COURT FILE NO.	2401 06383	Clerk's Stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
PLAINTIFF	CANADIAN WESTERN BANK	
DEFENDANT	ROCKY MOUNTAIN ALBERTA PARTNERS LTD.	
DOCUMENT	**BOOK OF AUTHORITIES OF CANADIAN WESTERN BANK**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, K.C. Telephone: (780) 482-9115 Fax: (780) 733-9757 Email: chuck.russell@mross.com File No.: 20230780

TABLE OF AUTHORITIES

TAB 1

Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

Vérification des comptes

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

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

Application

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

Application automatique

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

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

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

Definition of *receiver*

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

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

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

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

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

Définition de *séquestre*

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

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

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

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

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

Trustee to be appointed

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

Syndic

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

Place of filing

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

Lieu du dépôt

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

Orders respecting fees and disbursements

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

Ordonnances relatives aux honoraires et débours

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

TAB 2

General jurisdiction

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

RSA 1980 cJ-1 s8

Province-wide jurisdiction

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

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

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

RSA 1980 cJ-1 s10

Declaration judgment

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

RSA 1980 cJ-1 s11

Canadian law

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

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

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

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

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

Equity prevails

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

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

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

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

or

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

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

(2) If a defendant claims to be entitled

TAB 3

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

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.

(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.

(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.

(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.

(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.

(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.

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

(a) appoint a receiver;

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

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

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

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

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

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

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

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

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

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

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

TAB 4

(b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

TAB 5

2020 ABQB 316
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Proform Management Inc.

2020 CarswellAlta 903, 2020 ABQB 316, [2020] A.W.L.D. 1940, 12 P.P.S.A.C. (4th) 120, 18 Alta. L.R. (7th) 277, 318 A.C.W.S. (3d) 404

Servus Credit Union Ltd. (Plaintiff/Applicant) and Proform Management Inc., Proform Concrete Services Inc., and Proform Construction Products Inc., formerly known as Proform Precast Products Inc. (Defendants / Respondents)

M.J. Lema J.

Heard: May 5, 2020
Judgment: May 11, 2020
Docket: Edmonton 2003-06374

Counsel: Rick T.G. Reeson, Q.C., Patrick Harnett, for Plaintiff / Applicant
Jeffrey Oliver, D. Maréchal, for Defendants / Respondents
Adam Maerov, for Respondent / Guarantor, 285319 Alberta Ltd.
Sean E. Fleming, for Interim Monitor
J. Phillips, M. Phillips, for themselves

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
Debtors, group of related companies, were indebted to creditor for approximately $12.6 million — There had been two forbearance periods and additional period of interim monitoring — Creditor held consent receivership order granted at onset of forbearance — Debtors believed they could arrange refinancing to pay out entire debt if they had further 30 days of monitoring — Creditor applied for appointment of receiver; debtors applied to extend interim monitoring period — Creditor's application granted; debtors' application dismissed — Debtors were in state of default, creditor's enforcement rights were engaged, and gateway for entering consent receivership order had been opened — COVID-19 pandemic did not impact debtors in material way — Debtors' defaulted on second forbearance agreement as early as March 3, 2020, but massive impact of COVID-19 only began to emerge as of March 8, 2020 — Evidence was insufficient to show that pandemic had any material impact on debtors' businesses, refinancing efforts or asset sale efforts through March 12, 2020, when second forbearance period ended, and debtors received further 19 days of no enforcement when interim monitoring order was granted and further five week stay of proceedings — By signing consent receivership order debtors acknowledged their indebtedness to creditor, their default status, triggering of creditor's enforcement options which included applying for receiver, and that appointment of receiver was warranted once period of forbearance had expired without clearance of creditor's debt — At this stage, in light of agreement, it was not open to debtors to argue why receivership order was not just or convenient — Creditor lived up to its end of deal by forbearing from taking action, and by end of forbearance periods debtors had not accomplished clearing creditor's debt in full — Creditor had not agreed to any further forbearance period, consequence that it could seek receivership order in circumstances was exactly what debtors agreed to, and debtors had blocked themselves from resisting granting of order — Court had jurisdiction to grant receivership

A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree. A court should not unilaterally alter a proposed consent decree that has been submitted to it for entry." Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.

However, a court does have the prerogative to at least make the "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree". A consent decree should bear some relationship to the case and pleadings that have invoked the federal court's jurisdiction in the first place'" and "further the objectives of the law upon which the complaint was based." The decree should not undermine judicial integrity.

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.

The court's role here is discretionary, not mandatory. A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry. As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions." Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement. [footnotes omitted] [emphasis added]

Distillation of principles

60 On how to approach a consent order, the guiding principles are as follows:

- the Court is not obliged, from the mere fact of consent, to grant a consent order; and
- the Court must be satisfied (at minimum) that:
    - it has the jurisdiction to grant the order;
    - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
    - consent has actually been provided;
    - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
    - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
    - the proposed relief does not exceed that consented to; and
    - consent aside, the ordered relief is warranted in the circumstances.

61 The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.

62 At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

63 A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside. [14]

Whether it is "just or convenient" to appoint a receiver in these circumstances

64 The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

65 The question becomes whether it is indeed "just or convenient" to appoint a receiver here.

66 Here is where (as confirmed by the "consent-order-and-forbearance" cases) the debtors' consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

67 The debtors' core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs — continuing default — in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

68 In other words, even acknowledging significant progress to date, and even acknowledging the likelihood of more such progress over the next month, the debtors have *already agreed* that, if and when Servus decided against further grace (i.e. after the expiry of the latest hold period), it could move for the order *with no "merits" objection by them*.

