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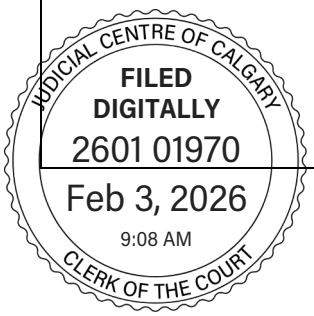

COURT FILE NUMBER	2601- 01970
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT / PLAINTIFF	INVICO LENDING STRATEGIES LP, by its general partner, INVICO LENDING STRATEGIES GP INC.
RESPONDENT / DEFENDANT	HALO EXPLORATION LTD.
DOCUMENT	**BRIEF OF LAW**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors 3400 First Canadian centre 350 – 7th Avenue SW Calgary, AB, T2P 3N9 **Attention: Robyn Gurofsky / Kaitlyn Wong** Tel: 403.261.9469 / 403.261.7388 Email: rgurofsky@fasken.com / kwong@fasken.com File No.: 248426.01489

BRIEF OF THE APPLICANT: RECEIVERSHIP ORDER AND APPROVAL OF SISP

Tuesday, February 10, 2026, at 2:00 p.m.

Before the Honourable Justice C.C.J. Feasby

CONTENTS

I. INTRODUCTION

1. This Brief is submitted on behalf of the Applicant, Invico Lending Strategies LP, by its general partner, Invico Lending Strategies GP Inc. ("**Invico**"), in support of its application to: i) appoint FTI Consulting Canada Inc. ("**FTI**") as the receiver and manager (in such capacity and if appointed, the "**Receiver**") of Halo Exploration Ltd. ("**Halo**") and all of Halo's current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (the "**Property**"); and ii) approve and authorize a sale and investment solicitation process ("**SISP**") for all, or substantially all, of the Property and business of Halo.

2. Invico is the first secured creditor of Halo who for over a year has been conducting a strategic alternatives process in an attempt to elicit an opportunity to repay Invico's loan and continue Halo's oil and gas operations as a going concern. Halo's strategic process has been unsuccessful, with no bids being received by the specified bid deadline in the fall of 2025 and no viable alternative transaction with a closing date in the near future, or at all, arising since.

3. Following years of waivers and loan amendments, forbearance, and other financial supports from Invico, Halo has run out of time to correct the course of its business and repay the amounts owing to Invico on its own terms. The revenues generated from Halo's assets are insufficient to sustain operations in the short term and the looming liquidity issues that Halo now faces risk Invico's collateral and secured position. Invico simply cannot wait any longer for management to attempt to close a transaction at the pace it has been moving and has lost confidence that Halo is able to close such a transaction in light of its conduct to date.

4. The state of Halo's strategic process and its stressed liquidity necessitate the appointment of a Receiver over Halo and its Property at this time to preserve and protect the same for the benefit of all stakeholders. Through a receivership appointment, Invico seeks to have the proposed Receiver conduct a focused SISP to capitalize on the marketing efforts previously undertaken and to bring the process to a controlled conclusion, all with the intention of maximizing creditor realizations.

5. On this Application, Invico therefore seeks:

   (a) a receivership order (the "**Receivership Order**") which, among other things:

      (i) abridges the time for service of the Application and supporting materials and deems such service to be good and sufficient; and

      (ii) appoints FTI as the Receiver over Halo and its Property; and

   (b) an order which, among other things, approves and authorizes the SISP for the Property and Halo's business (the "**Sale Approval Order**").

6. Defined terms used but not otherwise defined herein have the meanings ascribed to them in the Affidavit of Adam Jenkins, sworn January 30, 2026 (the "**Jenkins Affidavit**").

II. FACTS

7. Halo, an Alberta corporation, is a privately held junior oil and gas exploration and production company with assets, being facilities and wells, located in the Greater Kaybob area of Alberta. In particular, Halo holds a 100% working interest in certain sections of land in the Montney and Duverney light oil fairways, with 11 of its 18 wells currently in production.[1]

8. Pursuant to a loan agreement dated October 11, 2022, between Invico Diversified LP, by its general partner, Invico Diversified Income Managing GP Inc. ("**Invico Diversified LP**") as lender and Halo as borrower, as supplemented by eight limited waivers and six amending agreements from time to time (collectively, the "**Loan Agreement**"), Invico Diversified LP agreed to advance a loan (the "**Loan**") to Halo in the aggregate principal amount of $19 million.[2] Invico Diversified LP assigned the Loan Agreement, all amounts owing under the Loan, and the related security documents to Invico in December 2024.[3]

[1] Affidavit of Adam Jenkins, sworn January 30, 2026 at paras 10-11 [Jenkins Affidavit].

[2] Jenkins Affidavit at paras 12-13.

[3] Jenkins Affidavit at para 14.

9. Halo pledged certain security (the "**Security**") to Invico to secure all of its obligations, including the requirement to pay the amounts owing under the Loan inclusive of interest and legal and other costs (the "**Indebtedness**"), including: i) Fixed and Floating Charge Demand Debenture dated October 11, 2022 (the "**Debenture**"), in the amount of $35 million pursuant to which Halo pledged all of its present and after acquired real and immovable property, PNG Assets, equipment, hydrocarbons and inventory, intangibles, business, and proceeds to Invico;[4] ii) Pledge Agreement regarding the Debenture dated October 11, 2022; iii) Environmental Indemnity Agreement dated October 11, 2022; and iv) Deposit Account Control Agreement dated October 21, 2022.[5]

10. In October of 2024, Halo commenced a strategic alternatives process to identify refinancing and divestiture opportunities in an attempt to repay the Loan (the "**Strategic Process**"). Over the span of approximately 15 months, Halo actively pursued a number of opportunities through the Strategic Process but appeared to dedicate a significant amount of time to a share acquisition and an investment opportunity.[6] The potential share acquisition ultimately fell through in July 2025 when the deal failed to progress beyond a non-binding letter of intent.[7] Halo attempted to renew market interest given it was also engaging in discussions with various other parties, but did not receive any bids by its revised bid deadline at the end of August 2025 or after.[8]

11. By early September 2025, Halo had breached the terms of the Loan Agreement by, among other things, failing to make scheduled principal payments for the month ending August 31, 2025, and failing to meet certain financial covenants.[9] Over the following several months, Invico sought to continue to support Halo's efforts in the Strategic Process based on various representations made by Halo that the closing of a viable transaction was forthcoming and on the understanding that completion of a mutually beneficial transaction

[4] Jenkins Affidavit at para 16.
[5] Jenkins Affidavit at para 15.
[6] Jenkins Affidavit at para 19.
[7] Jenkins Affidavit at para 20.
[8] Jenkins Affidavit at para 21.
[9] Jenkins Affidavit at para 26.

would be in all parties' best interests.[10] As such, Invico and Halo entered into a forbearance agreement dated October 31, 2025, and, upon the almost immediate default by Halo, a first amendment to forbearance agreement dated November 27, 2025 (the "**First Forbearance Amendment**").[11]

