, the two February 22 emails could only have been sent after an earlier telephone conversation between Mr. Loder and Mr. Thomas. In the first of the emails, described as an introductory email, no mention is made of additional information. In the second of the emails, Mr. Thomas says that he forgot to remind Mr. Loder that the financial statements for the pharmacy were required to be submitted. From that use of language, the two of them had obviously discussed this requirement before. Since there was only one telephone conversation prior to February 22, the discussion about the need to produce the financial statements must have occurred in that conversation.

125 Mr. Loder responded with some financial information on February 25 but it led to further questions. The March 5 email shows that Mr. Thomas was seeking further information about 202, the actual borrower, including why corporate filings were not up-to-date. Mr. Loder would have known from his previous application for the original amount of $75,000 in LOC that CWB goes through a due diligence process.

126 It therefore seems to me, more likely than not, although not robustly documented, that Mr. Thomas did make Mr. Loder aware that there were certain informational requirements. It also seems that as Mr. Loder provided some information, additional questions arose for which CWB required answers.

127 The evidence shows that the LOC at its $75,000 level began to operate in significant overdraft, starting February 2019. In fact, for the period from April 30, 2019 to March 31, 2020, there were several months where the overdraft position exceeded $150,000, in some months significantly. A June 21, 2019 email from Mr. McGillivray to Mr. Thomas stated that the requested LOC increase was still "pending" but there was concern that the overdraft was trending in the wrong direction.

128 Mr. Thomas noted that for periods in 2018, CWB granted temporary increases to the LOC.

129 It seems that Mr. McGillivray jumped the gun in proclaiming on February 1, 2019 that the requested LOC increase had been granted. However, it should have been obvious to Mr. Loder from the content of the subsequent contact and emails from Mr. Thomas and Mr. McGillivray, and his previous experience with CWB, that final and formal approval was still pending because of the outstanding financial information and the overdraft situation.

130 After Mr. Thomas' involvement, it appears that the issue of an LOC increase merged with the discussions between Mr. Loder and Maxium regarding the overall restructuring.

Restructuring first rejected

131 Starting in June 2019, Mr. Loder engaged with Mr. McGillivray in what he (Mr. Loder) thought were good faith discussions regarding an overall restructuring. Mr. Loder alleges that he was led to believe that the restructuring would occur, that Maxium would take no steps to enforce its security and that Maxium itself (through its credit committee) had the authority to approve the restructuring. This latter allegation takes the form of Mr. Loder's assertion that Maxium failed to tell him that final approval for the restructuring proposal had to be exercised by CWB's head office in Edmonton.

132 Two things are apparent from the various emails that are attached as exhibits D and F to Mr. McGillivray's affidavit of October 15, 2020. The first is that Mr. McGillivray had to make a submission to the credit committee and the second is that Maxium throughout was pressing Mr. Loder for information required to complete the proposal. In a November 29, 2019 email Mr. McGillivray advised Mr. Loder that "finally things are going to the credit committee to get the restructure done."

133 Mr. Loder then deposes at paragraph 27 of his March 2, 2020 affidavit:

> However, the restructuring never happened. Instead, earlier this month, I received, through my solicitor, a demand from CWB-Maximum that I enter into a forbearance agreement. I had no warning of this and was astonished considering what had been told to me about the anticipated restructuring. To put it bluntly, I considered that CWB-Maxium had led me down the garden path, with no intention of actually restructuring the indebtedness. Unfortunately, I believed what CWB-Maxium had told me. Had I known differently, I would have sought refinancing of the indebtedness many months ago and I am confident I would have obtained it.

134 On October 3, 2019, Mr. Loder formed the view that Mr. Gilchrist and Mr. MacLellan, who were higher-ups in the Maxium hierarchy, had decided not to support his restructuring request. Alarmed, he contacted Mr. McGillivray who was the Maxium salesperson or agent with whom he had been dealing. Mr. McGillivray's job was to generate and compile applications for financing. Mr. Loder wrote in an email on that date:

> I only wish you had told me sooner that Darrell and Dan have no intention of refinancing the loan so that I could have moved sooner locally.

135 Mr. McGillivray responded later that day:

> Just found out last couple of days. Came as a surprise.

136 In his questioning on affidavit, Mr. McGillivray was not sure whether he had had any discussions with Mr. Gilchrist and Mr. McClellan concerning their intent, or whether it was a specific refinancing proposal that had been rejected. This turned out to be a temporary setback, as later in October 2019, discussions between Mr. McGillivray and Mr. Loder concerning the refinancing resumed.