69 Accordingly, on the "merits" review i.e. whether it is "just or convenient" to appoint a receiver here, I focus on the circumstances outlined by Servus.

70 Here it cites Romaine J.'s decision in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [15], in particular her helpful catalogue of appointment factors. I reproduce the *Paragon*-factors review from Servus's application brief:

> (a) Servus is a secured creditor of the Debtors and holds a security interest in of all the present and after-acquired property of the Debtors, subject to certain provisions of priority agreements entered into by Servus. Servus holds a first- ranking security interest in the Alberta Lands and NWT Lands;
>
> (b) The Debtors have demonstrated losses for the past 3 years;
>
> (c) the nature of the Debtors' property includes mobile equipment potentially located across Alberta, the Northwest Territories, British Columbia, Saskatchewan. There is also a risk of these mobile assets being subject to unauthorized sale and removal. The Debtors' also own two parcels of land located in Alberta and one parcel of land located in the Northwest Territories subject to Servus' security;

72 In these circumstances, and emphasizing the debtor's consent to the proposed receivership order, it is "just *and* convenient" that it be entered and, accordingly, that the debtors' application to extend the interim-monitoring period to June 4, 2020 be dismissed.

Creditor's application granted; debtors' application dismissed.

Footnotes

1 https://covid19stats.alberta.ca. I am using these statistics as a proxy for the general state of the Covid-19 pandemic in Alberta in the first part of March.

2 Servus also invoked s. 243 *BIA*, ss. 65(7) *PPSA*, and "Part A of the [*ABCA*]."

3 1988 ABCA 109 (Alta. C.A.)

4 2013 ABCA 288 (Alta. C.A.)

5 2002 ABQB 870 (Alta. Q.B.)

6 2010 ABQB 341 (Alta. Q.B.)

7 2010 ONSC 4236 (Ont. S.C.J. [Commercial List]) affd 2011 ONCA 314 (Ont. C.A.) leave denied 2011 CanLII 65628 [*Chegancas v. Lukezic*, 2011 CarswellOnt 10873 (S.C.C.)]

8 2007 BCSC 180 (B.C. S.C.)

9 See also the judgment of Mahoney J. in *Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc.*, 2019 ABQB 732 (Alta. Q.B.)

10 2004 BCSC 602 (B.C. S.C.)

11 2016 SKQB 387 (Sask. Q.B.)

12 2008 ABQB 170 (Alta. Q.B.)

13 (2010) 60 Am U L Rev 275 at 317-320

14 See, for example, *K. (T.E.H.) v. S. (C.L.)*, 2011 ABCA 252 (Alta. C.A.). See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 ("Judgments, Orders, and Settlements), R. ("Consent Orders or Judgments"), 7. ("Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 ("Consent Orders as Evidence of a Contract Between Parties" and "Binding Effect of Consent Orders") at p 303.

15 2002 ABQB 430 (Alta. Q.B.)

TAB 6

2023 ABKB 499
Alberta Court of King's Bench

Law Society of Alberta v. Higgerty

2023 CarswellAlta 2316, 2023 ABKB 499, [2023] 11 W.W.R. 511, [2023] A.W.L.D. 4668, 2023 A.C.W.S. 4382, 62 Alta. L.R. (7th) 78, 9 C.B.R. (7th) 59

Law Society of Alberta and Richard E. Harrison (Applicants) and Patrick B. Higgerty (Respondent)

D.B. Nixon J.

Heard: June 1, 2023
Judgment: August 31, 2023
Docket: Calgary 2301-03188

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

Related Abridgment Classifications

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

Headnote

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

Respondent personal injury and class-action focused law firm, who had substantial number of creditors, was placed under custodianship — Applicant provincial Law Society and individual applied for order appointing receiver and manager over certain undertakings, personal property, real property and assets of law firm — Application granted — Section 13(2) of Judicature Act allowed for granting of receivership order to party that was not creditor — Test to appoint receiver and manager was whether it was just or convenient to do so in light of circumstances — Law Society was major stakeholder in law firm — Law Society as regulator of legal profession needed to ensure that parties were acting in public interest, solicitor-client privilege was preserved, and that appropriate party dealt with obligation to settle law firm's indebtedness — There were trust account improprieties in range of $419,000 and no reasonable prospect of law firm repaying loan to secured creditor — Protection of solicitor-client privilege took precedence over rights and entitlements that secured creditor asserted in its capacity as secured lender — Risk to public was greater if there were breach of solicitor-client privilege than if there were breach of secured creditor's interest in security that law firm provided in respect of its property — Risk associated with nature of property was part of business risk that secured creditor assumed when it engaged in loan arrangement — Relief that Law Society and custodian sought did not strip secured creditor of its capacity — Balance of convenience favoured applicants — It was just or convenient for court to grant receivership order — Unique circumstances of case called for receiver and manager to be appointed under s. 13(2) of Act to best ensure protection of solicitor-client privilege Judicature Act, R.S.A. 2000, c. J-2, s 13(2).

Table of Authorities

Cases considered by *D.B. Nixon J.*:

Higgerty Law clients whose funds appear to have been misappropriated; (iv) the rights of Higgerty Law clients to access their file material; and (v) the rights of unsecured creditors, including clients of Higgerty Law.

