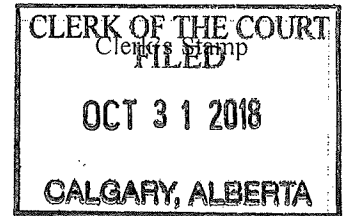


COURT FILE NUMBER 1801-09188
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE Calgary
APPLICANT THIRD EYE CAPITAL CORPORATION



RESPONDENTS RANCH ENERGY CORPORATION,
OPSMOBIL INC., 1734163 ALBERTA
INC., 1859821 ALBERTA INC.,
OPSMOBIL GROUP INC., OPSMOBIL
CONSTRUCTION INC., OPSMOBIL
ENERGY SERVICES INC., AIR
DALLAIRE LTD. AND K.L. CAPITAL
CORP
DOCUMENT BRIEF OF ARGUMENT OF THE
RECEIVER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT
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INTRODUCTION

1. This Brief is submitted on behalf of Ernst and Young Inc., in its capacity as the court-appointed Receiver (the “**Receiver**”) of Ranch Energy Corporation (“**Ranch**”), OpsMobil Inc. (“**OMI**”), 1734163 Alberta Inc. (“**1734 AB**”), 1859821 Alberta Inc. (“**1859 AB**”), OpsMobil Group Inc. (“**OMGI**”), OpsMobil Construction Inc. (“**OMCI**”), OpsMobil Energy Services Inc. (“**OMESI**”), Air Dallaire Ltd. (“**Air Dallaire**”) and K.L. Capital Corp. (“**KLCC**”) (collectively the “**Corporations**”) in response to the Application filed by Predator Oil BC Ltd. (“**Predator BC**”) on October 17, 2018 (the “**Application**”) seeking advice, direction and orders regarding certain oil and gas assets owned by Ranch (the “**PNG Assets**”).
2. In response to the Application, the Receiver submits that:
 - (a) Predator BC lacks standing to bring an Application for advice and direction. There is no basis for Predator BC to bring an application for advice and direction in any of: the receivership order dated July 19, 2018, (the “**Receivership Date**”), as amended on August 7, 2018 (the “**Receivership Order**”); the *Bankruptcy and Insolvency Act*;¹ or the common law;
 - (b) Predator BC has not applied for a lifting the stay of proceedings against the Corporations contained in the Receivership Order (the “**Receivership Stay**”). The Application clearly seeks to enforce Predator BC’s purported contractual rights and remedies against the Receiver and is therefore captured by the stay of proceedings imposed pursuant to the Receivership Order (the “**Receivership Stay**”). Unless and until Predator BC successfully applies to lift the Receivership Stay, the Application is automatically stayed;
 - (c) Even if Predator BC were to apply for a lifting of the Receivership Stay, Predator BC has not met its burden of establishing that lifting the stay is appropriate in the circumstances. Specifically, Predator BC has not established that the Receivership Stay has caused it any material prejudice – rather, Predator BC’s own business decisions have caused the unique regulatory situation which Predator BC now complains of. It would be inequitable to lift the stay in such circumstances, and further, lifting the Receivership Stay would significantly prejudice the Receiver and the Receivership estate by negatively interfering with the ongoing sales process and by causing the Receiver to expend resources to the detriment of stakeholders.
 - (d) There is no factual or legal justification for extending the Court-approved timelines for the sales process.

FACTS

3. The facts in response to the Application are set-out in detail in the Receiver’s Third Report, dated October 17, 2018 (the “**Third Report**”), and the Receiver’s Fourth Report, dated October 24, 2018

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3[BIA] [TAB 1].

(the “**Fourth Report**”). The Receiver adopts the facts set-out in the Third Report and the Fourth Report as if they were reproduced herein. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Third Report and Fourth Report.

LEGAL PRINCIPLES AND ANALYSIS

Predator BC lacks standing to seek advice and direction from this Honourable Court

4. As is typical in Alberta, the Receivership Order in the present case grants the Receiver the power to apply to this Honourable Court for advice and directions “in the discharge of its powers and duties hereunder.”² This provision in the Receivership Order is an expression of the statutory power granted to receivers pursuant to s.249 of the *BIA*, which states that a “receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.”³
5. As has been noted by our Court of Appeal, “a receiver is given the ability to apply to the court for advice and direction to ensure proper and timely administration of the estate, as well as to protect itself through court authorization of certain actions it wants to take in the course of the fulfilment of its duties under the receivership order.”⁴ As such, one crucial purpose of the power to apply for advice and directions is to permit the Receiver, as an officer of the Court, to monitor its own conduct and ensure that the manner in which it exercises its powers conforms with its legal obligations.
6. Other interested parties, such as the insolvent person or its creditors, are also able to monitor the Receiver’s conduct and ensure that the Receiver’s powers are exercised in accordance with the law. However, such third parties are not given any statutory power under the *BIA* to apply for advice and directions in this regard. Rather, pursuant to s.248 of the *BIA*, such parties are given the ability to apply for an order seeking specific relief.⁵
7. Applications pursuant to ss.248 and 249 may both be brought notwithstanding the terms of any receivership order.⁶ As such, any concerned party can call on the Court to review the conduct of the Receiver at any time, notwithstanding the fact that a stay of proceedings has been instituted by the terms of the receivership order.

² Receivership Order at para 33.

³ *BIA* at s.249 [TAB 1].

⁴ *YBM Magnex International Inc., Re*, 2000 ABCA 284 [YBM], at para 32 [TAB 2]

⁵ *BIA* at s.248 [TAB 1]

⁶ *BIA* at s.250 [TAB 1]

8. The applicable evidentiary and legal standards applicable to applications pursuant to ss.248 and 249 of the *BIA* are understandably different. Pursuant to s.249, a receiver may simply apply to the Court for directions and the Court shall give such directions as considers proper in the circumstances. In contrast, before making an order pursuant to s.248, the Court must first be satisfied by the applicant that the receiver is in fact failing to carry out its duties. As such, there is an evidentiary and legal onus on a creditor or other interested party who seeks an order pursuant to s.248. This onus makes practical sense, as without it, there would be an obvious risk that interested parties would regularly bring motions seeking advice and direction in order to second-guess any decision made by the receiver which did not benefit their interests.
9. Predator BC did not bring its Application pursuant to s.248 of the *BIA*, and is clearly ineligible to bring an application pursuant to s.249 of the *BIA* or under the terms of the Receivership Order.
10. Similarly, neither the *Rules of Court*⁷ nor the common law provide Predator BC with the right, in these circumstances, to seek advice and direction from this Honourable Court. Pursuant to Rule 1.4 of the *Rules*, this Honourable Court may make orders with respect to practice or procedure in a proceeding before the Court, including by giving parties advice. However, it is clear that the application of this Rule is limited to assisting parties with managing litigation, rather than providing advice or directions on substantive legal issues.⁸
11. In addition, this Honourable Court retains discretion to grant a declaration pursuant to s. 11 of the *Judicature Act* giving the parties advice and directions.⁹ This authority must be exercised with “great care and caution”¹⁰ and is generally limited to circumstances where there are no material facts in dispute between the parties, and no adequate alternative remedy is available.¹¹ Such declaratory orders will not be granted where the effect would be contrary to the accepted principles upon which the Court exercises its jurisdiction.¹² Generally, applications for such declaratory relief are brought by way of Originating Application.¹³
12. The Application does not mention the *Judicature Act*, and it does not appear from the Application materials filed by Predator BC that the Applicant intends to rely on the discretion to make

⁷ *Alberta Rules of Court*, AR.124/2010 [*Rules*] [TAB 3].

⁸ *Shaw v. Boyda*, 2015 ABCA 393, at para 6 [TAB 4]

⁹ RSA 2000, cJ-2 [*Judicature Act*] [TAB 5]; *YBM* at para 55

¹⁰ *Peter Lehmann Wines Ltd. v. Vintage West Wine Marketing Inc.*, 2015 ABQB 481, at para 75 [TAB 6]

¹¹ *YMB* at para 50-57 [TAB 2].

¹² *YMB* at para 55 [TAB 2]

¹³ See *Lehmann* for example [TAB 6].

declaratory orders granted by the *Judicature Act*. However, even if Predator BC were to apply for a declaratory order pursuant to the *Judicature Act*, this case is one to which this discretionary relief clearly does not apply.

13. First, there are many fundamental factual issues in dispute between the parties which make an application for advice and direction inappropriate.¹⁴ Most notably, there are clearly factual disputes between the parties respecting:
 - (a) the impact of the Receiver's operational decisions, including the desirability and feasibility of 'reactivating' of the PNG Assets located in Fort St. John, British Columbia;
 - (b) the production forecasts and cash flow projections which are reasonable and feasible;
 - (c) the ability to hedge production with marketing contracts; and
 - (d) the ongoing cost of operating the assets.
14. Second, even if it is assumed that Predator BC's factual and legal allegations are true, there are clear alternate remedies which Predator BC could pursue instead of an application for advice and direction. Most notably, where a receiver disclaims a contract, and the contracting party feels aggrieved by such conduct, the ordinary remedy is that contracting party applies for an order that the receiver has failed to fulfill its duties in a fair and reasonable manner.¹⁵ The onus is on the applying party to show that the receiver has breached its duties.¹⁶ In other words, the ordinary remedy available to an aggrieved contracting party is to bring a motion pursuant to s.248 of the *BIA*. As discussed above, Predator BC has failed to bring such a motion in the present case, and should not be permitted to avoid its legal and evidentiary onus by veiling its application as one for advice and direction. The effect of doing so would be contrary to the accepted principles upon which the Court exercises its jurisdiction.

In any event, the Application remains stayed by the terms of the Receivership Order

15. To the extent that Predator BC has standing to apply for advice, directions or orders from the Honourable Court, it is clear that any such application is captured by the Receivership Stay. The

¹⁴ Fourth Report, at paras 41-53.

¹⁵ *Bayhold Financial Corp. v. Clarkson Co.* 1991 CarswellNS 33, [1991] N.S.J. No. 488 [*Bayhold*] at para 32 [TAB 7]; *Bank of Montreal v. Scaffold Connection Corp.*, 2002 ABQB 706 [*Scaffold*], at para 12 [TAB 8].

¹⁶ *Ibid.*

Receivership Order stays all proceedings in respect of Ranch or the PNG Assets, and stays the exercise of all rights and remedies as against Ranch, the Receiver or affecting the PNG Assets.¹⁷

16. While Predator BC has attempted to cloud the remedies it seeks by framing its application as advice and direction, there is no doubt that Predator BC is, in practical terms, seeking to enforce various contractual remedies under the Trust Agreement as against the Receiver. It is well recognized that one essential purpose of a stay of proceedings in the receivership context is to prevent contractual counterparties from exercising contractual rights against the debtor or the Receiver, so as to permit the Receiver to maximize value for the receivership estate and prevent creditors from jockeying for position.¹⁸
17. Notwithstanding the existence of the Receivership Stay, in its motion for advice and direction Predator BC proposes that three options are available to this Honourable Court to “remedy” the allegedly untenable status quo stated to be created by the Receiver’s disclaimer of the Trust Agreement.
18. The first option involves this Honourable Court granting an order allowing Predator BC to take over operation of the PNG Assets on a contract basis on behalf of the Receiver. Given that Predator BC has no legal or practical capacity to assume operatorship of the PNG Assets, it is little wonder that Predator BC requests that this option “only be considered as a last resort.”¹⁹
19. The option for Predator BC to take over operatorship is impossible in practical terms because although Predator BC is the current permit holder for the PNG Assets, Predator BC clearly has insufficient funding available to it to operate the PNG Assets, which operate at a loss of approximately \$1 million per month and have since Ranch purchased the PNG Assets from Predator BC in 2017.²⁰ Further, Predator BC has failed to demonstrate that it has the necessary insurance coverage, possesses adequate and qualified staffing, and that it can otherwise operate the PNG Assets in a responsible manner in accordance with regulatory requirements.²¹
20. Further, Predator BC has no contractual right or other legal right to operate the PNG Assets, as it has no beneficial, working, or other economic interest in the PNG Assets and related surface

¹⁷ Receivership Order at paras 9 and 10.

¹⁸ *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 [*Alignvest*] at para 23 [TAB 9]; *Baytex Energy Ltd. v. MNP Ltd.*, 2012 ABQB 539 [*Baytex*] at para 18 [TAB 10]; *Re Skyservice Airlines Inc.*, 2011 ONSC 703 (Ont. S.C.J. [Commercial List]) at paras 77-89, aff’d 2012 ONCA 283 (Ont. C.A.) [TAB 11].

¹⁹ Applicant’s Brief, at para 29.

²⁰ Fourth Report, at para 48 and Appendix “C”.

²¹ Fourth Report at para 50.

leases.²² The Predator BC PSA and the related Transition Services Agreement contemplate that Ranch will operate the assets and in fact, Ranch assumed operation of the PNG Assets in accordance with the Transition Services Agreement in July, 2017.²³ Even the Trust Agreement, prior to being disclaimed by the Receiver, while silent on the issue of operatorship, stipulated that Predator BC was a bare trustee, such that the permits in question were held by Predator BC for the sole use, enjoyment and benefit of Ranch. Accordingly, there are no circumstances in which the parties agreed that Predator BC would have any legal right to operate the PNG Assets.

21. Predator BC's status as a holder of permits relating to the PNG Assets does not provide them with any right to actually operate the PNG Assets. In fact, section 39(3) of the *Oil and Gas Activities Act* prohibits a permit holder from operating a well once it no longer is the owner of the petroleum and natural gas rights of the well or no longer has an agreement with the owner of the gas rights.²⁴ Predator BC has no ownership interest in the PNG Assets, and no agreement with Ranch or the Receiver to operate the PNG Assets. As such, the very regulatory regime which Predator BC asserts requires that Predator BC operate the PNG Assets in fact bars Predator BC from doing to.
22. After proposing one impossible option, the remaining options which Predator BC presents to the Court both require that the Receiver perform the Trust Agreement, albeit in different ways. Essentially, Predator BC is requesting this Honourable Court's advice and direction as to whether the Receiver must comply with all of the terms of the Trust Agreement, or whether it must comply with only those terms related to the transfer of permits.²⁵ Not surprisingly, Predator BC's preferred option is the one which would require the Receiver to perform all of Ranch's obligations under the Trust Agreement, which would require the Receiver to make immediate and significant cash payments to Predator BC.
23. Predator BC's application for advice and direction is a thinly veiled attempt to enforce contractual rights against the Receiver, in a circumstance where the Receiver has disclaimed the relevant contract. The Receivership Stay clearly applies to attempts to enforce such contractual remedies. Predator BC has not applied to lift the Receivership Stay, nor has it applied to dispute the disclaimer notice, and as such, this Honourable Court should resolve this Application in its entirety by determining that the Receivership Stay both applies to the Application and has not been lifted.

²² Fourth Report at para 26.

²³ Fourth Report at para 27.

²⁴ *Oil and Gas Activities Act*, SBC 2008, c 36, s.39 [*OGAA*] [TAB 12].

²⁵ Applicant's Brief at para 28.

Lifting the Stay to permit the Application to move forward would not be justified

24. Given the test for lifting the Receivership Stay, it is perhaps not surprising that Predator BC has attempted to avoid the Receivership Stay by veiling its Application as one for advice and direction. The general test for lifting the Receivership Stay “focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.”²⁶ The court “should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant.”²⁷ Lifting the stay is “far from a routine matter.”²⁸
25. To meet their burden of showing material prejudice, an applicant must show “special harm,”²⁹ or that it has been “treated differently or some way unfairly”³⁰ as a result of the stay. Generally, the fact that a stay limits opportunities to take steps that are economically motivated is not sufficient material prejudice to justify lifting a stay.³¹

Predator BC has not been prejudiced by the Stay

26. Even if it were to apply for a lifting of the stay, Predator BC has not suffered any material prejudice which would justify lifting the Receivership Stay. Predator BC admits that the Trust Agreement has been disclaimed by the Receiver (the “**Disclaimer**”).³² Any prejudice alleged by Predator BC to have been caused by the Disclaimer appears to fall into two categories:
- (a) The “retroactive disclaimer” by the Receiver of the Trust Agreement to the date of the Receivership Order is unfair because it allows the Receiver to have benefitted from the Trust Agreement from the date of the Receivership Order until the date the Trust Agreement was disclaimed (the “**Disclaimer Date**”);³³
 - (b) Under the *OGAA* Predator BC remains responsible for ensuring that the assets are operated in accordance with the permit requirements, but is unable to fulfill this responsibility because it does not operate the PNG Assets and has no access to them. The Receiver’s disclaimer of the Trust Agreement exposes Predator BC to the possibility that the BCOGC

²⁶ *Alignvest*, at para 40 [TAB 9]

²⁷ *Alignvest*, at para 41 [TAB 9]

²⁸ *Ma, Re*, [2001] O.J. No. 1189, at para 3 [TAB 13]

²⁹ *Alberta Treasury Branches v. COGI Limited Partnership*, 2018 ABQB 356 [COGI], at para 53 [TAB 14]

³⁰ *Alignvest*, at para 43 [TAB 9]

³¹ *COGI*, at para 53-54 [TAB 14]; *Baytex*, at para 18 [TAB 10]; *Alignvest* at para 45-48 [TAB 9].

³² Affidavit of Ryan Tobber, sworn on October 16, 2018 [Tobber Affidavit] at para 67.

³³ Tobber Affidavit at paras 63 and 64.

will have recourse to the “Total Security Deposit” (as defined in the Tobber Affidavit) posted by Predator BC with the BCOGC.³⁴

There has been no retroactive disclaimer

27. As to the first point, it is clear that the mere fact that the Receiver has disclaimed the Trust Agreement ‘retroactively’ to the Receivership Date does not constitute material prejudice. Rather, such disclaimers occur regularly in the ordinary course in a receivership. As held in *Bank of Montreal v. Scaffold Connection Corp.*, the “law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.”³⁵ As discussed extensively in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, notwithstanding the fact that disclaimer powers are often explicitly included in receivership orders, the source of a receiver’s power to disclaim is the English common law, as adopted in Canadian jurisprudence.³⁶
28. The central reason that a receiver is not bound at common law by the debtor’s pre-receivership contracts is that there is no privity of contract between the receiver and the party who contracted with the debtor. It is “impossible to suggest” that a receiver could be liable for such contracts because “they are not with [the receiver]; they are contracts made with the company, which is still a company, and has not yet been wound up.”³⁷ As such, when a receiver disclaims a pre-existing contract of the debtor, it should not be seen as “breaking” such a contract.³⁸ The contract still subsists as between the debtor and the contracting party, and the receiver’s choice not to perform the contract will render the debtor, rather than the receiver, liable for breach of contract.³⁹ The counterparty who suffers damages from a breach of contract is left with a provable claim against the debtor in the insolvency proceeding.⁴⁰
29. At common law, a court-appointed receiver may become bound by a debtor’s pre-receivership contracts *only* if the receiver elects to affirm such a contract.⁴¹ As discussed in *Pope & Talbot Ltd., Re*, “in order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver’s appointment, there must be an affirmation of that contract by the receiver,

³⁴ Tobber Affidavit at paras 63 and 77.

³⁵ *Scaffold*, at para 11 [TAB 8].

³⁶ *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, at paras 21-32 [TAB 15].

³⁷ *Bayhold*, at para 48, quoting *Newdigate Colliery Ltd., Re; Newdegate v The Co.*, [1912] 1 Ch. 468 (C.A.) [TAB 7].

³⁸ *Ibid* [TAB 7].

³⁹ *Ibid* at para 52-53 [TAB 7].

⁴⁰ *Pope & Talbot Ltd., Re*, 2009 BCSC 17 [Pope] at para 17 [TAB 16].

⁴¹ *Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc.* 2015 ABQB 208 [Avison], at para 32 [TAB 17].

either expressly or by implication.”⁴² Generally, a receiver must make a decision to affirm or disclaim a contract with a reasonable time, and in circumstances where the receiver has not made a clear election and is not making payments when due under the contract, it is open to the contracting party to apply to the Court to seek an order requiring the receiver to make its election.⁴³

30. A receiver’s power to affirm or disclaim contracts must not be exercised arbitrarily, and the receiver is not entitled to use the power to prefer the interests of one creditor over another.⁴⁴ As a result, a receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party.⁴⁵ The duty of a receiver is to “act for the benefit of all interested parties” including the debtor itself.⁴⁶
31. Here, given the state of operational, contractual and regulatory disarray which existed when the Receiver was appointed, it was reasonable for the Receiver to take the time it did to assess the Trust Agreement and determine whether to affirm or disclaim it.⁴⁷ During this period, the Receiver always made it clear to Predator BC that it required time to assess the Trust Agreement, refused to make payments under the Trust Agreement despite demand, and never expressly or impliedly affirmed the Trust Agreement.⁴⁸
32. In this context, it is inaccurate to characterize the Disclaimer as “retroactive.” This implies that the Receiver was bound by the Trust Agreement until Disclaimer Date. However, the Receiver never expressly or implicitly affirmed the Trust Agreement, and no such affirmation appears to be alleged by Predator BC. In the absence of an affirmation, the Receiver has never been bound by the Trust Agreement. There has never been privity of contract as between Predator BC and the Receiver with respect to the Trust Agreement. The Receiver always had the choice about whether to affirm or disclaim the Trust Agreement, and given the complexity of the situation, it took the Receiver approximately two and a half months to complete its assessment and made this decision. The Receiver submits that this time period was a reasonable in the circumstances. To the extent that

⁴² *Pope*, at para 15 [TAB 16].