137 In the midst of these resumed discussions, Mr. Wyett caused Maxium to send demands to 202 and its guarantors on the two loans. I will discuss the demands further in the section after next.

Restructuring then approved

138 It turns out that Maxium eventually did, in fact, approve a restructuring. It was just not on the terms that Mr. Loder wanted. In particular, in the end Mr. Loder rejected the concept of using a forbearance agreement as the framework for the restructuring.

139 In order to place Mr. Loder's reaction in context, it is necessary to examine three documents relating to the approval of the restructuring. The first is the risk assessment summary dated December 12, 2019, prepared by Mr. Gilchrist and others, and which is exhibit Q to Mr. Gilchrist's affidavit of October 15, 2020. The second is the credit submission addendum, found at tab 42 of the defendants' book of evidence, and referred to at page 79 of Mr. Gilchrist questioning on affidavit of November 17, 2020. The third is the actual CWB approval document, entitled CRM review of CWB Maxium Financial Inc Finance Request, dated February 24, 2020 and found at exhibit R of Mr. Gilchrist's October 15, 2020 affidavit.

140 The risk assessment summary recommends:

> • restructuring the existing debt by recapitalizing the sum of $3.1 million to cover the balance of the main loan ($2.6 million), the balance owing on the secondary loan ($200,000) and the balance owing to CRA ($300,000), and amortizing that that sum over 96 months (8 years);
>
> • replacing the then existing LOC of $75,000 with a LOC of up to $250,000 through CWB's virtual bank.

141 At page 2 of the risk assessment summary, the authors note the pharmacy's cash flow problems, stemming from:

> • The maintenance of an employment contract with the vendor at $180,000 per year representing a premium of $70,000 per year (contract ended in November 2019); and

- The required cash to service the $500,000 loan on a short 36 month amortization.

142 The analysis of cash flow in the summary addresses how the pharmacy's cash flow can sufficiently handle debt service and other cash requirements.

143 The addendum, prepared by Mr. Wyett and another, contains these entries as the first two bullet points under the heading "December 29, 2019 call with Ben Wyett, Mike McGillivray and Loder":

- Loder is receptive to a restructure of his CM debt, pursuant to an FA (subject to CRM approval).

- Loder agrees to pledge his personal residence (wholly owned by him) as security.

144 CM refers to Maxium and FA refers to a forbearance agreement.

145 Mr. Loder was cross-examined on this point of when he first learned of the prospect of a forbearance agreement. He says it was not in a telephone conversation in December 2019 but rather in an email on January 29, 2020. Mr. Wyett testified in his cross-examination that the forbearance agreement was raised in the December 2019 telephone call.

146 I conclude that Mr. Wyett discussed the forthcoming forbearance agreement with Mr. Loder during the December 2019 telephone conversation. I have been given no reason to believe that Mr. Wyett completely fabricated this statement and put it in the addendum.

147 Based on the recommendation of December 12, 2019 and the addendum of January 9, 2020, CWB Senior VP Dave Thomson formally approved the restructuring. The recapitalized amount was $3,117,690, amortized over 8 years. The funds were to be used to pay out the existing Maxium indebtedness and the existing LOC. No new LOC was to be extended and no payment was specifically earmarked for CRA, although there was an expectation that the CRA indebtedness would be stabilized or reduced. This restructuring was premised on the borrower and guarantors providing a forbearance agreement.

148 Clearly, this final restructuring that was approved by CWB was not as favourable to Mr. Loder as the terms that had been proposed by Mr. McGillivray. The internal Maxium email exhibited at N, O and P of Mr. Gilchrist's October 15, 2020 affidavit reveal:

- there were some concerns about Grandin's viability as a business, to the extent that appointing a monitor was suggested as an option;

- as late as December 2, 2019, Maxium was still seeking financial information from Mr. Loder to inform its decision; and

- notwithstanding the concerns about viability, Maxium was still willing to consider different restructuring scenarios to assist Mr. Loder.

149 The final determination at the CWB level was that Grandin's risk profile was such that a forbearance agreement had to form the framework for restructuring on the revised terms.

150 In the end, Maxium was prepared to refinance 202's existing debt and provide a longer- term horizon for repayment of what owing on the $500,000 promissory note, which was Mr. Loder's major complaint. Mr. Loder was not prepared to accept the terms.