V. Law

A. Receiver vs Receiver and Manager — The Distinction

20 The Application seeks the appointment of either a receiver or a receiver and manager. A receiver is "...a person who receives rents or other income paying ascertained outgoings, but who does not ... manage the property in the sense of buying or selling or anything of that kind". If there is a need to continue the trade at all, it is necessary to appoint a receiver and manager: see Frank Bennett, *Bennett on Receiverships* 4th ed (Thomson Reuters 2021) at 268 [*Bennett on Receiverships*].

21 An aspect of the trade in the Higgerty Law context would be the proposed dealing with the "Property" as that term is defined in the Custodian Order. It includes the file material of Higgerty Law.

22 The draft "receiver order" provided by the Applicants (the "Draft Receiver Order") includes in clause 4 a number of powers that are granted to the proposed receiver, including the power to: (i) take possession of the Property; (ii) negotiate payment for the Property; and (iii) settle, extend or compromise any indebtedness owing to or by Higgerty Law.

23 Based on my review of the scope of the powers in the Draft Receiver Order, I find they include elements of trade, albeit much will involve the transfer of Property in the form of legal files. I further note that the powers include a number of initiatives that are beyond the passive scope asserted by ELFCo. Based on the foregoing, if I conclude that any such appointment is appropriate in the circumstances of this case, I find it prudent to appoint a receiver and manager, rather than just a receiver.

B. The Test — Just or Convenient

24 The test to appoint a receiver and manager is whether it is just or convenient to do so in light of the circumstances: Judicature Act, RSA 2000, c J-2, s. 13(2); Servus Credit Union v Proform Management Inc, 2020 ABQB 316 at para 65.

25 A receivership order "should not be lightly granted": Kasten Energy Inc v Shamrock Oil & Gas Ltd, 2013 ABQB 63 at para 20, citing BG International Limited v Canadian Superior Energy Inc, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: *BG International* at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: *Kasten Energy* at para 20, citing *BG International* at paras 16.

26 A wide array of factors should be taken into consideration when considering the appointment of a receiver and manager. A non-exhaustive list of the factors I may consider prior to any such appointment are set out in Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co, 2002 ABQB 430 at para 27 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 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;
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> c. the nature of the property;
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> 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.

VI. Application of Law to Facts

27 The LSA is one of the Applicants in this case. It regulates the legal profession in the public interest by promoting and enforcing a high standard of professional and ethical conduct by Alberta lawyers. As part of my analysis of whether it is just or convenient to appoint a receiver and manager of Higgerty Law, I infer that the LSA is making this application on an objective basis given its status as a regulator.

A. Does the Law Society of Alberta have status necessary to apply for a receivership order?

28 The Applicants assert their authority to apply for the Draft Receiver Order is legislated under section 13(2) of the Judicature Act. Unlike certain provisions in the *BIA*, a receivership order may be granted under the *Judicature Act* following an application by a party that is not a creditor. Further, it may be granted in circumstances outside the normal course of bankruptcy.

29 In this case, neither Applicant relies upon its status as a creditor in applying for the Draft Receiver Order. The Applicants assert that receivership orders have been granted before in similar unique circumstances: see *Alberta Health Services v Networc Health Inc*, 2010 ABQB 373.

30 *Networc* provides instructive judicial guidance in granting a receivership order under section 13(2) of the Judicature Act at paragraphs 18 - 19 of the decision:

> [18] Section 13(2) of the *Judicature Act* does not require even the pre-requisite of the filing of an application for bankruptcy, as required under section 46 of the BIA, nor does it appear to limit the scope of powers of a receiver appointed under the section, requiring that it must appear to a court to be "just and convenient that the order be made." It is clear, however, that the appointment of a receiver under this provision should not be lightly granted, that alternate remedies should be explored short of a receivership, and that the rights of both an applicant and the respondent debtor must be carefully balanced before an appointment is made: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469.

TAB 7

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

Date: 20020429
Action No. 0101 05444

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

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

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

Defendants

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

APPEARANCES:

Judy D. Burke
for the Plaintiff

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

INTRODUCTION

[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: ***Metropolitan Life Insurance Company v. Hover***, 1999, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

[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 et al***, [1990] A.J. No. 253 (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. (3rd) 179 (paragraphs 30 and 31).

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

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

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 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.

R.J.R. McDonald Inc. v. Canada (A.G.), [1994] S.C.J. No. 17 (S.C.C.); ***Schacter v. National Park Services***, [1999] A.J. No. 599 (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.

DATED at Calgary, Alberta this 29th day of April, 2002.

_____

J.C.Q.B.A.

TAB 8

Court of Queen's Bench of Alberta

Citation: Schendel Management Ltd, 2019 ABQB 545

Date: 20190719
Docket: BK03 115990, BK03 115991
Registry: Edmonton

In the Matter of

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

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

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

Endorsement of the Honourable Mr. Justice M. J. Lema

A. Introduction

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

[2] I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that

proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down "sight unseen."

