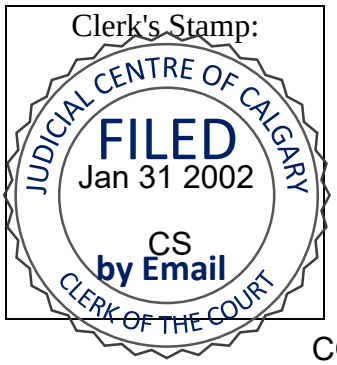
C20495

Clerk's Stamp:



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Feb 8 2022

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COURT FILE NUMBER	2201-01016
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ROBUS SERVICES LLC
DEFENDANTS	ROBUS RESOURCES INC. and ERNEST METHOT
DOCUMENT	**BOOK OF AUTHORITIES OF ROBUS SERVICES LLC**

Receivership Application scheduled to be heard on February 8, 2022 at 2:00 pm, before the Honourable Justice Hollins on the Commercial List

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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LIST OF AUTHORITIES

Tab	Document
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Judicature Act*, RSA 2000, c J-2
3.	*Murphy v Cahill*, 2013 ABQB 335
4.	*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311
5.	*Schendel Management Ltd, Re*, 2019 ABQB 545
6.	*Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430
7.	*Kasten Energy Inc v Shamrock Oil & Gas Ltd*, 2013 ABQB 63
8.	*RMB Australia Holdings Ltd v Seafield Resources Ltd*, 2014 ONSC 5205
9.	*Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc*, 2012 BCSC 437
10.	*RBC v Gustin*, 2019 ONSC 5370
11.	*Royal Bank v Sun Squeeze Juices Inc*., [1994] OJ No 567 aff'd 28 CBR (3d) 201 [No Hyperlink Available]
12.	*Brandon Packers Ltd., Re*, 33 DLR (2d) 503 (Man CA), leave to appeal to SCC refused [No Hyperlink Available]
13.	*Bank of Montreal v Owen Sound Golf & Country Club Ltd*., 2012 ONSC 557
14.	*Chow v Bresea Resources Ltd.*, 160 WAC 284, 209 AR 284

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to January 12, 2022

Last amended on November 1, 2019

À jour au 12 janvier 2022

Dernière modification le 1 novembre 2019

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Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

Vérification des comptes

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

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

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

Definition of *receiver*

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

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

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

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

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

Définition de *séquestre*

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

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

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

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

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

Trustee to be appointed

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

Syndic

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

Place of filing

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

Lieu du dépôt

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

Orders respecting fees and disbursements

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

Ordonnances relatives aux honoraires et débours

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

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.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

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

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

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

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

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

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

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

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

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

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

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

RSA 1980 cJ-1 s8

Province-wide jurisdiction

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

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

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

RSA 1980 cJ-1 s10

Declaration judgment

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

RSA 1980 cJ-1 s11

Canadian law

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

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

TAB 3

2013 ABQB 335
Alberta Court of Queen's Bench

Murphy v. Cahill

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

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

J.B. Veit J.

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

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

operations of the companies. Furthermore, the appointment of an interim receiver-manager would presume that Mr. Murphy's position with respect to the corporate structure is correct and that he is therefore entitled to present this application. However, the only evidence on this application with respect to the corporate structure consists of documents apparently executed by Mr. Murphy which require him to go to arbitration to solve management disputes rather than to invoke the assistance of courts. Also, in light of the Inspector's opinion about the current status of the companies, it is obvious that the appointment of an interim receiver-manager would not deal effectively with the real problems facing this group of companies. Also, the appointment of an interim receiver-manager would give Mr. Murphy the relief which he requests without addressing the fundamental issue of corporate structure.

14 Lastly, the biggest hurdle which Mr. Murphy faces in obtaining this relief on an interim basis is his acknowledgement that he would be prepared for a final hearing on the merits of his oppression application within months, a timing estimate with which the respondents agree. In such a situation, especially where the consequences of the appointment of a receiver-manager would be so dire from the respondents' perspective, there can be no justification for proceeding with an interlocutory remedy without a full hearing on contested evidence when a full hearing can finally resolve the crucial factual disputes between the parties.

Cases and authority cited

15 *By the Applicants:* *Murphy v. Cahill*, 2012 ABQB 220 (Alta. Q.B.); *R. v. Canadian Consolidated Salvage Ltd.*, 2012 ABPC 133 (Alta. Prov. Ct.); *Murphy v. Cahill*, 2012 ABQB 446 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 530 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 531 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 793 (Alta. Q.B.); *Murphy v. Cahill*, 2012 ABQB 754 (Alta. Q.B.); *Business Corporations Act*, R.S.A. 2000, c. B-7, s. 242(3)(b) and Part 8; *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.*, 1999 ABQB 406 (Alta. Q.B.); *BCE Inc., Re*, 2008 SCC 69 (S.C.C.); *Seidel v. Kerr*, 2003 ABCA 267 (Alta. C.A.); *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.); *Kumra v. Luthra*, 2010 ABQB 772 (Alta. Q.B.); *Citibank Canada v. Calgary Auto Centre* (1989), 98 A.R. 250 (Alta. Q.B.); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Chow v. Bresea Resources Ltd.* (1997), 209 A.R. 284 (Alta. C.A.); *Garratt v. Charlton*, 2012 ONSC 1129 (Ont. S.C.J.); *Fernando v. Francis*, [2007] O.J. No. 1644, 2007 CarswellOnt 2619 (Ont. S.C.J. [Commercial List]); *781952 Alberta Ltd. v. 781944 Alberta Ltd.*, 2003 ABQB 980 (Alta. Q.B.); *Deluce Holdings Inc. v. Air Canada*, 1992 CarswellOnt 154, 98 D.L.R. (4th) 509 (Ont. Gen. Div. [Commercial List]); *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565 (Alta. Q.B.); *Connelly v. Connelly-McKinley Ltd.*, 2010 ABQB 515 (Alta. Q.B.); *Seymour Resources Ltd. v. Hofer*, 2004 ABQB 303 (Alta. Q.B.); *719946 Alberta Ltd. v. Alberta's B.E.S.T. Inc.*, 2005 ABQB 771 (Alta. Q.B.); *Such v. RW-LB Holdings Ltd.* (1993), 15 Alta. L.R. (3d) 153 (Alta. Q.B.); *Stech v. Davies* (1987), 80 A.R. 298 (Alta. Q.B.); *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, ss. 96(3), 323(1) and 330; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended, s. 227.1; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 128; *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Co.* (1978), 23 N.B.R. (2d) 261 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301 (Ont. Bktcy.); *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.* (1992), 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.) [1992 CarswellOnt 4933 (Ont. Gen. Div.)]; *Weaver v. Cahill*, 2011 ABCA 290 (Alta. C.A.); *R. v. Cahill*, 2006 ABCA 119 (Alta. C.A.).

16 *By the Respondent, Margaret Cahill: Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.), *Bennett on Receiverships*, Second Edition, pages 130-132; *Bennett on Receiverships*, Second Edition, pages 138-140; *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 (Alta. Q.B.); *Murphy Oil Co. v. Predator Corp.* (2002), 7 Alta. L.R. (4th) 369 (Alta. Q.B.); *Spartan Drilling Ltd. v. Snowhawk Energy Inc.* (1986), 46 Alta. L.R. (2d) 67 (Alta. Q.B.); *Kumra v. Luthra*, [2010] A.J. No. 1581 (Alta. Q.B.); *Citibank Canada v. Calgary Auto Centre*, [1989] A.J. No. 347 (Alta. Q.B.); *Alberta Health Services v. Networc Health Inc.*, [2010] A.J. No. 627 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) (para 18); *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, [2010] A.J. No. 1189 (Alta. Q.B.); *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] A.J. No. 358, 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.) para 9; *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.); *Goebel v. Edmonton (City)*, [2004] A.J. No. 193 (Alta. C.A.); *Monco Holdings Ltd. v. B.A.T. Development Ltd.*, [2005] A.J. No. 1218 (Alta. Q.B.); *Lindsey Estate v. Strategic*

62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:

"It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see *Bell ExpressVu Limited Partnership v. Torroni* (2009), 94 O.R. (3d) 614 (C.A.), at para. 22, citing *Hobbs v. Hobbs* (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.