12. As an alternative path, Halo began to explore an opportunity to purchase certain oil and gas assets from a third party beginning in October 2025 to increase its revenue streams to enable it to continue as a going concern and repay the Indebtedness. In order to finance this potential acquisition, Halo engaged in discussions with several potential investors in Halo.[12] However, the potential asset purchase fell through in December 2025 when the third party vendor elected to terminate its own strategic process.[13]

13. Halo defaulted under the terms of the First Forbearance Amendment on January 12, 2026, when it failed to meet certain agreed upon milestone dates in respect of the Strategic Process.[14] There is no longer a forbearance in place as a result and as at January 30, 2026, the total amount of the Indebtedness is $13,541,612.32, together with interest, legal costs, and other recoverable charges accrued and continuing to accrue until payment is made in full.[15] Further, there is no indication that Halo has advanced a transaction in an amount sufficient to repay the Indebtedness to a stage where there is a defined transaction and therefore, a closing in the near future is possible.[16]

14. Finally, Halo's cash flow forecasts demonstrate that it is continuing to defer payables and even with such deferrals, will experience imminent liquidity issues with cash dropping very close to zero come mid-February 2026.[17] Invico is prepared to support Halo's operations

[10] Jenkins Affidavit at paras 27-28, 32-33.
[11] Jenkins Affidavit at paras 29, 31, 34.
[12] Jenkins Affidavit at para 23.
[13] Jenkins Affidavit at para 35.
[14] Jenkins Affidavit at para 36.
[15] Jenkins Affidavit at para 39.
[16] Jenkins Affidavit at paras 37, 41.
[17] Jenkins Affidavit at para 42.

but only in a receivership proceeding, with a clearly defined sale process led by a receiver.[18]

III. ISSUES

15. The issues to be considered on this Application are:

(a) *Should this Honourable Court exercise its discretion to appoint a Receiver over Halo and its Property?*

(b) *Should this Honourable Court approve and authorize the proposed SISP?*

IV. LAW AND ANALYSIS

A. This Court Should Exercise its Discretion to Appoint a Receiver

i. This Court has the Authority to Appoint a Receiver

16. The Court possesses the necessary authority to appoint a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("***BIA***"), section 13(2) of the *Judicature Act*, RSA 2000, c J-2 ("***Judicature Act***"), and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 ("***PPSA***").[19] In particular, section 243(1) of the *BIA* expressly states that a secured creditor, such as Invico, may bring an application to appoint a receiver over the property of an insolvent person and the court will grant such an application when it is "just or convenient to do so".[20]

17. The *BIA* requires the delivery of a notice of intention to enforce security ("**NITES**") under section 244 to the insolvent person at least 10 days prior to the appointment of a receiver as a procedural prerequisite. On November 17, 2025, Invico, in its capacity as a secured creditor of Halo, delivered a demand for repayment with a NITES,[21] and having satisfied this prerequisite may now properly seek to appoint a receiver pursuant to section 243(1) of

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[18] Jenkins Affidavit at para 44.

[19] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 243(1) [*BIA*] [**TAB 1**]; *Judicature Act*, RSA 2000, c J-2 at s 13(2) [*Judicature Act*] [**TAB 2**]; *Personal Property Security Act*, RSA 2000, c P-7 at s 65(7) [*PPSA*] [**TAB 3**].

[20] *BIA*, *supra* at s 243(1) [**TAB 1**].

[21] Jenkins Affidavit at para 31, Exhibit "M".

the *BIA*.[22] At no time did Invico retract the demand and NITES and pursuant to the terms of the First Forbearance Amendment Halo waived the requirement for Invico to issue any further demand before enforcing.[23]

18. Section 13(2) of the *Judicature Act* provides for the broad discretion of the Court to appoint a receiver separate and apart from the authority provided for under the *BIA*.[24] Similar to the *BIA*, however, the *Judicature Act* allows for the appointment of a receiver to be made when it is just and convenient to do so.[25]

19. Finally, the *PPSA* also provides for a similarly broad discretion for the appointment of a receiver when collateral security is at issue. Pursuant to section 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give direction on any matters relating to the duties of the receiver.[26]

20. Using its broad authority under the above noted legislation and its inherent jurisdiction, this Honourable Court has ample discretion to grant the proposed Receivership Order.

ii. Circumstances Exist that Justify the Appointment

21. The appointment of a receiver is a discretionary remedy that should not be lightly granted by the courts. On an application to appoint a receiver the Court "must carefully balance the rights of both the applicant and the respondent".[27] The applicant has the burden of establishing that it is both just and convenient to grant the proposed receivership order after the conclusion of the balancing exercise.[28]

22. Justice Romaine, drawing from Bennett on Receiverships, provided a non-exhaustive list of factors that the courts may consider in determining whether the appointment of a

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[22] *BIA*, *supra* at ss 243(1), 243(1.1), 244 [**TAB 1**].
[23] Jenkins Affidavit at para 34(e), Exhibit "N" at s 3.03(d).
[24] *Judicature Act*, *supra* at s 13(2) [**TAB 2**].
[25] *Judicature Act*, *supra* at s 13(2) [**TAB 2**].
[26] *PPSA*, *supra* at s 65(7) [**TAB 3**].
[27] *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127 at para 17 [*BG International*] [**TAB 4**].
[28] *BG International*, *supra* at para 17 [**TAB 4**].

receiver is just and convenient in *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, as follows:

(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 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 in the loan;

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

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

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

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

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

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.[29]

23. More recent editions of Bennett on Receiverships have since added additional factors to the list outlined in *Paragon*, being "the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity".[30]

24. This list of factors is not exhaustive, nor does the applicant carry the burden of satisfying each factor. Further, in cases where the security documentation specifically contemplates the appointment of a receiver, "the extraordinary nature of the remedy sought is less essential to the inquiry."[31]

25. Having regard to the *Paragon* factors, the circumstances of the present case weigh heavily in favour of a finding that it is just and convenient to appoint a Receiver over Halo and its Property.

26. *Irreparable harm will occur if a Receiver is not appointed:* At this time, the revenues generated from Halo's current assets are insufficient to maintain the business, resulting in ongoing liquidity issues. Halo is relying on the deferral of payables in order to continue its operations in the short term.[32] If Halo's operations do not continue, there is a clear risk to any future sale process and, therefore, the ability of Invico to recover the Indebtedness. There is also a significant risk of harm to Halo's broader group of stakeholders given the environmental implications and liabilities that would arise if the insolvency of a company, whose assets include wells and related servicing facilities, is not properly addressed. The incurrence of any environmental liabilities by Halo would further prejudice Invico's secured position. If the Receiver is not appointed, Invico will suffer irreparable harm.

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[29] *Paragon Capital Corp v Merchants & Traders Assurance Co Ltd*, 2002 ABQB 430 at para 27 [*Paragon*] [**TAB 5**] citing to *Bennett on Receiverships*, 2d (Toronto: Carswell, 1999) at 130.

[30] *Bennett on Receiverships*, 4d (Toronto: Carswell, 2021) at 189-197 [**TAB 6**].

[31] *Paragon*, *supra* at para 28 [**TAB 5**].

[32] Jenkins Affidavit at paras 25, 42.