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

Conclusion on "proposal deemed refused" application

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

E. Appointment of receiver

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

Test for appointing a receiver

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

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

[12] 2013 BCSC 1833
[13] 2002 ABQB 430 at paras 26-32

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

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

Arguments

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

- "the debtors are unable to continue as viable entities or continue operations as
  - the Proposal is not viable;
  - the Debtors operate at a loss;
  - the Proposal will not be approved by [ATB]; and
  - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;

[14] 2013 ABQB 335 at para 71

TAB 9

Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by “Freure Management” and “Freure Village” to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

[4] On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

[5] As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

[6] No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor – Mr. Freure – are the same. Finally, the evidence which is relied upon for the change in the Bank's position – an internal Bank memo from the local branch to the credit committee of the Bank in Toronto – is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

[7] Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

[8] The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

[9] It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement – which they are, and are not, respectively – the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants – supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) – urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

[10] The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act,* R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

[12] While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplates, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank’s attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor’s solicitors themselves refer to the prospect of “costly, protracted and unproductive” litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court’s approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

TAB 10

2003 SKQB 469
Saskatchewan Court of Queen's Bench

Export Development Canada v. IFM Film Associates Inc.

2003 CarswellSask 740, 2003 SKQB 469, [2003] S.J. No. 710,
126 A.C.W.S. (3d) 903, 242 Sask. R. 277, 46 C.B.R. (4th) 254

EXPORT DEVELOPMENT CANADA (PLAINTIFF) and IFM FILM ASSOCIATES INC. (DEFENDANT)

Matheson J.

Judgment: November 12, 2003
Docket: Regina Q.B.G. 538/03

Counsel: P.J.F. Warsaba for Plaintiff
C.D. Hadubiak for Defendant

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.B Preservation of assets
Headnote
Receivers --- Appointment — Application for appointment — Grounds
General security agreement ("GSA") was granted to production company as security for payment pursuant to production services agreement ("PSA") between defendant and production company — Production company purchased from plaintiff receivable insurance policy to insure against default by defendant — Plaintiff agreed to pay proceeds from policy to bank, to whom production company had assigned all money due under PSA — Film subject to PSA was produced and delivered to defendant — Defendant did not make payments — Upon default by defendant plaintiff paid bank pursuant to policy — Production company and bank assigned their interests in PSA and GSA to plaintiff — Plaintiff brought action against defendant for judgment of $729,100 — Plaintiff brought application for order to appoint receiver pursuant to GSA — Application granted — GSA contained provision for appointment of receiver by security holder — Court was to exercise discretion to appoint receiver only if receiver appointed by security holder could not properly fulfil functions of receiver — Security granted by defendant was in California — Real possibility existed as to dissipation of defendant's assets — Since Saskatchewan was exclusive jurisdiction for disputes arising under GSA, plaintiff was required to obtain appointment by court pursuant to laws of Saskatchewan to ensure receiver's authority was recognized in California.
Bankruptcy and insolvency --- Interim receiver — Appointment
General security agreement ("GSA") was granted to production company as security for payment pursuant to production services agreement ("PSA") between defendant and production company — Production company purchased from plaintiff receivable insurance policy to insure against default by defendant — Plaintiff agreed to pay proceeds from policy to bank, to whom production company had assigned all money due under PSA — Film subject to PSA was produced and delivered to defendant — Defendant did not make payments — Upon default by defendant plaintiff paid bank pursuant to policy — Production company

and bank assigned their interests in PSA and GSA to plaintiff — Plaintiff brought action against defendant for judgment of $729,100 — Plaintiff brought application for order to appoint receiver pursuant to GSA — Application granted — GSA contained provision for appointment of receiver by security holder — Court was to exercise discretion to appoint receiver only if receiver appointed by security holder could not properly fulfil functions of receiver — Security granted by defendant was in California — Real possibility existed as to dissipation of defendant's assets — Since Saskatchewan was exclusive jurisdiction for disputes arising under GSA, plaintiff was required to obtain appointment by court pursuant to laws of Saskatchewan to ensure receiver's authority was recognized in California.

Table of Authorities

Cases considered by *Matheson J.*:

Royal Bank v. White Cross Properties Ltd. (1984), 53 C.B.R. (N.S.) 96, 34 Sask. R. 315, 1984 CarswellSask 33 (Sask. Q.B.) — considered

APPLICATION by plaintiff for order to appoint receiver pursuant to general security agreement.

***Matheson J.*:**

1 The plaintiff sued the defendant claiming judgment in the sum of $729,100.00; a declaration that the security granted by the defendant pursuant to a General Security Agreement has become enforceable; and the appointment of a receiver of the security granted pursuant to the General Security Agreement.

2 The General Security Agreement was granted to Hit Productions Inc. ("Hit") as security for the payment of money agreed to be paid to Hit pursuant to a Production Services Agreement between the defendant and Hit whereby Hit agreed to produce a film - The Hit - for the sum of $721,500.00. The film was produced and delivered to the defendant. However, the defendant requested, as evidenced by its letters dated January 14, 2002, and March 5, 2002, additional time to pay the agreed price. But none of the money has apparently been paid.

3 Hit purchased from the plaintiff a receivable insurance policy insuring Hit against default by the defendant. The plaintiff agreed to pay any proceeds from the insurance policy to Canadian Imperial Bank of Commerce ("C.I.B.C."), to whom Hit had assigned all, or a portion, of the money due to it under the Production Services Agreement. Upon default by the defendant, payment was made by the plaintiff, to C.I.B.C., pursuant to the insurance policy. Hit and C.I.B.C. assigned their interests in the Production Services Agreement and the General Security Agreement to the plaintiff.

4 The defendant has asserted that this action should be stayed by virtue of an arbitration clause in the Production Services Agreement, and has applied for an order to that effect. The plaintiff has insisted that it is not attempting to enforce the Production Services Agreement, but only the General Security Agreement, and the plaintiff has applied for an order appointing a receiver of the security

5 The General Security Agreement contains provision for the appointment of a receiver by the security holder. Thus, the parties agree that the discretion of the court to appoint a receiver should only be exercised if it is demonstrated that a receiver appointed by the security holder is not likely to be able to properly fulfill the functions of a receiver: *Royal Bank v. White Cross Properties Ltd.* (1984), 34 Sask. R. 315 (Sask. Q.B.).