"The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.), at para. 13.

55 In the circumstances of this case, I have concluded that the sealing order was not sufficiently clear and unequivocal so as to provide a basis for a contempt finding. As I understand it -in the absence of a transcript of the proceedings that led to the making of the sealing order - the sealing clause of the order appointing the Inspector was not the subject of real discussion amongst the parties. No notice of the application to request a sealing order was brought pursuant to the provisions of R. 6.29 for a restricted court access order; therefore, there was no elucidation on the record of the intended objective of the sealing order. In those circumstances, the parties may understandably have been of the view that the obligation to prevent disclosure of the order and its terms rested essentially on the Inspector. Such an interpretation would have been reasonable, given the type of information which the Inspector was to uncover, relating for example to real estate appraisals; such information, if publicly disclosed, might have put the companies at a disadvantage in dealing with the properties and the corporate disadvantage would have had negative consequences for all the shareholders.

56 Incidentally, the existence of the sealing order would also limit the Inspector's ability to approach outside sources for information. That reality is reflected in the Inspector's answer to the court's query about which, if any, of the allegations made in the Third Report could be effectively assessed by the Inspector: the Inspector could not, as suggested by Mr. Murphy, merely go to a lawyer and ask that lawyer if s/he is driving a vehicle leased to the companies, and, if so, under what authority.

4. What test applies to a request for the appointment of an interim receiver-manager?

57 Mr. Murphy asserts that a strong *prima facie* case of oppression constitutes a sufficient basis for the appointment of an interim receiver- manager under the *Business Corporations Act* and that a test comparable to the tripartite test for interlocutory injunctive relief is the test that should be applied in relation to the *Judicature Act* application. Mr. Murphy adds that deadlock is sometimes mentioned as a justification for the appointment of a receiver-manager and that Lee J. has, in these very proceedings, made a finding of deadlock even though that finding did not result in Lee J.'s acquiescence to the request for the appointment of an interim receiver-manager.

58 The respondents assert that the test for the appointment of an interim receiver-manager under the *Business Corporations Act* is akin to the test for the issuance of an interlocutory injunction, i.e. the tripartite test set out in *RJR-MacDonald Inc.*

59 In essence, the difference between the parties on this issue is whether proof of irreparable harm is a necessary hurdle for an applicant requesting the relief requested here.

60 In my view, the respondents are more nearly correct on this issue than is the applicant: as the applicant himself recognizes, this court has, in *MTM Commercial Trust*, noted with approval the decision in *Anderson v. Hunking* [2010 CarswellOnt 5191 (Ont. S.C.J.)] which stated, among other things, that "the test for the appointment of a receiver is comparable to the test for injunctive relief". Indeed, it may be useful to quote from that decision more extensively:

> 15 Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> > (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

TAB 4

1994 CarswellQue 120
Supreme Court of Canada

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

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

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

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

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

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

Proceedings: Applications for Interlocutory Relief

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

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

I. Factual Background

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

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

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

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act.

Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment* , SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravе cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act* , R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada* , SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act* .

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

15

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

16

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to s. 2(*b*) of the *Charter* , the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious

question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's

this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988),

48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

TAB 5

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

***M.J. Lema J.*:**

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the Bankruptcy and Insolvency Act (BIA) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) BIA, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

- Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

- after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

- the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

• Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

• however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

• on March 22, 2019 and in response, Schendel filed a notice of intention to file a proposal under s. 50.4(1) BIA, triggering a stay (under s. 69.1 *BIA*) of enforcement action by ATB and other creditors;

• on April 18, 2019, Mah J. granted a 45-day extension and dismissed an application by ATB to lift the stay and appoint a receiver or interim receiver;

• on June 3, 2019, Little J. granted an interim extension to allow time for a further extension application;

• on June 11, 2019, Yamauchi J. granted a further extension, to July 11, 2019;

• on July 10, 2019, Schendel filed a proposal to ATB and its other creditors;

• the proposal treats ATB's claim (approximately $22 million) in two segments: it gauges the secured portion of ATB's claim at $11.2 million and the unsecured portion at $11 million. ATB's secured claim is the sole occupant of Secured Class; its unsecured portion joins other unsecured creditors in steerage. (Various other secured creditors are excluded from the proposal);

• by virtue of the solo nature of its secured claim, ATB has a veto over the proposal i.e. if it votes no to the proposal, it will fail, per para 62(2)(b) *BIA*. (ATB does not contest that aspect);

• for whatever difference it makes, ATB may also have a veto in the unsecured class, at least for Mechanical;

• ATB contends that, with no order consolidating the affairs of the three Schendel companies for proposal purposes, Schendel was not authorized to file a joint proposal;

• assuming that a joint proposal is authorized, the creditors' meeting to vote on it is set for July 31, 2019;

• on July 12, 2019, ATB applied for the deemed-refusal and stay-lifting orders described at the outset and heard at the application on July 16, 2019;

• ATB intends to vote no at the meeting, based on having lost confidence in Schendel's management, on Schendel's ongoing losses, on concerns about preferential payments having been made to certain pre-NOI creditors, on losing access (under the proposal) to personal guarantees, and on its perception that it will fare better in a bankruptcy or receivership than under the proposal (among other grounds);

• it argues that, in light of that position, which it maintains is fixed, the failure of the proposal on July 31, 2019 is a foregone conclusion and that, accordingly, the proposal should be "deemed refused" under ss. 50(12) or the s. 69.1 stay should be lifted (or both), followed the appointment of PwC as receiver-manager; and

• as noted, Schendel is opposed, citing the possibility of an amended (and enhanced) proposal between July 16 and 31 and, more fundamentally, based on what is perceives as the commercial unreasonableness of and inequitable and improper conduct by ATB. It believes the proposal process should continue until July 31 at which time the proposal (existing or amended) can be voted on by all of its creditors.

C. Issues

4 The issues are:

42 In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on "proposal deemed refused" application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the Judicature Act. Schendel opposes.

Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [13], Romaine J held:

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;

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

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

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

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

. . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
    - the Proposal is not viable;
    - the Debtors operate at a loss;
    - the Proposal will not be approved by [ATB]; and
    - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

TAB 6

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

***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?

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.

TAB 7

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

***Donald Lee J.*:**

Introduction

1 This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

Facts

2 Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

3 Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

4 The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of $567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

5 On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

6 By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

7 As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

8 On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

9 At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

10 On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58 which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

11 The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

12 The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

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

Parties' Positions and Analysis

13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

> 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;

18 The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

19 Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

22 Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

23 In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

24 In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

25 Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments

TAB 8

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured

> creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

TAB 9

2012 BCSC 437
British Columbia Supreme Court [In Chambers]

Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.

2012 CarswellBC 813, 2012 BCSC 437, [2012] B.C.W.L.D. 4215,
217 A.C.W.S. (3d) 94, 24 C.P.C. (7th) 1, 93 C.B.R. (5th) 57

Canadian Imperial Bank of Commerce, Petitioner and Can-Pacific Farms Inc., Daljit Singh Kooner, Manjeet Samra and Raman Samra, Respondents

Burnyeat J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: Vancouver H100986

Counsel: G. Thompson, for Petitioner
K.E. Siddall, for Respondents

***Burnyeat J.*:**

1 These are foreclosure proceedings. This is an application pursuant to s. 143(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*B.I.A.*"), and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The application would see the appointment of KPMG as the Receiver of the property, which is a berry farm in the Lower Mainland ("Property"). The application requests that the Receiver have borrowing powers up to $75,000 and the ability to sell particular assets but with any sale transaction not to exceed $50,000 and the aggregate of all sales not to exceed $250,000. Can-Pacific Farms Inc. ("Can-Pacific") has also commenced proceedings pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*C.C.A.A.*")

Background

2 There was a loan in April of 2010 for $10 million to Can-Pacific with a guarantee by its principal and sole shareholder, Mr. Kooner. In support of that loan, a general security agreement and mortgage charging all of the property, assets and undertaking of Can-Pacific was provided.