151 I do not see anywhere in the evidence where Mr. Loder was promised a particular form of restructuring. The evidence shows that Maxium throughout the fall of 2019 and into early 2020 was working assiduously toward the restructuring that Mr. Loder was seeking. It is also apparent that there were concerns expressed at Maxium about the pharmacy's ongoing viability which resulted in the ultimate decision-maker at CWB approving a revised form of restructuring premised on an executed forbearance agreement. Mr. McGillivray was also clear that any refinancing proposal required higher approval. While Mr.

McGillivray certainly made a recommendation to the credit committee, I do not see where either Maxium or Mr. McGillivray promised a specific outcome to the refinancing request.

152 CWB, as the final approving authority, was entitled to modify the terms of refinancing in accordance with what it felt was in the lender's best interest. Neither CWB nor Maxium were required to subordinate their interests to Mr. Loder by approving a form of restructuring that they felt would jeopardize their security.

153 I find that Maxium did not engage in misrepresentation or dishonesty in dealing with Mr. Loder's refinancing request.

4. Did Maxium represent that it would not enforce its demand?

154 As noted, Maxium sent its demands for payment to 202 and its guarantors on October 18, 2019 with respect to the main loan. This was done at the instance of Mr. Wyett. He testified that 202 had defaulted on both loan segments in that there were insufficient funds in 202's bank accounts to make the payments. Further, Mr. Wyett indicated that Maxium was concerned about the CRA indebtedness that Mr. Loder had disclosed.

155 Mr. Loder contacted Mr. McGillivray upon receipt of the demands. Mr. McGillivray did make a representation at that time that Maxium was not seeking to enforce those demands. He is not sure that he told Mr. Loder "not to worry" and that the demands were only required for Maxium's file, but does not deny that he may have done so. Mr. McGillivray said his intent at the time was to assure Mr. Loder that Maxium was still interested in pursuing a restructuring and working toward that end, although by the demands it was signalling that it was keeping its options open.

156 Mr. Loder argues that this was a false assurance that prejudiced him.

157 Maxium did not act immediately on the demands following the expiry of the payment deadline. Rather, it waited until Mr. Loder decided not to sign the forbearance agreement, which meant that he was rejecting the revised refinancing proposal put forward by Maxium. On February 27, 2020, Mr. Loder's then counsel advised Maxium's counsel by email that the forbearance agreement would not be signed, and provided directions about where the statement of claim could be sent.

158 February 27, 2020 was also the same day that CWB received the RTP from CRA for a sum in excess of $300,000 in respect of 202's unremitted source deductions. Maxium received the other RTP for 202's unpaid income taxes the next day.

159 From the above, it is clear that Maxium did not act on its demands for a period of four months after issuance, and only after it had reached an impasse with Mr. Loder following some eight to nine months of restructuring discussions. Maxium had done its due diligence on the restructuring proposal put forward by Mr. McGillivray, had it vetted by its credit committee and made a recommendation to the final decision-maker, CWB in Edmonton. The revised proposal coming from CWB's head office was premised on a forbearance agreement, which Mr. Loder was not prepared to sign.

160 In the meantime, 202 had remained in default of its loans since November of the previous year. The information that Maxium had gathered posed concern about the pharmacy's sustainability. Then, the RTPs were served and prevented any payments from 202's bank account.

161 Whatever Mr. McGillivray said to Mr. Loder back in October 2019, giving it the most generous reading in favour of Mr. Loder, could not be construed to mean that Maxium would never take enforcement action. Not ever taking enforcement steps on defaulting loans could not be within the contemplation of reasonable commercial parties.

162 I find that Maxium did what it said it would do, that is, it did not take steps to enforce its October 18, 2019 demands until it had reached the end of the road with Mr. Loder with regard to the restructuring discussions. I find that when such discussions failed, both sides expected, as reasonable commercial parties would expect, that the suspension of enforcement action would end.

5. Was the forbearance agreement non-negotiable?

163 Mr. Loder next contends that he and his then counsel were afforded no opportunity to provide input into the forbearance agreement and that it was presented to him on a take it or leave it basis. Foisting the forbearance agreement upon him in this manner is, Mr. Loder argues, further evidence of bad faith.

164 This argument can be resolved by examining the communications exchange between Mr. Wyett and Mr. Loder (found at document 45 of the defendant's book of evidence) and between counsel concerning forbearance agreement (found at exhibit F of Mr. Loder September 29, 2020 affidavit), and some of the preceding events.