6 It appears that the security granted by the defendant is located in California. According to the affidavit of Michael J. Novicoff, an attorney practising in Los Angeles, he has had extensive experience in the area of business litigation, with special expertise in international commercial matters and entertainment industry disputes. He has deposed that

> A Receiver appointed by instrument exercises a legal status not known or generally recognized under the laws of the United States of America or law of the State of California. It has been my experience that a Receiver appointed in such a manner may find it difficult, complicated, expensive and perhaps even impossible to exercise its authority anywhere in the United States of America. On the other hand, the legal status and authority of a Receiver appointed by an Order of a court in another country is generally recognized and respected under the laws of the United States of America and under the laws of the State of California.

> Accordingly, as there is an attornment clause providing that Saskatchewan is the exclusive jurisdiction for any disputes arising under the GSA, the Plaintiff must obtain the appointment of a Receiver by court Order pursuant to the laws of Saskatchewan, in order to ensure that the Receiver's authority will be recognized in California and elsewhere in the United States of America.

7 The defendant has argued that consideration of the appointment of a receiver is premature in view of the defences asserted to the plaintiff's claim. However, the affidavit of David Doerksen reveals a distinct possibility of the dissipation of the assets of the defendant, as do the balance sheets, dated February 28, 2003, and October 3, 2003, submitted by the defendant. Consequently, there will be an order, in the form of the draft order submitted, as amended, appointing a receiver.

Application granted.

End of Document

TAB 11

Alta. Reg. 124/2010, s. 7.2

s 7.2 Application for judgment

Currency

7.2Application for judgment

On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when

(a) admissions of fact are made in a pleading or otherwise, or

(b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

Concordance References

Rules Concordance 41, Summary judgment

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 7 — Resolving Claims Without Trial [Heading amended Alta. Reg. 126/2023, s. 5.]
Division 2 — Summary Judgment

Alta. Reg. 124/2010, s. 7.3

s 7.3 Application and decision

Currency

7.3Application and decision

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

(a) there is no defence to a claim or part of it;

(b) there is no merit to a claim or part of it;

(c) the only real issue is the amount to be awarded.

7.3(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

7.3(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;

(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

7.3(4) If the application is unsuccessful, the Court may

(a) direct that all or part of the claim proceeds by a streamlined trial, and

(b) make a procedural order respecting the streamlined trial.

Amendment History
Alta. Reg. 126/2023, s. 7

Currency
Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

Concordance References
Rules Concordance 41, Summary judgment

End of Document

TAB 12

2024 ABCA 3
Alberta Court of Appeal

Canadian Natural Resources Limited v. Harvest Operations Corp

2024 CarswellAlta 1, 2024 ABCA 3, [2024] A.J. No. 1

Canadian Natural Resources Limited, Canadian Natural Resources, a General Partnership by Its Managing Partner Canadian Natural Resources Limited, Canadian Natural Resources Northern Alberta Partnership by Its Managing Partner, Canadian Natural Resources Limited, CNR Royalty Partnership, a General Partnership by Its Managing Partner Canadian Natural Resources Limited (Appellants) and Harvest Operations Corp and Spoke Resources Ltd (Respondents)

Peter Martin J.A., Patricia Rowbotham J.A., Dawn Pentelechuk J.A.

Heard: November 10, 2023
Judgment: January 3, 2024
Docket: Calgary Appeal 2301-0049AC

Proceedings: Reversed, 2023 CarswellAlta 243, 2023 ABKB 62, 2023 A.C.W.S. 462, [2023] A.W.L.D. 2393 (Alta. K.B.)

Counsel: E.E. Paplawski, A.G. Manasterski (no appearance), A. Schnell, for Appellants
G.S. Poelman, S. Mann, for Respondents

Subject: Civil Practice and Procedure; Contracts; Natural Resources

Headnote

Natural resources

Table of Authorities

Cases considered:

EnCana Oil & Gas Partnership v. Ardco Services Ltd (2017), 2017 ABCA 401, 2017 CarswellAlta 2591, 61 Alta. L.R. (6th) 102, [2018] 2 W.W.R. 455, 418 D.L.R. (4th) 46, 76 B.L.R. (5th) 234 (Alta. C.A.)

Geophysical Service Incorporated v. Plains Midstream Canada ULC (2023), 2023 ABCA 277, 2023 CarswellAlta 2496 (Alta. C.A.)

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.)

JBRO Holdings Inc v. Dynasty Power Inc (2022), 2022 ABCA 140, 2022 CarswellAlta 979, 30 B.L.R. (6th) 163, 45 Alta. L.R. (7th) 252 (Alta. C.A.)

Kehewin Cree Nation v. Kehew Construction Ltd (2022), 2022 ABCA 78, 2022 CarswellAlta 616, 39 Alta. L.R. (7th) 232, [2022] 5 W.W.R. 582, 27 C.L.R. (5th) 189 (Alta. C.A.)

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1 (S.C.C.)

Schafer v. Schafer (2023), 2023 ABCA 117, 2023 CarswellAlta 840, 480 D.L.R. (4th) 676, 87 R.F.L. (8th) 323 (Alta. C.A.)