3 In July 7, 2010, demand was made for repayment of the balance that was owing at that time, being roughly $7,500,000. As well, a notice of intention to enforce security was provided pursuant to both the *B.I.A.* and the *Farm Debt Mediation Act*, R.S.C. 1997, c. 21. No payments were made and Can-Pacific did not seek mediation under the *Farm Debt Mediation Act*. These foreclosure proceedings were then commenced on August 10, 2010.

4 In September 2010, the parties came to an agreement which was subsequently encapsulated in a forbearance agreement. The Petitioner agreed that it would only take a three-month redemption period on any application for an order nisi of foreclosure. Can-Pacific agreed to make certain payments during the term of the forbearance agreement and keep the Petitioner informed regarding its effort to obtain refinancing. The Petitioner submits that it was not informed of the efforts to obtain refinancing and that Can-Pacific was in default under the forbearance agreement by September 22, 2010.

5 The Petitioner also discovered that Can-Pacific had been using its funds to fund a proposal filed under the *B.I.A.* by a related company, Meadow Creek Cedar Ltd. Various other defaults occurred. Those defaults had not been cured by late November 2010.

6 On December 2, 2010, the Petitioner discovered that Can-Pacific and Mr. Kooner were continuing to use Can-Pacific monies for the benefit of Meadow Creek. The Petitioner instructed its counsel to continue with the foreclosure proceedings and

January 12, 2011 was set as the date when an application was to be made to apply for an order nisi of foreclosure. As a result of further negotiations, an agreement was reached that a redemption period of six months would be sought by the Petitioner and that any order would not be entered for a period of three months to accommodate the attempts of Can-Pacific to conclude refinancing arrangements.

7 The Order Nisi of Foreclosure was granted on January 9, 2011. Judgment was granted against Can-Pacific and Mr. Kooner for $7,361,232.05 with the six-month redemption period to expire on July 19, 2011. To date, the Petitioner has not undertaken enforcement proceedings against Mr. Kooner or against other assets owned by Can-Pacific.

8 The Petitioner learned that Can-Pacific had sold its 2011 berry crop and had deposited the proceeds with another financial institution despite the fact that the accounts receivable reflected by the sales constituted funds available to the Petitioner under its security.

9 The application of the Petitioner on July 21, 2011 for an Order for Conduct of Sale was granted by the Court. The Property was listed for sale with Colliers International at a listing price of $13.5 million. The listing price was subsequently reduced to $12.5 million, then to $11.5 million, and then to $11 million.

10 The materials which are in evidence indicate that there was an appraisal done in April of 2011 indicating a value of the Property of $15 million if a freezer building that is partially constructed on the Property was completed.

11 Despite the optimism in the appraisal and despite the optimism of the listing prices, only two offers were received by December 2011, being an offer of $8 million and an offer of $9 million. The subject clauses on those two offers were never removed.

12 The balance owing to the Petitioner is approximately $7.5 million. Taking into account the real estate commission, the property taxes which are in arrears for approximately $25,000, the balance owing under the security of the Petitioner and of the second mortgage, and the claims of builders lien which have been filed against the Property, it would take a sale of in excess of $8.6 million to clear those debts. Any such sale would not provide payment for unsecured trade creditors of approximately $600,000 and the significant shareholders loan from Mr. Kooner of $5.5 million.

13 The Petitioner obtained short leave to have this application for the appointment of a Receiver heard on February 15, 2012. On February 14, 2012, Can-Pacific filed for mediation under the *Farm Debt Mediation Act* which had the effect of staying the Petitioner's ability to proceed with the application. That stay was subsequently lifted by the Farm Debt Mediation Service. On February 27, 2012, an appeal of that decision was taken by Can-Pacific and, on March 6, 2012, the Farm Debt Mediation Service dismissed the appeal and filed a notice of termination of the stay of proceedings.

14 The application before me is one which should, pursuant to the principles set out in *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]), result in the order requested being granted as a matter of course. Accordingly, I make the order requested. What has happened between the parties makes the appointment of a Receiver inevitable. In the case at bar, Can-Pacific has not met the onus of showing that there are compelling commercial or other reasons why such an order ought not be made. It would ordinarily be the case that the appointment of a receiver should be made as a matter of course: *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149 (B.C. S.C.); *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]); *Ross v. Ross Mining Ltd.* (2009), 57 C.B.R. (5th) 77 (Y.T. S.C.); and *United Savings Credit Union*, *supra*.

15 In that regard, the Order Nisi has been granted so that there can be no doubt as to the legitimacy of the security of the Petitioner; an Order for Conduct of Sale has been granted; two offers of $9 million and $8 million have been received but without the subject clauses being removed; there is a possible shortfall to the creditors having secured or other claims against the Property if the Property can only be sold for less than $8.6 million; no interest payments have been made for about 19 months; efforts under the *Farm Debt Mediation Act* have failed; and monies otherwise available to the Petitioner have been diverted by Can-Pacific.

16 Counsel has drawn to my attention the decisions in *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]) and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 (B.C. S.C. [In Chambers]), where the Court concluded that it was necessary to show that it was just and convenient to make an appointment before an appointment of a receiver would be made. In *Textron*, judgment had not been obtained. The same was the case in *Maple Trade*. From the Reasons, it is clear that the decision in *United Savings Credit Union* and the decisions relied upon in that decision were not drawn to the attention of the Court in *Maple Trade*. The decision in *United Savings Credit Union* was considered by the Court in *Textron*, but the Court relied on the decision in *Maple Trade* which had not considered the decision. While I am able to distinguish the decisions in *Textron* and *Maple Trade* on the basis that they dealt with applications for the appointment of a receiver prior to judgment being obtained, I find no need to do so as I am satisfied that neither decision correctly states the law in British Columbia.

17 On the assumption that I am incorrect in arriving at the conclusion that an order for a receiver should go as a matter of course, I also find that it would be just and convenient for this appointment to be made. In particular, I take into account the dissipation of assets which has occurred as a result of the activities of Can-Pacific in using the sale proceeds from the sale of berries other than in accordance with the security of the Petitioner, the apparent deterioration of the Property as evidenced by the state of cleanliness and repair that was present when the security was first put in place and what is evident now, and the fact that no interest has been paid to the Petitioner for approximately 19 months. Other than the fact that the order takes effect from today, I do not see any commercial or other reasons why any harm will come to Can-Pacific as a result of the appointment.

18 I am satisfied that the order requested by the Petitioner should be granted. In view of the fact that there is a filing under the *C.C.A.A.*, I will stay all aspects of the appointment for a period of two weeks to April 2, 2012. That stay includes any statutory or common-law obligations of the Receiver in the interim. Accordingly, the Receiver will not be in a position to take possession. It will not be required to undertake those matters which are set out in the Order. It will not be necessary to take any of the statutory or common-law obligations ordinarily imposed on a Receiver.

19 The stay will end at 4:00 p.m. on April 2, 2012. I adjourn the application under the *C.C.A.A.* Counsel will set a date for a full-day hearing on the question of whether the orders sought under the *C.C.A.A.* should be made.

Application granted.

TAB 10

2019 ONSC 5370
Ontario Superior Court of Justice

RBC v. Gustin

2019 CarswellOnt 14764, 2019 ONSC 5370, 310 A.C.W.S. (3d) 19, 73 C.B.R. (6th) 289

MNP Limited (Receiver) and Royal Bank of Canada (Applicant) and Grant Gustin (Respondent)

H.A. Rady J.

Heard: September 13, 2019
Judgment: September 16, 2019
Docket: 35-2225602T

Counsel: J. Ross MacFarlane, for Receiver, MNP Limited
Timothy C. Hogan, for Applicant, Royal Bank of Canada
Benjamin Blay, for Respondent

***H.A. Rady J.*:**

Introduction

1 MNP, the Court appointed Receiver, seeks the Approval of its first report dated August 30, 2019 and various related relief. The only controversy is whether the Court can and should order the relief sought in para. 8 of the proposed draft order. It authorizes the Receiver to file an assignment in bankruptcy on behalf of the debtor. Royal Bank of Canada supports the relief and Mr. Gustin opposes.