27. *There is no equity remaining in the business:* The results of the Strategic Process, including management's hesitance to pursue alternative opportunities despite interest from other parties, coupled with the amount of the Indebtedness, indicates that the market is leaning towards a sale of all or substantially all of the Property, which would likely demonstrate there is no equity remaining in the business.[33]

28. *The nature of the Property requires the appointment of a Receiver:* Halo operates in a highly regulated industry necessitating an experienced third party, being the Receiver, to step in and ensure that Halo's oil and gas assets are maintained and preserved in light of Halo's financial difficulties, with the standard protections afforded to the Receiver in the Alberta template receivership order. This same experience is also needed to ensure that assets of this nature are properly marketed as part of further sale efforts.

29. *There is an apprehended waste of assets:* Management has been marketing the Property and Halo's business for well over a year with no success. The length of the Strategic Process means potential purchasers are now well-aware of the opportunity resulting in an increased risk of failure.[34] If the Strategic Process continues under the control of management, this risk will only increase given the lack of defined timelines in that process. Furthermore, it is important to ensure that the business is properly funded to address any maintenance or other issues facing the assets, which Invico is only prepared to do under the supervision of a receiver.

30. *The appointment of a Receiver is necessary to preserve and protect the Property:* Halo's current liquidity issues are material, thus threatening its continued operations, particularly as there is no meaningful buffer in place to address any unforeseen operational issues.[35] These tenuous circumstances pose a risk to both Invico's collateral and creditor realizations in any sale process. It is therefore necessary to appoint a Receiver to preserve and protect the Property for the benefit of creditors and other stakeholders.

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[33] Jenkins Affidavit at paras 39, 41.

[34] Jenkins Affidavit at para 37.

[35] Jenkins Affidavit at para 42.

31. *The balance of convenience favours the appointment of a Receiver:* Halo's imminent liquidity issues, which risk operations going forward and, in turn, the Security and Invico and other creditors' secured positions, cause the balance of convenience to weigh heavily in favour of the appointment of a Receiver and far outweigh any prejudice that Halo may face as a result of such appointment. Invico has provided Halo with ample time to repay the Indebtedness using Halo's methods.

32. *Invico has the right to appoint a Receiver under the Security:* Pursuant to the express terms of the Debenture, Invico has the clear right to seek Court-appointment of a receiver upon the occurrence and continuance of an event of default under the Loan Agreement.[36] Halo has both acknowledged the existence of certain events of default under the Loan Agreement and Forbearance Agreement and that the Security is valid and enforceable under the terms of the First Forbearance Amendment.[37]

33. *The extraordinary appointment of a Receiver is justified:* While Invico recognizes the discretionary nature of a receivership appointment, and that it is a remedy reserved for extraordinary circumstances, Invico's right to seek court appointment of a receiver under the Debenture makes this factor less essential to the Court's broader inquiry.

34. In any event, this case does present extraordinary circumstances that warrant the requested appointment. As noted above, Halo has substantial liquidity issues and no viable alternative option available to increase its revenues to sustain operations beyond short term, band-aid measures, such as deferring payables to stretch its available cash.[38] The amount of time that Halo has been marketing its Property and business is also significant – approximately 15 months – with no closing date for a transaction in the near term despite continued supports from Invico during this period. Invico now seeks a receivership appointment as a last resort.

35. *A Court-appointment is necessary for the Receiver to carry out its duties efficiently and effectively:* The appointment of a Receiver in this case goes hand-in-hand with the ability

[36] Jenkins Affidavit at Exhibit "G" at s 4.2(f).

[37] Jenkins Affidavit at Exhibit "N" at s 3.01(f), (h).

[38] Jenkins Affidavit at para 42.

of a Receiver to conduct a formal sale and marketing process for the Property and Halo's business under the supervision and direction of the Court. Court-appointment of a Receiver is then required to allow the Receiver to conduct the proposed SISP and its other duties in an efficient and effective manner.

36. *Halo's conduct justifies the appointment of a Receiver:* In light of management's conduct throughout the Strategic Process, Invico is of the view that Halo is either unable or unwilling to advance and close a viable transaction on the necessary timelines on its own, in part due to management's apparent focus on attempting to salvage shareholder equity.[39] Halo excluded its financial advisor, Peters & Company ("**Peters**"), from conversations with prospective purchasers and failed to update Peters' engagement to that of a sale advisor to meet the milestone dates contained in the First Forbearance Amendment,[40] all of which resulted in an unfocused and ill-defined process. This behaviour coupled with Halo's repeated breaches under the Loan Agreement, Forbearance Agreement, and First Forbearance Amendment have resulted in Invico losing faith in Halo's ability to improve its financial situation and repay the Indebtedness.[41]

37. *The appointment of the proposed Receiver is anticipated to for a short duration to minimize costs:* Invico is seeking the Sale Approval Order concurrently with the Receivership Order to minimize costs to the estate. Invico's intention is to have the Receiver, if appointed, build off of the efforts undertaken in the Strategic Process to conduct a focused and expedient SISP that works towards a defined end date,[42] all to be mindful of the length of the Receiver's appointment and costs of the administration.

38. *The appointment of a Receiver increases the likelihood of maximizing realizations:* Closing a viable transaction in respect of Halo remains the only avenue available to repay the Indebtedness; however, Invico has lost confidence in the ability of management to complete a process.[43] By having a Receiver, a neutral party, assume conduct of a further

[39] Jenkins Affidavit at para 41.
[40] Jenkins Affidavit at paras 19, 36.
[41] Jenkins Affidavit at para 43.
[42] Jenkins Affidavit at para 43.
[43] Jenkins Affidavit at para 43.

sale process and push known bidders to come forward with bids and advance a transaction at set deadlines, the likelihood of a successful transaction will increase and the ability to make distributions to creditors accordingly.

39. *Invico has acted in good faith:* For several years, Invico has provided supports and space for Halo to identify a viable path to repay the Indebtedness. This support has included, among other things:

(a) entering into eight limited waivers and six amendments to the Loan Agreement over the span of approximately a year and a half to primarily address Halo's repeated inability to meet certain financial and reporting covenants;[44]

(b) providing Halo with breathing room to advance the Strategic Process through formal forbearance from enforcing on the Security, including entering into the First Forbearance Amendment despite Halo's almost immediate breach under the Forbearance Agreement;[45]

(c) postponing certain interest payments during the forbearance periods;[46] and

(d) withholding from immediately issuing a demand or notice of default in respect of the events of default that occurred under the Forbearance Agreement and First Forbearance Amendment to provide Halo with additional time to attempt to remedy the breaches and advance a transaction.[47]

40. In addition, Invico is prepared to fund any cash shortfalls that may arise in these proceedings, but only if a Receiver is appointed.[48]

41. For all of the above noted reasons, the *Paragon* factors have been met, it is just and convenient to appoint a Receiver, and no other remedy will adequately protect the interests of Halo's creditors, including those of Invico. At this time, the appointment of the Receiver

[44] Jenkins Affidavit at para 13, Exhibits "D"-"E".
[45] Jenkins Affidavit at paras 27-28, 31-34.
[46] Jenkins Affidavit at paras 29(c), 34(c).
[47] Jenkins Affidavit at paras 31, 36, 38.
[48] Jenkins Affidavit at para 44.

has become necessary in order to bring the sale and marketing process for Halo to an expedient and focused conclusion and to ensure Halo has sufficient funding to continue its operations. Invico respectfully submits that this Honourable Court should grant the proposed Receivership Order and appoint the Receiver over Halo and its Property.