165 As recounted earlier, Mr. Loder was alerted to Maxium's request for a forbearance agreement in a December 29, 2019 telephone conversation with Mr. Loder, documented in the February 24, 2020 addendum document. On January 29, 2020 Mr. Wyett wrote to Mr. Loder by email as follows:

> I do not believe I have heard back from you from this request below.
>
> I hope to have a draft forbearance agreement to you this week, so please give your counsel a heads up.

166 The first sentence in the above email refers to financial statements requested but not provided. Mr. Loder testified in questioning that the second sentence was the very first mention to him of a forbearance agreement. If so, it seems quite an abrupt way to introduce the concept of a forbearance agreement. The language used here is more suggestive of the idea of a forbearance agreement having been previously discussed.

167 Mr. Wyett followed up with Mr. Loder in a February 5, 2020 email:

> Further to my voicemail, please provide me with the contact information for your legal counsel. I am hoping to have our counsel send a draft forbearance agreement.

168 Mr. Loder responded the same day with the contact information for Mr. Banack, his then legal counsel. One would think that if the forbearance agreement had been suddenly sprung on Mr. Loder, he might be asking questions about it.

169 It appears that the draft forbearance agreement was sent by Maxium's counsel, Mr. Warner, to Mr. Loder's counsel, Mr. Banack, on February 6, 2020. On February 13, 2020, Mr. Warner was in contact with Mr. Banack by email, looking for a response:

> Jason, the forbearance agreements were sent you a week ago. There has been no response. That is not acceptable. The forbearance agreement has to be properly executed and returned to her office if your client wants to preserve his business. In the event we do not have the executed forbearance and related documents in our office by the close of business today, we will seek instructions to take the next step in this matter.

170 Then another thirteen days went by. On February 26, 2020, Mr. Banack wrote back to Mr. Warner as follows:

> As Doug continues to actively market the Grandin pharmacy for sale and make efforts to bring the outstanding payments up to date, he (and I) have become much less comfortable with the forbearance agreement as presented.
>
> The stricter covenants combined with the various consent orders and absence of revolving credit, in our opinion, put Doug and his business at greater risk than a creditor enforcement proceeding initiated by CWB and/or Maxium (which Doug would contest). If you are instructed to send new demands and/or notices to enforce, I would ask that you copy Jim Schmidt and I.
>
> To reiterate, Doug is actively seeking an exit from the business and part of that sale transaction would necessarily involve a payout of the debt owed to CWB and Maxium (and, so I am told, a settlement offer for McKesson). I have been engaged to act for Doug on the sale and am instructed to make this happen as quickly as possible, and also to provide whatever reasonable assurances your client may request to show that the sale process is progressing.

> Let me know your thoughts?

171 Mr. Warner responded on February 27, 2020 with this email:

> Jason, I have discussed your email with CWB Maxium and I have been instructed to advise you that the Forbearance Agreement, as drafted, must be signed and returned to our office by no later than noon tomorrow, failing which we will proceed with a Statement of Claim and proceed with enforcement. We are also in the process of issuing demands on behalf of Canadian Western Bank. While there may be a few minor nits with the documents, the essence of the documents is the basis upon which CWB Maxium is prepared to continue to do business with your client. Your client has a decision to make.

172 As mentioned in the previous section, Mr. Banack advised Mr. Warner later on February 27, 2020 that the forbearance agreement as prepared would not be signed by Mr. Loder, and that litigation could ensue.

173 From the foregoing, the following can be gleaned:

- first, the forbearance agreement as sent was intended as a draft, at least at first;
- second, Mr. Warner received no feedback from Mr. Banack for a period of 20 days;
- third, the "stricter covenants", along with the consent orders and lack of revolving credit were not acceptable to Mr. Loder; and
- last, Maxium was insisting on the "essence" of the forbearance agreement as drafted.

174 Mr. Wyett in his affidavit suggested that the forbearance agreement was favourable to Mr. Loder and addressed his needs. The actual forbearance agreement is not in evidence before me so I will not comment further on its content. It seems evident that Mr. Loder disagreed with some of the major features of the forbearance agreement and that Maxium was not prepared to relent on those points.

175 I think it fair to say that, at the end of the day, when Maxium said it would not resile from those major components, Mr. Loder's signing of the forbearance agreement was left on a "take it or leave it" basis. From Maxium's perspective, Mr. Loder wanted Maxium to strip away some of the core components which, it seems, it felt was necessary to protect its interests.