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd. (2019), 2019 ABCA 49, 2019 CarswellAlta 204, 32 C.P.C. (8th) 247, [2019] 6 W.W.R. 567, 86 Alta. L.R. (6th) 240, 442 D.L.R. (4th) 9 (Alta. C.A.)

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.3

9 Based on various exemptions identified in the agreements, Harvest and Spoke sought partial summary judgment, arguing that CNRL had no legal basis to withhold its consent to the 114 consent exempt assignments and that such assignments are accordingly valid.

II. The Decision Below

10 The chambers judge declared the assignment of these 114 agreements to Spoke to be valid, concluding Harvest was exempt from requiring CNRL's consent: Canadian Natural Resources Limited v Harvest Operations Corp, 2023 ABKB 62 (Decision). She accordingly granted partial summary judgment in relation to the 114 agreements, finding that their assignability could be "easily bifurcated" from the main action: Decision at para 42. The parties agree that the remaining 56 agreements require CNRL's consent and whether that consent was unreasonably withheld is an issue requiring a trial.

11 The chambers judge found that in each of the 114 agreements no consent was required pursuant to the language of the agreement itself: in one facility agreement, consent was deemed where the non-consenting party (here CNRL) declined to exercise a Right of First Refusal (which CNRL did); in two facility agreements, consent was not required; in the remaining 15 facility agreements, exemptions listed in Clause 902 of the incorporated PJVA applied. With respect to the remaining 96 land agreements (the bulk of the consent exempt agreements), the so-called "5% exemption" from Clause 2402 of the incorporated CAPL applied.

12 The chambers judge also considered and rejected CNRL's argument that determining the assignment of the 114 agreements was ill-suited for partial summary judgment. She reasoned that contractual disputes are well-suited for summary judgment; the consent exemption issues involved in the 114 agreements were easily bifurcated from the issue of the reasonableness of CNRL's conduct in the remaining 56 agreements; there was no indication that additional evidence would be adduced at trial regarding the 114 agreements; the trial would be simplified; and it was fair to grant partial summary judgment in this case.

III. Grounds of Appeal and Standard of Review

13 CNRL raises two grounds of appeal, arguing the chambers judge erred i) in finding that partial summary judgment was appropriate in the circumstances, and ii) in her interpretation of the CAPL and PJVA exemption clauses in the agreements.

14 The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: Weir–Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49 [at para 10, citing Hryniak v Mauldin, 2014 SCC 7 [at paras 81-84; Geophysical Service Incorporated v Plains Midstream Canada ULC, 2023 ABCA 277 at para 7; Kehewin Cree Nation v Kehew Construction Ltd, 2022 ABCA 78 at para 14.

15 The interpretation of the exemption clauses at issue is reviewed for correctness. Both the CAPL and PJVA exemption clauses are standard form clauses whose interpretation is of clear precedential value and for which there is no meaningful factual matrix specific to the parties: Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co., 2016 SCC 37 [at paras 4, 46.

16 There is no suggestion that the CAPL or PJVA exemption clauses were amenable to any negotiation beyond their incorporation into the agreements, or that the parties disputed their being standard form in nature: see similarly EnCana Oil & Gas Partnership v Ardco Services Ltd, 2017 ABCA 401 at paras 2–8. Nor does the correctness standard from *Ledcor* cease to apply simply because the parties were required to agree on a specific option within a standard form clause: Schafer v Schafer, 2023 ABCA 117 at paras 50–51. Finally, while a small number of the 114 agreements at issue in the summary judgment application do not contain standard form exemption clauses, none of those agreements are being specifically challenged on appeal.

IV. Discussion

17 While partial summary judgment is contemplated under Rule 7.3 of the Rules of Court, a nuanced assessment is required as to whether it is appropriate in the circumstances. The risk of inconsistent findings and duplicative proceedings

must be considered against the prospect that resolution of a claim will significantly advance access to justice, and be the most proportionate, timely and cost-effective approach: *Hryniak* at para 60. These goals must necessarily consider the expense and delay inherent in partial summary judgment proceedings. The ultimate question is whether partial summary judgment will "achieve a just result": JBRO Holdings Inc v Dynasty Power Inc, 2022 ABCA 140 at para 50.

18 To be awarded partial summary judgment, Harvest and Spoke had the burden of showing either "no merit" or "no defence" and that there was "no genuine issue requiring a trial" with respect to the assignment of the 114 agreements said to be consent exempt: *Weir-Jones* at para 47. No genuine issue requiring a trial means "the judge is able to reach a fair and just determination on the merits on a motion for summary judgment" such that "the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": *Weir-Jones* at para 21, citing *Hryniak* at para 49.

19 At issue are the exemption provisions found in Clause 2402 of both the 1981 and 1990 CAPL, as well as the exemption provisions found in Clause 902 of the 1999 PJVA. The complete clauses are attached to this judgment in Appendix A.

20 The chambers judge found Harvest and Spoke had met their burden on the CAPL exemption clauses, concluding that "the language . . . makes it clear that the 5% exemption is to be calculated on an agreement-by-agreement basis with reference to the total land contemplated in a "transaction" or "disposition". In this case, the total land contemplated in the PSA": Decision at para 62. Regarding the PJVA, the chambers judge rejected CNRL's contention that, at least in relation to 10 of 16 facilities, there was insufficient evidence to determine whether "the wells that flow to such facilities are governed by the agreements included in the application": Decision at para 79.