B. The SISP is Reasonable and Appropriate in the Circumstances

42. The only way for Invico to recover the amounts owing under the Loan is through the completion of a transaction for Halo or the Property. As such, Invico has determined that the best way to maximize value both for itself and for Halo's other stakeholders, minimize further costs, and to preserve the efforts taken in the Strategic Process is to pursue approval of the proposed SISP concurrently with the granting of the Receivership Order. The Receiver, if appointed, will bring much needed expertise, control, and consistency to a further sale process, all while working towards a defined conclusion. The proposed SISP will be filed in these proceedings.

43. The Court has the necessary authority to approve the SISP pursuant to section 243(1)(c) of the *BIA*, which provides that, on the application of a secured creditor, the Court may appoint a receiver to "take any other action that the court considers advisable."[49] Further, the proposed Receivership Order, which is largely based on the Alberta Template Order, allows the Receiver to, among other things, take possession of and exercise control over the Property (paragraph 3(a)), market, solicit offers for, and negotiate the terms of a sale for the Property (paragraph 3(k)), and sell the Property, or any part of it, out of the ordinary course of business, subject to the approval of the Court if the transaction exceeds a specified amount (paragraph 3(l)).

44. The Ontario Superior Court of Justice outlined the following relevant factors when a sale process is being considered in *Nortel Networks Corporation (Re)*:

(a) whether a sale transaction is warranted at that time;

(b) whether the sale would benefit the whole "economic community";

[49] *BIA*, *supra* at s 243(1)(c) [**TAB 1**].

(c) whether any of the debtor's creditors have a *bona fide* reason to object to a sale of the business; and

(d) whether there is a better viable option.[50]

45. The proposed SISP should be approved as:

(a) the SISP is warranted at this time in light of Halo's imminent liquidity issues and the risk of failure continues to increase the longer Halo continues its unsuccessful marketing efforts exposing the opportunity to the market in the Strategic Process;[51]

(b) granting the proposed Sale Approval Order concurrently with the Receivership Order removes the need for a further and separate application, minimizing costs;

(c) the SISP will use the leads identified in the Strategic Process to increase efficiency and work towards set deadlines to preserve and maximize value for all creditors;

(d) Halo has not advanced any transaction[52] to a point where it would be prejudiced by granting the Sale Approval Order and any truly interested bidder can continue to participate and put their best bid forward in the SISP;

(e) Halo has not identified a viable alternative to repay the Indebtedness and continue its operations after over a year, in particular there is no longer an opportunity for Halo to purchase additional assets to improve its revenues;[53] and

(f) the Receiver will administer the SISP to preserve its integrity, which will address Invico's concerns with management's handling of the Strategic Process.

46. Invico respectfully submits that the proposed structure of the SISP is reasonable, fair and transparent, and appropriate in the circumstances, and should therefore be approved at this time.

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[50] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) at para 49 [**TAB 7**].

[51] Jenkins Affidavit at para 37.

[52] Jenkins Affidavit at paras 22, 37.

[53] Jenkins Affidavit at para 35.

V. CONCLUSION

47. Invico has justifiably lost confidence in Halo's ability to repay the Indebtedness through the Strategic Process. Given all of the circumstances present, it is more than just and convenient to appoint a Receiver over Halo and its Property. Such relief is immediately required given Halo's severe liquidity issues and to minimize the potential harms that will result to Invico and the broader group of stakeholders if Halo cannot continue its operations, including those in relation to its wells. It is further reasonable and appropriate to approve the SISP at this time to minimize cost to the estate and maximize creditor returns. Accordingly, Invico respectfully submits that this Honourable Court should grant all of the relief sought on the within Application, including the appointment of the Receiver without delay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF FEBRUARY, 2026.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

Robyn Gurofsky / Kaitlyn Wong,
Counsel for Invico Lending Strategies LP, by its general partner, Invico Lending Strategies GP Inc.

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Judicature Act*, RSA 2000, c J-2
3.	*Personal Property Security Act*, RSA 2000, c P-7
4.	*BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127
5.	*Paragon Capital Corp v Merchants & Traders Assurance Co Ltd*, 2002 ABQB 430
6.	*Bennett on Receiverships*, 4d (Toronto: Carswell, 2021)
7.	*Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC)

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act

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

Currency

An Act respecting Bankruptcy and Insolvency

R.S.C. 1985, c. B-3, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 203; R.S.C. 1985, c. 31 (1st Supp.), ss. 3, 28, 69-77; R.S.C. 1985, c. 3 (2nd Supp.), s. 28; R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); S.C. 1990, c. 17, s. 3; 1991, c. 46, s. 584; 1992, c. 1, ss. 12-20, 143 (Sched. VI, item 2), 145, 161; 1992, c. 27, ss. 1-90; 1993, c. 28, s. 78 (Sched. III, items 6, 7) [Amended 1999, c. 3, s. 12 (Sched., item 3).]; 1993, c. 34, s. 10; 1994, c. 26, ss. 6-9, 46; 1995, c. 1, s. 62(1)(a); 1996, c. 6, s. 167(1)(b), (2); 1996, c. 23, s. 168; 1997, c. 12, ss. 1-119; 1998, c. 19, s. 250; 1998, c. 21, s. 103; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 1999, c. 28, ss. 146, 147; 1999, c. 31, ss. 17-26; 2000, c. 12, ss. 8-21; 2000, c. 30, ss. 143-148; 2001, c. 4, ss. 25-27, 28 (Fr.), 29-32, 33(1) (Fr.), (2), (3); 2001, c. 9, ss. 572-574; 2002, c. 7, ss. 83-85; 2002, c. 8, s. 182(1)(b); 2004, c. 25, ss. 7(1), (2) (Fr.), (3)-(8), (9) (Fr.), (10), 8, 9 (Fr.), 10(1) (Fr.), (2), (3) (Fr.), 11 (Fr.), 12-16, 17 (Fr.), 18, 19 (Fr.), 20-23, 24 (Fr.), 25(1), (2) (Fr.), 26, 27(1)-(3), (4) (Fr.), (5), 28-31, 32(1), (2), (3) (Fr.), 33-35 (Fr.), 36-48, 49(1) (Fr.), (2), (3), 50(1), (2) (Fr.), (3), 51 (Fr.), 52(1) (Fr.), (2), 53-64, 65 (Fr.), 66, 67-69 (Fr.), 70-74, 75 (Fr.), 76 (Fr.), 77, 78 (Fr.), 79 (Fr.), 80-83, 84 (Fr.), 85 (Fr.), 86, 87, 88(1), (2) (Fr.), 89, 90 (Fr.), 91 (Fr.), 92, 93, 94 (Fr.), 95-99, 100(1) (Fr.), (2), 101 (Fr.), 102(1), (2) (Fr.), 103; 2005, c. 3, ss. 11-14; 2005, c. 47, ss. 2(1), (2) (Fr.), (3)-(5), (6) (Fr.), 3-52, 53 (Fr.), 54-100, 101(1), (2) (Fr.), (3), 102-123 [ss. 20(3), 30(2), 31(3), 37, 104(3), 106, 116, 120(2) repealed 2007, c. 36, ss. 95-98, 101-104; ss. 39(2), 103 amended 2007, c. 36, ss. 99, 100.]; 2007, c. 29, ss. 91-102; 2007, c. 36, ss. 1-3, 4 (Fr.), 5-7, 8 (Fr.), 9(1) (Fr.), (2), (3), 10, 11 (Fr.), 12-32, 33(1), (2), (3) (Fr.), (4), (5), 34, 35, 36 (Fr.), 37-52, 53(1) (Fr.), (2), 54-60, 112(4), (10)(b), (13), (14) [ss. 25, 31, 40 repealed 2007, c. 36, s. 112(2), (7), (10)(a).]; 2009, c. 2, ss. 355 (Fr.), 356 (Fr.); 2009, c. 31, ss. 63-65; 2009, c. 33, ss. 21-26; 2012, c. 16, ss. 79-81; 2012, c. 31, ss. 414-418; 2014, c. 20, s. 484; 2015, c. 3, ss. 6 (Fr.), 7 (Fr.), 8, 9, 10 (Fr.); 2017, c. 6, s. 122; 2017, c. 26, ss. 5-10; 2018, c. 10, s. 82; 2018, c. 27, ss. 265 (Fr.), 266-268; 2019, c. 29, ss. 133-135, 160, 161; 2022, c. 5, s. 12; 2022, c. 10, ss. 137, 173(2); 2023, c. 6, ss. 2-4; 2024, c. 15, ss. 99, 273 [s. 273 to come into force June 20, 2026 or on an earlier day to be fixed by order of the Governor in Council.]; 2024, c. 17, ss. 83, 111(2); 2024, c. 31, s. 2.