176 I do not think that Maxium, in failing to give in to Mr. Loder's objections to the forbearance agreement, engaged in bad faith. Maxium is entitled to do what it feels is reasonably necessary, such as insist on the "essence" of an agreement, to protect its interests. Mr. Loder is similarly entitled to do what he believes is necessary to protect his interests. Both did so, and that is why the matter is now in litigation.

6. Did Maxium's mislead the Court on March 2, 2020

177 It is next asserted, on behalf of Mr. Loder, that comments made by Maxium's counsel before Nielsen ACJ on March 2, 2020, in procurement of the Interim Receivership order, were misleading and, at least in part, induced Nielsen ACJ to make the order. Here are counsel's comments:

> I mean, there's just too much left to speculation here that — and the Interim Receiver, the only thing that the Interim Receiver is going to do is to ensure that this continues to run smoothly. As I said on Friday, and as is set out in Mr. Wyett's affidavit, the existing management will stay in place. The pharmacy will continue to run as it would, would normally in the ordinary course. All that will happen is that funding will be provided from a reliable source to deal with ongoing operations, and the payments that are being made from insurance companies will be intercepted and utilized to offset ongoing operations. That is not that intrusive, in my submission. The management stays there. They continue to operate as they are — ordinarily would. It's just making allowance or making provisions for the preservation of the security of CWB Maxium.

178 Mr. Loder points to the submission that "the existing management will stay in place" and that the pharmacy would continue to operate as it has, and says that is not the reality of what happened. Rather, Mr. Loder alleges that he was effectively fired as the manager of the pharmacy by the Interim Receiver. As evidence, he tenders this email from Mr. Sirrs of MNP Ltd dated March 6, 2020:

> Hello Doug,
>
> As we review the projected cashflows of the Pharmacy we wanted to advise you that amounts typically paid to you in the monthly payroll will not be distributed going forward due to the cash flow deficit the pharmacy is experiencing. We have also discussed with the pharmacists at the clinic and confirmed that they can manage the delivery of the prescriptions (something I understand you were assisting with).
>
> Should you require any further details on this please do not hesitate to contact me.

179 In argument, Mr. Schmidt contended that counsel's statement at the hearing about existing management remaining in place was part of a course of conduct by or on behalf of Maxium that evinces bad faith. If not deliberately misleading, the comment is at best reckless as to its truth and ought not to have been made. Mr. Schmidt said that taking away someone's salary is the very hallmark of wrongful termination.

180 Mr. Warner, in addressing this submission, took great umbrage with Mr. Schmidt's characterization of his comments before Nielsen ACJ, saying the comments were made in good faith. He pointed out that neither he nor Maxium had any control over the actions or decisions of the Interim Receiver, an independent officer of the Court, and that the decision made in respect of Mr. Loder's salary was within the Interim Receiver's powers as conferred by the Court. Mr. Warner further stated that his comments were based on his experience as an insolvency practitioner with regard to Interim Receivership situations. Finally, Mr. Warner submitted that Mr. Loder continues to function at the pharmacy as he previously did. He simply no longer collects the salary.

181 Mr. Schmidt, on Mr. Loder's behalf, takes no objection to anything done by the Interim Receiver.

182 The Interim Receiver's second report to the Court, dated August 25, 2020 indicates that Mr. Cameron Santer is the pharmacy manager. The report also states that "Mr. Loder has continued daily involvement with the company through delivery of prescriptions to customers as required."

183 I am satisfied from the above that the statement made by Mr. Warner to Nielsen ACJ concerning the retention of management during the period of Interim Receivership was not misleading, intended to mislead or recklessly made. It aligns with what happened with regard to the day-to-day management of the pharmacy. I acknowledge that Mr. Loder did lose his salary as a result of a business decision made by the Interim Receiver.

7. Did Maxium fail to disclose to that CWB was the final decision-maker on the restructuring?

184 Here, Mr. Loder argues that Maxium's failure to advise him of CWB's ultimate authority is part of a pattern of conduct that amounts to a breach of statutory good-faith requirements.

185 Mr. Loder knew about CWB's final authority in some aspects of 202's borrowings. For example, he knew that CWB in Edmonton had to grant final authority for the terms of the 2017 $500,000 secondary loan related to the residual indebtedness. During his questioning, Mr. Loder said at page 37, lines 20 to 24:

> ... Also during that conversation in relation to the 500,000, Dan explained to me that there had been back and forth on this particular loan with CWB in Edmonton who had to sign off on this particular loan, and it was in relation to the term.