21 However, the chambers judge reached these conclusions by considering the allegedly consent exempt agreements in isolation from the transaction as a whole. The individual agreements within the PSA, a single "white map" transaction, were created over the course of many decades. We are not convinced that those agreements subject to consent exemption clauses can be easily bifurcated from those agreements requiring the consent of CNRL.

22 Regarding the PJVA exemptions, the record does not establish where within the "white map" area the land agreements explicitly requiring consent are located as opposed to those alleged to be consent exempt. As a result, the record does not clearly establish which facility agreements (governed by the PJVA) correlate to which land agreements, and whether, in turn, those land agreements require consent or are arguably consent exempt. The parties agree that the PJVA requires a symmetry between the facility interest (falling under the PJVA) and the corresponding production flowing to the facility (falling under the CAPL). Accordingly, these exemptions cannot be determined, at least not on this record, absent a consideration of whether the 56 other agreements were validly assigned.

23 As for the interpretation of the 5% exemption clause in CAPL, the evidence proffered by Harvest and Spoke did not establish that there was no genuine issue requiring a trial. The purpose of the contracts, the nature of the relationship they created, and the market and industry in which these agreements operate all need to be considered in interpreting these standard form provisions: *Ledcor* at para 31. The evidentiary record did not contain this crucial information. The affidavit evidence of Harvest and Spoke simply demonstrated that each agreement subject to the CAPL consent exemption clause was, taken individually and in isolation, less than 5% of the total "white map" area. Further, Mr Lowes, the affiant of Harvest and Spoke, while admittedly experienced in the industry, was not proffered as an expert qualified to give opinion evidence. His evidence that the various exemptions applied was nothing more than a bare assertion.

24 The interpretation of these standard form clauses requires a full evidentiary record to ensure, in part, that the interpretation leads to a sensible commercial result. The interpretation of the consent exempt clauses in issue is best left to the trial judge. Moreover, while a small number of agreements are subject to clauses that the parties agree are not standard form clauses, it is not proportionate or economical to allow summary judgment to stand for these few agreements.

25 In short, the result of the decision to grant partial summary judgment still leaves for trial the validity of other assignments forming part of the overall transaction. It cannot be said, based on this evidentiary record, that the determination of validity

TAB 13

2019 ABCA 49
Alberta Court of Appeal

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.

2019 CarswellAlta 204, 2019 ABCA 49, [2019] 6 W.W.R. 567, [2019] A.W.L.D. 1078, [2019] A.W.L.D. 1084, [2019] A.J. No. 144, 301 A.C.W.S. (3d) 643, 32 C.P.C. (8th) 247, 442 D.L.R. (4th) 9, 86 Alta. L.R. (6th) 240

Weir-Jones Technical Services Incorporated (Appellant / Respondent / Plaintiff) and Purolator Courier Ltd., Purolator Inc. and Purolator Freight (Respondents / Applicants / Defendants)

Catherine Fraser C.J.A., Jack Watson, Frans Slatter, Thomas W. Wakeling, Jo'Anne Strekaf JJ.A.

Heard: September 7, 2018
Judgment: February 6, 2019
Docket: Edmonton Appeal 1703-0218-AC

Proceedings: affirming *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.* (2017), 2017 CarswellAlta 1437, 2017 ABQB 491, D.L. Shelley J. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Contracts
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.iii When statute commences to run
VII.4.a.iii.C Miscellaneous
Civil practice and procedure
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Headnote
Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous
In January 2008, defendant courier began providing services to plaintiff company pursuant to agreement comprised of collective agreement, owner/operator contract, and standards of performance contract — General manager and employee of company filed grievances in January 2009 related to claims for compensation for services rendered, unpaid invoices of company, termination of agreement, and other matters — Courier terminated agreement in August 2009 — Company commenced action for damages for breach of agreement — Grievances were settled by agreement in 2015 — Courier successfully brought application for summary dismissal of company's action as statute-barred — Evidence established company communicated concerns about breaches of agreement to courier in November 2008 and February 2009 — Limitation period for breach of contract commenced on date of breach — Company appealed — Appeal dismissed — Emergence of case law rift respecting summary judgment test in Alberta and standard of proof, and resort must be had to principles behind modern law of summary judgment, standard of proof, type of record to be used in summary dispositions, and fairness — There was no policy reason to cling to old, strict rules for summary judgment, and summary judgment should be used when it was proportionate, more expeditious and less expensive procedure — To obtain summary dismissal of claim based on expiration of limitation period, courier had to show from record that injury

all of the records and evidence with respect to the claim: e.g. *P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of)*, 2015 ABCA 390 (Alta. C.A.) at para. 11, (2015), 26 Alta. L.R. (6th) 1, 612 A.R. 63 (Alta. C.A.). In those circumstances, the application for summary determination can be adjourned to permit some pre-trial discovery.

IV. Principles of Fairness

41 The final principle is a need to ensure an appropriate level of fairness in the procedures used to resolve disputes. Considerations of "fairness" are built into the *Hryniak v. Mauldin* test, which specifies that summary disposition must be a suitable "means to achieve a just result".

42 Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of "the right to go to trial", or "full access to the civil procedure spectrum". This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in *Hryniak v. Mauldin* at para 28 as "the most painstaking procedure". All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient "merit" to avoid summary disposition: R. 7.3. There is no "right" to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018) [2018 CarswellBC 2029 (S.C.C.)].