⁴³ *Pope* at paras 21- 23 [TAB 16].

⁴⁴ *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.) [*Probe*] affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (Alta. C.A.), at para 40 [TAB 18].

⁴⁵ *bclMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297, at para 96 [TAB 19].

⁴⁶ *Probe* at para 36 [TAB 18].

⁴⁷ Fourth Report at paras 20-25.

⁴⁸ Fourth Report at para 28 and 31.

Predator BC felt otherwise, Predator BC could have applied for an order requiring the Receiver to make an election sooner, but it failed to do so.

There is no evidence that the Disclaimer altered the status quo

33. Further, and in any event, Predator BC has not established that the Receiver obtained any benefit whatsoever from the Trust Agreement in the period between the Receivership Date and the Disclaimer Date. Part of the reason the Receiver elected to disclaim the Trust Agreement was that it determined that the Disclaimer would have no effect on the Receiver's ability to operate the PNG Assets.⁴⁹
34. As has already been noted, the Receiver has been concerned since the inception of the receivership that the Trust Agreement might involve a contravention of the BCOGC's rules and regulations.⁵⁰ Accordingly, the Receiver has never performed or relied upon the Trust Agreement and instead has maintained close communications with the BCOGC from the outset of its appointment while it operates the PNG Assets on a *de facto* basis, in accordance with its powers under the Receivership Order and the status quo that was in place at the time the Receiver was appointed.⁵¹
35. At the time of the Receivership Order, Predator BC had already placed itself in financial risk by making itself financially responsible for the PNG Assets *vis a vis* the BCOGC, including by posting the Total Security Deposit. While the Trust Agreement, assuming that it was even being performed by Ranch, may have provided Predator BC with some mitigation of its financial risk, it never provided Predator BC or Ranch with any authority to operate the PNG Assets. As such, Predator BC was always dependent upon a third party to meet its obligations and operate the PNG Assets in a manner which complied with the BCOGC's requirements. Disclaiming the Trust Agreement therefore may have had an impact on the respective financial risks faced by Predator BC on one hand and by the Receiver on the other, but it had no impact on the underlying right to operate.
36. There are a number of unsettled regulatory issues to be addressed by the BCOGC, all of which have been caused by Predator BC's decision to enter into the Predator BC PSA in circumstances in which Ranch was not qualified to hold the permits associated with the PNG Assets. For example, it does not appear that Predator BC has any continuing authority under the *OGAA* to hold permits related

⁴⁹ Fourth Report at para 30.

⁵⁰ Fourth Report, at para 22.

⁵¹ Sixth Affidavit of Mark Horrox, Sworn on October 24, 2018, at para 58(d).

to PNG Assets when it admittedly no longer has any economic interest in the PNG Assets.⁵² Likewise, given the precarious financial state of both Predator BC and many of the PNG Assets, and given Predator BC operates under the same management as Ranch prior to the receivership, it does not appear that Predator BC is legally entitled to continue to hold any permits. Further, even if Predator BC is entitled to hold the relevant permits, it does not appear that it was ever legally possible for Predator BC to hold such permits in trust for Ranch.

37. The Receiver recognizes that the BCOGC has exclusive jurisdiction to determine who can hold permits related to the PNG Assets and conduct operations related thereto. This is a power to be exercised by the BCOGC in accordance with its statutory mandate. It is not a power which Predator BC can wield to seek financial advantages in a receivership.
38. The Receiver submits that the most reasonable course of action would be for the BCOGC to permit the Receiver to continue to operate the PNG Assets in accordance with the status quo, or, alternatively to provide the Receiver authority to contract operate the PNG Assets on an interim basis pending completion of the SISP.⁵³ However, the BCOGC's determination in this regard is not at issue here. For the purposes of this Application, this regulatory uncertainty makes it clear that Predator BC has not established that the Receiver's right to operate derives from or depends on the Trust Agreement, and as such that the Disclaimer altered the status quo. The Trust Agreement was merely a financial arrangement whereby the permits would be held in trust in exchange for financial compensation. Nothing in the Trust Agreement speaks to the right to operate the PNG Assets. Accordingly, Predator BC has not established that the Receiver has ever benefited from the Trust Agreement.

Any impact on Predator BC resulting from by the Disclaimer is of Predator BC's own making

39. To the extent that Predator BC argues that it has been prejudiced by costs or risks associated with holding the permits related to the PNG Assets or posting related security deposits with the BCOGC, this is prejudice of Predator BC's own making. Predator BC chose to sell the PNG Assets to a company that was incapable of holding the permits or posting the security deposits. It may have done so to remove approximately \$105 million worth of abandonment and reclamation obligations associated with the PNG Assets off of its balance sheet. While Predator BC may have bargained to take a financial risk by posting the Total Security Deposit, in exchange for receiving certain

⁵² Tobber Affidavit at para 27; *OGAA* at ss. 24(4), 34(2) and 39 [TAB 12].

⁵³ For example, the BCOGC might exercise its powers pursuant to s.53 of the *OGAA* to take over control of the PNG Assets and allow the Receiver to contract operate [TAB 12].

payments under the Trust Agreement, depriving a contracting party “of rights that it had specifically bargained for” under an agreement is often necessary in a receivership, and in fact, is often the purpose of the stay of proceedings.⁵⁴ As such, the fact that Predator BC may be deprived of certain benefits of its contractual bargain does not constitute material prejudice relevant to lifting the stay. Predator BC entered into the Trust Agreement “knowing the risks.”⁵⁵

40. This factor is particularly true for a party like Predator BC, whose management controlled and designed both sides of the Predator BC PSA transaction. Predator BC is not an innocent counterparty, and does not come to this application with clean hands. Having engineered the Predator BC PSA transaction and specifically the Trust Agreement to avoid the requirements of the *OGAA*, Predator BC now seeks to rely on these very requirements to obtain payments from the Receiver, or alternatively, to require the Receiver to replace the security deposit which Predator BC currently has posted with the BCOGC. If any of the relief requested in the Application is granted, Predator BC will gain an unfair and inequitable advantage over other creditors.

The Disclaimer clearly benefited the receivership estate

41. In contrast to the lack of material prejudice suffered by Predator BC, being forced to adopt the Trust Agreement would clearly prejudice the receivership estate. As already noted, the regulatory uncertainties surrounding the Trust Agreement mean that any of the purported benefits associated with requiring the Receiver to adopt the Trust Agreement are hypothetical and premature. In contrast, the significant payments pursuant to the Trust Agreement being demanded by Predator BC are real and immediate.⁵⁶ Being forced to make these payments or otherwise adopt the Trust Agreement would not only exacerbate the ongoing losses faced by the estate, but would also have a negative impact on the Receiver’s ability to operate the assets in accordance with the requirements of the BCOGC and jeopardize the ongoing sales process.
42. The BCOGC has confirmed that it has the authority to transfer the necessary permits to a successful bidder under the *SISP*.⁵⁷ There is no need for the Receiver to hold the permits in order to run a successful sales process, and specifically, no need for the Receiver to initiate or complete the permit transfer procedure contained in the Trust Agreement.

⁵⁴ *COGI*, at para 52 - 55 [TAB 14]

⁵⁵ *Ibid* [TAB 14]

⁵⁶ Fourth Report at para 29.

⁵⁷ Fourth Report at para 56.

43. Finally, any order that permitted Predator BC to act as contract operator of the PNG Assets would undermine the SISP by placing control over operations into the hands of a party that admittedly has no economic interest in the PNG Assets. The Receiver would lose the ability to ensure that operations are undertaken in a manner that preserves the PNG Assets for the benefit of an ultimate purchaser.⁵⁸

There is no basis for extending the timelines of the SISP

44. Predator BC has failed to provide any evidence that the Receiver's cash flow projections are inaccurate. Rather, it is Predator BC which has been consistently inaccurate and overly optimistic with respect to its financial projections.⁵⁹ The Receiver has a very real and justified concern with concluding the SISP quickly to mitigate financial losses.
45. In addition, The SISP Order has already been approved, and provides the Receiver with the discretion to extend the applicable timelines if in the Receiver's reasonable business judgment, doing so will enhance the prospects of a successful process. Predator BC's contention that an extended SISP would allow for a more robust process, permit more interested parties to participate and ensure maximization of value from the PNG Assets is nothing more than speculation. Phase 1 of the SISP has been concluded, and the process is now moving into Phase 2 with a Phase 2 bid deadline of November 15, 2018.

Conclusion

46. For the aforementioned reasons, the Receiver respectfully requests that this Honourable Court dismiss the relief sought in the Application and direct Predator BC to pay the wasted solicitor and own client costs of the Receiver in having to prepare the Third Report and Fourth Report and to appear at the hearings scheduled regarding this matter.

⁵⁸ Fourth Report at para 59.

⁵⁹ Fourth Report at para 47.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF OCTOBER, 2018.

BORDEN LADNER GERVAIS LLP

Per: 
Robyn Gurófsky

Solicitors for the Receiver/Applicant

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to October 3, 2018

À jour au 3 octobre 2018

Last amended on May 23, 2018

Dernière modification le 23 mai 2018

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

- (a) to the insolvent person or the trustee (in the case of a bankrupt); and
- (b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

- (a) to the insolvent person or the trustee (in the case of a bankrupt); and
- (b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247 A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

- (a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or
- (b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

- a) à la personne insolvable ou, en cas de faillite, au syndic;
- b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

- a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;
- b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

or both.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

Receiver may apply to court for directions

249 A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

1992, c. 27, s. 89.

Right to apply to court

250 (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

Where inconsistency

(2) Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(a) the security agreement or court order under which the receiver acts or was appointed, or

(b) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

1992, c. 27, s. 89.

Protection of receivers

251 No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections.

1992, c. 27, s. 89; 1997, c. 12, s. 117(F).

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

Instructions du tribunal

249 Le tribunal donne au séquestre qui lui en fait la demande les instructions écrites qu'il estime indiquées sur toute disposition de la présente partie.

1992, ch. 27, art. 89.

Ordonnance d'un autre tribunal

250 (1) Une demande peut être présentée aux termes des articles 248 ou 249 indépendamment de toute ordonnance qu'aurait pu rendre un tribunal au sens du paragraphe 243(1).

Incompatibilité

(2) Les dispositions d'une ordonnance rendue aux termes de l'article 248 ou d'une instruction donnée aux termes de l'article 249 l'emportent sur les dispositions incompatibles du contrat de garantie ou de l'ordonnance du tribunal portant nomination du séquestre, de même que sur les dispositions incompatibles de toute autre ordonnance rendue par le même tribunal.

1992, ch. 27, art. 89.

Protection du séquestre

251 Le séquestre est à l'abri de toute poursuite pour le préjudice ou les pertes résultant de l'envoi ou de la four-niture par lui de tout avis prévu à l'article 245 ou de toute déclaration ou tout rapport établis conformément à l'article 246, s'il a agi de bonne foi dans l'exercice effectif ou censé tel des pouvoirs et fonctions que lui confèrent ces articles.

1992, ch. 27, art. 89; 1997, ch. 12, art. 117(F).

TAB 2

2000 ABCA 284
Alberta Court of Appeal

YBM Magnex International Inc., Re

2000 CarswellAlta 1133, 2000 ABCA 284, [2000] A.J. No. 1231, [2001] 2 W.W.R. 628,
[2001] A.W.L.D. 41, 234 W.A.C. 123, 271 A.R. 123, 88 Alta. L.R. (3d) 181, 9 B.L.R. (3d) 24

In Re S. 234 of the Business Corporations Act R.S.A. (1980) c.J-1; In Re the Matter of YBM Magnex International, Inc.; Griffiths McBurney & Partners and National Bank Financial Inc. (Appellants) and Ernst & Young YBM Inc., Roger Mondor, Admit M. Karia, the Plaintiff's Executive Committee, Royal Trust Corporation of Canada, in its Capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its Capacity as the Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark & Lunn Investment Management Ltd., and her Majesty the Queen in Right of the Province of British Columbia (Respondents)

McFadyen, Sulatycky, Wittmann JJ.A.

Heard: July 18, 2000

Judgment: October 23, 2000

Docket: Calgary Appeal 00-18827, 00-18832, 00-18841

Proceedings: reversed in part *YBM Magnex International Inc., Re* (2000), 2000 CarswellAlta 380, 264 A.R. 275 (Alta. Q.B.)

Counsel: *A.D. Macleod, Q.C.* and *R.F. Smith*, for Griffiths McBurney, et al.

D.J. Sorochan, Q.C. and *D. Mitchell*, for Canaccord Capital Corporation.

D.F. Bell, for Appellants Parente, Randolph, et al.

P. Howard, for Ernst & Young YBM Inc.

C. Allen, for Roger Mondor and Amit Karia.

M.C. Freeman, for Plaintiff's Executive Committee.

E.A. Cherniak, Q.C., for Respondent, Royal Trust Corporation.

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL from order reported at (2000), 264 A.R. 275 (Alta. Q.B.), providing advice and directions to receiver.

The judgment of the court was delivered by *Wittmann J.A.*:

INTRODUCTION

1 This is an appeal by Griffiths McBurney & Partners ("Griffiths"), National Bank Financial Inc. ("National"), Canaccord Capital Corporation ("Canaccord") and Parente Randolph Orlando Carey and Associates ("Parente") from the Order of Paperny, J. dated April 17, 2000. Ernst & Young YBM Inc., the Receiver of YBM Magnex International Inc. (the "Receiver") and the plaintiffs in three different class actions (the "Class Action Plaintiffs") applied for advice and direction in respect of certain reports known as the 3(o) Report and the Miller Tate Report, which were prepared on the direction of, and on behalf of, the Receiver regarding the business and affairs of YBM Magnex International Inc. ("YBM").

2 The learned chambers judge declared that the Receiver was in common interest privilege with the Class Action Plaintiffs and therefore could provide the 3(o) Report to counsel for those parties, on such terms and conditions as the Receiver deemed appropriate. She also authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without waiving any privilege that exists with respect to that report on the basis that the waiver of privilege was limited to that document and is not a general or wider waiver of privilege. Finally, she held that if the Receiver was satisfied that it shared common interests with other entities against common adversaries on a particular issue, with benefit accruing to YBM's estate as a whole, the Receiver was authorized to release the Miller Tate Report to those entities on terms and conditions it deemed appropriate.

FACTS

3 YBM is an Alberta corporation which traded on the Toronto Stock Exchange until May 13, 1998 when it was cease traded by the Ontario Securities Commission after a raid at YBM's head office in Pennsylvania by a United States Organized Crime Strike Force.

4 YBM made a public offering of shares in a prospectus dated November 17, 1997. The share issue was underwritten by two lead underwriters, Griffiths and National, and three junior underwriters including Canaccord. The five underwriters (collectively the "Underwriters") entered into an Underwriting Agreement dated November 17, 1997 with YBM regarding the prospectus. The Underwriting Agreement contained indemnity provisions whereby YBM agreed to indemnify the Underwriters against all losses (other than loss of profits), claims, damages, liabilities, costs or expenses caused by, among other things, any statement which constituted or is alleged to have constituted a misrepresentation or material omission in YBM's offering documents or company information records. YBM also agreed to reimburse the Underwriters promptly, on demand, for any legal or other expenses reasonably incurred by the Underwriters in connection with investigating or defending any such losses, claims, damages, liabilities or actions in respect of any claims alleging such misrepresentations as incurred.

5 Parente was the auditor of YBM from 1995 until mid-1997.

6 Connor Clark & Lunn Investment Management Ltd. ("Connor Clark") is a Vancouver-based investment management firm. In 1998, Connor Clark retained VC & Co. International ("VC") for advice with respect to YBM. At the time of the engagement of VC, Connor Clark, on behalf of its institutional and other clients, had acquired approximately 14.4% of YBM's outstanding shares. A controlling shareholder of VC was appointed as YBM's Chairman of the Board of Directors on September 23, 1998.

7 On December 8, 1998, YBM brought an application in the Court of Queen's Bench to have Ernest & Young YBM Inc. appointed as the Receiver of YBM. Ernst & Young YBM Inc. was appointed as the receiver of YBM by court order (the "Receivership Order"). Following the appointment, the Receiver appointed Stikeman Elliott to act as counsel for the Receiver.

8 On June 7, 1999, YBM, through its Receiver, pleaded guilty in the United States to a multi-object conspiracy to commit fraud (the "Guilty Plea Agreement"). In the Guilty Plea Agreement, YBM admitted to committing overt acts intended to deceive its auditors. Parente was one of those deceived auditors. Also, pursuant to the Guilty Plea Agreement, YBM agreed to cooperate with the U.S. Attorney by providing complete and accurate information. However, the provision of information to the U.S. Attorney was stated to be subject to attorney work product privilege.

9 The fraud and guilty plea have resulted in the following litigation:

1. An as yet, uncertified class action in Ontario, in which Connor Clark is Plaintiff, which alleges that certain misrepresentations were made in a short form prospectus filed by YBM dated November 17, 1997 (the "Ontario Prospectus Class Action");

2. An as yet, uncertified class action in Ontario, asserting claims for persons in Canada who suffered losses trading YBM shares in the secondary market between March 10, 1996 and May 14, 1998 (the "Ontario General Class Action"); and
 3. A consolidated class action in the United States, on behalf of all purchasers (not limited to the U.S.) of YBM common stock between January 19, 1996 and May 14, 1998, as represented by the Plaintiff's Executive Committee (the "U.S. General Class Action").
- 10 Each of the Underwriters, through their counsel, wrote to the Receiver and advised of their intention to assert their contractual indemnity rights against YBM under the Underwriting Agreement. The Receiver advised the Underwriters that indemnity claims would be treated as part of the proof of claims process. The Receiver anticipates that the indemnity claims will be disallowed and if the disallowances are contested by the Underwriters, there will be litigation as to whether the indemnity provisions in the Underwriting Agreement are enforceable. Parente has filed a proof of claim with the Receiver.
- 11 Paragraph 3(o) of the Receivership Order appointing the Receiver authorized the creation of the 3(o) Report. Ernest & Young, an affiliate of the Receiver, had certain audit and other business relationships with parties against which YBM may have potential causes of action. For this reason, the Receiver retained the law firms of Stikeman Elliott and Voorheis & Co. to assist the Receiver in the analysis of potential legal claims which YBM may have and to assist in the development of a plan to present the analysis to YBM stakeholders, subject to court direction, pursuant to section 3(o) of the Receivership Order.
- 12 On October 26, 1999, the Receiver sought an Order confirming that the 3(o) Report was privileged in the hands of the Receiver and that the provision of the 3(o) Report to certain specified individuals would not constitute waiver of privilege to the 3(o) Report. Paperny J. ruled that the Receiver was permitted to provide a copy of the 3(o) Report to institutional shareholders and shareholders who were not a party to the fraudulent acts of YBM (the "Innocent Shareholders"), subject to specific terms.
- 13 To ensure that privilege and confidentiality were maintained for the 3(o) Report, the October 26, 1999 Order required that the Innocent Shareholders execute an Acknowledgement of Privilege and Undertaking of Confidentiality (the "Undertaking"). The Undertaking provided that the 3(o) Report was received by the Innocent Shareholders only for the purposes of assessing and pursuing causes of action on behalf of YBM. The undertaking also expressly provides that the 3(o) Report will not be used by the receiving party, directly or indirectly, for any purpose other than evaluating potential causes of action on behalf of the estate of YBM.
- 14 On January 24, 2000, the Receiver filed a Notice of Motion seeking, among other things, an Order allowing the Innocent Shareholders to provide the 3(o) Report to their employees and/or their counsel provided that those individuals were approved by the Receiver, and provided they executed and delivered an Undertaking to the Receiver.
- 15 The Receiver engaged Miller Coffey Tate LLP, a firm of Certified Public Accountants and Consultants, to prepare a draft report on share activity involving YBM (the "Miller Tate Report"). As part of the January 24, 2000 Motion, the Receiver sought an Order:
1. Directing the Receiver to waive privilege, if any, with respect to the Miller Tate Report on the basis that the waiver is limited to that document.
 2. Authorizing the Receiver to provide a copy of the Miller Tate Report to the representatives of the U.S. Attorney for the Eastern District of Pennsylvania on the basis of the express acknowledgement by the U.S. Attorney of the limited nature of the waiver.