2 I pause here to note that the receiver was also seeking relief against 1886890 Ontario Limited and Frank Gustin, who is Grant Gustin's father. He and the numbered company filed a responding motion record opposing some of the relief the Receiver's being requested. I am advised that the Receiver and Mr. Gustin Sr. have reached an accommodation and as a result, he did not participate in the motion.

Facts

3 Grant Gustin has been a farmer operating a hog and cash crop farm in Petrolia on land he owned at 4715 Lasalle Line and also rented elsewhere.

4 Royal Bank of Canada holds a mortgage on the property and a first ranking general security agreement. Mr. Gustin is in default, which led to the appointment of the Receiver. Mr. Gustin has not been cooperative, and there is evidence in the record that he has withheld relevant information and has or has threatened to remove assets from the Receiver's reach.

5 The Receiver and Royal Bank of Canada say that he misrepresented that he was the owner of 931 hogs. The hogs may be owned by J. A. Cryderman Farms Inc. They are being managed by Scott Leystra, a business associate of Mr. Gustin.

6 Mr. Gustin also has made eight payments totaling $242,047 to Mr. Leystra between March and May 2019. There is also an issue respecting the ownership of certain equipment and stored grain (which was the subject of Mr. Gustin Senior's response to the motion). Mr. Gustin has said some of the equipment and crops are jointly owned with or owned outright by his father.

The Law

7 As already noted, the Receiver seeks authority from the Court to make an assignment in bankruptcy of the debtor. Obviously, it is not a creditor.

8 It wishes to avail itself of the enhanced powers available to a trustee in bankruptcy under ss. 158 and 161-167 of the *Bankruptcy & Insolvency Act*. This is necessary given Mr. Gustin's lack of cooperation and misrepresentations.

9 In support of the relief sought, Royal Bank of Canada submits that Mr. Gustin has committed acts of bankruptcy as defined in s. 42(1) of the *BIA* and in particular subsections (f), (g), (h) and (j). He availed himself of the provisions of the *Farm Debt Mediation Act*, thereby acknowledging his insolvency.

10 As a preliminary matter, ss. 43-48 of the *BIA* protects farmers from creditor applications for bankruptcy orders. Section 48 provides:

> Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

11 The Receiver and Royal Bank of Canada submit that Mr. Gustin is no longer entitled to the protection afforded by the *BIA* because he ceased being a farmer when the Receiver was appointed.

12 There is authority supporting the Court's power to grant this form of relief in *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Ont. Gen. Div. [Commercial List]) aff'd 1994 CarswellOnt 310 (Ont. C.A.); and *Bank of Montreal v. Owen Sound Golf & Country Club Ltd.*, 2012 ONSC 557 (Ont. S.C.J. [Commercial List]).

13 On behalf of Mr. Gustin, Mr. Blay opposes the relief for the following reasons:

> 1) an assignment is premature because there is no evidence of what the creditor's position will be on liquidation;
>
> 2) Royal Bank of Canada is a single, secured creditor and as a result, must show special circumstances;
>
> 3) the cases relied upon both involved corporations rather than individuals; and
>
> 4) there are remedies available under provincial legislation for improper conveyances etc. and resort to the *BIA* is unnecessary.

Analysis

14 I agree with the Receiver and Bank that Mr. Gustin ceased to fall within the ambit and protection of s. 48 of the *BIA* upon the appointment of the Receiver. His principal occupation and means of livelihood can no longer be said to be from active farming.

15 Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions. There is no sound basis to distinguish the cases because the debtors were corporations. There is no legal distinction between a person and a corporation.

16 Nor is Royal Bank of Canada a sole creditor. A list of Mr. Gustin's unsecure Creditors is found in the material filed.

17 Finally, while there may well be remedies available under provincial statues, it is needlessly inefficient and expensive to be required to resort to them. And more importantly, it would serve to delay the orderly execution of the Receiver's undertaking.

18 I am satisfied that the relief sought should be granted as requested and I have signed the order provided.

Application granted.

TAB 11

1994 CarswellOnt 266
Ontario Court of Justice (General Division — Commercial List)

Royal Bank v. Sun Squeeze Juices Inc.

1994 CarswellOnt 266, [1994] O.J. No. 567, 24 C.B.R. (3d) 302, 46 A.C.W.S. (3d) 821

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.

Farley J.

Heard: February 28, 1994
Judgment: March 16, 1994
Docket: Doc. B253/93

Counsel: *J.A. Carfagnini* and *R. Chadwick*, for Coopers & Lybrand Ltd., court-appointed receiver and manager.
Paul G. Macdonald, for plaintiff.
Edward M. Morgan, for defendants.
Ronald M. Moldaver, Q.C., for Josef Blum, majority shareholder of defendants.

***Farley J.*:**

1 The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

2 On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately $16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court au thorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

3 Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately $1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

4 Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

5 Actions have been commended and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the $75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: *Re Can Corp Financial Services Ltd.* (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) at p. 107.

6 As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p. 240; *Re Brandon Packers Ltd.* (1962), 33 D.L.R. (2d) 503 (Man. C.A.), at pp. 510-511 and 513, leave to appeal to S.C.C. refused [1962] S.C.C. ix; *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) at p. 165; *Chinavision Canada Corp. v. Ling* (Ont. Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in *Brandon* at p. 511:

> The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the *Companies Act*). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded ...

7 As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed. (London: Sweet & Maxwell, 1989), at p. 219; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (C.A.); *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at p. 111.

8 Freedman J.A. in *Brandon, supra*, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C. S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the *Company Act*, R.S.B.C. 1979, c. 59.

9 As Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* 3rd ed., Vol.1, (Toronto: Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-2-49 where it is said [at D§12]:

> **(a) Conflict Between Assignment and Petition**
>
> There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: *Re Lalonde* (1924), 4 C.B.R. 416 (Ont. S.C.); *Re Lakeshore Golf & Country Club* (1933), 19 C.B.R. 127 (C.S. Que.); *Re Slavonia SS Agencies* (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is

that bankruptcy proceedings are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: *Re Croteau & Clark Ltd.* (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. (413 (S.C.).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in *Chinavision, supra*, at p. 4 as well.

10 Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See *Prairie Palace, supra*, at p. 65; *Re Western Hemlock Products Ltd.* (1961), 2 C.B.R. (N.S.) 207 (B.C. S.C.) at p. 210; *Chinavision, supra*, at pp. 4-5. Guy J.A. in *Brandon, supra*, said at p. 513:

> Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

11 Thus this mater boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in *Kerr, Hat* and *Nova, supra*. The question of "need" for a bankruptcy was canvassed in *Prairie Palace, supra*, at p. 165 and *Chinavision, supra*, at pp. 4-5.

12 Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited *Re Goodis-Wolf Inc.* (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-155 that:

> *The existence of a prior civil action has not always resulted in the court staying or dismissing a petition*: see, for example, *Re Hutchens* (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and *Re H.M. Simpson Ltd.* (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, *(*sub nom. *Jenkins Transfer Ltd. v. H.M. Simpson Ltd.)* 246 A.P.R. 307 (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider, on balance, that it is preferable that the litigation be allowed to take its course.

13 [emphasis added]

14 That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the $75 million claim against the

Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

15 In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to s. 38 of the BIA. There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

Receiver-manager directed to consent to receiving order.

TAB 12

1962 CarswellMan 2
Manitoba Court of Appeal

Brandon Packers Ltd., Re

1962 CarswellMan 2, 33 D.L.R. (2d) 503, 39 W.W.R. 1, 3 C.B.R. (N.S.) 326

Re Brandon Packers Limited; Re Rowe

Miller C.J.M., Freedman and Guy JJ.A.

Judgment: April 30, 1962

Counsel: *C. V. McArthur, Q.C.*, and *W. S. Martin*, for appellant, Brandon Packers Limited.
A. Sweatman, for respondent, Rowe.

***Miller C.J.M.* (*dissenting*):**

1 These are three appeals filed in the same cause arising out of three separate orders made by Monnin J. (now J.A.) in connection with the affairs of Brandon Packers Ltd. The three appeals were argued together.