186 He recounts that Mr. McGillivray had requested a 10 year term, then a 5 year term, but ultimately CWB wanted a 3 year term.

187 In his attempt to obtain an increased LOC from CWB's virtual branch in Edmonton, Mr. Loder similarly understood by May 1, 2019 that CWB had the final sign-off (see transcript, page 78, lines 14 to 18).

188 However, I do not find anywhere in the record of the summary trial where Mr. Loder was explicitly told by Mr. McGillivray or anyone else that the overall restructuring could only be approved by the CWB head office in Edmonton. Many of the emails between Mr. McGillivray and Mr. Loder indicate that Mr. McGillivray was making his submission to the credit committee of Maxium. Mr. Loder also testified to his belief that the Maxium office in Toronto was responsible for administering his loans.

189 Maxium suggests that Mr. Loder, as a sophisticated businessman with extensive experience with banking institutions, would realize there are levels of authority within every lender. That may be so and that may be a reasonable assumption to make about Mr. Loder. However, based on the record, I agree that Mr. Loder was not told explicitly that CWB in Edmonton was the ultimate decision-maker.

190 Having said that, it does not appear to me that this lack of disclosure had any sort of material consequence for Mr. Loder. From the whole course of communications between Mr. McGillivray and Mr. Loder, I think it fair to say that the restructuring proposal prepared by Mr. McGillivray had to be approved by a higher level authority of some sort. Whether was the credit committee in Toronto doing that approval, or the credit committee in Toronto making a recommendation for approval and sending the request to a final decision-maker at CWB in Edmonton, would not have made a difference.

191 Mr. Loder says that he would have conducted himself differently, that had he known it was CWB in Edmonton rather than the credit committee in Toronto, he would have sought earlier refinancing from a different source. How or why he would have done that is completely unknown or unexplained. Mr. Loder offers no evidence beyond the mere assertion. To me, that does not establish proof on a balance of probabilities that he would have obtained refinancing from another lender had he known about CWB.

192 In these circumstances, I do not see how the failure to disclose the exact steps involved in an internal approval process or the levels of authority within an organization, in the case of the private lender, amounts to a breach of the good-faith requirement. Good faith in private commercial relations is not the same as a duty of fairness and transparency with regard to decision-making in the public law realm.

K. Application of Factual Findings to the Law

1. Summary of the Findings

193 I have concluded the following on a balance of probabilities:

- Mr. Loder was not told that the purpose of the secondary loan of $500,000 (evidenced by promissory note) was to deal with his guarantee to McKesson Canada.

- The residual indebtedness actually existed, based on the shortfall of $970,000 left from the Loder Group receivership and, at least in part, remaining from the unpaid balloon payment in relation to the Consort pharmacy. Mr. Loder understood that the secondary loan was funded to eliminate the remaining debt from the previous receivership, which had been guaranteed by him.

- Maxium did not mislead Mr. Loder about whether a restructuring would materialize and did not promise a particular form of restructuring. In the end, Maxium offered a restructuring, but it was not on terms that Mr. Loder found acceptable (particularly as it did not involve any revolving credit, let alone an increase, and required a forbearance agreement).

- Maxium did represent to Mr. Loder (through Mr. McGillivray) that it would not enforce its October 2019 demands. This representation could not reasonably be construed to mean that Maxium would never enforce the demand. Once Mr. Loder and Maxium reached an impasse on the form of restructuring, it was reasonable for the parties to expect that Maxium would proceed with enforcement.

• The forbearance agreement was presented as a draft. The parties could not agree as to the critical elements, including the giving of consent orders. Only at the point when the parties reached impasse, the critical elements became non- negotiable.

• Maxium's counsel did not mislead the Court, deliberately or recklessly, on March 2, 2020 with the submission that the existing pharmacy management would remain in place.

• Maxium did not specifically disclose to Mr. Loder that, beyond Maxium's credit committee in Toronto, CWB's head office in Edmonton was required to give final approval to restructuring. However, Mr. Loder has not proven to the Court's satisfaction that anything would have been different had this fact been specifically disclosed.

2. Estoppel

194 The parties are agreed on the elements of estoppel. The plaintiffs cite B & R Development Corporation Ltd v Trail South Developments Inc 2012 ABCA 351 at para 23 for this statement of the law:

> There are two components to an action in promissory estoppel: (1) the party invoking the doctrine must prove that the other party made, by virtue of word or deed, a promise or assurance intended to alter their existing legal relationship and to be acted upon by the party receiving the assurance; and (2) the recipient of the assurance acted upon it in a manner which changed his or her position.