3. Authorizing the Receiver to provide a copy of the Miller Tate Report to the Class Action Plaintiffs on terms and conditions satisfactory to the Receiver, including an express acknowledgement of the limited nature of the waiver of privilege, the application of the doctrine of absolute and qualified privilege to the document as if produced as an expert's report in litigation and that all parties and their counsel undertake not to use the document or the information contained in it for any purposes other than those of the proceeding or proceedings specified.

16 On June 14, 2000, a United States Bankruptcy Judge in the Eastern District of Pennsylvania modified the stay of proceedings imposed by the United States Bankruptcy Court for the Eastern District of Pennsylvania on February 1, 1999 to allow certain parties including Parente to assert claims against YBM in the U.S. General Class Action. Apparently, this decision is under appeal. Also, on July 14, 2000, the plaintiffs in the U.S. General Class Action filed a motion for an application to have the stay of proceedings against YBM lifted.

COMMON INTEREST PRIVILEGE

17 Litigation privilege, sometimes called legal professional privilege, protects documents from disclosure during litigation provided the dominant purpose of the creation of the documents is to submit the documents to a lawyer for advice and use in current or anticipated litigation: *Nova, an Alberta Corp. v. Guelph Engineering Co.*, [1984] 3 W.W.R. 314 (Alta. C.A.). For example, a lawyer's client obtains the written opinion of an expert to give to his lawyer to further the anticipated or current litigation.

18 Common interest privilege extends the litigation privilege where the document or information has been shared with a third party (other than the client and the lawyer) provided that third party has a common interest with the client in the same anticipated or current litigation. This general principle was first articulated in *Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. C.A.) where Denning, L.J. stated that it is a privilege in aid of anticipated litigation where several persons have a common interest. They independently may prepare documents for their own lawyer. The exchange of those documents among and between those having a common interest does not operate to waive the litigation privilege.

DECISION BELOW

19 In the decision below, the learned chambers judge referred to her decision of October 25, 1999, (1999), 75 Alta. L.R. (3d) 99 (Alta. Q.B.), in which she concluded that common interest privilege may attach to documents shared by parties with common interests even if the parties were also adverse in interest in some respects and that unusual circumstances present here meant that adversarial aspects did not preclude a finding of common interest privilege. In the October 26, 1999 Order, Paperny J. directed that the Receiver be permitted to provide the 3(o) Report to the Innocent Shareholders subject to terms.

20 Paperny J. began by reviewing the law regarding common interest privilege. She adopted the law as set out in her October 25, 1999 decision and highlighted the decisions in *Supercom of California v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Ont. Gen. Div.), *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), and *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 50 Alta. L.R. (3d) 131 (Alta. Q.B.). She concluded [at paragraph 36] "I accept the test as outlined in *Buttes* and refined in *Chrusz* and *Supercom*. There will be a common interest where parties anticipate litigation against a common adversary or share a united front against a common foe on the same issue."

21 She then went on to determine whether common interest privilege applied as between the Receiver and the Class Action Plaintiffs. She began by noting that since any adversity between the Receiver and the Class Action Plaintiffs was latent, they were not adverse in interest. She further found that Griffiths, National, Canaccord and Parente were adverse in interest with the Receiver since they were demanding indemnification and other benefits from the Receiver which the Receiver was assessing and might resist.

22 The learned chambers judge concluded by holding that the Receiver had the authority and discretion to distribute the 3(o) Report.

23 The learned chambers judge then went on to consider the issue of whether release of the Miller Tate Report to certain parties would constitute a general and wider waiver of privilege. She authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without such release operating as a general waiver of the Receiver's privilege over that report. She also authorized the Receiver to release the Miller Tate Report on terms and conditions it deemed appropriate to the parties with whom it was satisfied it shared common interests against common adversaries on a particular issue.

24 In the result, Paperny J. held that assuming, without deciding, that the 3(o) Report was privileged, common interest privilege exists among the Receiver and the Class Action Plaintiffs such that there would be no general waiver of privilege should the Receiver decide to release the 3(o) Report and therefore the Receiver was permitted to use its discretion to distribute the 3(o) Report. She also held that the Receiver was permitted to use its discretion in deciding whether to distribute the Miller Tate Report.

ISSUE

25 The issue to be determined is whether the learned chambers judge erred in making the order as worded since it impacts the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. General Class Action. Stated another way, should the issues of common interest privilege and waiver between the Receiver and the Class Action Plaintiffs, and general waiver of privilege over the Miller Tate Report be determined only by courts in the jurisdictions in which the actions were commenced by the Class Action Plaintiffs?

ANALYSIS

(i) Nature of a Court-Ordered Receivership

26 In determining whether the learned chambers judge erred in making the order as worded since it impacts proceedings in other jurisdictions, it is useful to note the functions, powers and obligations of a court-ordered receiver.

27 In *Bennett on Receiverships*, 2d ed. (Toronto: Carswell, 1999), the author [at page 1] defines a receiver as "a person who has been appointed to take possession of property belonging to a third party." One method by which a receiver may be appointed is by court order, as is the case here. The court order appointing the receiver sets out the receiver's powers and duties. In addition to the powers and duties set out in the court order, the receiver also has any powers and duties provided for in any relevant statute. In this case, the Receiver was appointed by the court pursuant to s.234 of the *Business Corporations Act*, SA 1981, c. B-15 ("*ABCA*"), and therefore, it is bound by the powers and duties provided in the *ABCA*, in addition to those set out in the Receivership Order.

28 Paragraph 1 of the Receivership Order provided for the appointment of the Receiver and its primary duties. It appointed the Receiver with respect to the present and future assets, property and undertaking of YBM wherever situate with authority to receive, preserve, protect realize and sell or otherwise dispose of the property and at its discretion, to oversee the operation of YBM. Paragraph 3 set out specific powers that the Receiver may exercise.

29 It is common for a Receivership Order to contain a clause empowering it to make applications to the court for advice and direction. Paragraph 23 of the Receivership Order authorizes the Receiver to apply to the court for advice and direction regarding the exercise of its powers and duties under the Receivership Order. Paragraph 3(o) specifically permits the Receiver to seek the direction of the court regarding a mechanism and methodology for releasing the 3(o) Report to relevant stakeholders on a confidential basis.

30 In *Bennett on Receiverships*, *supra*, the author notes [at 166] that a court appointed receiver as an officer of the court, "must discharge its duties properly and is afforded protection on any motion for advice and direction." He describes the scope of the power of the receiver to apply to the court for advice and directions as follows at page 209:

[a] receiver may initiate on its own behalf a motion for advice and directions if it relates to the receiver's administration, the powers and performance of duties including custody of assets, their disposition and approval of settlements. ... [I]f a motion is brought for advice and direction where the court is requested to adjudicate a dispute between the receiver and some third party, the court may turn the motion for directions into a substantive motion since the receiver is taking an adversarial position.

31 The purpose behind granting a receiver the ability to apply to the court for advice and direction was noted in *National Trust Co. v. Christian Community of Universal Brotherhood Ltd.*, [1941] S.C.R. 601 (S.C.C.). In that case, a court appointed receiver applied to the court under the *Farmer's Creditors Arrangement Act* for advice and direction with respect to whether it could accept a proposal. In the course of its judgment, the Supreme Court of Canada considered the purpose of a procedure which allows a receiver to apply to the court for advice and direction. At 613, the Court stated:

[t]he purpose of the procedure is to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.

It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.

[emphasis added]

32 In summary, a receiver is given the ability to apply to the court for advice and direction to ensure proper and timely administration of the estate, as well as to protect itself through court authorization of certain actions it wants to take in the course of the fulfilment of its duties under the receivership order. The court may also make substantive rulings in circumstances where the receiver takes an adversarial position against a third party where all affected parties have had the opportunity to present their case.

(ii) Exercise of the Power to Give Advice and Direction to a Receiver

33 Although a receiver may be empowered to seek the advice and direction of the court, there are circumstances where the court should decline to provide it.

1. Impact on Proceedings in Another Jurisdiction

34 One circumstance in which a court should decline to provide advice and direction is when that advice and direction would substantively impact proceedings in another jurisdiction which are properly before the court in that other jurisdiction. That circumstance exists here. The court should refuse to provide advice and direction on matters that do not directly relate to the receivership. The receiver and other parties seeking advice and direction should apply in the court where the proceedings have been commenced for rulings as to matters that relate directly and substantively to those proceedings.

35 In *Abacus Cities Ltd., Re* (1981), 128 D.L.R. (3d) 566 (Alta. Q.B.), the Attorney-General of Ontario brought a prosecution in Ontario against the employee of a bankrupt corporation, an Alberta company. The Attorney-General asked the trustee in bankruptcy to waive privilege to certain communications between the company and its solicitor. The trustee made an application for advice and direction to the Court of Queen's Bench of Alberta. MacDonald J. authorized the trustee to waive privilege if there would be no prejudice to the interests it represented. However, he refused to give advice and direction as to whether any privilege actually existed. At page 280, he stated

... this court can make no decision with respect to the proceedings in Ontario nor with respect to the admissibility of evidence and neither with respect to the existence or non-existence of solicitor-client privilege. All this is within the jurisdiction of the court seized with the hearing. The only matter that it may be proper for this court to consider is the attitude the trustee should take with respect to waiver should it be determined in Ontario that communications between the solicitors and the bankrupt are subject to privilege in proceedings against Mr. Rogers.

[emphasis added]

36 MacDonald J. concluded at 284 by stating:

I do not consider that an order should go directing the trustee to waive privilege as there may be circumstances of which this court has no knowledge, but an order will go authorizing the trustee to waive privilege and suggesting he do so, if he has no reason to believe that such waiver would be to the prejudice of the interests that he represents.

[emphasis added]

37 Paperny J.'s April 17, 2000 Order, in part, stated as follows:

1. The Receiver is authorized but not directed that in its discretion, and on terms and conditions the Receiver deems appropriate, it may waive privilege, if any, with respect to the Miller Tate Share Report on the basis that the waiver of privilege is limited to that document and is not a general or wider waiver of privilege, and it may provide the Report to representatives of the U.S. Attorney for the Eastern District of Pennsylvania if the Receiver considers that to do so would be in the best interests of the YBM estate as a whole.

2. The Receiver is in common interest privilege with the plaintiffs in the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. Class Action, and the Receiver may in its discretion if it considers to do so would be for the benefit of the receivership estate, and without waiving privilege if it exists, provide the 3(o) Report to counsel for those parties, on such terms and conditions the Receiver deems appropriate, including without limitation the condition that counsel execute and deliver to the Receiver the Acknowledgement of privilege and Undertaking of Confidentiality substantially in the form required by the Order of October 26, 1999 as amended for the particular recipient in a manner satisfactory to the Receiver prior to receipt of the Report.

[emphasis supplied]

38 It is clear that Paperny J.'s order went further than merely authorizing the Receiver to release the reports in question. She held that release of the Miller Tate Report will not constitute waiver to the documents that underlie that report, and declared the Receiver is in common interest privilege with the Class Action Plaintiffs and therefore it may release the 3(o) Report to the Class Action Plaintiffs without waiving privilege in respect of it. She made declaratory orders which determine the existence or non-existence of common interest privilege and the conditions which prevent a general waiver of privilege. The April 17, 2000 Order is not merely permissive. It may be used, or an attempt may be made to use it, authoritatively, in the proceedings in Ontario and Pennsylvania.

39 The facts in *Abacus Cities Ltd.* and the present case are not strictly analogous. In *Abacus Cities Ltd.*, the trustee in bankruptcy applied for advice and direction which did not relate to the bankruptcy proceedings in Alberta but rather arose in response to a prosecution in Ontario. MacDonald, J. described the nature of the Ontario prosecutor's request in respect of charges brought in Ontario against a former officer and employee of the bankrupt, Kenneth D. Rogers at p.280:

Counsel for the Attorney General of Ontario engaged to conduct the preliminary hearing into the charges has asked the trustee whether or not the trustee is prepared to waive privilege in connection with certain communications between the then solicitors for the bankrupt and the bankrupt, in order that the communications may be introduced in evidence at the preliminary hearings.

40 Here, the Receiver's application relates to an Alberta receivership, but the questions of whether common interest privilege exists between the Receiver and the Class Action Plaintiffs, and whether release of the Miller Tate Report constitutes a general waiver relate entirely to the actions in Ontario and Pennsylvania. No doubt the questions are of great concern to the Receiver in assessing whether or not to release the reports, but they do not relate to the receivership as it is being carried out by the Receiver in Alberta. These questions relate to the personal actions that the shareholders of YBM have against various parties as a result of the acts and omissions of YBM and others. The reason that the Receiver and the Class Actions Plaintiffs applied to the Alberta court for a ruling as to whether the Receiver could release the reports to the Class Action Plaintiffs was so that the reports could be released without waiving privilege. The purpose of the application is to allow the Receiver to release the report without waiver of any privilege. It is clear that the Receiver and the Class Action Plaintiffs expect the April 17, 2000 Order and the Reasons of the learned chambers judge to be used in the Ontario and Pennsylvania proceedings. If the existence of common interest privilege and waiver were to be put in issue in Ontario and Pennsylvania, they may argue, among other things, that the issue has been decided in Alberta and therefore the matter is *res judicata*.

41 The question of whether the Receiver is authorized to release the reports is properly before this court as it relates to the receivership. To the extent that the learned chambers judge authorized the Receiver to release the reports to certain parties if to do so would be in the best interests of YBM's estate, her order was properly made. However, she went on to make declaratory orders with respect to existence of common interest privilege and the nature of the waiver of privilege now contemplated to relate only to the actions in Ontario and Pennsylvania. In *Abacus Cities Ltd.*, the court recognized the notion that it should be the court that will actually determine the outcome of an action that should determine the existence and status of any privilege alleged.

42 No convincing reason has been put forward as to why the Receiver and the Class Action Plaintiffs could not apply to the courts in Ontario and Pennsylvania for a determination as to whether there is common interest privilege and whether release of the Miller Tate Report would constitute a general waiver. It was argued that the Receiver cannot do it because it is not a party to those proceedings. It was not suggested the Receiver could not participate if it chose to do so, particularly if the Class Action Plaintiffs bring the application.

43 Also, an issue arises as to whether a court in Ontario or Pennsylvania is bound to or will in fact obey an order of the Alberta court. Although arguments of abuse of process, estoppel and *res judicata* could be made to support upholding the decision of the Alberta court, the Ontario and Pennsylvania courts may determine they are masters of their own procedure, unfettered by a decision of an Alberta court.

44 An Alberta court generally should not make orders that it cannot enforce. The declaratory orders made are for use only outside this jurisdiction. An Alberta court should decline to make such orders. The courts which have proper jurisdiction over the relevant proceeding should deal with these issues.

45 If the Receiver wants to provide a copy of the 3(o) Report to the Class Action Plaintiffs without waiving any privilege that may attach to that report or release the Miller Tate Report without such release constituting a general waiver, it should seek such an order from the courts in the jurisdictions in which the actions have been brought, or await the Class Action Plaintiffs seeking and obtaining the ruling.

2. Legal Advice

46 Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice.

47 In *Canadian Steering Wheel Co., Re* (1921), 21 O.W.N. 15 (Ont. S.C.), Canadian Steering Wheel Co. made an assignment into bankruptcy. Section 18(d) of the *Bankruptcy Act* allowed a trustee to apply to the court for direction regarding the administration of the estate of a bankrupt. Under the *Act*, any directions given by the court were binding

and justified the subsequent consonant action of the trustee. The trustee of the estate made an *ex parte* application to the court for direction regarding the status of certain officers of the company and the validity of the assignment. The court refused to provide directions, stating at page 16 that "[c]ause (d) was not by any means intended to turn the Court into a sort of solicitor for the trustees to whom they might resort for advice in an informal way whenever they happened to be in doubt as to what they should do." The court went on to state that "on the affidavits filed, and in the absence of notice, it did not seem proper or possible to give the trustee any instructions as to what in the circumstances he should do or refrain from doing."

48 In *Bennett on Receiverships*, the author considered receivership under the *Bankruptcy and Insolvency Act*, S.C. 1992, c. 27 (the "*BIA*"). He considered s. 249 of the *BIA* which authorizes a receiver to apply to the court for directions in relation to provisions of the *BIA*. At 698, he states:

However, the court cannot be turned into a forum for giving advice nor should the court decide substantive law matters between the parties. In these situations, the court is directing its own officer. If there are substantive issues to be tried, the receiver should not apply for directions but rather commence an action or request a trial of an issue.

49 As noted, the Receiver retained independent counsel from which it receives advice.

(iii) Other Discretionary Powers

50 A party may make an application to the court for advice and directions. In the normal course, such applications are made by way of notice of motion pursuant to Part 33 of the *Alberta Rules of Court*. Under the *Alberta Rules of Court*, a party may apply to the court for advice and direction by way of a notice of motion in circumstances where there are no material facts in dispute between the parties. The matter is put to the court on the basis that the facts are as stated in the motion and on that given set of facts, advice or direction is sought. Part 33 of the Rules of Court sets out the rules relating to applications made by way of notice of motion. Rule 409 authorizes the court to dispose of applications in a summary manner while Rule 410 sets out the proceedings which may be commenced by way of originating notice. Under Rule 410(e), a proceeding may be commenced by way of originating notice where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument or legislation.

51 However, the courts have recognized that there are limits on when they should provide advice and directions under the Part 33 Rules. In *Edmonton Telephones Corp. v. Stephenson* (1994), 24 Alta. L.R. (3d) 96 (Alta. Q.B.), aff'd (1994), 26 Alta. L.R. (3d) 33 (Alta. C.A.), leave to appeal dismissed, (1995), 26 Alta. L.R. (3d) 1 (S.C.C.), the applicant corporation supported by the respondent City sought certain declarations regarding the City's relationship with the corporation pursuant to s. 410(e) of the *Alberta Rules of Court*. Ritter J. summarized the general principles that apply when a party makes an application for advice and direction from the court as:

1. Rule 410(e) is a discretionary rule which should be exercised with restraint.
2. The question must be real and not a theoretical question.
3. The person raising it must have a real interest to raise it.
4. The person raising the question must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
5. Once the foregoing considerations have been met, the Court should endeavour to make a practical determination as to whether there is sufficient likelihood of relevant evidence being admitted at trial which will significantly assist the Court in interpreting the words of the document or documents to warrant the expense and delay of a full trial process.
6. Voluminous evidence will not take the matter outside Rule 410(e) by itself. If there are no material facts in dispute, then the matter may be brought to the Court by virtue of affidavit or affidavits.

52 The court is also empowered to make a declaratory judgment under s. 11 of the *Judicature Act*, R.S.A. 1980, c. J-1. In *The Law of Declaratory Judgments*, 2d ed. (Toronto: Carswell, 1988), Lazar Sarna at page 1 defines a declaratory judgment as a judicial statement confirming or denying legal rights.

53 Section 11 is often used in conjunction with Rule 410(e) so that the court may make a declaration as to the rights of parties in a summary way where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument. See *Oracle Resources Ltd. v. Dome Petroleum Ltd.* (1988), 86 A.R. 281 (Alta. Q.B.).

54 Section 11 provides that

[n]o 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.

55 The power of the court to make a declaratory judgment is limited only to the proper exercise of its discretion. This Court has recognized that its discretion to make declaratory judgments is subject to certain restrictions. In *McMurray Homes Ltd. v. Fort McMurray (Town)*, [1976] 5 W.W.R. 442 (Alta. C.A.), this Court set out parameters for the exercise of its discretion under s. 11 of the *Judicature Act*. The Court underscored the fact that the exercise of the power to make declaratory judgments was subject to restraints and noted the comments of Estey J. in *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 (S.C.C.) where he considered the English equivalent of s. 11. Estey J. stated at page 331 that the power to grant a declaratory judgment was discretionary and should be exercised with "great care and caution." The Court cited 19 Hals. (2d) 215, para. 512, which, in part, states that

[t]he power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution, and with regard to all the circumstances of the case, and must be exercised judicially. The power to make a declaration will not be exercised where the relief claimed would be unlawful or unconstitutional, or inequitable for the Court to grant, or contrary to the accepted principles upon which the Court exercises its jurisdiction. The Court will not make a declaratory judgment where the declaration would be useless or embarrassing, or where an adequate alternative remedy is available.

[emphasis added]

56 It is clear that under the *Rules of Court* and s. 11 of the *Judicature Act*, the courts have recognized the discretionary nature of the powers given therein and have constructed tests accordingly which limits their ability to make such orders. The courts have balanced the powers that have been given to them by the Legislature with the practicality of making such orders in particular circumstances.

57 In the same way that the courts have recognized the limits on their powers to give advice and directions and make declaratory judgments, the courts should recognize that there are limits to the circumstances in which they should give advice and directions to receivers.

DECISION AND CONCLUSION

58 The chambers judge erred in making the order as worded. She should have declined to give advice and direction as to the existence or non-existence of common interest privilege and whether release of the Miller Tate Report constituted a general wider waiver. These are matters that should properly be determined by the courts in Ontario and Pennsylvania, the jurisdictions in which the three actions have been brought.