2 Gabriel Richard Rowe, the above-named petitioner, filed a petition for the winding-up of Brandon Packers Limited. Mr. Rowe had a very small interest as a shareholder in the company, such interest amounting to about $8 in actual value. However, he was entitled to file a petition, but he did so only on his own behalf. The petitioner contended that the affairs of the company should be wound up, as some alleged irregularities by certain directors of the company, representing the majority shareholders, justified the Court in so acting.

3 The petition was originally filed on 19th December 1960, but due to various intervening court proceedings it was not heard until December, 1961. The order of Monnin J. directing the winding-up was dated 6th December 1961. In that order, among other things, it was directed that Brandon Packers Ltd. be wound up by the Court under the provisions of The Companies Act, R.S.M. 1954, c. 43, and that Christopher Henry Flintoft be appointed provisional liquidator of the company. By the order certain limited powers were given to the provisional liquidator, and the provisions respecting the winding-up of companies, as set out in Part XV of The Companies Act, would apply. The winding-up of companies under order of the Court is provided for in s. 382 and succeeding sections of The Companies Act. The company in question here was a provincial company.

4 The provisional liquidator made a hasty investigation into the affairs of the company and came to the swift conclusion that it was insolvent. He therefore returned to the Court on 11th December 1961, and applied for, and was granted, an order empowering and directing him to make an assignment under the Bankruptcy Act, R.S.C., 1952, c. 14, of all the property of Brandon Packers Ltd. for the general benefit of its creditors. The assignment was actually made pursuant to the order on the same date.

5 On 21st September 1961, Messrs. Paton and Cox, who controlled Great West Saddlery Co. (the majority shareholder in Brandon Packers Ltd.) had disposed of controlling interests in the Great West Saddlery Co. to personal holding companies controlled by Messrs. Cleveland and Holland of Toronto. (This involved a complicated series of transactions which it is not necessary to discuss for the purposes of this judgment.) Thus, when the winding-up petition, filed in December, 1960, was finally heard in December, 1961, the alleged offending directors Messrs. Paton and Cox were no longer at the helm of Brandon Packers Ltd.

6 Mr. McArthur, Q.C., acting for the appellant, argued that once the company was found to be insolvent the winding-up provisions should have been cancelled by the Court and contended that winding-up proceedings only related to companies which

were solvent. I am inclined to think there is strength to this contention; but unfortunately Mr. McArthur and Mr. Cleveland, at the hearing of the winding-up petition, asserted that the company should not be wound up *as it was not insolvent*.

7 The contention of counsel as to solvency cannot alter the law, and if winding-up proceedings should not be ordered in cases of insolvency then this Court must act accordingly.

8 Section 382(*c*) of The Companies Act reads as follows:

> 382. A corporation may be wound up by order of the court, ...
>
> (*c*) where, in the opinion of the court, it is just and equitable for some reason *other than the bankruptcy or insolvency of the corporation that it be wound up*.

[The italics are mine.]

9 It is clear that a company cannot be wound up for insolvency. It is to be noted, too, the section does not explicitly say that even though it may be insolvent a company cannot be wound up for other reasons. My opinion however is that, constitutionally, winding-up proceedings do not apply to the winding-up of an insolvent company under The Companies Act. I agree with what was said by Masten J.A. in *Re Shipway Iron Bell & Wire Mfg. Co.*, 58 O.L.R. 585 at 586, [1926] 2 D.L.R. 887, 9 Can. Abr. 952, 963:

> In the course of the discussion before us, Mr. McPherson very frankly and most properly informed the Court that from the report of the interim liquidator it clearly appeared that the company is utterly insolvent at the present time. This placed on the application an aspect entirely different from that which it presented when it was heard by my brother Rose. Not only does the statute, for constitutional reasons, exclude insolvency as a ground for winding-up, but the admission of insolvency sweeps away all interest of the petitioner in the result — the parties and the only parties really interested in case of insolvency being the creditors, whereas here all the shares are fully paid-up.

10 However, I do not deem it necessary to turn my decision on the above point, but rather do I desire to decide these appeals on my opinion that the learned chambers judge had no authority to authorize and direct a provisional liquidator to make an assignment in bankruptcy. It is my view that, with the evidence before the learned chambers judge, he was justified in making the winding-up order of 6th December 1961, but that upon the return of the provisional liquidator to the Court showing the insolvency of the company, it would be an error to permit him to proceed with the winding-up.

11 With great respect, it seems to me that the learned chambers judge, upon the report of the provisional liquidator and in view of the futility of the winding-up order, should have rescinded that order. This would have left the company in a position where the directors or creditors could have applied for bankruptcy of Brandon Packers under the provisions of the Bankruptcy Act. It is true that on the surface it appears to have been a sensible short cut for the learned chambers judge to have authorized the making of the assignment, though in fact this has not proven to have been a short cut at all. Even though on the merits there is much to recommend the order authorizing and directing bankruptcy made by the chambers judge, I have regretfully come to the conclusion that the order should not have been made and that the winding-up proceedings should have been cancelled and nullified. Then, by due process, and as authorized by the Bankruptcy Act, anyone desiring to place the company in bankruptcy, and authorized to take the proper legal proceedings, could have done so. The normal and proper course would thus have been followed.

12 There is nothing in the provisions of The Companies Act permitting the Court to make an order authorizing and directing an assignment in bankruptcy and, in my opinion, only powers authorized by the Act could be invoked. Furthermore, this bankruptcy order was made under and in winding-up proceed ings although in my view such an order is foreign and repugnant to such proceedings.

13 It was argued that the order directing assignment would be authorized by the inherent jurisdiction of the Court. It seems to me that this is not so. The procedure according to the Act relates only to winding-up a Manitoba company, and what may be

done in such winding-up proceedings must be found within the limits of the statute, namely, The Companies Act, and nothing therein gives the Court authority to either direct or authorize bankruptcy proceedings.

14 It has been suggested to us in argument that the provisional liquidator was an officer of the Court. Possibly he was, or was at least an appointee of the Court, but I do not think that adds any strength to the argument. That fact does not clothe the Court with power to authorize the doing of anything beyond the limits of authority granted by the statute.

15 In British Columbia, Macfarlane J. was twice confronted with a somewhat similar problem to that which confronted the learned chambers judge in these hearings. In *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211, Macfarlane J. felt that in a *voluntary* winding-up the liquidator could, if faced with insolvency, file an assignment in bankruptcy under the Bankruptcy Act, and he ordered accordingly. The same learned judge made an earlier order under similar circumstances in the unreported case of *Re Parker's Mfg. Co. Ltd.* (P. 369/55).

16 So far as the points involved in the instant case are concerned, I do not think there is any difference as between a voluntary winding-up and a court winding-up, except, of course, the applicability of s. 382(*c*) to court winding-up orders. In any event, in the instant case I am not prepared to follow the British Columbia cases above referred to.

17 It seems to me that upon Mr. Flintoft reporting the insolvent condition of the company five days after he was appointed provisional liquidator, and acceptance by the Court of the truth of that finding by Mr. Flintoft, it was obviously futile to continue the winding-up order and, as above stated, it should have been rescinded. Even though I hold that the order authorizing the assignment is invalid, at least it had the effect of superseding the winding-up order and thereby automatically cancelling same.

18 It is doubtful whether the learned chambers judge could have made an order directing or authorizing the company itself to make an assignment in bankruptcy. Of course in such a case an order is not necessary. I see no reason to justify ordering or authorizing a liquidator to do that which the learned judge could not have ordered the company itself to do.

19 I do not think it necessary to consider whether or not the provisional liquidator, of his own volition and without the intervention of the Court, could have made the assignment. Much of Mr. Sweatman's argument was directed to the powers of the liquidator to make such an assignment, pointing out that the definition of "person" in the Bankruptcy Act had been amended some years ago to include "legal representative of a person" and that, therefore, the legal representative of Brandon Packers (whom Mr. Sweatman contended was the provisional liquidator) was a person authorized to make an assignment for the company, within the meaning of the Bankruptcy Act, as the provisional liquidator purported to do.

20 I have approached this whole question from the viewpoint simply as to whether the Court had power to authorize or order an assignment (as this was the procedure adopted), and I am not concerned at the moment as to whether the provisional liquidator had the authority, without the intervention of the Court, to make the assignment. I might say, though, that I strongly doubt his authority and power so to do.