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Federal English Statutes reflect amendments current to December 3, 2025
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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

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

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

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

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

243(3)Definition of "receiver" — subsection 248(2)

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

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

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

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

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

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

Judicial Consideration (9)

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Federal English Statutes reflect amendments current to December 3, 2025
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R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

244.

244(1)Advance notice

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.

244(2)Period of notice

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.

244(2.1)No advance consent

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).

244(3)Exception

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.

244(4)Idem

This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History

1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency

Federal English Statutes reflect amendments current to December 3, 2025
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TAB 2

Alberta Statutes
Judicature Act

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

Currency

R.S.A. 2000, c. J-2, as am. R.S.A. 2000, c. A-30, s. 91; R.S.A. 2000, c. 16 (Supp.), ss. 27, 36, 73 [s. 73(3) not in force at date of publication. Repealed 2004, c. 11, s. 3(5).]; S.A. 2001, c. 24, s. 9; 2002, c. 32, s. 9; 2003, c. 41, s. 1; 2003, c. 42, s. 11; 2004, c. 11, s. 3(1)-(4) [s. 3(2) amended 2006, c. 4, s. 2.]; 2005, c. 15, s. 7; 2007, c. 21; 2008, c. 13, s. 14; 2009, c. 53, s. 1; 2011, c. N-6.5, s. 13 [Not in force at date of publication.]; 2011, c. 20, s. 8(17); 2013, c. 10, s. 20; 2013, c. 11, s. 2(2); 2013, c. 23, s. 8; 2014, c. 13, s. 29; 2017, c. 22, s. 30; 2018, c. 20, s. 9; Alta. Reg. 137/2022, s. 7; 217/2022, s. 120; 2022, c. 21, s. 45; Alta. Reg. 75/2023, s. 43.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 121:9 (May 15, 2025)

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Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.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.

13(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.

Judicial Consideration (1)

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TAB 3

Alberta Statutes
Personal Property Security Act

R.S.A. 2000, c. P-7

Currency

R.S.A. 2000, c. P-7, as am. S.A. 2001, c. C-28.1, s. 462; 2006, c. S-4.5, s. 108; 2006, c. 23, s. 63; 2009, c. 53, s. 129; 2016, c. 18, s. 14; Alta. Reg. 217/2022, s. 172; 2023, c. 5, s. 9 [s. 9(17), (22) amended 2023, c. 9, s. 29.].

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

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Alberta Statutes
Personal Property Security Act
Part 5 — Rights and Remedies on Default (ss. 55-65)

R.S.A. 2000, c. P-7, s. 65

s 65. Receiver

Currency

65.Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

65(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act*, and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

65(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

65(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

65(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

65(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

65(7) On the application of any interested person, the Court may

(a) appoint a receiver;

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

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

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

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

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

65(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

65(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

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TAB 4

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

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

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

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

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

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

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

Headnote

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

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

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

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

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

***Per curiam*:**

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

Facts

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

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

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

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

Standard of Review

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

Appointment of the Receiver

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

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia.

He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

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

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

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

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

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

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had

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

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

Conclusion

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

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

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

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

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

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

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

Appeal dismissed.

End of Document

TAB 5

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

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

Headnote

Receivers --- Appointment — General

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

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

> a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;
>
> b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;
>
> c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;
>
> d) an assignment of mortgage-backed debentures;
>
> e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;
>
> f) $250,000 to be held in trust by Paragon's counsel; and
>
> g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable

apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

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

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

Should the ex parte order now be set aside?

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

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

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all,

but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

TAB 6

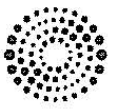
BENNETT
on
RECEIVERSHIPS

Fourth Edition

2021

by

Frank Bennett
L.S.M., LL.M.
Toronto, Canada



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If the applicant is not a security holder or secured creditor, the court will recognize that the application is an extraordinary remedy that should be applied sparingly.[67] In these cases, the court will apply a more stringent test since if successful, the receivership becomes in effect execution before judgment.

This remedy to appoint a court-appointed receiver includes the court appointment of an investigative receiver where the receiver obtains powers of investigation into the financial affairs of the defendant without the power to seize and realize on its assets.[68]

The test for the appointment of a receiver is often compared to the test for an injunction, namely:

a. whether there is a serious issue to be tried,
b. irreparable harm if not granted, and
c. the balance of convenience.[69]

The court reviews these factors in reviewing the facts of each case. And in particular,the court focuses on the following general facts:

a. The existence of a debt and default;[70]
b. The nature and extent of the creditor's security;

S.C.J.), additional reasons as to costs 2014 ONSC 1426 (Ont. S.C.J.) and *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]). where a subsequently ranked mortgagee obtained the appointment of a court-appointed receiver over the objections of prior mortgagees.

67 *Alberta Treasury Branches v. COGI Limited Partnership*, 2016 ABQB 43, 33 C.B.R. (6th) 22 (Alta. Q.B.) where the court appointed receiver attempted to place its subsidiary in receivership.

See also *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.) where the court dismissed an application to appoint an interim receiver in an oppression remedy case.

See also *Katz v. Katz* (1976), 22 C.B.R. (N.S.) 198 (Ont. S.C.) where the court appointed an interim receiver to collect the rents and profits while the action proceeded.