195 The defendants cited Vision West Development Ltd v McIvor Properties Ltd 2012 BCSC 302 at paras 63-65 for the same proposition.

196 The defendants rely on Maxium's promise of restructuring and Mr. McGillivray's advice to Mr. Loder that the October 2019 demands would not be enforced as constituting the words and conduct that altered the existing legal relationship. Mr. Loder says that these words and conduct were interpreted by him to mean that the existing legal relationship was changed in that Maxium's legal rights of enforcement would not be relied upon. Detrimental reliance is shown, Mr. Loder says, when he did not pursue other refinancing options that surely would have been successful.

197 As I found, Maxium did not go back on its word in this regard. It actually did offer a form of restructuring to Mr. Loder.

198 Further, Mr. McGillivray's words that Maxium would not call the loan must be placed in context. That context was that the parties were in the midst of restructuring discussions and Mr. McGillivray was in the process of putting together a restructuring proposal. Those words could not possibly be construed by reasonable commercial persons as meaning that Maxium had forever relinquished its enforcement rights. It would be obvious to reasonable commercial parties that when the impasse was reached with regard to the forbearance agreement and Mr. Loder expressed a preference to litigate instead of sign the forbearance agreement as presented, any previous words regarding not enforcing remedies on Maxium's part no longer applied.

199 Indeed, at para 38 of the defendants' January 8, 2021 brief, Mr. McGillivray's remarks were characterized as a "deferral of enforcement steps". That, to me, is an accurate description of what Mr. McGillivray said. It was a deferral not a relinquishment. The deferral lasted four months.

200 Finally, as I stated above, Mr. Loder has not satisfied me that other successful refinancing options were forgone as a result of Maxium's words, conduct or omissions.

201 In consequence, estoppel fails as a defence.

3. Lack of Good Faith

202 I stated above that, for the purposes of a secured creditor's conduct in the circumstances at hand, the standard of good faith should be consonant with that expressed by the Supreme Court of Canada in pronouncing upon the organizing principle

of good faith in contract law in cases such as *Bhasin* and *Callow*. That standard requires the actor to avoid dishonesty or lying. It does not bind the actor to a duty of loyalty or disclosure. It does not require a party to subordinate its interests.

203 As said, such a requirement of good faith as expressed in section 66 (1) of the PPSA relates to a secured creditor's acquisition of or exercise of rights under a security agreement. In relation to section 4.2 of the BIA, the good-faith requirement relates to a secured creditor's invoking and conduct of insolvency proceedings under the *BIA*.

204 Given my factual findings above, I further find there has been no breach of the good-faith requirement in either context because neither Maxium nor its representatives engaged in dishonesty or lying in its dealings with Mr. Loder, either at the time of initiating the loans in 2017 or during the restructuring talks throughout 2019 and early into 2020.

205 I did find that Maxium had failed to disclose that CWB had ultimate decision-making authority with regard to the restructuring. However, I also found that Mr. Loder would have some general understanding, as a business person of his experience, that there was an approval process beyond Mr. McGillivray. I also accept Mr. Warner's submission (see para 48 of reply brief dated January 20, 2021) that it is not industry practice to advise a customer exactly who within the organization has the authority to approve a particular credit submission, nor does the good faith requirement imply such an obligation.

206 This is not a case like *Callow* where one party, through silence, misled the other about the state of relations between the two and thereby received the benefit of free services. In this case, Maxium was always engaged in a process of working toward a restructuring, but in the end, the parties could not reach consensus on what the restructuring should entail.

207 Furthermore, some of events occurring between January 2019 and October 18, 2019 (the date on which the Maxium demands were sent) are too remote in time to be "with respect to" these proceedings within the meaning of section 4.2 of the BIA, but even if not, for the reasons stated above still fall short of bad faith. I do consider the course of events in 2017 to be too remote in time for the purposes of section 4.2 of the BIA and therefore confine my analysis of the good faith requirement in that timeframe to Maxium's acquisition of its security interest for the purposes of section 66(1) of the PPSA.

208 In the result, there is no defence based on lack of good faith, and no remedy is available to the defendants under section 4.2 of the BIA or section 66(1) of the PPSA. My conclusion regarding section 4.2 takes into account the intent and policy objectives of the *BIA*. Here, the proceedings have not been invoked for some oblique or improper purpose but rather to subject the assets of an insolvent debtor to an orderly, Court-supervised process for the benefit of interested parties.