21 I hold, therefore, that the order of Monnin J. dated 11th December 1961: "that the said provisional liquidator be and he is hereby empowered and directed to make an assignment under the Bankruptcy Act ...," should be set aside.

22 I further hold that the order dated 6th December 1961, ordering the winding-up of Brandon Packers Ltd. under the Court, should be set aside on the ground that it is futile and, in any event, that it has been superseded and cancelled by the subsequent order directing the assignment.

23 It follows as a matter of course that the order dated 8th December 1961, which involved only costs, should also be set aside.

24 I am not disposed to award any costs on this appeal, inasmuch as the first winding-up order was opposed mainly on the ground that the company was not insolvent, which, so far as the records of this Court show, appears to have been incorrect. The true facts concerning the company's affairs should have been known to Messrs. Cleveland and Holland, and Mr. McArthur should have been correctly instructed.

25 All appeals are therefore allowed but, as above indicated, without costs.

***Freedman J.A.*:**

26 Appeals have been taken by Brandon Packers Ltd. from three separate but related orders of Monnin J. (as he then was). The appeals came on for argument together, and in this judgment I will deal with each of them in turn.

No. 152/61 — First Appeal.

27 This appeal is from an order made under s. 382(*c*) of The Companies Act, R.S.M., 1954, c. 43, directing that Brandon Packers Ltd. be wound up and appointing Mr. Christopher Henry Flintoft as provisional liquidator. The section referred to is in the following terms:

> 382. A corporation may be wound up by order of the court, ...
>
> (*c*) where, in the opinion of the court, it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it be wound up ....

28 The attack on the order is based on several grounds, but these on examination can be reduced to two main ones, namely: (1) That the affidavit in support of the applicant's petition was based on information and belief; and (2) That the learned chambers judge failed to take into account certain material facts bearing upon the issue whether the order should or should not be granted.

29 Concerning the first point, I need only comment that the order rests on much stronger support than the affidavit alone. The learned chambers judge conducted a full scale inquiry in the form of a two-day trial in which several witnesses were examined and cross-examined. Under the circumstances it is idle to challenge the order on the basis that certain paragraphs in the supporting affidavit were allegedly imperfect in form.

30 On the second point, I am bound to say that there was ample evidence to support the conclusion at which the learned chambers judge arrived. The statute empowers the Court to make a winding-up order where, in its opinion, it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it be wound up. The learned chambers judge, after careful consideration of the evidence that had been placed before him, formed the opinion that it was indeed just and equitable that the company be wound up.

31 Here I may point out that on the evidence before him, any suggestion that the company was at that time in a state of bankruptcy or insolvency was expressly negatived. Indeed, it was the company which aggressively asserted, as one of the grounds why the order should not be made, that the company under its new management was solvent and well able to carry on its affairs fairly and properly. This line of approach has significance not only here but in the third appeal as well.

32 I would dismiss the appeal and affirm the order of the learned chambers judge.

No. 153/61 — Second Appeal.

33 This appeal grows directly out of the first one. In the first order the learned chambers judge reserved the matter of costs. Two days later he disposed of the matter of costs (and certain other points not in issue in this appeal).

34 The present appeal, which is brought by leave of Monnin J., is from that part of his order awarding costs to the petitioner, and reserving the costs of the company.

35 The appeal is by its express language made dependent upon the successful outcome of the first appeal. The sole ground urged against the order is that if the winding-up order should be set aside, the order allowing costs in favour of the petitioner should correspondingly be set aside. Since, however, the winding-up order involved in the first appeal is being upheld, it follows that the second appeal must also be dismissed.

No. 154/61 — Third Appeal.

36 The order before us on the third appeal was made upon the application of the provisional liquidator. It arose under the following circumstances:

37 Within a few days after his appointment, the provisional liquidator made a close examination of the affairs of the company. From this examination it became clear that, notwithstanding the evidence led in the contrary direction by the company during the earlier hearing, Brandon Packers Ltd. was in fact insolvent. In these circumstances the provisional liquidator made application to the Court for an order that he be empowered and directed to make an assignment under the Bankruptcy Act of all the property of the company for the general benefit of its creditors. After hearing all interested parties, Monnin J. made the order applied for, and the present appeal is from that order.

38 The substantial point of objection to the order is that the learned trial judge had no jurisdiction to make it. With this contention I am unable to agree.

39 There is judicial precedent to support the course taken by the learned trial judge. In the British Columbia case of *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211, Macfarlane J. considered the position of a company which, in the process of being voluntarily wound up, was shown to be insolvent. He concluded that the proper course for the liquidator to take was to file an assignment in bankruptcy and then proceed under the Bankruptcy Act. He called attention to the fact that under similar circumstances he had made such an order in an earlier case.

40 To me the course taken by Macfarlane J. in the cases referred to seems, if I may say so with respect, eminently reasonable and practical. In fairness to the contention of the present appellant, however, I must refer to a comment which is appended by the learned editor to the report (2 C.B.R. (N.S.) at p. 211) of the *Western Hemlock Products Ltd., Re* case, *supra*, reading in part as follows:

> Macfarlane, J. suggests that the liquidator should file an assignment in bankruptcy. It is doubtful whether a liquidator has any such power. The corporate existence and corporate powers of the company continue to exist notwithstanding the fact that the corporation is being wound-up ... and the proper persons to authorize the making of an assignment would seem to be the directors of the company. If the company would not agree to the making of an assignment then there would be nothing improper in the liquidator informing the creditors of the situation and requesting that one of the creditors should take the necessary steps to file a petition.

41 The editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as with the powers of a judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of The Companies Act). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior court in whose favour jurisdiction should be presumed unless it is expressly or by necessary implication excluded. Counsel have been unable to, nor have I been able to find, any statutory provision expressly denying such power to the Court. Is the absence of such power then to be implied from the fact that in The Companies Act, and particularly in s. 391, certain specific powers of the Court are outlined with respect to winding-up proceedings? I would think not, for the simple reason that winding-up proceedings normally contemplate a condition of solvency on the part of a company, and one would not therefore expect to find, in a statute concerned with winding-up, any provision authorizing a liquidator to file an assignment in bankruptcy. Accordingly, the absence there of such a provision would not determine the matter of jurisdiction.

42 Admittedly the situation which confronted the liquidator was an unexpected and unusual one. The editor, in the comment above referred to, suggests that the liquidator's proper course was to call upon the directors of the company to authorize the making of an assignment, and upon their failure to do so he could then seek assistance from one of the creditors of the company. But we must not overlook the realities of the case. The fact is that the directors strenuously opposed the liquidator's application.

It would have been idle to call upon them to take steps to put the company into bankruptcy. Nor in my view was it necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing.

43 As to whether the same result could have been achieved by a petition on the part of a creditor is a matter which it is not necessary to consider. All that is before us is the order of the Court — an order which dealt with a difficult situation in a sensible and practical way. I would be distressed to learn that the Court was without power to act as it did, but happily I have not been persuaded that it lacked such power. Indeed, I believe the contrary to be the case.

44 I would dismiss the appeal and affirm the order of the learned trial judge. The respondent should have one set of costs of these appeals.

***Guy J.A.*:**

45 I have had the opportunity to read the reasons for judgment of my brother Freedman, and I concur with his conclusions as to the validity of the orders in question. I only wish to add a few words with respect to the third appeal.

46 This appeal dealt with an order of Monnin J. dated 11th December 1961, in which he authorized and directed the provisional liquidator to make an assignment under the Bankruptcy Act.

47 A great deal of the appellant's counsel's argument was devoted to s. 367 of The Companies Act, R.S.M. 1954, c. 43. The burthen of the argument was that, despite the winding-up order

> ... its corporate state and all its corporate powers ... continue until the affairs of the company are wound up.

48 And this meant that any voluntary assignment in bankruptcy should be made by the directors of the company and not by the liquidator.