68 *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, 25 C.B.R. (6th) 260 (Ont. C.A.), additional reasons as to costs 2015 ONCA 771 (Ont. C.A.).

See also *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) at para. 88, where the court reiterated the legal principles governing the appointment of investigative receivers; leave to appeal refused 2011 ONSC 4704 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10661 (Ont. Div. Ct.), additional reasons as to costs 2011 ONSC 4136, 89 C.B.R. (5th) 143 (Ont. S.C.J. [Commercial List]).

See also *Continental Casualty Co. v. Symons*, 2016 ONSC 4555, 39 C.B.R. (6th) 65 (Ont. S.C.J.), additional reasons 2016 ONSC 4750, 39 C.B.R. (6th) 76 (Ont. S.C.J.), additional reasons 2016 CarswellOnt 12195 (Ont. S.C.J.), additional reasons 2016 CarswellOnt 16189 (Ont. S.C.J.).

69 *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.). See, for example, *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15(e) (S.C.J.), additional reasons 2010 ONSC 4920.

70 If the security holder cannot readily establish a debt owing or that the debt is in dispute, the court will dismiss the motion or application: *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 (B.C. S.C.) where the court dismissed the application to appoint a receiver as the debtor successfully argued that the debt was settled.

c. The need for the appointment in view of the alternatives;
d. The nature of the property;
e. The likelihood of maximizing the return to the parties;
f. The costs involved;
g. The need to preserve the property pending realization;
h. The effect of an order on other creditors and other stakeholders.[71]

There are many factors and variations in determining whether it is just or convenient to appoint a receiver. The court should look at all the facts and review the matter "holistically" or on the "whole of the circumstances" to determine whether it is just or convenient to appoint a receiver.[72] These facts include the following:[73]

---

[71] *Central 1 Credit Union v. UM Financial Inc.*, 2011 ONSC 5612, 84 C.B.R. (5th) 315 (Ont. S.C.J. [Commercial List]) where the court dismissed an application by a third party to intervene on an application to appoint a receiver.

[72] *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) at paras. 22-24 where the court refers to the holistic approach and refers to two lines of authority for the test, namely the appointment as of right where there is default under a security agreement and where the court should nonetheless in addition to the default under the security agreement still consider whether the appointment is just or convenient..

[73] These factors were considered in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 46 C.B.R. (4th) 95, 2002 ABQB 430 at paragraph 27, 2002 CarswellAlta 1531 (Alta. Q.B.); in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 at para. 25, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]); in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 C.B.R. (5th) 178 (Alta. Q.B.) at para. 13.

See also *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, 2021 ABQB 137 (Alta. Q.B.) where in reviewing these factors, the court appointed a receiver. The court reviewed several defences including whether the security holder made misrepresentations about restructuring the loans, the lack of good faith in the enforcement proceedings, the credibility of the parties, misleading the debtor about restructuring the loans, and the lack of opportunity to negotiate the forbearance agreement.

In *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) at para. 9, leave to appeal to the Divisional Court dismissed 2009 CarswellOnt 1128 (Ont. S.C.J.) where the court considered the four following factors in dismissing a motion for the appointment of an interim receiver:

"(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));

(2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));

(3) When the security interest permits the appointment of a receiver — and the circumstances of default justify the appointment — the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]))

(4) Where there is default which is not caused by the moving party where a loan had matured and there was no other means to protect the party's interest, then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List])."

In *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242, 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69

(1) whether irreparable harm might be caused if no order were made, although it is not essential that the creditor establish that it will suffer irreparable harm if a receiver is not appointed;[74]

C.B.R. (5th) 42, 2010 ABCA 191 (Alta. C.A.), the motion court considered the following factors in determining "just or convenient":

"In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;
b. the risk to the parties;
c. the risk of waste debtor's assets;
d. the preservation and protection of property pending judicial resolution; and
e. the balance of convenience."

See also *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477, 2010 CarswellBC 855 (B.C. S.C. [In Chambers]) and *Kumra v. Luthra*, 2010 ABQB 772, 79 C.B.R. (5th) 77 (Alta. Q.B.)

See also *Elleway Acquisitions Ltd. v. The Cruise Professionals Limited*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), where the court reviewed several other related cases in considering whether to appoint a receiver:"(a) the potential costs of the receiver;(b) the relationship between the debtor and the creditors;(c) the likelihood of preserving and maximizing the return on the subject property; and(d) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.)."

See also *Re Alexis Paragon Limited Partnership*, 2014 ABQB 65, 9 C.B.R. (6th) 43 (Alta. Q.B.) where the court considered the following factors in making the order:

1. the secured creditor's contractual right to appoint a receiver;
2. the risk of harm to the secured creditor if a receiver is not appointed;
3. the risk to the secured creditor from a sizeable deficiency;
4. the nature of the property;
5. the length of the receivership process; and
6. costs to the parties minimized if a receiver is appointed.

See also *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 (N.S. S.C.) where the court reviewed most of the factors in granting the appointment.

See also *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, 61 C.B.R. (6th) 322 (N.S. S.C.), additional reasons following debtor's redeeming bank before order was taken out 2018 NSSC 182, 62 C.B.R. (6th) 283 (N.S. S.C.).

See also *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243, 72 C.B.R. (6th) 118 (N.S. S.C.) following *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* above.

See also *Re Schendel Management Ltd.*, 2019 ABQB 545 (Alta. Q.B.) where the debtor's proposal was doomed fail.

See also *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited*, 2020 MBQB 58, 79 C.B.R. (6th) 44 (Man. Q.B.) where the debtor had not been acting in good faith and with due diligence, and had not provided the proposal trustee with accurate and timely information.

74 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) referring to *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. H.C.). In the *Odyssey* case, there was no evidence of the loans being in jeopardy of repayment while being in default.

See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) where the court focused on (1) the effect of an appointment on the parties including costs, maximizing the return and preserving the property, (2) the parties' conduct and (3) the nature of the debtor's property and the rights and interest of the parties in relation to the property referring to the *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

(2) the risk to the security holder. In considering the risk factor, the court considers the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while the litigation takes place. If the security holder can readily establish that there is going to be a sizeable deficiency in relation to the size of the loan, then the court will lean in favour of making the appointment as there is clear prejudice to the security holder. On the other hand, 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 adequately protect the security holder;[75]

(3) the nature of the property;

(4) the rights of the parties thereto;[76] If the secured creditors lose confidence in the debtor's ability to manage the business, then the court will consider this factor in favour an appointment.[77]

The *Swiss Bank* case has been distinguished and not followed in Alberta: *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that the debtor does not to prove any special hardship, much less "undue hardship" to resist an application for the appointment of a receiver.

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1993), 87 Man. R. (2d) 216, 19 C.B.R. (3d) 190, 1993 CarswellMan 30 (Man. Q.B.) where the court also took into consideration the fact that the plaintiffs had a strong *prima facie* case and that the balance of convenience favoured the appointment.

75 If there is no danger to the debtor's property, and the appointment will have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.)

See also *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. H.C.) where the court, after considering that the debtor's financial situation was desperate, appointed a receiver and manager.