59 A receiver may ask the court for direction as to waiving privilege, if any, and for permission and direction to distribute the documents in question.

60 Here, the authorization for the Receiver to waive privilege, if any, with respect to the Miller Tate Report and the 3(o) report was a valid exercise of the discretion of the learned chambers judge. Similarly, the authorization of the Receiver

to provide the 3(o) Report to counsel for the Class Action Plaintiffs on such terms as the Receiver thinks appropriate, was a reasonable exercise of the chambers judge's discretion.

61 The learned chambers judge ought not to have made any declaration as to the existence of common interest privilege, nor the legal effect or extent of any waiver.

62 The appeal is allowed to this extent and the order varied accordingly.

Appeal allowed in part.

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TAB 3



ALBERTA

RULES OF COURT

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(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2 Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

- (a) give any relief or remedy described or referred to in the *Judicature Act*;
- (b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 [*Purpose and intention of these rules*] the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

- (a) grant, refuse or dismiss an application or proceeding;
- (b) set aside any process exercised or purportedly exercised under these rules that is
 - (i) contrary to law,
 - (ii) an abuse of process, or
 - (iii) for an improper purpose;
- (c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;
- (d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;
- (e) impose terms, conditions and time limits;
- (f) give consent, permission or approval;
- (g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

- (h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;
 - (i) determine whether a judge is or is not seized with an action, application or proceeding;
 - (j) include any information in a judgment or order that the Court considers necessary.
- (3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be
- (a) recorded in the court file of the action by the court clerk, or
 - (b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

- (a) to cure the contravention, non-compliance or irregularity, or
 - (b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.
- (2) An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity.
- (3) An application under this rule may not be filed by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.
- (4) The Court must not cure any contravention, non-compliance or irregularity unless
- (a) to do so will cause no irreparable harm to any party,
 - (b) in doing so the Court imposes terms or conditions that will
 - (i) eliminate or ameliorate any reparable harm, or
 - (ii) prevent the recurrence of the contravention, non-compliance or irregularity,
 - (c) in doing so the Court imposes a suitable sanction, if any, for the contravention, non-compliance or irregularity, and
 - (d) it is in the overall interests of justice to cure the contravention, non-compliance or irregularity.

TAB 4

2015 ABCA 393
Alberta Court of Appeal

Shaw v. Boyda

2015 CarswellAlta 2268, 2015 ABCA 393, [2016] A.W.L.D. 232, 261 A.C.W.S. (3d) 261

**Marilyn Juel Shaw, Applicant (Defendant) and
Howie Preston Boyda, Respondent (Plaintiff)**

Frans Slatter J.A.

Heard: December 10, 2015
Judgment: December 11, 2015
Docket: Calgary Appeal 1501-0291-AC

Counsel: Marilyn Juel Shaw, for herself
No one for Howie Preston Boyda

Subject: Civil Practice and Procedure; Family

APPLICATION by vexatious litigant asking how to obtain copy of order and transcripts and how to contact judge.

Frans Slatter J.A.:

- 1 The applicant has launched an appeal against an order of the Queen's Bench case management judge, who refused to disqualify himself from continuing to manage this litigation, and found the applicant to be a vexatious litigant: *Boyda v. Shaw*, 2015 ABQB 780 (Alta. Q.B.).
- 2 The underlying dispute arises from a divorce action. The applicant has been before the Court of Appeal on previous occasions: *Boyda v. Shaw*, 2014 ABCA 1 (Alta. C.A.).
- 3 On October 30, 2015, the applicant applied to have the case management judge disqualify himself from continuing in that role. The respondent, who is the applicant's previous spouse, did not appear. When the case management judge declined to recuse himself, the applicant launched this appeal.
- 4 The applicant contemporaneously brought an application in which she asks:
 - (a) "How can I obtain a copy of the 2015/10/30 court order?"
 - (b) "Why do I have to include H.P. Boyda when he was not even there and has nothing to do with it?"
 - (c) "How can I obtain access to the Calgary Courts Centre (CCC) for such things as transcripts management, court assistance program (CAP), and library?"
 - (d) "How do I contact Justice Mahoney?"
 - (e) "Can we not put someone else in charge of me?"

The applicant acknowledges in her materials that the judges are not in a position to give her legal advice, which is a sufficient answer to this application. While judges do their best to accommodate self-represented litigants, there are limits to the assistance that can be offered.

5 The applicant seeks an "interim" order removing the case management judge, and allowing her to contact the Court of Queen's Bench otherwise as ordered. A single judge of the Court of Appeal cannot effectively allow the appeal under the pretext of granting interim relief.

6 It is not appropriate for any party to an appeal to bring applications to single judges seeking advice on how she should prosecute her litigation, or explanations about why certain court procedures are in place. Rule 1.4(2)(g) empowers the court to manage litigation, but does not turn the judges into legal advisors. The present application is dismissed.

7 This is a Fast Track Appeal. As a reminder, the transcripts should have been ordered by December 7, and the Appeal Record is due to be filed by January 4th, 2016. The applicant complains that her access to the Calgary Court Centre and other legal resources has been restricted. Those restrictions are a direct result of the events outlined in *R. v. Shaw*, 2012 ABPC 273 (Alta. Prov. Ct.), and her history of making multiple unmeritorious applications. The applicant will have to work within those restrictions otherwise than by bringing applications like this, and is expected to comply with the filing deadlines found in the Rules of Court with respect to this appeal.

Application dismissed.

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TAB 5



Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 15, 2017

Office Consolidation

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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.

TAB 6

2015 ABQB 481
Alberta Court of Queen's Bench

Peter Lehmann Wines Ltd. v. Vintage West Wine Marketing Inc.

2015 CarswellAlta 1417, 2015 ABQB 481, [2015] A.W.L.D. 3614, [2015] A.W.L.D.
3672, [2016] 4 W.W.R. 192, 256 A.C.W.S. (3d) 508, 27 Alta. L.R. (6th) 95

**Peter Lehmann Wines Ltd, Applicant and Vintage
West Wine Marketing Inc, Alberta Gaming & Liquor
Commission, and Connect Logistics Services Inc, Respondent**

Robert A. Graesser J.

Heard: July 21, 2015
Judgment: July 29, 2015
Docket: Edmonton 1503-07515

Counsel: Thomas V. Duke, for Applicant
Mark Fancourt-Smith, for Respondent, Vintage West Wine Marketing Inc.
Hillary Flaherty, for Respondent, Alberta Gaming & Liquor Commission

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

APPLICATION for order requiring liquor commission to recognize applicant's new agency relationship.

Robert A. Graesser J.:

I. Introduction

1 Peter Lehmann Wines Ltd. [PLW] seeks a declaration and orders that would have the effect of implementing a new product distribution agency relationship over the objections of its former distributor in Alberta, Vintage West Wine Marketing Inc. [Vintage]. The relief sought includes an order requiring the Alberta Gaming & Liquor Commission [AGLC] to recognize PLW's new agency relationship with Phillippe Dandurand Wines Ltd. [Dandurand] despite its policy of requiring the former agent to "sign off".

2 This application came before me in regular morning Chambers.

3 In its Originating Application, PLW sought declarations that:

1) Dandurand is PLW's agent for the sale of its wine in Alberta;

2) Vintage is not PLW's agent; and

3) Vintage owes PLW monies due to its default on valid and subsisting conditional sales agreements with PLW.

4 PLW sought orders that:

1) Dandurand pay monies into trust in anticipation of receiving possession of unpaid wine currently under the control of Vintage;

2) Vintage transfer possession of the wine to Dandurand pursuant to contract or the *Personal Property Security Act*, RSA 2000, c P-7 [PPSA] in relation to the Vintage conditional sales agreements and inventory that was unpaid at the time of filing the Originating Application; and

3) the AGLC implement an agency representation transfer from Vintage to Dandurand, transfer unpaid inventory in AGLC's possession to Dandurand's control, and remit proceeds of sales of this wine to Dandurand. PLW also wants an order that would direct the third-party warehouseman to transfer the wine to Dandurand.

5 During the interval between PLW filing the Originating Application and my hearing this application, Vintage paid PLW everything PLW was entitled to for the wine under Vintage's control. That led PLW to seek different relief on the application before me.

6 At the application, PLW sought the declaratory relief specified above, and also sought an order Vintage to sell its entire PLW inventory to Dandurand at Vintage's full retail price.

7 For the reasons that follow, PLW's application is denied.

II. Background

8 PLW is a winery in Australia. In order for it to distribute wine in various Canadian provinces, it uses the services of a marketing and distribution agent. In Alberta, the AGLC establishes policies and authorizes operators for the warehousing and distribution of liquor products in the province. Connect Logistics Services Inc. [Connect Logistics] warehouses and distributes spirits, wine, coolers, and imported beer.

9 Sometime in the summer of 2014, PLW established a business relationship with Vintage, a company based in British Columbia and operating in several provinces, including Alberta. The parties' negotiations may or may not have led to an oral agreement. Regardless, Vintage became PLW's agent in Alberta and British Columbia, and perhaps also in Manitoba and Saskatchewan. The terms of the agreement, if there ever was one, are unclear. As part of the relationship, Vintage acquired wine through a series of conditional sales agreements wherein PLW became Vintage's creditor.

10 In August 2014, PLW advised the AGLC and the British Columbia Liquor Distribution Branch [BCLDB] that Vintage would be its distribution agent.

11 In November 2014, another Australian company, Casella Family Brands [Casella], purchased PLW. At the time, Casella was using Dandurand as its marketing and distribution agent in Canada.

12 On February 27, 2015, PLW notified Vintage that it was terminating the relationship without notice. On March 2, 2015, PLW advised the AGLC that PLW authorized Dandurand to be its distribution agent.

13 The AGLC's policies preclude it from recognizing multiple distribution agents for any one producer. In order for it to recognize a replacement agent for a producer, the AGLC requires the supplier, the current agent, and the new agent to provide notification authorizing such a change and detailing terms of product transfer.

14 Through its counsel, Vintage wrote to PLW on March 4, 2015 stating that Vintage considered the termination notice to be a breach of their agreement, but that Vintage remained ready, willing, and able to fulfill its contractual obligations. Vintage later changed its mind, and advised PLW on April 10, 2015 that it accepted PLW's repudiation of the contract. At this point, Vintage still controlled a significant amount of product in Alberta and British Columbia. On April 13, 2015, PLW demanded that Vintage pay approximately \$400,000 owing for wine shipped under the conditional sales agreements.

15 On April 15, 2015, Vintage filed a claim in British Columbia against PLW for breach of contract in British Columbia, which PLW has defended by claiming set-off for amounts owing. Vintage advised PLW on April 27, 2015 that it would continue to sell the wine in order to mitigate its damages.

16 In May 2015, PLW registered a security interest in the wine with the Alberta Personal Property Registry. It attempted to seize the product a few days later, but was rebuffed by Connect Logistics who was not able to isolate and provide the product in their warehouse without notice.

17 On May 27, 2015, PLW obtained an *ex parte* order in British Columbia declaring that Vintage was no longer PLW's agent in British Columbia, that Vintage was to deliver possession of the British Columbia wine to Dandurand, and that the BCLDB was to facilitate the transfer of possession and agency so far as its assistance was required.

18 After PLW filed the Originating Application in early June leading to this hearing, Vintage paid out the entirety of its debt to PLW relating to the inventory of PLW product in Alberta.

19 Vintage estimates that it currently owns approximately \$209,000 worth of PLW inventory in Alberta. It continues to fill purchase orders for PLW wine stored at the Connect Logistics warehouse.

20 At the application, PLW indicated that it had offered to purchase all of Vintage's PLW inventory, at Vintage's full retail price. This would allow Vintage to recover all of the money paid to acquire the inventory, together with all of its anticipated profit. PLW points out that this offer should be particularly attractive, as it would allow Vintage to recover all of its investment and anticipated profit immediately, rather than wait until the inventory has been sold out (anticipated by Vintage to take until November).

III. Positions

PLW

21 Counsel for PLW asks the Court to invoke its inherent jurisdiction to provide "quasi-injunctive" relief compelling the AGLC to recognize Dandurand as PLW's agent in place of Vintage.

22 PLW has two concerns.

23 First, PLW takes the position that, in the ordinary course, Vintage's PLW wine stock will be depleted by early August 2015. It takes four months to move PLW's wine from its winery to shelves in Alberta. Assuming a smooth agency substitution only after the wine in the warehouse is depleted, there will necessarily be a lack of availability of PLW wine for a period of time. PLW believes that this will jeopardize its reputation and future profitability due to retailers discontinuing their brand, and that it will be impossible to ascertain damages.

24 Second, PLW suspects that Vintage does not intend to deplete its stock entirely in a timely manner, but instead intends to reduce its stock to a minimal level. According to PLW, Vintage plans on forestalling an agency transition to eliminate (at least temporarily) PLW from the Alberta market in order to extract a better settlement in relation to the outstanding legal claim in British Columbia.

25 It argues that by buying all of Vintage's PLW inventory for full retail price, the AGLC's policy objective of protecting former agents from being stuck with inventory with limited ability to sell it would be satisfied. As well, by providing Vintage with its full retail price for its PLW inventory, Vintage would be more than made whole because Vintage would get its full price now, without incurring any further costs.

26 The AGLC's agency-transfer policies are intended to protect outgoing agents in the normal course of business, ensuring that they receive payment from incoming agents for subsisting stock. According to PLW, Vintage is taking

advantage of these policies in a way that is neither intended by the AGLC nor would be appropriate in the industry. Vintage is using the system as a sword when it is intended to be used as a shield.

27 PLW argues that the status quo will inevitably result in irreparable harm to its business interests in Alberta. It has already lost sales, and expects many retailers to discontinue their stock of PLW wine in light of growing uncertainty about supply.

28 Regarding the nature of the relationship between the parties, PLW concedes that it had negotiated a distribution agreement with Vintage, but submits that that no contract was ever concluded. It suggests that the only agreements between them were the conditional sales agreements, and that any relationship negotiated was one of an indefinite nature. Accordingly, when PLW terminated their relationship in February 2015, it was not repudiating a contract, so there is no reason for the Court to consider whether it behaved wrongfully in the contractual dispute before the courts in British Columbia.

29 PLW relies on the unreported matter of *Bruce Ashley Group Inc v Spider Beverage Co Inc* (21 March & 6 May 2014), Edmonton, Alta QB, 1403-03636 (interim and interlocutory injunction orders) [*Bruce Ashley*]. The plaintiff importer of alcoholic beverages had engaged the defendant as a sub-agent to distribute the products. The AGLC recognized the defendant as the distribution agent (in the same way that it recognizes Vintage as agent in the matter before this Court). In the claim, the defendant distributor was alleged to have breached its payment obligations to the plaintiff. The plaintiff stated in its affidavit that it believed the defendant was also deliberately holding a very low inventory as "ransom" to impede sales. The Court granted orders in the form of interim and interlocutory injunctions directing the AGLC to treat a new distributor as the plaintiff's sole agent. The Court was unimpressed that the defendant had not been paying its invoices, and found that there existed a *prima facie* case of irreparable harm with little detriment to the defendant if an injunction were granted.

Vintage

30 Vintage argues that it owns the PLW wine free and clear, having paid out the amounts owing under the conditional sales agreements. It reasons that in light of its ownership rights and the AGLC's recognition of Vintage as the exclusive agent to market and distribute the wine, PLW can claim no legal or equitable right that would justify the Court's interference with the status quo.

31 Counsel for Vintage further submits that it is not holding up product, nor does it intend to deplete the stock to a minimal amount before holding it up. It continues to sell the wine and anticipates that the stock will not be depleted until November of 2015.

32 Vintage also argues that the Originating Application was made in the *PPSA* context, pointing to the relief sought in paragraphs 13(a), (b), and (e), 14, 15(b) through (d), 16, and 17. These paragraphs, which comprise the majority of the relief sought, refer to PLW's alleged rights as a secured creditor under the *PPSA* regime. As Vintage has paid off its debts in relation to the wine security, the application requesting remedies under the *PPSA* should fail.

33 Vintage argues that an order in the nature of an injunction would be extraordinary in these circumstances, especially in the absence of any articulated claim. Although the contractual dispute has yet to be determined in the courts in British Columbia, Vintage invites this Court to consider PLW's wrongful actions in repudiating the distribution agreement, which it vigorously asserts was in place for a three-year term.

34 Vintage also objects to having to sell all of its PLW inventory to PLW or Dandurand at full retail price, even though the effect of such sale would allow it to realize a certain profit immediately. Vintage suggested that it might be able to sell some of the inventory at a higher price and realize greater profits than presently contemplated. Nevertheless, it became apparent in argument that their real objection is based on Vintage's legal and strategic positions.

AGLC

35 Counsel for the AGLC states that its own internal policies allow the AGLC to recognize only one agent. This is consistent with its position that it will not recognize multiple agents for one producer. While it acknowledges that the order made in *Bruce Ashley* is similar to the one sought here, it argues that an order in this case could seriously affect the AGLC. While not taking a position on the application, it is clear that the AGLC would prefer to have the court recognize its policies and not require it to do anything contrary to its policies.

IV. Issues

36 There are essentially two sets of issues at play in this matter. The first are the legal issues relating to the relief sought by PLW and the court's jurisdiction to order such relief. The second are the practical issues arising in this application relating to the court's so-called inherent jurisdiction and strategic issues. I will divide my comments between the legal issues and the practical issues.

V. Analysis of Legal Issues

PPSA Orders

37 In paragraphs 13(a), (b), and (e), 14, 15(b) through (d), 16, and 17, PLW seeks a declaration and orders relating to its conditional sales agreements with Vintage, and the collateral wine security which is the subject of the registration in the Personal Property Registry.

38 Vintage was indebted to PLW pursuant to purchase orders made under the conditional sales agreements. PLW registered its security interest in the Personal Property Registry in May of 2015 and filed this Originating Application on June 8, 2015. It is not disputed that Vintage paid its outstanding balance to PLW on June 19, 2015, prior to this application in Chambers.

39 As PLW is no longer a creditor of Vintage, it follows that PLW is not entitled to enforce its security under the *PPSA*. I note that counsel for PLW did not argue this point.

40 Accordingly, the Court denies the remedies sought in paragraphs 13(a), (b), and (e), 14, 15(b) through (d), 16, and 17.

Mandamus Remedy Against the AGLC

41 PLW asks the Court to compel the AGLC to recognize Dandurand as PLW's agent in place of Vintage. Such relief is in the nature of mandamus. There are a number of reasons why mandamus would be an inappropriate remedy.

42 If a statutory entity is expressly designated by legislation as a Crown agent, then its agency status is conclusively determined and cannot be questioned by the courts: Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 468. Such an entity will enjoy the benefits of agency status so long as it acts within the scope of the public purposes it is statutorily empowered to pursue, that is, commits acts designed to effect Crown purposes: *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (S.C.C.) at 565-66, 568.

43 The AGLC is an agent of the provincial Crown: *Gaming and Liquor Act*, RSA 2000, c G-1, s 4(1). One of the AGLC's objects is to control the import and storage of liquor: s 3(d). The Board of the AGLC is empowered to establish policies and is authorized to store liquor in any warehouse, subject to conditions the Board establishes: s 12(1)(b); *Gaming and Liquor Regulation*, AR 143/1996, s 99(1).

44 Both parties acknowledge that the Board has established policies whereby the AGLC recognizes only one agent for any given producer, and requires letters of authorization from the producer, the old agent, and the new agent for an agency transfer: *AGLC Liquor Agency Handbook* (27 November 2012), policies 1.1.3, 3.1.4, 3.18.2(a) [*AGLC Handbook*]. The *AGLC Handbook* also precludes the AGLC from engaging in activities not specifically permitted therein, nor is

the AGLC permitted to become involved in resolving disputes between suppliers and their registered agents: policies 1.1.10, 3.1.6.

45 PLW does not challenge these AGLC policies. In establishing and following policies regarding the import and storage of liquor in warehouses, the AGLC is acting *intra vires* its enabling legislation, and therefore squarely within its role as a Crown agent.

46 Mandamus is confined to judicial review, and accordingly has no application to private litigation: *Allard v. Shaw Communications Inc.*, 2010 ABCA 316 (Alta. C.A.) at para 27, (2010), 493 A.R. 182 (Alta. C.A.).

47 Because a Crown or statutory body is always implicated in administrative law, Rule 3.15(3)(b) of the *Alberta Rules of Court*, RSA 2000, c P-25 requires the Minister of Justice and Solicitor General for Alberta to be given notice of applications which ask the Court to contemplate any of the prerogative writs used to initiate a judicial review.

48 PLW has not added the Minister of Justice and Solicitor General to these proceedings. Accordingly, without giving her the opportunity to intervene, I cannot grant an order in the nature of mandamus.

49 It is also evident that this application has not been brought in the context of a judicial review, because there is no AGLC decision that is impugned. For that reason as well, an order in the nature of mandamus would be inappropriate.