49 The learned trial judge relied on the decision of Macfarlane J. in *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211: at p. 187 Macfarlane J. says:

> Once a company in a *voluntary* winding-up is shown to be insolvent, I think the proper course for the liquidator to take is to file an assignment in bankruptcy or take other appropriate action to put the company in bankruptcy and proceed under the Act. I made an order under similar circumstances in *Re Parker's Mfg. Co. Ltd.* (P. 369/55) which I would suggest that counsel refer to.

50 The editorial comment in 2 C.B.R. (N.S.), at p. 211, reads:

> It is doubtful whether a liquidator has any such power. The corporate existence and corporate powers of the company continue to exist notwithstanding the fact that the corporation is being wound-up .... and the proper persons to *authorize* the making of an assignment would seem to be the directors of the company. If the company would not agree to the making of an assignment then there would be *nothing improper in the liquidator* informing the creditors of the situation and *requesting that one of the creditors should take the necessary steps to file a petition.*

[The italics are mine.]

51 However it must be remembered that in this case there is no *voluntary* winding-up of the company; and this is not a *voluntary* assignment in bankruptcy by the company. Here we have an officer of the Court appointed as provisional liquidator by the Court, and who must answer to the Court. And he shows to the satisfaction of the Court that the company is bankrupt. Any attempt to fulfil the duty imposed upon him by the Court in its order appointing him as liquidator is impossible.

52 Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

53 In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true that the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfil its duty and give judgment "according to the very right and justice of the case."

54 Accordingly I would dismiss these appeals.

TAB 13

2012 ONSC 557
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Owen Sound Golf & Country Club Ltd.

2012 CarswellOnt 911, 2012 ONSC 557, 213 A.C.W.S. (3d) 543, 98 C.B.R. (5th) 161

Bank of Montreal Applicant and Owen Sound Golf and Country Club, Limited and Kenneth W. Rowe Limited Respondents

D.M. Brown J.

Heard: January 23, 2012
Judgment: January 23, 2012
Docket: CV-11-9306-00CL

Counsel: J. Simpson for Receiver, BDO Canada Limited
Keith Hagedorn, Claimant Creditor for himself

***D.M. Brown J.*:**

I. Receiver's motion to liquidate debtor corporations

1 Last July BDO Canada Limited was appointed receiver of the Owen Sound Golf and Country Club, Limited ("OSGCC") and Kenneth W. Rowe Limited, a wholly-owned subsidiary of the Golf Club which owned property on which a practice facility was located (the "Debtors").

2 Pursuant to orders of this Court the Receiver sold the Golf Club and ran a claims process for creditors. As a result, last October this Court authorized the Receiver to pay out the secured creditor, BMO, as well as the Canada Revenue Agency. The claims process for the other creditors has been completed, and the Receiver seeks approval to disburse funds to those claimants.

3 On the return of the motion Mr. Keith Hagedorn, the former chef at the Golf Club, sought leave for an extension of time in respect of the claim which he had filed with the Receiver. Mr. Hagedorn had mailed in his claim before the claims bar date, but his letter was returned due to insufficient postage. By the time he had re-sent his claim he was 10 days past the claims bar date. The Receiver did not oppose the requested extension of time, and during a break in the proceedings the Receiver and Mr. Hagedorn settled his claim for $5,000.00. Accordingly, I formally grant Mr. Hagedorn an extension of time in which to file his claim, declare that his claim as filed was received by the Receiver within the permitted extension, and approve the Receiver paying out the agreed upon $5,000 settlement.

4 Upon payment of the unsecured creditors the Receiver will hold surplus funds of slightly under $1 million. The Receiver moves for authorization to place both Debtors into liquidation. The Receiver gave proper notice of this motion. Although no one has appeared to oppose the relief sought, one Club member contacted the Receiver to query its jurisdiction to put the companies into liquidation.

II. Analysis

5 Kenneth W. Rowe Limited is incorporated under the *Ontario Business Corporations Act*. [1] OSGCC owns all of the shares of that company. Section 208(1) of the *OBCA* provides that a shareholder may apply to court for a winding-up order. Paragraph 4(r) of the Appointment Order made July 15, 2011 authorized the Receiver "to exercise any shareholder...rights which the Debtors may have". Therein lies the power of the Receiver to apply to wind-up OSGCC's subsidiary, Kenneth W. Rowe Limited.

6 OSGCC is incorporated under the *Corporations Act*.[2] A few days before the appointment of the Receiver the entire Board of Directors of OSGCC resigned. Paragraph 3(c) of the Appointment Order authorized the Receiver to "manage, operate and carry on the business of the Debtors". As Cumming J. observed in *Ravelston Corp., Re*: "When a court-appointed receiver is appointed in the normal course, 'the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced'...The essence of a receiver's power is to settle liabilities and liquidate assets."[3]

7 The Receiver has sold OSGCC's assets, satisfied the secured creditors, and administered a claims process for unsecured claims. Once the unsecured claims are paid, the Receiver will be left holding surplus proceeds. The shareholders are the next group entitled to claim against those funds, and the Receiver seeks to address that stage in the corporate life of OSGCC by seeking an order to wind-up that company. Section 244(1) of the *Corporations Act* authorizes a corporation to apply to court for a winding-up order. It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.[4] In my view the same logic applies to the power of the court to authorize a court-appointed receiver to apply to wind-up a company.

8 In its Supplement to the Second Report the Receiver described the work which must be done in order to identify the current shareholders of OSGCC and proposed a notice and claims bar-like process to deal with claims by shareholders. The process proposed is a reasonable one.

9 Accordingly, I grant the Receiver's motion for orders to wind up the Debtors and to appoint the Receiver as liquidator. I approve the winding-up process it proposes. I grant an order in the form submitted by the Receiver, which I have signed.

Motion granted.

Footnotes

1 R.S.O. 1990, c. B.16.

2 R.S.O. 1990, c. C.38.

3 *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), para. 61; affirmed 2007 ONCA 135 (Ont. C.A.).

4 *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Ont. S.C.J. [Commercial List]), paras. 6 to 10.

TAB 14

1997 CarswellAlta 1092
Alberta Court of Appeal

Chow v. Bresea Resources Ltd.

1997 CarswellAlta 1092, 160 W.A.C. 284, 209 A.R. 284, 75 A.C.W.S. (3d) 1006

Yate Chow, Bud Damura, et al Appellants (Respondents by Cross-Appeal) and Bresea Resources Ltd., Respondent (Appellants by Cross-Appeal) and Price Waterhouse Limited, Monitor of Bresea Resources Ltd.

Bracco, O'Leary, Hunt JJ.A.

Heard: November 13, 1997
Judgment: December 4, 1997
Docket: Calgary Appeal 97-17440

Proceedings: additional reasons at (February 3, 1998), Doc. Calgary Appeal 97-17440 (Alta. C.A.)

Counsel: *B.P. O'Leary* and *D.S. Nishimura*, for the Appellants (Respondents by Cross-Appeal).
J.B. Rooney, Q.C., for the Respondent (Appellants by Cross-Appeal).
P.T. McCarthy, for the Monitor of Bresea Resources Ltd.

The Court:

1 The Appellants are Alberta residents who hold approximately 26% of the issued and outstanding shares of Bresea Resources Lid. ("Alberta shareholders"). On November 5, 1997 they succeeded in obtaining an Order from Cairns, J. in Chambers appointing Price Waterhouse Limited as Interim Receiver and Manager of the assets of Bresea and directing the Receiver/ Manager to "immediately make an assignment in bankruptcy of Bresea pursuant to Section 49 of the *Bankruptcy and Insolvency Act* ... and pursuant to the assignment, appoint Arthur Andersen Inc. as Trustee in Bankruptcy". The Chambers Judge then stayed the Order pending this appeal. The Order was made in the context of a shareholders' oppression action commenced by the Alberta shareholders in mid-October.

2 The Alberta shareholders are nominal appellants. They want the stay set aside. This is really an appeal by Bresea and the critical issues are raised in its cross-appeal. Bresea argues that in the circumstances an Interim Receiver/Manager should not have been appointed. Alternatively, if the appointment is justified, the Chambers Judge should not have directed the Receiver/ Manager to assign Bresea into bankruptcy.