In *Churchill (Local Government District) v. Costa Cartage Ltd.* (1994), 94 Man. R. (2d) 216, 1994 CarswellMan 286 (Man. Q.B.) where the debtor threatened to remove the furniture and furnishings of a hotel.

See also *Wilson v. Marine Drive Properties Ltd.* (2008), 51 C.B.R. (5th) 74, 2008 BCSC 1431, 2008 CarswellBC 2240 (B.C. S.C.).

Sequestre de Bouvidard limitee c. 3184277 Canada inc., 2017 QCCS 2293, 53 C.B.R. (6th) 162 (C.S. Que.).

See also *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, 2009 CanLII 12803, [2009] O.J. No. 1228 (Ont. S.C.J.), where the unsecured creditor's right to recovery money in a fraud situation is in serious jeopardy. In this case, the court appointed an "investigatory receiver" to locate, investigate and monitor the debtor.

See also *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* 2011 ONSC 4704 (Ont. Div. Ct.), refusing leave to appeal, additional reasons as to costs 2011 ONSC 5699 (Ont. Div. Ct.) where the court appointed an "investigative receiver" to review transfers between interconnected entities.

See *Business Development Bank of Canada v. Royal Green Enterprises Ltd.*, 2012 ONSC 478 (Ont. S.C.J. [Commercial List]), where the court appointed a receiver as security holder's collateral was eroding.

76 *Nat. Trust Co. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.); applied in *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366, 1991 CarswellOnt 469 (Ont. Gen. Div.). See also *Royal Trust Corp. of Can. v. D.Q. Plaza Holdings et al.* (1984), 36 Sask. R. 84, 53 C.B.R. (N.S.) 18, 1984 CarswellSask 38 (Sask. Q.B.).

(5) the apprehended or actual waste of the debtor's assets;[78]
(6) the preservation and protection of the property pending the judicial resolution;[79] If the business is operating, the court considers the amount of carrying costs needed to preserve the business for re-sale.

See also *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that an appointment should not lightly be granted and that the rights of both parties should be carefully balanced before an appointment is made.

In *MTM Commercial Trust v. Statesman Riverside Quays Ltd.* (2010), 70 C.B.R. (5th) 233, 2010 ABQB 647 (Alta. Q.B.) the court reviewed the test for the appointment of a receiver as being comparable to the test for an injunction, namely whether there is a serious issue to be tried, irreparable harm if not granted, and the balance of convenience: *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.).

77 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851, 81 C.B.R. (5th) 47 (Ont. S.C.J.).

78 *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver as the debtor was dissipating its assets and its property was deteriorating. However, the court stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*. The court held, at para. 14, that if a debtor is in default under a security agreement, then it is a matter of course that a receiver should be appointed unless there are compelling reasons to the contrary.

Compare *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) where the court refers to two lines of authority on the test to appoint a receiver.

79 For example, the court has the discretion to appoint a receiver in a mortgage action where the mortgagor fails to manage the buildings properly and make repairs: *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Company* (1978), 23 N.B.R. (2d) 261, 1978 CarswellNB 96 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301, 1996 CarswellOnt 430 (Ont. Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallet Fruit Farms Ltd.*, 1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.).

See also *McLennan Ross v. Paramount Life Ins. Co.* (1986), 44 Alta. L.R. (2d) 375, 63 C.B.R. (N.S.) 265, 1986 CarswellAlta 448 (Alta. Q.B.). When a mortgagee applies for a court appointment, the order does not create any new rights; it only protects existing rights. In this case, the court held that the receiver is entitled to collect rent arrears after the appointment, but the receiver cannot collect rent already collected by the mortgagor.

See also *Standard Trust Co. v. Pendygrasse Hldg. Ltd.* (1988), 71 C.B.R. (N.S.) 65, 1988 CarswellSask 27 (Sask. Q.B.) where the court, in referring to many of these factors, refused the appointment on the basis that the mortgagee already had significant control over the management board of a condominium complex and, therefore, its security was not in danger.

See also *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, 1991 CarswellOnt 1511 (Ont. Gen. Div.), where the court, in referring to many of these factors, appointed a receiver to complete a large construction project of an office building and to lease out space. Here, the debtor had no substantial equity in the project, its loans were in default and they had matured. The right to appoint a receiver becomes even less extraordinary when dealing with a default under a mortgage.

See also *Bank of N.S. v. Marbeck Well Servicing Ltd.; Bank of N.S. v. Becker* (1986), 43 Alta. L.R. (2d) 453 (M.C.) (headnote only).

See also *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 31 C.B.R. (5th) 100, 2007 YKSC 2, 2007 CarswellYukon 1 (Y.T. S.C.) where the court concluded that an interim receiver was needed where there were dangerous and unsafe conditions in a mine site that had been abandoned.

See also *Bacic v. Millennium Educational & Research Charitable Foundation*, 2013 ONSC 4545, 17 C.B.R. (6th) 162 (Ont. S.C.J.) where after an initial appointment of a receiver to

On the other hand, if the business is closed at the time of the application or motion, the court will be less concerned about these costs, but will be focused on the costs to moth-ball the business.

(7) the balance of convenience to the parties;

(8) the fact that the creditor has the right to appoint a receiver under its security upon the debtor's default is an important factor. Where this clause is present, the extraordinary nature of the remedy is less essential as a determining factor in the consideration.[80] However, the

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protect the assets against dissipation, the applicants obtained an order expanding the powers of the receiver to mirror the appointment within bankruptcy proceedings.

See also *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905, 17 C.B.R. (6th) 169 (Ont. S.C.J. [Commercial List]) where the court appointed a receiver in order to preserve the continuity of a retirement residence as a going concern.

If the property is not in peril or the creditor is unable to demonstrate that, the court will not appoint a receiver: *Tim v. Lai and Harry Invts. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CarswellBC 575 (B.C. S.C.).

See also *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 13 C.B.R. (6th) 136 (Ont. S.C.J. [Commercial List]) at paras. 59-62, additional reasons as to costs 2014 ONSC 3480, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]) where in competing interests, the court appointed a receiver rather than allow the debtor protection under the *CCAA*.

See also *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]) where the court in choosing between a receivership or a *CCAA* process, must balance the competing interests of the various stakeholders to determine which process is more appropriate. The court will consider the following factors:

"a) Payment of the Receivership Applicants

b) Reputational damage

c) Preservation of employment

d) Speed of the process

e) Protection of all stakeholders

f) Cost

g) Nature of the business."

See also *Re 2607380 Ontario Inc.*, March 6, 2020 - referred to in *BCIMC Construction Fund Corp. Clover on Yonge Inc.*, [2020] O.J. No. 1615 (Ont. S.C.J.) - where the court granted an order under the *CCAA* rather than appointing a receiver. In this case, the debtor was supported by two of the three security holders and had a plan to present to the creditors.

But see *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver but stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*.

See also RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205, 18 C.B.R. (6th) 300 (Ont. S.C.J. [Commercial List]) where in appointing a receiver, the applicant was prepared to fund the receivership thereby preserving the debtor's enterprise value.

Instead of appointing a receiver, the security holder can request an injunction and a preservation order against the debtor pending a declaration that the security holder is entitled to enforce its security.