43 In any event, any "right of the plaintiff to have a trial" is equally offset by the "right of the defendant *not* to have a trial on an unmeritorious claim". Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has "no merit" on a summary disposition application should not have to suffer a trial. As noted, *supra* para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.

44 All of the parties and the court must make efficient use of limited resources:

> ... the problem of systemic delay is exacerbated by cases like this where a summary judgment motion has been properly brought and a judge refuses to adjudicate it on its merits. On a summary judgment motion, a judge has the duty to take "a hard look" at the merits of a claim: *Knee v. Knee*, 2018 MBCA 20 (Man. C.A.) at para. 33.

As the Court noted in *Hryniak v. Mauldin* at paras. 27-8, a fair and just summary dismissal procedure is "... illusory unless it is also accessible - proportionate, timely and affordable", and that summary procedures are "no less legitimate" than trials.

45 While the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record: e.g. *Tottrup v. Clearwater (Municipal District) No. 99* at para. 11; *Cardinal v. Alberta Motor Association Insurance Company*, 2018 ABCA 69 (Alta. C.A.) at para. 10, (2018), 66 Alta. L.R. (6th) 15 (Alta. C.A.); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.) at para. 29, (2016), 33 Alta. L.R. (6th) 209, 612 A.R. 284 (Alta. C.A.); *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.) at para. 49. Where the case presents complex factual issues, such as those based on highly technical scientific and medical evidence, summary disposition will often be inappropriate. There are other occasions where there will be a genuine issue requiring a trial.

46 Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination

of whether summary disposition is appropriate is up to the chambers judge: *Hryniak v. Mauldin* at para. 83. As stated in *Hryniak v. Mauldin* at para. 50 and *Nelson v. Grande Prairie (City)*, 2018 ABQB 537 (Alta. Q.B.) at para. 47, (2018), 75 Alta. L.R. (6th) 36 (Alta. Q.B.), whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

V. Summary of the Application of the Principles

47 The proper approach to summary dispositions, based on the *Hryniak v. Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
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> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
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> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
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> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

48 There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by *Hryniak v. Mauldin*. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

49 In closing, it is helpful to note that the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. The judge may be able to isolate and identify issues that can be tried separately under R. 7.1. The summary judgment materials may form a suitable platform for a summary trial, as happened in *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, 41 C.L.R. (4th) 51 (Alta. Q.B.). While serial applications for summary judgment are not to be encouraged, a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed: *Milne v. Alberta (Workers' Compensation Board)*, 2013 ABCA 379 (Alta. C.A.) at para. 6, (2013), 561 A.R. 313 (Alta. C.A.).

The Limitation Period

50 The *Limitations Act* provides:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
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> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

There is therefore a three part test, based on a reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding for a remedial order.

51 The limitation period for breaches of contract is covered by this provision. Under s. 4(g) of the previous *Limitation of Actions Act*, RSA 1980, c. L-15, the limitation period for breaches of contract started when the "cause of action arose": *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)*, 1988 ABCA 267 (Alta. C.A.) at para. 28, (1988), 89 A.R. 151, 61 Alta. L.R. (2d) 193 (Alta. C.A.). That occurred at the time of the breach of the contract, regardless of "discoverability" of the claim or any damage. The specific wording of the statute drove that result.

52 The chambers judge concluded that the same rule still applies under the new *Limitations Act*, citing *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.) at para 155, (2004), 365 A.R. 1 (Alta. Q.B.), aff'd *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para. 12, [2008] 1 S.C.R. 372 (S.C.C.). The breach of contract in *Papaschase*, however, occurred in the 1880s, and that case was decided under the old legislation. The present *Limitations Act* contains no separate rule for limitation periods for breaches of contract, and they are covered by the same three part test: reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding. In many cases arising from breach of contract the three part test may in fact be met at the time of the breach of contract, but that is not invariably so.

53 Since the statute provides the test for the commencement of the limitation period, the alternative starting points proposed by the appellant do not apply. Unless the alternative proposed dates happen to coincide with the test in the *Limitations Act*, the limitation period does not commence on (a) the date of breach, (b) the date the last services are provided under a service contract, (c) the date that economic loss emerges, (d) the date of acceptance of repudiation, or (e) the termination of the contract.

54 In order to obtain summary dismissal of the claim based on the expiration of the limitation period, the respondents had to show from the record that the injury alleged by the appellant (arising from the alleged breaches of contract) was reasonably known, attributable to the respondents, and sufficiently serious to warrant a proceeding, no later than July 22, 2009. While the chambers judge proceeded on the erroneous assumption that the limitation period started to run at the time of breach, she made the necessary findings of fact as to when the appellant discovered and could reasonably have commenced the action.

55 The chambers judge found that the breaches alleged by the appellant, the injury that resulted, and the knowledge that the injuries warranted a proceeding were known more than two years before the action was commenced. This is a finding of fact, to which deference must be extended. There is in substance no doubt that the appellant was aware of the claim before July 22, 2009. It acknowledges in para. 2 of its factum: "The appellant states that it first became aware of a claim against the Respondents in February 19, 2009, after obtaining a legal opinion from his legal counsel." A number of the alleged breaches of contract are mentioned in a memorandum of a telephone conversation of November 1, 2008 (EKE R4-7). The appellant's letter to the Union dated June 13, 2009 (EKE A10-13) also contains particulars of many elements of the claim. There were other communications that amply support the chambers judge's conclusion that the breaches were known months before July 22, 2009. The determinative issue is therefore whether there were any circumstances that would, in law, extend the commencement date of the limitation period.