50 If PLW seeks to impugn the AGLC's decision to refuse to recognize Dandurand as PLW's agent in place of Vintage, it must apply for judicial review in the appropriate fashion.

51 Further, at common law, mandamus does not lie against the Crown or her agents: *Alberta Mortgage & Housing Corp. v. Hindmarsh* (1987), 77 A.R. 263 (Alta. C.A.) at para 3. As Cockburn CJ reasoned in *R. v. Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387 (Eng. Q.B.) at 394:

[W]e must start with this unquestionable principle, that when a duty has to be performed ... by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.

52 The proper application of mandamus compels respect to the Crown by ordering that the Crown's commands be obeyed by the Crown's servants. "If a Crown servant refuses or neglects to obey the Crown, it is the function of the Courts to compel his obedience": *R. v. British Columbia (Workmen's Compensation Board)*, [1942] 2 D.L.R. 665 (B.C. C.A.) at 682.

53 When mandamus is sought, the question is whether the duty is owed by the Crown, or by a designated individual. Only in the latter case might mandamus be available: Hogg, Monahan & Wright at 58. In this case, neither statute nor policy designates a particular person who is to perform the duty of facilitating the agency transfer. Therefore, mandamus is not available in this case because there is no designated person obliged to discharge this duty.

54 Finally, even if mandamus were available, PLW has not established the necessary elements. The first condition for an order in the nature of mandamus against a public body is that there be a public legal duty to act and that such duty is owed to the applicant: *MacKenas Estates Development Corp. v. Calgary (City)*, 2012 ABCA 376 (Alta. C.A.) at para 62, (2012), 539 A.R. 279 (Alta. C.A.), citing *Apotex Inc. v. Canada (Attorney General)* (1993), 162 N.R. 177 (Fed. C.A.), aff'd [1994] 3 S.C.R. 1100 (S.C.C.). In determining whether there is a public legal duty to act, the question is whether the legislative scheme in its entire context logically leads to the conclusion that the legislature intended the public body to be obliged to exercise some duty: *Toth Equity Ltd. v. Ottawa (City)*, 2011 ONCA 372 (Ont. C.A.) at paras 28-29, (2011), 283 O.A.C. 33 (Ont. C.A.).

55 PLW has not established that AGLC owes a public legal duty to PLW.

Injunctive Relief Against the AGLC

56 The relief which PLW seeks against the AGLC appears to be in the nature of a mandatory permanent injunction.

57 At common law, as with orders in the nature of mandamus, injunctive relief is not available against the Crown, so long as the Crown is not acting unconstitutionally or *ultra vires* its lawful authority: *Grand Council of Crees (Quebec) v. R.* (1981), [1982] 1 F.C. 599 (Fed. C.A.) at 600; *Lameman v. Alberta*, 2013 ABCA 148 (Alta. C.A.) at paras 40-41, (2013), 553 A.R. 44 (Alta. C.A.) [*Lameman*]. This common law bar has been codified in the *Proceedings Against the Crown Act*, RSA 2000, c P-25, s 17(1).

58 The Alberta Court of Appeal has suggested that permanent injunctions against the Crown might be available in the context of novel claims in rapidly evolving areas of the law (*Lameman* at para 42).

59 This matter involves sophisticated business entities who are attempting to resolve a commercial dispute. There is nothing to suggest that it is a novel claim.

60 In *Bruce Ashley*, this Court granted orders in the form of interim and interlocutory injunctions directing the AGLC to treat a new distributor as the plaintiff's sole agent for its products. The orders resulted from chambers applications, and all that resulted were the orders. If reasons were given, they have not been provided to me in any fashion, and I have not attempted to locate them myself by listening to the recordings of the applications.

61 However, in that case it is clear that the plaintiff had brought a claim against the defendant. The plaintiff first applied for an interim injunction, and then for an interlocutory injunction pending trial.

62 In the matter before me, there is only a stand-alone application for what is in effect a permanent injunction. Permanent relief can be granted only after a final adjudication, and therefore irreparable harm and balance of convenience have little relevance: *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 (Ont. C.A.) at paras 76-80, (2014), 315 O.A.C. 160 (Ont. C.A.); *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 (B.C. C.A.) at paras 27-28, (2010), 323 D.L.R. (4th) 680 (B.C. C.A.).

63 In *Bruce Ashley*, the applicant was not a supplier, but rather an import agent for a supplier. There, the applicant was applying for an injunction pending trial on the merits of a breach of contract claim where there seems to have been no dispute that the respondent sub-agent had not been remitting payment in accordance with a written agreement.

64 In the application before me, the applicant is a defendant in legal proceedings in British Columbia. It is Vintage that has claims against PLW, not the other way around.

65 There are few factual similarities between this case and *Bruce Ashley*, and in the absence of a written decision in that case, or oral reasons for decision, it is of limited precedential value. From my understanding of the facts there, it is clearly distinguishable from this case.

66 For all of these reasons, the Court dismisses PLW's application in paragraph 15(a) for an order (in the nature of a mandatory injunction) compelling the AGLC to implement an agency representation transfer from Vintage to Dandurand.

Injunctive Relief Against Vintage

67 PLW seeks to have the court order that Vintage sell its inventory of PLW wine to Dandurand at full market value with immediate "closing" and payment. That is not an unreasonable offer by PLW. Vintage would benefit from realizing its investment and recovering its full presently-anticipated profit without having to incur further expenses (such as storage, handling and selling costs). It is difficult to see, on any reasonable basis, how this offer would not make

Vintage whole with respect to the Alberta inventory. Wrongful termination issues are being litigated between the parties in British Columbia, so such a sale would likely bring any Alberta proceedings to an end.

68 Such an offer would undoubtedly be a good alternative for an undertaking as to damages which would be required in the event of any injunctive relief in favour of PLW.

69 While Vintage suggests that it might be able to increase its profit margin on the inventory in Alberta, it provides no real evidence as to the feasibility of that, especially in the context that it has no ability to obtain further inventory from PLW and the existing inventory is expected by it to run out by November, 2015.

70 I suppose that Vintage could unilaterally raise the price of its PLW inventory, but there is of course no certainty that the marketplace would continue to buy the same quantities over the same period of time at an increased price.

71 The answer to this aspect of the application is that the court has no jurisdiction to order the sale of Vintage's product to PLW, Dandurand or anyone else. The marketplace imperative of a willing vendor and a willing purchaser is only overridden when there is a juristic reason to do so. Contractual obligations, statutory obligations, fiduciary obligations or other legal duties are required to force someone to sell his or her property to someone else.

72 Vintage is undoubtedly acting strategically by refusing PLW's offer to purchase. Vintage is obviously prepared to take the risk that it will not make as much profit by selling the product over time as it would realize by accepting PLW's offer. But PLW can point to no legal duty on the part of Vintage to sell the inventory of PLW product owned by Vintage to PLW or Dandurand or at all.

73 As a result, I am without jurisdiction to order any sale as requested by PLW.

Declaratory Orders

74 Finally, PLW seeks a declaration in paragraphs 13(c) and (d) of its Originating Application that Vintage is no longer the agent of PLW in Alberta for the sales of its wine, or for any other purpose, and that Dandurand is the agent of PLW for the sales of its wine in Alberta.

75 Section 11 of the *Judicature Act*, RSA 2000, c J-2 allows the Court to make binding declarations of right. The Court retains absolute discretion as to whether to make a declaratory order: *YBM Magnex International Inc., Re*, 2000 ABCA 284 (Alta. C.A.) at para 55, (2000), 271 A.R. 123 (Alta. C.A.), citing *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 (S.C.C.) at 331. This discretionary authority must be exercised with great care and caution.

76 In this case, the parties did not make submissions as to what effect, if any, such a declaration would have in the circumstances. PLW and Vintage agree that whether or not there was a binding contract between them, there is certainly no longer an agency relationship. That was terminated by PLW in February 2015, and Vintage purported to accept the repudiation in April 2015.

77 Further, AGLC is not operating under the fiction that there remains an agency relationship between the parties. In fact, PLW notified the AGLC on March 2, 2015 that Dandurand is authorized to be PLW's distribution agent in Alberta.

78 A declaration regarding PLW's agency relationship with Vintage would not compel the AGLC to effect an agency transfer from Vintage to Dandurand. As discussed above, the procedure for an agency transfer is detailed in AGLC's policy. In my view, a declaration of this nature would simply be a collateral attempt by PLW to achieve indirectly what it cannot achieve directly.

79 As the declaratory order sought would not appear to serve any meaningful purpose, PLW's application for a declaration further to paragraphs 13(c) and 9(d) of its Originating Application is denied.

VI. Analysis of Practical Issues

80 It is clear on this application that each party is attempting to advance its position in the litigation involving the termination of Vintage's agency relationship. This resulted from PLW's acquisition by another winery. Little has been said in the application before me justifying Vintage's termination, other than that it was a termination without notice. Whether there was any cause to terminate at all, or any cause to terminate without notice, is not before me.

81 If this application turned on the application of the "clean hands" doctrine, I would want more evidence about the reasons for and manner of termination. But this application does not turn on principles of equity.

82 It is also clear that much of the dispute between the parties results from the absence of a clear written agreement between them. Essentially, PLW is seeking to have the court imply terms to the agreement made between them to give effect to a reasonable dissolution of their business relationship and allow the parties to carry on their respective businesses in a reasonable fashion, leaving them to sort out their legal disputes in the litigation that has ensued.

83 Courts are sometimes called on to give commercial efficacy to the parties' agreements where the formal agreements are lacking. The courts are sometimes called on to imply terms in a contract where the agreed terms are arguably incomplete.

84 Those are remedies that cannot simply be pulled out of the air, or given on the basis of "inherent jurisdiction". Remedies must have a legal or equitable basis. Otherwise, the court is placed in the position of making an agreement for the parties, rather than enforcing the agreement they actually made. Certainly a court will not rewrite a contract for the parties, nor will it impose obligations between the contracting parties as a result of the contract that the parties did not themselves agree to: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 (S.C.C.) at para 81; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1990), 70 D.L.R. (4th) 51 (B.C. C.A.) at 107, aff'd [1992] 3 S.C.R. 299 (S.C.C.).

85 Here, there is little consensus as to what the parties agreed to. They apparently attempted to reduce their agreement to writing, without success. It may be that the sale of PLW doomed the negotiations and prevented them from being completed. There is evidence that the parties at least contemplated an agency arrangement and acted on that by installing Vintage as PLW's agent in Alberta and elsewhere. Vintage was also provided with inventory to sell for PLW. But beyond that, there is no evidence before me that the parties addressed their minds to termination, implementing termination and the consequences of that.

86 While the remedies sought by PLW are practical and not obviously detrimental to Vintage in any way, they are not remedies that PLW has shown any legal or equitable entitlement to.

87 On the information before me, it appears that Vintage is using AGLC policy to hold PLW hostage in Alberta. So long as Vintage has PLW products in its inventory, or until Vintage signs off its agency relationship with PLW in a manner satisfactory to AGLC, AGLC will not recognize Dandurand as PLW's agent in Alberta. That has the consequence of Dandurand not being able to stockpile inventory in Alberta and implement its agency relationship with PLW.

88 However, that is not a situation that has been orchestrated by Vintage. It is the consequence of AGLC policy, which was and is well-known to the parties. As discussed above, I am not prepared to order AGLC to ignore its policy or change its policy. If I did so, PLW and Dandurand could likely impact Vintage by lowering prices or bringing in competing products.

89 PLW's offer to buy all of the Vintage PLW inventory would prevent that from happening, but that would require me to order AGLC to do something I do not have the power to do on the facts of this case, as well as ordering Vintage to sell its inventory to PLW. That is also something that I do not have the power to do on the facts of this case.

90 On the other hand, preserving the status quo gives Vintage a strategic advantage at this stage. Unless AGLC changes its policy, Vintage can likely do exactly what PLW fears: slow down the sale of its inventory of PLW product

or refuse to sell the last of its PLW product when it has recovered most of its existing investment and anticipated profit. That would, unless AGLC changes its policy, keep PLW and Dandurand out of the Alberta market indefinitely.

91 I am loathe to countenance strategic moves, but in the absence of a legitimate juristic reason to get involved, I am unable to provide any remedies to PLW at this stage.

92 The fact of potential irreparable harm to PLW, the absence of likely loss to Vintage and the willingness of PLW to facilitate a profitable purchase of Vintage's inventory make PLW's proposed remedies appealing, but PLW has not articulated or advanced any claims suggesting that Vintage has committed or will commit an actionable wrong against PLW.

93 I am not prepared to impose remedies simply because they may be commercially reasonable solutions to a problem. The court's equitable jurisdiction does not extend that far. Nor does the court's inherent jurisdiction.

VII. Conclusion

94 PLW's application is dismissed.

VIII. Costs

95 If counsel cannot agree as to costs, they may be spoken to within 30 days of this decision.

Application dismissed.

Appendix — Relevant Legislation

Gaming and Liquor Act, RSA 2000, c G-1:

3 The objects of the Commission are

...

(d) to control in accordance with this Act the manufacture, import, sale, purchase, possession, storage, transportation, use and consumption of liquor;

4(1) The Commission is an agent of the Crown and may exercise its powers and perform its duties only as an agent of the Crown.

12(1) The board is responsible for

...

(b) establishing the policies of the Commission;

Gaming and Liquor Regulation, AR 143/1996:

99(1) The board may authorize the storage of liquor in a warehouse subject to any conditions established by the board.

AGLC Liquor Agency Handbook (27 November 2012) ("Policies"):

1.1.3 Board policies are approved by the Board of the AGLC and signed by its Chair, on behalf of the Board.

1.1.10 An activity not specifically permitted under these guidelines is prohibited.

3.1.4 Each particular product brand must not be represented by more than one (1) liquor agency at the same time.

3.1.6 If a supplier and the registered agency the supplier has designated to represent its products in Alberta become involved in a dispute regarding the ownership of, payment for, or representation of liquor products or any sort of conflict, the AGLC will not become involved in resolving the dispute. The AGLC will rely upon direction agreed to by the parties involved or by court order.

3.18.2 There are several different scenarios which occur when a transfer of agency representation is pending. In order for the AGLC to implement an agency transfer the AGLC requires certain documentation. The documentation differs depending on the scenario:

a) If there is inventory on hand and the current agency is the consignment payee because it owns the inventory, the AGLC requires:

- a Letter of Authorization from the supplier indicating the new agency as its representative;
- a letter from the supplier cancelling its current agency/supplier agreement (as per the Letter of Authorization);
- an Agency Letter of Understanding from the new agency acknowledging its relationship with the supplier; and
- a letter from the current agency releasing the inventory on hand to the new agency (this letter is normally received after the new agency has purchased the inventory from the current agency and payment has actually been received).

Judicature Act, RSA 2000, c J-2:

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.

Proceedings Against the Crown Act, RSA 2000, c P-25:

17(1) When in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may, instead, make an order declaratory of the rights of the parties.

Alberta Rules of Court, RSA 2000, c P-25:

3.15(3) An originating application for judicial review must be served on

...

(b) the Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the circumstances require ...

TAB 7

1991 CarswellNS 33
Nova Scotia Supreme Court, Appeal Division

Bayhold Financial Corp. v. Clarkson Co.

1991 CarswellNS 33, [1991] N.S.J. No. 488, 108 N.S.R. (2d) 198, 10 C.B.R.
(3d) 159, 294 A.P.R. 198, 30 A.C.W.S. (3d) 832, 86 D.L.R. (4th) 127

**BAYHOLD FINANCIAL CORP. LIMITED v. CLARKSON COMPANY
LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.**

Jones, Hallett and Matthews JJ.A.

Heard: September 18, 1991
Judgment: December 2, 1991
Docket: Doc. S.C.A. 02376

Counsel: *Douglas Caldwell, Q.C.*, and *Joel E. Fichaud*, for appellant.
Harry E. Wrathall, Q.C., and *Stephen Kingston*, for respondents.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Appeal from judgment of Kelly J. dated October 2, 1990, reported (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.), dismissing action for damages against receiver-manager.

The judgment of the court was delivered by Hallett J.A.:

1 This is an appeal from a decision of Kelly J. [reported at 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.)] dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited ("Community") which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver-manager to take possession of the assets of Community; that is, the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver-manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist season and thus obtain a good price for the hotel as a going concern. The hoped-for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981, at \$623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for \$200,000. The sum of \$157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of \$42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at \$109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of \$63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

2 Following the purchase of the hotel by Bayhold at the sheriff's sale, it went into possession and in late 1982 allowed Mr. Rahey (with the approval of Clarkson) to operate the hotel. In the spring of 1983 Bayhold entered into an agreement with Equitas Investment Corp. ("Equitas") to sell the hotel for the sum of \$1,000,000 (\$50,000 down and the balance secured by two mortgages back to Bayhold).

3 The agreement of purchase and sale provided for the transfer of the real property free from encumbrances but insofar as the chattels were concerned, Bayhold agreed only to transfer its interest. The agreement provided that Bayhold did not warrant the condition or even the existence of the chattels although there was a list of chattels initialled by the parties. The chattels were, of course, located in the hotel and included all the furnishings.

4 The agreement of sale was to close on May 2, 1983. Bayhold was aware that under the Burchell order, Clarkson had a prior charge against the chattels for \$63,117.50. Despite repeated requests by Clarkson to Bayhold to purchase the chattels, Bayhold did not respond. Clarkson threatened to remove the chattels. On April 29, 1983, Clarkson engaged a private security firm and the chattels were removed from the hotel. On May 2, 1983, Equitas offered to buy the chattels from Clarkson for about \$30,000. The respondent, Mr. Scouler, the chartered accountant with Clarkson who was Clarkson's directing mind in this receivership, refused the offer. He felt the chattels were worth about \$150,000. He advised Equitas it would have to purchase the chattels at auction. On May 2, 1983, Equitas advised Bayhold it would not complete the purchase. Bayhold did not re-open the hotel and on November 29, 1983, sold it for \$450,000 to a Sydney businessman.

5 Bayhold commenced action against Scouler, Clarkson and its successor firm, the respondent Ernst & Young Inc., claiming damages for breach of duties as receiver-manager up to a maximum amount of \$808,339.21 plus prejudgment interest from November 29, 1983 (the date Bayhold sold the hotel) to April 3, 1990 of \$519,425.47. The learned trial judge dismissed all the claims, essentially finding that Clarkson was not negligent in the performance of its duties. The appellant Bayhold identified six issues on the appeal; I will deal with each in the order raised by the appellant.

Issue 1

6 The appellant asserts that the respondents Clarkson, Scouler and Ernst & Young are liable for damages to Bayhold for breach of fiduciary duty for failing to apply to the court in April 1981 after Clarkson as receiver-manager had borrowed in excess of \$50,000. The appellant asserts that Clarkson was limited, pursuant to the terms of the receivership order, to borrow an amount not exceeding \$50,000.

7 It is therefore relevant to look at the terms of the receivership order. It provided for a broad power of management as contained in cl. 3 of the order wherein it is stated:

3. THAT The Clarkson Company Limited, be and it is hereby appointed Receiver and Manager of the undertaking; property and assets of each of the Respondents, with authority to manage the business and undertaking of each of the Respondents, and to act at once and until further order of this Court.

Community was one of the respondents named in the receivership order.

8 Specific powers granted the receiver are set forth in cl. 6 of the order:

6. THAT the said Receiver and Manager be and it is hereby empowered from time to time to do all or any of the following acts and things until further order of this Court or a judge thereof:

(a) To carry on and manage the businesses of all of the Respondents, in all phases whatsoever;

(b) To enter into negotiations for the sale, conveyance, transfer, assignment, mortgaging or other disposition of the real property and/or shares of the Respondent Companies, owned, legally or beneficially, by any of the Respondents, in such manner and at such price as the Receiver and Manager, in its discretion, may

determine, provided that the Receiver and Manager may not enter into any agreement or commitment to sell, convey, transfer, assign, mortgage or otherwise dispose of the real property and/or shares of the Respondent Companies, without prior approval of the Court;

(c) To pay such debts of the Respondents, as the Receiver and Manager deems necessary or advisable to properly operate and manage the businesses of the Respondents and all such payments shall be allowed the Receiver and Manager in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents in priority to any other person, company, or corporation, secured or unsecured;

(d) For the purpose of carrying out the powers and duties hereunder, to employ, retain, or dismiss such agents, assistants, employees, solicitors and auditors as the Receiver and Manager may consider necessary or desirable for the purpose of preserving and realizing on the said property and assets of the Respondents, and carrying on the businesses and undertakings of the Respondents, and to enter into agreements with any person or corporation respecting the said businesses or properties and that any expenditure which shall be properly made or incurred by the said Receiver and Manager in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents, in priority to any other person, company, or corporation, secured or unsecured;

(e) To receive and collect all monies now or hereafter owing to the Respondents;

(f) To take such other steps as the Receiver and Manager deems necessary or desirable to preserve and protect the real and personal property of the Respondents, in its custody.