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 ABQB647 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 option on the table. In a September 29, 2020 affidavit, Mr. Loder adverted to his attempts to find a buyer for the pharmacy. In the ensuing five months, nothing has materialized before the Court as to a realistic sale.

• In the absence of any viable or realistic plan on Mr. Loder's part as to how he intends to extricate the pharmacy from its current predicament, and given the length of time that has elapsed since the Interim Receivership order, I am left with the conclusion that he has run out of options.

• No payments have been made on any of the Maxium loans or CWB indebtedness for a period of over a year.

• Maxium says, and it is not disputed by Mr. Loder, that the best avenue for maximizing recovery is a sale of the pharmacy as a going concern. Maxium's counsel suggests, and I accept, that the major asset is the goodwill associated with the pharmacy's business.

• The purpose of the Interim Receivership was to preserve the assets pending a final determination one way or the other. Based on the foregoing, I conclude that the pharmacy with its present indebtedness would have little or no chance of survival if the Interim Receiver were discharged and the pharmacy business turned back over to Mr. Loder. Maxium's security is therefore in jeopardy.

• Maxium's security documentation contractually provides for the appointment of receiver. The extraordinary nature of the receivership remedy is attenuated somewhat by such a provision.

213 I find that Mr. Loder's allegations against Maxium, which I have dealt with at length above and even where supported, do not constitute grounds on which to refuse a final order of receivership based on the "just and convenient" test.

214 I accept Maxium's argument that a transparent, Court-supervised process under which a Receiver uses its expertise and professional contacts provides the best option for selling the pharmacy as a going concern and maximizing recovery for all concerned, including Mr. Loder. I find that it is just and convenient to appoint a receiver over the assets of the corporate defendants.

M. Coda

215 These reasons should not be read as a ringing endorsement of Maxium's conduct. I did find that Maxium did not engage in deception or dishonesty in its dealings with Mr. Loder but that is not to say that it achieved high levels of customer service in its handling of this account.

216 First, Maxium could have saved itself a lot of grief by simply sending Mr. Loder a letter back in June 2017 to confirm the purpose of the $500,000 loan and promissory note, rather than only documenting it internally.

217 Second, Maxium did itself no favours by having different individuals within the organization send him apparently mixed messages. Mr. Wyett sent Mr. Loder demand letters in October 2019 during the midst of Mr. McGillivray attempting to put together a restructuring proposal for the pharmacy business. While I realize that Maxium was "keeping its options open" by sending the demand letters when the loans were in default, it gave the impression that Maxium was working at cross purposes

with itself, or that one hand did not know what the other was doing. Maxium would have been better off telling Mr. Loder about the demand letters in advance and properly contextualizing them for him, so as to avoid any confusion on his part.

218 Third, while I found there was no duty of disclosure and no industry established practice, the experience of this case might suggest to Maxium that, as a matter of practice not of law, it might well be beneficial for all to consider explaining to customers the limits and levels of authority for approval of credit submissions, if only to set and manage expectations.

219 These gaps in communication no doubt contributed to Mr. Loder's suspicions and what now has been a year's worth of costly litigation.

220 If the parties require a further brief hearing to settle the contents of the final order of receivership, they should contact the commercial coordinator to obtain a date.

221 Mr. Quinlan, on behalf of the Interim Receiver, appeared briefly at the start of the first day of hearing and was excused for the balance of the two days.

Application granted.

Footnotes

1 Since the hearing of this matter, the Supreme Court of Canada delivered its decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,*, 2021 SCC 7, which further elaborates on the nature of the duty of good faith in exercising discretion conferred by the contract.

2 Wood, Roderick J., A Guide to the Alberta Personal Property Security Act (February 22, 2017). Available at SSRN: https://ssrn.com/abstract=2922196.

TAB 13

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.
Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered

that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*, [8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms* [9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*, [10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act* [11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available." [12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne [*]

Table of Authorities

Cases considered by *Romaine J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., *(*sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, *(*sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

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

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

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

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

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

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

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

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

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

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

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

has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

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

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

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

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

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

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

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

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

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

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

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

Should the ex parte order now be set aside?

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

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

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

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

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen.

Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

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

Should the order be stayed?

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

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

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

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

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

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

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

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

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

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

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

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

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

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

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

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

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

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

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

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

12 Para. 20.

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