80 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

See *Alexander v. 2025610 Ontario Ltd.*, 2012 ONSC 3486, [2012] O.J. No. 2721 (Ont. S.C.J. [Commercial List]) where the parties agreed to the appointment of a receiver in a side agreement if they defaulted under a forbearance agreement.

court still has to decide on reviewing other factors whether an appointment is just or convenient and necessary to enable the receiver to carry out its work and duties more efficiently. As a result, the court should not ordinarily interfere with the contract between the parties, but it should still review other factors;[81]

(9) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;[82]

(10) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;[83] however, the fact that a creditor has the right to appoint a receiver by instrument under its security makes the "extraordinary" nature of the remedy less essential in the consideration, but the applicant must still demonstrate that the appointment is just or convenient;[84]

There are many cases following this factor.

81 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

There are many cases that adopt this principle: See Appendix to this Chapter.

On the other hand, there is *dicta* to the effect that the appointment of a receiver should be a matter of course in the context of a foreclosing mortgagee and that there is no need to satisfy the just or convenient test: *First West Credit Union v. 687830 B.C. Ltd.*, 2012 BCSC 908, 92 C.B.R. (5th) 198 (B.C. S.C.) referring to *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347, 2003 BCSC 640, 2003 CarswellBC 1084 (B.C. S.C. [In Chambers]).

See also below in text (10) extraordinary relief.

82 *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042, 2010 CarswellOnt 3588 (Ont. S.C.J.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

See also *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.).

But see *Visser v. Godspeed Aviation Ltd.*, 2020 BCSC 1241, 2020 CarswellBC 2070 (B.C. S.C.) where the court denied the appointment as there was no risk to the security or any potential irreparable harm. In this case, there was already a privately appointed receiver in place. The debtor had sued the creditor for misrepresentation arising out of the sale of the business to the debtor.

83 *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416 (Ont. Gen. Div.) referring to *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.).

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).See also *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*, 2003 CarswellOnt 3598 (Ont. S.C.J.), appeal dismissed 2004 CarswellOnt 810 (Ont. C.A.).

See also *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), *WestLBAG v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 3510 (Ont. S.C.J. [Commercial List]) where the receiver was initially appointed under subsection 47(1) of the *Bankruptcy and Insolvency Act* and sections 68(1) and (2)(b)(c) and (d) of the *Construction Lien Act*.

84 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

(11) whether a court appointment is necessary to enable a private receiver to carry out its duties more efficiently;[85]

(12) the effect of the order on the parties. 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;[86]

(13) the conduct of the parties;[87]

(14) the length of time that a receiver may be in place. Usually, a receiver appointed by the court remains in place until after judgment and realization of assets. This could last several years depending upon the nature of the business. However, 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;[88]

(15) costs to the parties;

(16) the likelihood of maximizing the return to the parties. As set out in Chapter 7, Realization, a court-appointed receiver has a higher standard in maximizing the return to all parties whereas a privately appointed receiver has a duty to the initiating creditor to obtain a fair price for the debtor's business. The receiver, whether court or privately appointed, can close the business, operate it for a short term and ultimately liquidate its assets if it cannot be sold as a going concern

(17) facilitating the duties of the receiver;[89] and

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85 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]); referred to in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1 (Ont. S.C.J.); and followed in *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (Ont. S.C.J.).

86 *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). In this case, the court was also concerned about the receiver's capabilities as the proposed receiver lacked experience in operating a nursing home. See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

87 *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.) where the court in rejecting the appointment of a receiver reviewed the effect of the order on the parties as well as their conduct.

88 In Ontario, the security holder seldom obtains judgment before the receiver sells the debtor's business. But see *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 56 C.B.R. (N.S.) 7, 16 D.L.R. (4th) 181 (B.C. C.A.) where the court commented about the creditor first obtaining judgment before it could sell.

89 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) where the court reviewed many of the above circumstances. In this case, the debtor had been attempting to re-finance real properties for one and a half years and was at odds with the security holder as to marketing them. In postponing the appointment for a short time to give the debtor a further opportunity to re-finance, the court concluded that a court-appointed receiver could resolve that impasse.

(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[90]

(19) the appointment will facilitate a cross border sale transaction giving the receiver power to apply to the United States Bankruptcy Court for recognition and enforcement of orders.[91]

In many cases, a security holder whose instrument charges all or substantially all of the debtor's property provides for a court-appointed receivership if the debtor is in default and fails to pay following a demand for payment.[92] *Prima facie*, the security holder is entitled to enforce its security by applying for a court-appointed receiver and manager.

If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that:

1. there is a serious issue to be tried,
2. that irreparable harm will occur if an appointment is not made, and
3. that the balance of convenience must be in the creditor's favour.

In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[93]

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90 *Priority 1 Security Inc. v. Phasys Ltd.* (2006), 9 P.P.S.A.C. (3d) 203, 22 C.B.R. (5th) 258, 2006 ABQB 332 (Alta. Q.B.).

See also section 4.2 of the *Bankruptcy and Insolvency Act* which provides that any interested person in any proceedings under this Act shall act in good faith. If an interested person fails to act in good faith, the court has the power to "make any order that it considers appropriate in the circumstances."

91 *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]).

92 The above passage as it was written in the first edition was cited in *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343 (Alta. Q.B.).

See *Royal Bank v. Brodak Construction Services Inc.* (2002), 34 C.B.R. (4th) 107, 2002 CarswellOnt 1774 (Ont. S.C.J. [Commercial List]) referring to *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]).

93 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.). In *Anderson v. Hunking*, 2010 ONSC 4008, 2010 CarswellOnt 5191 (Ont. S.C.J.), additional reasons 2010 ONSC 4920, the Ontario court summarized the factors in dismissing an application for the appointment of a receiver where the creditors were neither judgment creditors nor secured creditors at paras. 15 and 16:

"[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 (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 (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(S.C.) at paras. 7 and 11;

(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 (S.C.J.). [*Degroote v. DC Entertainment Corp.* (2013), 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List])].

[16] The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As the court observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is 'just' or 'convenient' or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)]."

Followed in *Schembri v. Way* (2010), 76 B.L.R. (4th) 147, 2010 ONSC 5176, 2010 CarswellOnt 8675 (Ont. S.C.J.) and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2011 ONSC 4704, 2011 CarswellOnt 8054 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10661 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10375 (Ont. S.C.J. [Commercial List]), followed in *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759, 86 C.B.R. (5th) 49 (Alta. Q.B.) where the court extended the appointment of a receiver having been previously appointed over real estate to take possession of related companies operating a hotel on the mortgaged lands.

See also *Eaglewood Specialty Products et al v. Royal Bank*, 2017 NBQB 136, 50 C.B.R. (6th) 246 (N.B. Q.B.) where the debtor unsuccessfully applied to restrain the privately appointed receiver.

See *Murphy v. Cahill*, 2013 ABQB 335 (Alta. Q.B.) where the court dismissed an application to appoint a receiver on the basis that the applicant did not meet the triparte test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, that the parties were ready for trial,

TAB 7

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra,* at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the <u>means</u> contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009