9 The court, pursuant to cl. 7 of the receivership order, authorized the borrowing of up to \$50,000 which would be secured against the property and assets of all the respondents, which of course included Community. That clause of the order provided as follows:

7. THAT for the purpose of exercising the powers and performing the duties hereunder, the said Receiver and Manager be and it is hereby empowered from time to time to borrow monies not exceeding \$50,000.00 by way of revolving credit which may be borrowed and re-borrowed provided that the said limit is not exceeded at any time and that as security therefor the whole of the said properties and assets of the Respondents, together with all other assets and properties which may hereafter be in the custody or control of the said Receiver and Manager, do stand charged with the payment of the sum or sums so borrowed as aforesaid together with interest thereon in priority to all claims of the Applicant or any other person, secured or unsecured, by which the assets and properties of the Respondents may be encumbered.

10 The receivership was funded by Revenue Canada which advanced funds to Clarkson or reimbursed Clarkson for moneys Clarkson borrowed from the Toronto-Dominion Bank during the period Community was in receivership. By April 1981, Clarkson had borrowed in excess of \$50,000. The appellant argues this was a breach of the terms of the order and therefore a breach of fiduciary duty that Clarkson, as receiver-manager, owed not only to the court but to all the creditors and the debtors. The appellant argues that Clarkson was required by law to go back to the court to obtain increased borrowing authority and that Clarkson's failure to do so deprived Bayhold of an opportunity to make representations to the court that there were other options the receiver-manager could pursue rather than continue with its strategy to keep the hotel open so as to take advantage of the hoped-for increase in occupancy in the tourist season.

11 The premise for this argument is that a receiver-manager must obtain approval of the court before it exceeds the borrowing authorized by the court pursuant to a clause such as cl. 7 of the receiving order and that the failure to do so is a breach of a fiduciary duty that gives rise to the liability of a receiver-manager for unpaid amounts due to creditors of the debtor. In my opinion, that proposition is not valid. The purpose of cl. 7 of the receiving order and like clauses which are common in such orders was to authorize the receiver-manager to borrow up to \$50,000 and with respect to such borrowings the receiver-manager would have a charge against the undertaking property and assets of the debtor in

priority to other creditors. The only result of a failure to get approval for further borrowings would be that the receiver-manager would have no assurance that the court would retroactively grant the receiver-manager a prior charge against the assets for such excess borrowings. The failure to obtain court approval does not automatically result in the receiver-manager becoming personally liable for the existing contractual obligations of the debtor. In this case, Clarkson was being indemnified by Revenue Canada for funds borrowed to operate and manage the hotel business. The receiving order, read as a whole, shows that there was no prohibition against borrowing in excess of \$50,000. The receiver-manager was given broad management powers and could borrow up to \$50,000 and have a charge against the assets for such an amount. If the receiver-manager chose to borrow more without obtaining court approval, the only repercussion would be that Clarkson would not have the comfort of a charge against the assets of the hotel for such excess borrowing.

12 Support for this conclusion is the following statement from *Receiverships* by Frank Bennett (Toronto: Carswell, 1985) where the author states at p. 128:

The receiver has no authority to borrow more money than has been authorized, including any overdraft position. If the receiver does not obtain a further order for borrowings, he may be prevented from being indemnified out of the assets for expenses incurred unless he can show that such expenses were proper and beneficial to the estate. If the receiver borrows in good faith but for an improper purpose, he will be denied indemnity.

However, the receiver may bring a motion after the event for an order nunc pro tunc, but on such motion, the receiver must demonstrate that the borrowings were properly incurred and that he was justified in the circumstances in exceeding his borrowing limits. It will not be enough to show that the additional expenses were made in good faith and in the ordinary course of business.

If there is no provision in the order authorizing the receiver to borrow moneys, the court may infer such power from the other provisions in the order, particularly the power to carry on the business.

13 Further at p. 216, the author states:

In the event that the receiver exceeds his borrowing power, or borrows without power to do so, he may be deprived of his right of indemnification out of the assets in receivership to the extent of such amount in excess of his authority. Irrespective of whether the receivership is private or court-appointed such borrowings may be unsecured or at best rank subsequently to any prior security unless they can be justified as necessary for the preservation of the property. While each case must be reviewed on an individual basis, it is not enough to show that the further liabilities had been incurred bona fides and in the ordinary course of business. Furthermore, if the debt is incurred on a speculative basis, the receiver will be denied his indemnity.

14 The decision of the Manitoba Court of Appeal in *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.*, (sub nom. *Rothburg v. Federal Business Development Bank*) 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 is illustrative that the courts regularly consider whether a receiver should be retroactively indemnified for exceeding the borrowing limits under clauses similar to cl. 7 of the receiving order granted in the case we have under consideration. There are no cases cited by the appellant to support its position that the failure to return to court to have the court authorize borrowing in excess of \$50,000 could result in the receiver-manager becoming personally liable for obligations under contracts including the liabilities accruing under mortgages that existed prior to the receiver-manager being appointed.

15 Insofar as the appellant's arguments focus on breaches of perceived duties of receiver-managers, it is important to consider what are the duties of a receiver-manager. The essential duty of a receiver-manager as an officer of the court is to discharge those duties prescribed by the order appointing the receiver-manager. (See *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476.) Bennett, at p. 118, explains the extent of a receiver-manager's duties as follows:

Notwithstanding that the receiver and manager is an officer of the court, his fiduciary duty to all extends to a standard of care in the running of the business comparable to the 'reasonable care, supervision and control as an

ordinary man would give to the business were it his own'. Where he fails to provide such a standard of care, he may be liable for his negligence.

16 That is the standard a receiver-manager's performance must measure up to before liability is imposed. The trial judge found that Clarkson was not negligent in the conduct of the receivership. There was ample evidence before the trial judge to support such a finding.

17 In summary, the receiving order gave the receiver-manager broad power of management. Read in the context of the receiving order and the law, cl. 7 did not prohibit Clarkson from borrowing in excess of \$50,000 while operating the hotel. Therefore, there was no breach of duty giving rise to the liability that the appellant seeks to impose. Accordingly there is, in my opinion, no merit to the first issue raised by the appellant.

Issue 2

18

Are the respondents liable to Bayhold for damages for breach of fiduciary duty for closure of the hotel on November 3, 1981?

19 The clauses in the receivership order relevant to this issue are cls. 3, 6(a), (b), and (f), which have previously been set out. In short, cl. 3 appointed Clarkson receiver and manager of the undertaking property and assets of Community with authority to manage the business until further order of the court. Under cls. 6(a) and (b) there were broad and specific powers of management and under 6(f) Clarkson could take such steps as it deemed necessary or desirable to preserve and protect the real and personal property of Community. Clause 9 might also be of some relevance in that it provided that the receiver and manager could apply to court from time to time for direction and guidance in the discharge of its duties.

20 It is clear from the order and not uncommon that the receiver-manager could not dispose of major assets without court approval. In this case, the receivership order provided that the receiver-manager could not dispose of the real property or the shares of Community without prior approval of the court. The question raised by the appellant is whether or not the receiver-manager could close the hotel without court approval where it was operating at a loss. The appellant asserts in para. 110 of the factum that the receivership order, para. 6(a), provided that Clarkson should

until further order of this court ... carry on and manage the business of all the Respondents, in all phases whatsoever.

21 Counsel for the appellant argues from this provision that the closure without court approval offended the receivership order and constituted a breach of the receiver-manager's fiduciary duties to Bayhold. Accordingly he asserts that the respondents are liable to Bayhold for the full amount that was owing on its mortgage as of the date of the foreclosure sale, plus prejudgment interest from that date, for a total claim in excess of \$1.3 million.

22 The receivership order does not state what the appellant asserts. Clause 3 provides for Clarkson's appointment as receiver-manager of the undertaking, property and assets of each of the respondents with authority to manage the business and undertaking of each of the respondents and to act at once and until further order of this court. Clarkson was empowered under cl. 6(a) until further order of the court to carry on and manage the business in all phases. The appellant's argument is that unless a further order of the court was obtained the receiver-manager had an obligation to continue to operate the hotel. The words of cl. 6 granted Clarkson the *power* to carry on the business. The clause did not oblige Clarkson to do so until further order of the court. There is a major distinction between a power and an obligation; this is the flaw in the appellant's argument. Furthermore, the receiver's general power of management seems to me to entail full scope of management responsibilities including, as provided for in para. 6(f), the right of the receiver-manager to take such steps as it deems necessary or desirable to preserve and protect the real and personal property of Community. The only power given to the receiver-manager in the order that could not be exercised without court approval would be the sale or mortgaging of the real property or shares of the respondent companies, including Community. When the receivership order is read as a whole, there is no limitation placed on the scope of the receiver's powers of management

other than if he chooses to sell or mortgage the real property or the shares of the respondent companies. The order does not expressly require that he keep the hotel open or obtain court approval before closing. Does the law impose such a duty on a receiver-manager?

23 The appellant submits that if Clarkson had applied to the court in October or November of 1981 for approval of its intention to close the hotel, the court would have terminated the receivership for the hotel and returned the hotel to Community. He asserts that this would have permitted Community to operate the hotel until the most propitious moment for a sale and that in all likelihood an offer in the range of \$1,000,000, as eventually was offered by Equitas in April 1983, could have been obtained and Bayhold's mortgage would have been paid out. It should be noted that by the fall of 1981, prior to the closure of the hotel, Bayhold had already commenced foreclosure proceedings. With respect to the arguments advanced by the appellant, it is a matter of speculation as to what would have happened had Clarkson applied to the court for approval to close the hotel. It is quite clear the operation of the hotel was incurring very substantial deficits. It is more likely that the court would have approved of the closing of the hotel rather than return it to Community which had no apparent ability to finance the continued operation of the hotel.

24 The appellant relies on certain statements from Bennett on *Receiverships* that Clarkson could not have closed the hotel without court approval. At p. 118 Bennett states:

As a fiduciary to all, the court-appointed receiver must manage and operate the debtor's business as though it were his own. He cannot therefore, without court approval, close the business down or repudiate executory contracts.

25 Bennett does not cite any authority for the statement that the receiver-manager cannot close the business without court approval.

26 At p. 119 of text, Bennett states:

As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business.

27 Does this statement lead to the conclusion that Clarkson should have applied to the court before closing the hotel? Is the statement supported by the authorities? Bennett appears to cite as authority for this proposition the case of *Re Newdigate Colliery Ltd.; Newdigate v. The Co.*, [1912] 1 Ch. 468 (C.A.). However a review of that case does not support such a broad statement. The *Newdigate* case is authority for the following valid proposition (p. 468):

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

28 In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims.

29 Again it is important to remind oneself that the duty owed by a receiver-manager is to exercise reasonable care in the management and operation of the business. The trial judge found Clarkson was not negligent in deciding to close the hotel. There was no duty specifically imposed on Clarkson pursuant to the receivership order to keep the hotel open until such time as it obtained approval of the court to close it. While it may have been prudent to obtain such approval in

view of the statements in Bennett, there was no obligation under the receivership order to do so. There is no case law in support of the statement made in Bennett that a receiver-manager cannot close a business without approval of the court.

30 What Bennett was probably referring to is the recognized duty of the receiver-manager, not only to preserve the property of the debtor, but also the goodwill of the debtor's business if there is any. Certainly if a business is operating at a profit or there is goodwill it would be a breach of the receiver-manager's duty, to the debtor at least, to close the business. The receiver-manager under such circumstances would require court approval before doing so as on its face it would appear that the receiver-manager would be in breach of the duty to preserve the goodwill. It would be for the receiver-manager to satisfy the court that under all the circumstances a liquidation of the business was reasonable. Whether that duty extends to the creditors I have some doubt. However, the receiver-manager does have a duty to creditors to operate the receivership with reasonable care so as not to unfairly affect the interest of all the persons affected by the receivership; that is, debtor and creditors, and has a duty to the court to act in accordance with the terms of the order and the law.

31 In dealing with the appellant's argument on this issue, it may be useful to consider the *nature* and *purpose* of a receiver-manager's appointment. The remarks of Cozens-Hardy M.R. at p. 472 of the *Newdigate* case, *supra*, are relevant; he stated:

The jurisdiction of the Court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency.

32 The point being that while a receiver-manager is empowered to carry on the debtor's business, it is contemplated that eventually there will likely be a liquidation notwithstanding that the receiver-manager has a duty to preserve the property and the goodwill of the business. The trial judge found in this case there was no goodwill at the time when Clarkson made its decision to close the hotel. The evidence could lead to no other conclusion. In my opinion, the failure to apply to the court for approval to close the hotel on the facts of this case did not breach any duty Clarkson owed to Bayhold. Furthermore, the law is clear that if a debtor or creditor feels adversely affected by any action of a receiver-manager the person may apply to the court to protest the action and the complainant must prove the receiver is in breach of his duties. Bayhold made no such application but continued with its foreclosure action. I reject the argument by the appellants that this proceeding is Bayhold's complaint. The time to apply would have been in November 1981, not years later when this action was commenced.

33 The position of Bayhold on the first two grounds of appeal is interesting. On the one hand, Bayhold asserts that Clarkson should have applied to the court in April 1981 to approve an increase in its borrowing and at that time Bayhold argues if such an application had been made it could have made submissions to the court that the hotel should have been sold as early as April 1981 as it was losing money and there was no need to wait for the summer season to show that it could not be viable. Yet despite its argument that the hotel should have been sold in April 1981, it objects to Clarkson having closed the hotel in November of 1981, arguing that the hotel should have been kept open to facilitate a sale as an ongoing concern. It is difficult to reconcile these positions except to say that one argument is needed to support the first ground of appeal and the latter argument the second.

34 In summary, the essence of a receiver's powers is to liquidate the assets. On the other hand, a receiver-manager is vested with the additional power to manage the business, but this does not derogate from his power to realize on the assets. His management duty, if I can call it that, is to act with the care an owner would exercise in the running of his own business subject of course to the terms of the court order appointing him receiver-manager. In this receivership, as in most, the powers to manage are broad. There is nothing in the order that required the receiver-manager to obtain court approval before closing the hotel. Justice Kelly found this was a valid business judgment considering all the circumstances and I agree. The receiver-manager had the power pursuant to cl. 6(f) of the order to preserve the assets; the hotel was losing money, the receivership had turned out to be a financial disaster and closing it to await the foreclosure sale was a reasonable judgment to preserve the property. The receiver-manager did owe a duty to act reasonably in the conduct of

the hotel business so as to preserve the goodwill and the property of Community in the interests of not only Community but all the creditors, including the appellant. The fact that Clarkson did not apply for court approval of the closure is not a breach of his duty to preserve the goodwill of Community in view of the finding of the trial judge that there was no goodwill, a fact which the receiver was well aware of at the time of the closure. Furthermore, even if Clarkson had breached its duties, the learned trial judge found as a fact that the closure did not cause any loss to Bayhold. There was evidence to support this conclusion. There is no need to go into detail with respect to this finding, as I have disposed of Issue 2 on the ground there was no breach of any duty owed by Clarkson to Bayhold. Therefore I reject the appellant's argument that on this ground the respondents are liable to Bayhold for \$808,339.21 plus prejudgment interest.

Issue 3

35

Are the respondents liable to Bayhold for damages resulting from the trespass on April 29, 1983, causing loss of the Equitas sale of \$1,000,000?

36 This issue is framed by the appellant in such a way that it assumes the trespass and the removal of the chattels caused the loss of the Equitas sale. The only impropriety which surrounded the chattels removal was Clarkson's failure to obtain a recovery order from the court. The hotel had been purchased by Bayhold at the sheriff's sale on January 13, 1982, and Clarkson had agreed to leave the chattels in place rather than remove them for storage. The sale of the realty by the foreclosure order did not include a sale of the chattels. The chattels were still owned by Community and were subject to a first charge in favour of Clarkson for the balance of the preservation expenses and were subject to a second specific charge and a floating charge in favour of Bayhold under the terms of its security document.

37 The appellant's argument is that by removing the chattels the receiver-manager committed a trespass and that this trespass was the cause of Equitas refusing to complete the agreement to acquire the hotel from Bayhold for \$1,000,000.

38 The trial judge clearly directed himself to the appropriate question when he rhetorically stated at p. 129 of his decision [p. 145 N.S.R.]:

Although Clarkson's method of seizing the chattels from Bayhold was improper, is Equitas (sic) correct when it alleges that this action caused a loss to Bayhold, in that it resulted in Equitas properly refusing to perform the agreement of purchase and sale?

39 After dealing with a number of issues raised by Bayhold on this question, the trial judge decided as follows (p. 132 [p. 146 N.S.R.]):

Before Bayhold can succeed in this aspect of the claim, it must satisfy the Court that the negligent or trespass action of Clarkson was the cause of its failure to complete its contract with Equitas, and that it suffered a measurable loss from this failure. On the face of it, Bayhold has not satisfied me that the agreement of purchase and sale incorporated a condition that the hotel be a going concern at the time of the closing, nor have they satisfied me that there was a collateral enforceable agreement to this effect. I therefore cannot conclude that the precipitous and inappropriate seizure action initiated by Mr. Scouler on behalf of Clarkson was the cause of a breach of contract. Bayhold was in a position to provide to Equitas all of the apparent requirements of the written agreement.

40 The trial judge, in effect, found that the seizure of the chattels by Clarkson was not the cause of Bayhold's losing the sale to Equitas as there was no requirement in the agreement of sale that the chattels be even in existence let alone in the hotel. The learned trial judge found that Bayhold didn't satisfy him that there was a collateral agreement (outside the written agreement between the parties) that the hotel would be a going concern on May 2, 1983, the closing date. The trial judge found that Bayhold could comply with the requirements of the written agreement. The evidence is clear that Bayhold did not sue Equitas on the agreement. The trial judge found that the conduct of both Bayhold and Clarkson

with respect to events surrounding the proposed sale to Equitas was somewhat tainted. He stated (pp. 131-132 [p. 146 N.S.R.]):

Neither Bayhold nor Clarkson come to court with very clean hands in the matter of Equitas refusing to complete the sale of the hotel. Clarkson took possession of the chattels without proceeding in the appropriate way with a recovery order, and its agent removed furniture in a clumsy way causing some minor damage to the hotel. The agent also removed furniture and fixtures in which Clarkson had no claim. Bayhold was less than candid with Equitas about the nature and extent of the claim of Clarkson to the chattels, and did not give Equitas notice of the clear warning from Clarkson that it would take action to remove the furniture if some satisfactory arrangement was not made with respect to its claim. As well, Bayhold did not bargain in good faith regarding the retention of the chattels.

41 The appellant asserts that the trial judge erred when he seemed to conclude that Bayhold would have had to sue Equitas before coming against Clarkson. This argument is based on the following statement by the trial judge at p. 132 [p. 147 N.S.R.]:

Bayhold has not tested the validity of its proposition by a legal action to enforce the agreement or for damages. If Bayhold had brought an action to enforce its agreement by way of specific performance, or an action for damages for the breach of the contract, it would have recovered to the same extent that it now seeks to recover from Clarkson. If it had taken this action and failed on the basis that there was a binding term of the contract that the property be a going concern, then an action against Clarkson might be sustainable. However, I am not satisfied that Bayhold would not have succeeded in its action to enforce the contract against Equitas, and I must therefore conclude that Bayhold cannot succeed on this alternative claim.

42 I tend to agree with Bayhold's assertion that there was no requirement that Bayhold sue Equitas on the agreement before pressing any claim it might have against the receiver-manager for damages arising from the removal of the chattels. However, that does not assist the appellant. The trial judge was not satisfied the removal of the chattels was the cause of Bayhold losing the sale to Equitas. There is evidence to support such a finding as despite the removal of the chattels from the hotel on April 29, 1983, Equitas was prepared to buy the chattels from Clarkson for \$30,000 on May 2, 1983. Therefore, the removal per se was not the fact which caused Equitas to refuse to complete. It would appear that the reason this sale fell through was that Bayhold did not own the chattels and Equitas was unable to buy the chattels from Clarkson for a price Equitas was prepared to pay. While technically Clarkson had no right to enter the hotel premises in the possession of Bayhold and remove the chattels without a recovery order, Bayhold was well aware that the chattels were owned by Community and aware of Clarkson's prior secured claim to the chattels. In addition, Clarkson had repeatedly requested a decision from Bayhold as to whether it intended to purchase the chattels and, if not, Clarkson would remove them. The trial judge found that Mr. Scouler mistakenly believed the order of Burchell J., dated January 6, 1983, in which the receiver-manager was granted a prior charge against the hotel and the chattels to the extent of the preservation expenses was sufficient authority from the court to seize the chattels on April 29, 1983. I would note that the order provided as follows:

AND IT IS FURTHER ORDERED that The Clarkson Company Limited is entitled to the chattels in The Isle Royal Hotel in priority to Bayhold Financial Corporation Limited and Romiss Sales Limited to the extent that the expenses exceed the surplus proceeds of the foreclosure and sale of The Community Hotel Company Limited

43 At most, the trespass was technical. Under the circumstances that existed on or about April 29, 1983, it is likely that Clarkson could have obtained from the court a recovery order to remove the chattels from the hotel premises as Bayhold had no legal right to retain them as title to the chattels was still vested in Community and Bayhold knew its interest in the chattels as mortgagee was subject to the prior charge of Clarkson in the amount of \$63,117.50. Equitas knew Bayhold was not warranting even the existence of the chattels, so Equitas ought to have been alert although not fully informed by Bayhold that there was a problem with respect to the transfer of the chattels that were in the hotel. The trial judge's conclusion that the seizure of the chattels was not the cause of Bayhold losing the sale to Equitas was based on the trial judge's view that there was no agreement between Bayhold and Equitas that the sale of the hotel was to be

as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of Bayhold under the sale agreement. The terms of the agreement support this conclusion.