3 Bresea, Bre-X Minerals Ltd. and Bro-X Minerals Ltd. are related companies and are referred to as "the Bre-X Group". Bre-X owns 12.2 per cent of the shares of Bresea and Bresea owns 22.3 per cent of the shares of Bre-X and 22.7 per cent of the shares of Bro-X. The companies have common officers, directors and employees. At all material times David Walsh was the president and chief executive officer of each company. Numerous and substantial claims have been made against each of the companies, primarily by shareholders, as a result of the sudden and dramatic decline in the market value of Bre-X shares. None of the claims against Bresea have been reduced to judgment. There is no evidence that any of Bresea's assets were acquired through the wrongdoing of Bresea, Bre-X or Bro-X or their officers or directors. Bre-X made a voluntary assignment in bankruptcy hours before the Order appealed was made.

4 On May 8, 1997, Cairns J. made an Order granting each of the companies the protection of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("C.C.A.A."), and directed each company to file a formal plan of compromise or

arrangement before October 31, 1997. Price Waterhouse Limited was appointed to supervise the affairs of Bresea ("the Monitor").

5 Bresea did not file a plan of arrangement by the specified date and its protection under the C.C.A.A. terminated.

6 The Alberta shareholders allege that the Bre-X Group issued false and misleading public statements concerning the value of Bre-X's mining interests in Indonesia, thereby artificially inflating the value of Bre-X shares on public markets. They say that some of the individual representatives of the Bre-X Group participated in a fraud of enormous magnitude, with the shareholders of the companies being the victims. They also claim that Bresea and the other companies have viable causes of action against a number of third parties, including assayers, geological advisers, investment bankers, brokers, financial analysts and advisers, and their own officers and directors.

7 The application was made solely for the purpose of placing Bresea in bankruptcy. The Chambers Judge found that Bresea was insolvent at the date of the Order. That finding was the foundation for his Order. It was made on the basis of a statement in the affidavit of David Walsh dated May 8, 1997 sworn in support of the joint Petition of the Bre-X Group for protection under the C.C.A.A. A company must be "insolvent" to qualify for a protection order under the C.C.A.A. Walsh swore (A.B. Sec. II, Tab A, p.3):

> I do verily believe that the Petitioners' anticipated loss of their mining concessions in Indonesia and the enormous costs, expenses and disbursements necessary for the investigation, defence and, if appropriate, resolution of the threatened or perceived imminent shareholders' claims or proceedings has rendered each of the Petitioners to be insolvent.

8 The Chambers Judge found that there was no evidence of a change in Bresea's financial circumstances between May 8, 1997 and the date of the Order and held that Bresea continued to be insolvent. At the same time, he acknowledged that there were no debts or liquidated claims outstanding against Bresea giving rise to "difficulty in a creditor petitioning Bresea [into bankruptcy] under Section 43.". After finding Bresea to be insolvent, the Chambers Judge continued:

> [I]t is in the best interests of the creditors, who are all shareholders, it would appear, that the company be in bankruptcy.

9 In our view, the Chambers Judge made a palpable and overriding error in finding that Bresea was insolvent at the time of the Order. He had before him the periodic reports of the Monitor appointed in the C.C.A.A. proceedings concerning the affairs of Bresea. The Fifth Report dated October 30, 1997, showed that Bresea had assets valued at almost $29 million and liabilities of only $54,000. The liabilities included $50,000 in reserves for anticipated professional fees. The assets included approximately $23 million in cash which has been paid into court, an office building in Calgary valued at approximate $2.5 million and some Indonesian mining claim that are apparently being liquidated in an orderly fashion with the proceeds being held in trust. There is no evidence of any other outstanding liabilities or assets that the Monitor has been able to identify in his six months of overseeing the company's affairs. We appreciate that the Monitor's information was based upon information he received from the company.

10 It is not suggested that Bresea's assets are being dissipated or that they cannot be preserved in some way short of bankruptcy. The validity of the claims being advanced against Bresea by the Alberta shareholders and by other shareholders of the Bre-X Group is uncertain. They are merely disputed unliquidated claims.

11 The uncontradicted evidence before the Chambers Judge demonstrated conclusively that Bresea was not insolvent no matter how that state may be defined and assuming that it means the same thing in both statutes. Walsh's belief on May 8, 1997 may have been an unintentional mistake or it may have been a conscious mis-statement. In any event, it appears in hindsight to have been in error. He was, of course, referring to all three companies collectively. The representation of insolvency may have induced the Court to grant the C.C.A.A. Order. That is not, in our view, justification for making a finding that Bresea is currently in a state of insolvency and ordering bankruptcy when the evidence showed very convincingly that the company was solvent. The finding of the Chambers Judge has the effect of visiting the consequences of Walsh's erroneous belief on all of the shareholders and creditors of the company.

12 The Chambers Judge was also in error in assuming that the Order was in the best interests of shareholders. Shareholders resident in Ontario who are also making claims similar to those of the Alberta shareholders and who hold a larger percentage of outstanding shares have entered into a "stand-by" agreement with Bresea, part of which is an undertaking by Bresea to hold a special meeting of shareholders within 120 days of the agreement at which time all of the current officers and directors of the company will resign. The apparent object of the agreement is to turn the company over to its shareholders. The Chambers Judge rejected the request of counsel for Bresea that those arrangements be sanctioned by a formal order for the benefit of all shareholders. The Ontario shareholders were served with notice of the motion. They did not support or oppose it. The Order appealed is clearly inconsistent with the stand-by agreement and the benefit of the Order to those shareholders is questionable.

13 In our opinion, the Chambers Judge was not justified in indirectly ordering Bresea into bankruptcy. The authorities relied upon by the Chambers Judge and by the Alberta shareholders have a common feature not present here. In each of those cases the court directed an independent and court-supervised person to assign the company into bankruptcy. Unlike the present case, however, that person had conducted an investigation and determined prior to the order that the company was in a state of insolvency within the meaning of the bankruptcy legislation: See in particular, *Royal Bank v. Sun Squeeze Juices Inc.* (1994), 24 C.B.R. (3d) 302 (Ont. Gen. Div. [Commercial List]) and *Brandon Packers Ltd., Re* (1962), 33 D.L.R. (2d) 503 (Man. C.A.) (leave to appeal to S.C.C. refused). Where a company is insolvent within the meaning of the *Bankruptcy and Insolvency Act*, and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy. In our view, however, it is not proper to make an order which has as its purpose the forced bankruptcy of a solvent company simply because it is convenient to a minority of its shareholders to do so.

14 The appointment of an interim receiver and manager is a remedy contemplated in oppression proceedings. The affairs of Bresea are in a state of suspension. It is not carrying on an active business. Its assets are highly liquid and therefore vulnerable. In the circumstances, we would not disturb that part of the Order which appoints Price Waterhouse Limited as the Interim Receiver and Manager of the assets of Bresea. The claims against the company, primarily by shareholders, are substantial. The appointment of a Receiver/Manager will not interfere with any current operations of the company and acts as some protection for its assets, at least on an interim basis.

15 We dismiss the cross appeal with respect to that part of the Order which appoints Price Waterhouse Limited as Interim Receiver and Manager of the assets of Bresea. We direct that the Receiver/Manager take possession of and preserve the assets of Bresea under the supervision of the Court of Queen's Bench. Additional authority and powers may be sought in the usual way by application to the Court. We anticipate that those powers will include the ability to fully investigate Bresea's affairs and the validity of the claims made against it by its shareholders and others as well as any claims Bresea may have against third parties. The Receiver/Manager may ultimately seek authority to take the steps necessary for the orderly realization of Bresea's assets and resolution of the claims against it.

16 We set aside that part of the Order which directs the Interim Receiver/Manager to assign Bresea into bankruptcy and have Arthur Andersen Inc. named as Trustee in Bankruptcy.

17 At the conclusion of the oral hearing we continued the stay of the Order except as to the appointment of the Interim Receiver/Manager. In view of our disposition of the appeal, it is not necessary to deal further with the stay imposed by the Chambers Judge and continued by us.

Appeal allowed in part; cross-appeal allowed in part by dismissing portion of order requiring corporation to be assigned into bankrupcty.