44 When one looks at all the facts surrounding this sale to Equitas, the removal of the chattels was certainly not the real cause of Equitas's failure to complete the agreement to purchase the hotel. Apart from the reason identified by the trial judge, Bayhold cannot be heard to complain too much about this lost sale being caused by Clarkson's removal of the chattels because Bayhold, by purporting to sell the chattels to Equitas pursuant to the terms of the agreement, was holding out to Equitas that it owned the chattels, whereas in fact it did not. The chattels were owned by Community and were subject to a first charge to Clarkson and then a second charge to Bayhold. Bayhold had no right to sell the chattels and can hardly be heard to assert that it lost the sale because Clarkson removed them from the premises. Bayhold really lost the sale because it didn't own the chattels; it didn't have any right to sell them in the first place and Equitas wasn't able to buy them at a price Equitas was prepared to offer to the receiver-manager.

45 There isn't any need to deal with the issue whether the trial judge was in error when he suggested Bayhold must first sue Equitas for a breach of contract before claiming damages for trespass.

46 I reject Bayhold's claim for damages which it asserts arises as a result of the trespass on April 29, 1983. The sale to Equitas was not lost because of Clarkson's technical trespass.

Issue 4

47 The appellant sets out this issue as follows:

Are the respondents liable to Bayhold for mortgage interest owing to Bayhold during the term of the receivership until Bayhold acquired the hotel at the foreclosure?

48 The short answer is "no"; the receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver-manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:

I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

49 Buckley L.J. in the same case made it abundantly clear that receiver-managers are not personally bound by existing contracts. He stated at pp. 476-477:

As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all.

50 In support of the argument that the receiver-manager is obliged to pay mortgage interest to Bayhold, the appellant relies on certain statements by Bennett, *Receiverships*, and Sir R. Walton and M. Hunter, *Kerr on Receivers*

and *Administrators*, 17th ed., (London: Sweet & Maxwell, 1989), the essence of which is that a receiver-manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver-manager is obliged to preserve (*Kerr*, pp. 31, 207, 219-220; *Halsbury's Law of England*, 4th ed., vol. 39 (London: Butterworths, 1982) (Receiverships) at para. 982; Bennett's *Receiverships* (1985), pp. 119, 110 and 118).

51 The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver-manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver-manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from *Kerr* at pp. 219-220 with emphasis by the appellant as follows:

The receiver and manager is the agent neither of the company nor of the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, *subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment. Such contracts, unless they are contracts depending on personal relationship, such as contracts of employment, remain valid and subsisting, notwithstanding the appointment of a receiver and manager.* Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. *In this respect, a manager differs from a receiver appointed over the assets without any power to carry on the business, who is under no obligation and has no power to carry out these contracts, nor to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts. A manager must not, without leave of the court, disregard the contracts in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages; nor must he pick and choose which contracts he will carry out as being most profitable.*

52 The appellant's factum does not highlight the sentence which states that "[a]ny breach [of pre-existing contracts] will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business." This statement in *Kerr on Receivers and Administrators* is consistent with the views expressed by the justices who rendered opinions in the *Newdigate* case.

53 The reasons a receiver-manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver-manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver-manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver-manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver-manager only in the general sense that the receiver-manager must honour them to preserve the goodwill of the business. In Bennett on *Receiverships*, at p. 223, the author states:

At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not he should complete those contracts.

In a court-appointed receivership, the *receiver is not bound by existing contracts made by the debtor*. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[Emphasis added.]

54 The statement which I have underlined in Bennett is a contradiction of the following statement made by Bennett at p. 110 of his book on *Receiverships* and upon which the appellant relies: "The receiver will be bound by the terms of existing contracts. However, the receiver may move before the court for an order to breach such contracts." Bennett was merely making a general statement; the footnotes refer the reader to his section on contracts which starts at p. 223 where he makes a more specific statement, which I have quoted, and then goes on to discuss the *Newdigate Colliery* case.

55 That the receiver-manager is not personally liable for breaking pre-existing contracts is clear from the statements of the justices in the *Newdigate Colliery* case. Of course, if the receiver-manager adopts pre-existing contracts he then becomes personally liable for their performance. That is not the situation we have here. With respect to pre-existing contracts, it is the company in receivership that continues to be liable for such contractual commitments if the receiver-manager fails to honour them during the term of the receivership. That is all that the case of *Parsons v. Sovereign Bank of Canada*, supra, stands for.

56 There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:

The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants.* That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

57 The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts. The preservation of the goodwill of the hotel, if there was any, did not require payment of mortgage interest as the income from the operations was insufficient to do so. In short, the appellant has read into the case law and the statements in the text books a duty on a receiver-manager that he honour contracts and that if he does not he incurs personal liability for the breaches notwithstanding he was not a party to the contracts. The case law does not support such a proposition and, in fact, it supports the contrary (*Newdigate* case). The appellant had a remedy as a secured creditor which it eventually exercised to foreclose the mortgage and have the real property sold by the sheriff pursuant to court order. In conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

Issue 5

58

Did Bayhold have priority over Clarkson for monies disbursed by Clarkson over \$109,608.73?

59 The appellant argues that all receipts from the continuation of the hotel business during the receivership including borrowings from the Toronto-Dominion Bank plus realizations from the liquidation of the assets ought to have been paid to Bayhold to pay out the mortgages held by Bayhold on Community's property before any receipts were used by Clarkson to pay the expenses of the receivership (except to the extent of \$109,608.73 found by Burchell J. to have been expenditures by Clarkson for preservation of Community assets and therefore having priority over Bayhold). The appellant's argument on this issue rests on the assertion that there was an automatic crystallization of Bayhold's floating charge on Community's assets and undertaking when, on February 1, 1981, Burchell J., upon the application of Revenue Canada as a creditor of Community, appointed Clarkson receiver-manager. The appellant asserts that the "authorities are overwhelmingly" in support of this argument.

60 The learned trial judge found that there was no automatic crystallization and that Bayhold would have to have intervened by appointing its own receiver to have crystallized its floating charge. The appellant asserts that the trial judge considered none of the case law in support of their position that the floating charge had crystallized upon the appointment of Clarkson as receiver-manager. The appellant cites the following cases [and authorities] in support of the argument:

Bank of Montreal v. Glendale (Atlantic) Ltd. (1977), 20 N.S.R. (2d) 216 (sub nom. *Glendale (Atlantic) Ltd. v. Gentleman*), 1 B.L.R. 279, 76 D.L.R. (3d) 303 (C.A.), at pp. 250-251 [N.S.R.];

Palmer's Company Law, Clive M. Schmitthoff and James H. Thompson, 21st ed. (London: Steven & Sons Limited, 1968) pp. 396-397;

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.), at p. 220 [C.B.R.];

Kerr on Receivers and Administrators, 17th ed., pp. 50-51;

Evans v. Rival Granite Quarries Ltd., [1910] 2 K.B. 979 (C.A.), at p. 1000;

Re Crompton & Co. Ltd.; *Player v. Crompton & Co.*, [1914] 1 Ch. 954;

Bennett, *Receiverships* (1985), p. 48;

Gough, *Company Charges* (London: Butterworths, 1978), pp. 84-86;

Lightman, G. & G. Moss, *The Law of Receivers and Companies* (London: Sweet & Maxwell, 1986), p. 28.

61 I have reviewed the authorities cited by appellant's counsel and would note that the statements referred to in the *Glendale* case are quotations from texts simply describing the nature of a floating charge and are not of great assistance in dealing with the issue before us as the statements do not address the issue whether a holder of such a charge must intervene to crystallize the floating charge. However, the statements do set out a point of view on crystallization. The general statement from *Palmer's Company Law* as referred to in the *Glendale* decision at p. 250 [N.S.R.] reads in part as follows:

Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it 'crystallizes', and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallize on the appointment of a receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ...

62 In *Irving A. Burton v. Canadian Imperial Bank of Commerce*, supra, the case involved an assignment of book debts. On the facts of that case, anyone would agree that an assignment of book debts made in compliance with the applicable legislation would take priority, with respect to the book debts, over a subsequent assignment in bankruptcy.

63 With respect to the statement in *Kerr on Receivers and Administrators*, 17th ed., at pp. 50-51, the author is referring to situations in which a receiver will be appointed and does not address the issue as to when exactly a floating charge crystallizes and what is the effect of the so-called crystallization.

64 The *Crompton* case, *supra*, doesn't address the issue raised by the appellant in this case. In *Crompton* the debenture holders applied for and were granted an order appointing a receiver when the company ceased to do business. Here, Bayhold never applied for the appointment of a receiver.

65 With respect to the statement on p. 48 in Bennett, *Receiverships*, the author makes a general statement that "if the business ceases or is disposed of as a business, the floating charge automatically crystallizes since the debtor is no longer in business". No authority is cited by the author for this proposition but it is consistent with the statement from *Palmer* previously quoted.

66 In Gough, *Company Charges* (1978), pp. 84-85, the author states:

Since a specific charge over trading assets was considered necessarily to bring about the consequence of paralysis or stoppage of the business, it can be seen that the first moment when it might be envisaged, according to the intention of the parties as expressed in the security contract, that the process of crystallization might come about is when the business of the company for some reason or other ceases to operate on a continuing and going basis; in short, when the business stops. The business might stop by virtue of a decision made by the company management (and therefore ultimately membership), or else by virtue of the decision of any company creditor, including the creditor secured by floating charge, to initiate proceedings towards that end. The company is, respectively, either unwilling or unable to carry on its ordinary business so that, as far as the company management is concerned, it is unwilling or unable any longer to appropriate its property in the ordinary course of business for purposes other than that of the security. Obviously, in either case it is the intention of the parties under the security contract, with the purpose of the floating charge having been served and the disadvantage of a specific charge over trading assets, viz., to cause a paralysis or stoppage of the business, no longer being relevant, that such circumstances constitute the natural time for the conversion of charge from being hitherto floating into a specific security.

67 I agree with the above as a general statement as to the nature, purpose and effect of a floating charge as opposed to a fixed charge.

68 In Lightman & Moss, *The Law of Receivers and Companies* (1986), p. 28, the general statement dealing with the crystallization is as follows:

A floating charge will crystallize on the appointment of a receiver (whether by the debenture-holder under the debenture or the court) or on the commencement of winding-up (even if the winding-up is merely for the purposes of reconstruction) or on the cessation of business.

69 It is to be noted that this statement is made in the context of a chapter entitled "The Basis of Appointment of Receivers"; the statement must be looked at in that light.

70 The crystallization of a floating charge means that upon the happening of some event or events the charge that had been floating over the assets becomes fixed.

71 To the extent there are conflicting views as to when a floating charge crystallizes and the effect of the same, I am attracted to the reasoning of Berger J. in *R. v. Consolidated Churchill Copper Corp.*, 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C.S.C.) that before the floating charge in favour of a mortgage or debenture holder crystallizes, that is becomes fixed on all the assets and undertakings of the debtor, the holder must intervene by going into possession or by bringing an application for the appointment of a receiver.

72 In that case, Berger J. analyzed the decisions which deal with the subject of automatic crystallization including the decision in *Evans v. Rival Granite Quarries*, supra, and concluded that it was only Buckley L.J. in the *Evans* case who took the view, in obiter, that a floating charge might crystallize without intervention. Berger J. referred to L.C.B. Gower, *Modern Company Law*, 3rd ed. (1969) in which the author stated at p. 421:

Default alone will not suffice to crystallize the charge, the debenture-holders must intervene to determine the licence to the company to deal with the property, normally by appointing a receiver or by applying to the court to do so.

73 Berger J. went on to state that there has been no judgment rendered in Canada on the issue of automatic crystallization. I agree with the policy enunciated by Berger J. in the following passage from his decision (pp. 41-42 [C.B.R.]):

But there has been no judgment rendered on the question in Canada. The matter is one of first impression. So policy considerations should be placed on the scales. These considerations weigh heavily against the adoption of the motion of self-generating crystallization. In the case at bar there were numerous acts of default, going back to 1972. Brameda did not, until 14th April 1975, take the position that the floating charge had crystallized. If in truth it had crystallized back in 1972, when Brameda acquired the bank's interest in the debenture, Brameda did not treat the company thereafter as if its licence to carry on business was at an end. Brameda sought to have it both ways: to attain priority over the province's lien without putting Churchill into receivership. This shows the parlous state of affairs which would result if the concept of self-generating crystallization were to be adopted. The requirements for filing by a receiver under the *Companies Act* would be rendered a dead letter. The company would not know where it stood; neither would the company's creditors. How is anyone to know the true state of affairs between the debenture-holder and the company unless there is an unequivocal act of intervention? How can it be said that the default by the company terminated its licence to carry on business when in fact it was allowed by Brameda to carry on business for three years thereafter? If the argument were sound, the debenture-holder would be able to arrange the affairs of the company in such a way as to render it immune from executions. The debenture-holder would have all the advantages of allowing the company to continue in business and all of the advantages of intervening at one and the same time, to the prejudice of all other creditors. This contention was rejected in the *Evans* case: see Vaughan Williams L.J. at pp. 989-990, and Fletcher Moulton L.J. at p. 995.

It is my view that not in the older cases nor in the recent cases nor in the exigencies of policy is there any justification for the adoption of a concept of self-generating crystallization. If there is any practical scope for such a theory it does not extend to a case where the conduct of the debenture-holder is inconsistent with the assertion of any such claim.

This brings me back to the wording of the floating charge in the case at bar. It says that 'such floating charge shall in no way hinder or prevent the company ... until the security hereby constituted shall have become enforceable from ... dealing with the subject matter of such floating charge in the ordinary course of its business.' Condition 6 of the debenture says: 'If the security hereby constituted shall become enforceable the Banks (Brameda) may by instrument in writing ... appoint any person ... to be a receiver ... of the property and assets hereby charged.' The point is that default by the company renders the floating charge enforceable. To that extent, default is a hindrance to the company, i.e., the debenture-holder has the right to intervene when he pleases. But in order to terminate the company's licence to carry on business, the debenture-holder must in fact intervene. This is provided for by the very language of the debenture itself. While the security may become *enforceable* on default, still the debenture-holder must intervene to *enforce* his security before it crystallizes.

74 In the case we have under consideration, the floating charge in favour of the appellant (the pledge agreement dated July 24, 1974) provides for the standard two-step process for the enforcement of the floating charge. Although the appointment of a receiver gave rise to a default just as did the failure to pay moneys due from Community to Bayhold, the terms of the pledge agreement (cl. 6 of the debenture) provided: "At any time after the happening of any event by which

the security hereby constituted becomes enforceable, the chargee shall have the following rights and powers". There were then listed a number of powers Bayhold could exercise, including the power to appoint a receiver.

75 Therefore, although the charges created by the security document became enforceable upon the appointment of Clarkson, Bayhold would have to have taken proceedings under cl. 6 to appoint a receiver or exercise any of the other powers mentioned before the security would be enforced. Bayhold did not exercise its right under the provision of the security document, but allowed the hotel to be operated by Clarkson under the receiving order that had been granted. Bayhold took no formal steps to enforce the floating charge and therefore applying the decision in the *Consolidated Churchill* case, the charge did not crystallize. That means it did not become fixed, therefore Community's assets and revenues were not attached for the benefit of Bayhold other than as an uncrystallized floating charge. Bayhold cannot have it both ways; that is, allow the business to be operated by the receiver-manager without intervening itself and then subsequently take the position its floating charge had crystallized upon the appointment of Clarkson and that it was therefore entitled to all the money that went into the bank account opened by the receiver-manager in connection with its operation of the hotel. That would create an impossible and inequitable situation for all creditors and receivers.

76 Bayhold, as the first mortgagee on the realty and personalty and holder of the first floating charge on the undertaking, could have applied for the appointment of its own receiver if it wished to enforce its floating charge. It chose not to do so for the obvious reason it did not want to take on the task of providing money to run the hotel in the summer of 1981; a task which was so graciously accepted by the Canadian taxpayers.

77 In summary, for the policy reasons enunciated by Berger J. coupled with the fact that the terms of the security document held by the appellant provided separately for, (i) events of default (for example, the appointment of a receiver being in the event of a default), and (ii) enforcement; the appellant, to crystallize its floating charge security, would have had to intervene by application to appoint a receiver of its own or have gone into possession. The appellant did not make any such application to court, nor did it go into possession until after it acquired the hotel at the sheriff's sale. Therefore, I reject the appellant's argument that it was entitled to all revenues that came into the hands of Clarkson while operating the hotel.

78 Bayhold also argues that because it did not get notice of Revenue Canada's application to the court to appoint Clarkson receiver-manager, Bayhold is entitled to all moneys received by Clarkson during the receivership. The appellant relies on the case of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.). The *Kowal* case does not support the appellant's argument. In the *Kowal* case the Ontario Court of Appeal simply said a receiver-manager could not have a charge against the mortgagee's security for the amounts that the receiver-manager had paid to the mortgagee during the period of the receivership as the payments were not made for the preservation of the property and therefore not for the benefit of all the creditors. In the case we have under consideration, Clarkson's expenditures in operating the hotel were for the benefit of all the creditors and Clarkson did not get priority over Bayhold against the hotel assets except to the extent of the preservation expenses in the amount of \$109,608.73. Bayhold, by commencing foreclosure proceedings and having the real property sold by the sheriff, realized on its security against the real property. However, the surplus from the sheriff's sale and the realization from the sale of the hotel chattels was insufficient to pay Clarkson's "preservation expenses". Other than with respect to the "preservation expenses", the receiver-manager did not subject Bayhold's security to recover the receiver-manager's expenditures in operating the hotel; these expenses were paid out of the borrowings from the Toronto-Dominion Bank and advances from Revenue Canada. In summary, the *Kowal* case does not stand for the proposition that all revenues or realizations on the sale of assets during a receivership must be turned over to a creditor with an uncrystallized floating charge against the assets and undertaking of the company in receivership simply because the holder of the floating charge was not given notice of the application to appoint a receiver-manager.

79 In summary in Issue 5, Bayhold does not have priority over Clarkson for moneys disbursed by Clarkson during the receivership.

Issue 6

80 As framed by the appellant: "Is Clarkson liable to Bayhold for the damage to the building caused by fires and a flood during the receivership?"

81 During receivership there were two fires which caused damage to the boiler room and the Sadat Room (a conference room). Clarkson received and kept the fire insurance proceeds of \$13,773.07. Clarkson did not repair all the damage to the boiler room because it was not necessary for the operation of the hotel.

82 With respect to the flood damage, the following facts are relevant. The hotel had been closed on November 3, 1981, and the heat turned down. On January 13, 1982, Bayhold purchased the hotel at the sheriff's sale. Mr. Scouler had undertaken to one of the counsel for Bayhold to keep the hotel premises safe and secure. On January 20, 1982, a Ms Bagnell, who was employed by Clarkson at the time, before leaving the hotel during a period of cold weather decided it would be prudent to flush some of the toilets to loosen up any ice clogging the pipes as the heat had been turned back. During the night the pipes froze and there was substantial damage done.

83 As Bayhold wished to sell the hotel as a going concern, it allowed Mr. Rahey to go into possession and operate the hotel. Mr. Rahey repaired most of the fire and flood damage caused during the receivership. The appellant asserts that Mr. Rahey did so at a cost of \$125,000 and that Mr. Rahey was setting this off against Community's outstanding mortgage debt to Bayhold. Bayhold claims \$125,000 from the respondents which it says it owes to Rahey for the work to repair the fire and flood damage. The learned trial judge found that the care of the hotel by Clarkson in this period was adequate under the circumstances and that none of the physical damage was caused by the negligence of Clarkson. The trial judge also concluded that Bayhold had not suffered recoverable damages as a result of the actions even if Clarkson had been negligent.

84 With respect to the claim of \$125,000 the respondents make the following points in their factum:

Bayhold claims that in 1982-83 Rahey repaired damages sustained by the hotel during the receivership, at a cost of some \$125,000.00. Bayhold further claims that Rahey is now 'setting-off' these repairs as against his debt to Bayhold. It seeks damages in the same amount as against Clarkson as a result. Clarkson makes the following points in response:

(a) The learned trial judge found as a matter of fact that Clarkson had maintained adequate precautions and performed adequate remedial measures and was not responsible in negligence for any physical damage to the hotel;

(b) Little or no evidence was provided with respect to repairs performed by Rahey, or the value of any such repairs;

(c) Little or no evidence was provided with respect to any attempt by Mr. Rahey to set-off the amount of any such repairs as against Bayhold. Mr. Rahey had not claimed the cost of repairs as against Bayhold in the eight years which had elapsed since repairs allegedly took place;

(d) Both Alan Feldman and Gordon MacLean testified that Rahey operated the hotel on the basis that he would contribute necessary repairs, pay mortgage interest, and pay most operating expenses and, in return, be entitled to keep all hotel revenue. *By Bayhold's own evidence, accordingly, Rahey has no basis to claim the cost of any repairs as against Bayhold.*

[Emphasis added.]

85 I am satisfied based on the points made by the respondents, as set out above, that the learned trial judge did not commit error when he concluded that Clarkson was not responsible to Bayhold for the \$125,000. The evidence does not support a finding for the appellant on this issue. By Bayhold's own evidence the damage was repaired by Rahey pursuant to the agreement they made with him. Based on that agreement alone, Mr. Rahey has no right of recovery against

Bayhold for any expenditures made to repair the fire and flood damage while he was operating the hotel. Mr. Rahey has not commenced an action in which he has made such a claim. The evidence supports the trial judge's conclusion that Bayhold did not suffer recoverable damage as a result of the actions of Clarkson.

86 In summary, I would dismiss the appeal with costs to the respondents to be taxed.

Appeal dismissed.

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TAB 8

2002 ABQB 706
Alberta Court of Queen's Bench

Bank of Montreal v. Scaffold Connection Corp.

2002 CarswellAlta 932, 2002 ABQB 706, [2002] A.W.L.D. 420,
[2002] A.J. No. 959, 115 A.C.W.S. (3d) 620, 36 C.B.R. (4th) 13

**BANK OF MONTREAL (Plaintiff) and SCAFFOLD CONNECTION
CORPORATION, P.S.P. ERECTORS INC., SC ERECTORS INC.,
SCAFFOLD WORKS INC., INDUSTRIAL INNOVATIONS AND SERVICES
LIMITED, AND SCAFFOLD CONNECTION (USA) INC. (Defendants)**

Wachowich C.J.Q.B.

Heard: July 23, 2002

Judgment: July 26, 2002

Docket: Edmonton 0103-23333

Counsel: *J. Hocking, D. Polny, T. Reid*, for Receiver

R. Rutman, for Plaintiff

D. Shell, for Roynat Inc.

J. Topolniski, for Sit Down Export AB and Sit Down AB

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

APPLICATIONS by receiver for approval of sale of assets of debtor companies and for declaration that assets would vest in purchaser free and clear of all charges or claims.

Wachowich C.J.Q.B.:

1 KPMG Inc., the Court-Appointed Receiver and Manager (the "Receiver") of the Defendants ("Scaffold"), seeks the Court's approval of a sale of certain assets ("Seating Equipment") of Scaffold. Some or all of the Seating Equipment was acquired by Scaffold from Sit Down Export AB, a secured creditor of Scaffold.

2 The Receiver further seeks a declaration that: the Seating Equipment shall vest in the Purchaser free and clear of all encumbrances, charges, interests or claims; and Sit Down Export AB, Swedish Export Funding AB and the Swedish Export Credits Guarantee Board, or any party claiming through or under them, have no claims whatsoever to the Seating Equipment or the proceeds of the Sale, or against the Receiver in respect of the Sale. The Receiver's applications were adjourned to allow Sit Down to present its objection to the proposed sale.

3 Under the Consent Receivership Order filed November 16, 2001, the Receiver is empowered to sell the property of Scaffold.

4 Sit Down disputes this Court's jurisdiction in this matter on the basis that the assessment of the propriety of the proposed sale requires an interpretation of the Distributor Agreement between Sit Down and Scaffold, which Agreement specifies that all disputes arising in connection with the Agreement shall be arbitrated in London, Great Britain and that the Agreement shall be construed according to the laws of Sweden.

5 The Distributor Agreement clearly provides that upon termination of the Agreement, Scaffold shall be allowed to sell any existing units within its possession at the time of termination.

6 In a letter dated November 23, 2001 to the Receiver, counsel for Sit Down advised that Sit Down considered the contract between it and Scaffold to be at an end pursuant to Article 1.18 of the Distributor Agreement. In a further letter dated November 28, 2001 to Scaffold, Sit Down's Swedish counsel terminated the agreements in effect between Scaffold and Sit Down.

7 Counsel for Sit Down submits that the Distributor Agreement contains restrictions on the use of Sit Down's intellectual property rights in and relating to the Seating Equipment, and requires the parties to exert reasonable efforts to "transit (which Sit Down defines as "convey") the relationship of the parties", which Sit Down understands to be the package of rights under the Distributor Agreement. Counsel for Sit Down did not articulate the manner in which the proposed sale would result in breach of any intellectual property rights.

8 The Receiver, the Bank of Montreal and Roynat Inc. (secured creditor) argue that the Receiver is not bound by the contracts entered into by Scaffold. The contemplated sale does not purport to assign any interest in intellectual property, nor does it purport to convey the distribution or manufacturing rights which arose under the agreements between Sit Down and Scaffold. The clear language of the Distributor Agreement permits sale of units in Scaffold's possession upon termination.

9 The Receiver provided evidence that there will not be sufficient assets to discharge the claims of Roynat and the Bank of Montreal and therefore no funds will be available for subordinate creditors.

10 Further, under s. 82(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, where any property of a bankrupt vesting in a trustee consists of patented articles that were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the patented articles free and clear of the restrictions or limitations. The Receiver argues that by analogy, the Receiver likewise should not be bound. I note that ss. (2) provides that where the manufacturer or vendor of the patented articles objects to the disposition and gives notice, the manufacturer or vendor has the right to purchase the patented articles at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

11 The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159 (N.S. C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341. The Receiver in this case is not breaking a contract which it has adopted, as the agreements between Sit Down and Scaffold were terminated by Sit Down shortly after the appointment of the Receiver. Thus, there is no basis to suggest that the Receiver is bound by any of the contractual terms entered into between Sit Down and Scaffold.

12 Although the Receiver is not bound by the Distributor Agreement, the Receiver does have a duty to act fairly and reasonably, and I conclude that this Court may consider that Agreement in determining whether the Receiver has fulfilled its duty in relation to the proposed sale.

13 The very clear language of the Distributor Agreement would have permitted Scaffold to sell the Seating Equipment on termination. There is nothing before the Court beyond speculation to suggest that the provisions in question would be interpreted any differently by a London arbitrator applying Swedish law. Further, there is nothing before the Court beyond vague speculation that the proposed sale will adversely affect any intellectual property rights of Sit Down, and counsel for Sit Down did not propose any concrete method of avoiding the result it fears.

14 The applications of the Receiver are granted.

Applications granted.

TAB 9

2015 ABQB 148
Alberta Court of Queen's Bench

Alignvest Private Debt Ltd. v. Surefire Industries Ltd.

2015 CarswellAlta 485, 2015 ABQB 148, [2015] A.W.L.D. 2108, [2015] A.W.L.D.
2109, [2015] A.W.L.D. 2152, [2015] A.J. No. 316, 16 Alta. L.R. (6th) 1, 23 C.B.R. (6th)
66, 251 A.C.W.S. (3d) 197, 39 B.L.R. (5th) 87, 3 P.P.S.A.C. (4th) 308, 608 A.R. 292

Alignvest Private Debt Ltd., Plaintiff and Surefire Industries Ltd., Defendant

B.E. Romaine J.

Judgment: March 4, 2015
Docket: Calgary 1301-11285

Counsel: Howard J. Sniderman, Q.C., John Frame, Jonathan Calvert for York Realty Inc.
Sean F. Collins, Pantelis Kyriakakis for Alignvest Private Debt Ltd.
Thomas S. Cumming, Clifton Prophet for Duff & Phelps Canada Restructuring Inc.

Subject: Corporate and Commercial; Insolvency; Property

APPLICATION by secured creditor for order directing bankrupt's landlord to remit deposit amount paid by bankrupt to trustee and for order declaring that deposit was unregistered security and subordinate to creditor's claim.

B.E. Romaine J.:

1. Introduction

1 After a short history of insolvency proceedings, Surefire Industries Ltd. was placed into bankruptcy with Duff & Phelps Canada Restructuring Inc. ("D & P") appointed as Trustee of Surefire's estate. The primary issue in this application and cross-application is the characterization of a deposit made under a lease between Surefire and York Realty Ltd. which was disclaimed by the Trustee, specifically whether York is entitled to retain the deposit or whether it must be remitted to the Trustee as part of Surefire's estate, subject to the claim of a secured creditor.

II. Relevant Facts and Applications

2 Surefire was granted an initial order under the *Companies' Creditors Arrangement Act* in August, 2013. The CCAA proceedings were terminated in September, 2013 and D & P was appointed as receiver and manager of Surefire's assets.

3 During the course of the receivership, D & P caused Surefire to continue to occupy the premises that were subject to the lease, and caused Surefire to pay rent to York. The lease was part of a sale of Surefire's property to York and the lease back of the property, effective on February 15, 2013.

4 On December 23, 2013, Surefire was declared bankrupt, with D & P appointed as Trustee. The Trustee disclaimed the lease on January 2, 2014. As of the date of the disclaimer, all rent owing had been paid to York.

5 When Surefire was in receivership, York applied for an order that it was entitled to retain a deposit of \$3,187,500 described under the lease, notwithstanding the stay of proceedings imposed by the receivership. The deposit in issue was not paid in cash but by way of an adjustment to the cash to close the purchase of the lands.

6 That application was adjourned by order dated December 16, 2013, which provided that, if it was determined that the deposit was not forfeit prior to the commencement of CCAA proceedings, the issue of whether the stay of proceedings in force under the receivership should be lifted to allow York to forfeit the deposit should be determined as if no bankruptcy had ensued.

7 Alignvest Private Debt Ltd. is a secured creditor of Surefire with a general security agreement over its assets. Alignvest registered its GSA under the *Personal Property and Security Act (Alberta)* ("PPSA") on March 27, 2013. York did not register any security interest in the deposit under the PPSA.

8 On March 20, 2013, York and Alignvest entered into an agreement whereby York consented to and acknowledged the validity of Alignvest's security and subordinated its interest in that security until Surefire's obligations to Alignvest were paid in full.

9 Alignvest applies for an order directing York to pay \$3,187,500 to the Trustee, either in its previous capacity as receiver or alternatively as trustee in bankruptcy, and for an order declaring that the deposit is an unregistered security interest under the PPSA, subordinate to Alignvest's perfected secured claim.

10 The Trustee takes the position that the deposit is intangible personal property as defined in the PPSA in which Surefire has an interest and to which Alignvest's security attaches. Alternatively, the Trustee submits that York should pay a sum of money equal to the deposit to the Trustee for distribution.

III. Issues

- a) Is the deposit security for the performance of obligations under the lease or prepaid rent?
- b) Is the deposit subject to the provisions of the PPSA?
- c) Should the stay imposed by the receivership be lifted?

IV. Analysis

A. Is the deposit security for the performance of obligations under the lease or prepaid rent?

11 The relevant provisions of the lease are as follows:

6. Security Deposit/Rent Credit

(a) The Tenant will pay to the Landlord ... a deposit of ... \$3,187,500 plus goods and services tax (the Security Deposit"), which Security Deposit is to be held without interest by the Landlord as security for the performance by the Tenant of its obligations under the Lease ... Subject to the foregoing, the Security Deposit will, provided that the Tenant has paid all amounts due to the Landlord under this Lease and is not otherwise in default..., be applied during the term as follows:

[applied to monthly rent commencing on the 13th month of the term, and certain following months during the term of the tenancy]

(b) The Tenant shall be credited ... \$5000,000.00 ...towards its Rent obligations during the first two months of the Term...

12 In the event of a default, the lease provides that York may retain the Security Deposit and advance rent (if any) for its own use.

13 The prepaid rent for the first two months of the lease were credited to York at the closing of the sale and lease back transaction.

14 York relies on *Abraham, Re*, [1926] 3 D.L.R. 971 (Ont. C.A.) and cases that follow *Abraham* for the proposition that a non-refundable deposit, to be applied either to rental payments throughout the term of a lease or alternatively to any defaults of the tenant, is prepaid rent and the property of the lessor from the day that it is paid under the lease.

15 In *Abraham*, the lease provided for a deposit that would be credited to rent payable in the last year of the lease, but which could be forfeited as liquidated damages in the event of a bankruptcy. The Court noted that "in all cases the Court strives to give effect to the actual contract of the parties according to its real nature and legal effect": para 10. The issue before the Court was whether the deposit was a penalty or a genuine pre-estimate of liquidated damages. However, the Court took the position that it was obvious under the lease that the deposit was never to be repaid to the tenant. If there was no default, it would be applied to rent. If there was default, it would be applied to damages arising from breach of contract. The Court concluded that:

(i)f effect is to be given to the contract between the parties, in no possible event is this money to be actually repaid to the tenant, and the assignee of the tenant has no greater right than the tenant himself. No matter what the parties have called it, it was a partial prepayment of rent and nothing more.

It should be noted that this case pre-dates the modern provisions of bankruptcy law that allow disclaimer of leases.

16 The Trustee and Alignvest submit that the governing authority is the decision in *Champion Machine & Tool Co., Re* (1971), 15 C.B.R. (N.S.) 136 (Ont. S.C.), where *Abraham* was distinguished.

17 In *Champion*, the lease provided for a "security deposit" as security to guarantee the performance of covenants in the lease, which "shall be retained by the Lessor and become the property of the Lessor" in the event of a breach of covenant, but would otherwise be applied to rent for the last month of the lease. The issue was whether the trustee in bankruptcy could set off prepaid rent against the landlord's claim for accelerated or occupation rent.

18 The Registrar found that the deposit was to be held as security for a breach of the covenant not to become bankrupt. As a bankruptcy had occurred, the lease provided that the deposit was to become the property of the lessor. However, the law in Ontario in force at the time precluded the landlord from having a claim for damages for the unexpired term of this lease. Thus:

.. (t)he lessor has not exacted prepaid rent from the lessee, but a deposit as a guarantee against the happening of an event which has now occurred, that is the bankruptcy of the lessee and it is my view that the trustee is entitled to set-off the amount of the deposit forfeited to the lessor against the claim of the lessor for accelerated rent: para 19.

19 In the result, the benefit of the deposit accrued to the trustee.

20 What the cases make clear is that the Court must look to the wording of the lease to determine the intention of the parties with respect to the deposit, whether it should be characterized as pre-paid rent, liquidated damages or security and whether it would be non-refundable in the hands of the tenant and thus with respect to the trustee in bankruptcy: *Ébénisterie Renouveau inc., Re*, 2009 QCCS 1454 (C.S. Que.) at paras. 53, 59.

21 The following provisions of the lease imply that the deposit is a security deposit and not prepaid rent:

a) The relevant section of the lease is entitled "Security Deposit/Rent Credit" and the deposit is defined as a Security Deposit. While the paragraph heading also refers to "Rent Credit", that is a reference to section 6(b). Thus, section 6 distinguishes between the "Security Deposit" in section 6(a) and prepaid rent by credit in section 6(b). Section 6 (a) specifies that the deposit will be held "as security for the performance by the Tenant of its obligations under the Lease."

b) The deposit was also referred to as a "Security Deposit" in the Final Statement of Adjustments rendered in connection with the transaction.

c) Although the lease allowed York to "retain the Security Deposit" for its own use in the event of a default in the lease, including the failure to pay rent. York did not exercise this option when rental payments were late by a few days prior to the receivership, and the failure to pay rent was remedied.

d) The lease provides that the deposit "will be applied during the term [of the lease]" to rent for certain months of the tenancy. Those months were not reached before the lease was disclaimed by the receiver. The lease does not immediately credit the deposit to future months, but only to rent falling due in the future. The deposit can only be applied to rent in these designated future months if the tenant is not otherwise in default.

22 York submits that there are factors that imply that to the deposit should be characterized as prepaid rent, or as a non-refundable deposit:

a) Security for obligations to be performed under a lease is not a good or service that would give rise to the requirement of the payment of GST, yet the deposit included the payment of GST. While this may be true, the lease anticipates that the deposit could be applied to rent in certain circumstances, or to designated months if the lease continued to the end of its term, making the payment of GST necessary. This provision can be considered as no more than a prudent pre-estimate of the amount that would be necessary if the deposit was applied in that manner.

b) York submits that it had the right without notice to retain the deposit for its own use in the event that any of the events of default listed in section 10 of the lease occurred. That right was stayed by the CCAA proceedings and the receivership, but York submits that

i) it was its intention to retain the deposit when Surefire failed to pay rent on June 18, 2013 and August 16, 2013. However these rent payments were made on June 19, 2013, and August 22, 2013 respectively, and accepted by York, as were rent payments made by the receiver through the term of the receivership until the lease was disclaimed. There is no evidence of York exercising its right to retain the deposit after these failures to pay rent, other than in an affidavit filed by the president of York, Glenn Woolsey in which he states that this was "the position that [he] took". However, Mr. Woolsey conceded in questioning that York had not taken the deposit from Surefire as it was entitled to do prior to accepting late payment of rent.

ii) Surefire became insolvent prior to the CCAA and receivership proceedings, giving rise to York's right to retain the deposit. Again, York has conceded that it had not enforced its rights under the lease prior to the commencement of insolvency proceedings.

c) Mr. Woolsey deposed that it was York's intention that the deposit be non-refundable. Evidence of the subjective intention of the parties does not aid in the interpretation of a contract, and there is no language in the lease that indicates that the deposit is non-refundable.

d) York submits that there is no possible event where the deposit would be repayable to Surefire. However, one such scenario would be the early termination of the lease by the landlord, for example under paragraph 23, when the tenant is not in breach of the lease. Another scenario is the situation that has now occurred, where the lease has been disclaimed by Surefire's trustee in bankruptcy and such disclaimer has been confirmed by the Court. Thus, if the term of the lease is interrupted, by the landlord or by operation of law or court order, with no actionable breach by the tenant, the deposit will not be forfeited.

23 I am satisfied by the provisions of the lease that the deposit cannot be characterized as prepaid rent, that it is not non-refundable in any scenario and that it is properly characterized as security to guarantee the performance by Surefire

of its obligations under the lease, similar to the deposit described in *Champion Machine & Tool Co., Re*. While the lease may provide that the landlord may retain the deposit upon the tenant taking the benefit of or becoming subject to an insolvency statute, the CCAA and receivership proceedings stayed that remedy.

B. Is the deposit subject to the provisions of the PPSA?

24 The PPSA applies to every transaction that creates a security interest: section 3. A "security interest" includes an interest in money or an intangible that secures payment or the performance of an obligation: section 1 (tt). As the deposit is security for the performance of obligations under the lease, it would fall into the category of "security interest", absent an exclusion from the PPSA regime. If the deposit falls within the definition of "security interest," York should have filed a financing statement to perfect its interest under the PPSA, since security interests in intangible personal property cannot be perfected by possession. Since York failed to do so, York's claim would be subordinate to that of Alignvest and ineffective against the Trustee.

25 York submits that the deposit falls within the exclusion from the PPSA regime set out in section 4(g) of the Act, which provides that the PPSA regime does not apply to:

... the creation of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument.

26 York's argument appears to be that, since the deposit is dealt with under the lease and the lease is an interest in land, any payments made under the lease, including either as a security deposit or prepaid rent, are excluded from the PPSA pursuant to section 4(g).

27 York relies on *Bank of Montreal v. Dynex Petroleum Ltd.*, [1997] 6 W.W.R. 104 (Alta. Q.B.), at para 45, rev'd on different grounds in (1999), [2000] 2 W.W.R. 693 (Alta. C.A.), for the proposition that leases are interests in land and therefore lease payments to lessors pertinent thereto arise in connection with an interest in land. However, as the Trustee points out, *Dynex* drew a distinction between rental payments to lessors and interests that are not interests in land in the same sense as or equivalent to rental payments. In *Dynex*, overriding royalty interests were not considered to arise in connection with an interest in land.

28 Similarly, while York relies on *Couiyk v. Couiyk*, [1999] B.C.J. No. 2737 (B.C. S.C.) at para 19 for the proposition that an identically-worded section of the British Columbia PPSA is intended to ensure that streams of payment arising in connection with an interest in land are excluded from the scope of the legislation, the Court in that case noted that the subsection should be narrowly construed, and refused to apply it to funds "not remotely akin to lessor rental payments": para 20.

29 The Trustee submits that the deposit:

- a) does not "arise in connection with an interest in land", and
- b) is not a "right to payment".

30 The Trustee points out that the deposit is not a rental payment, but collateral in which York has a security interest for the performance of all Surefire's obligations under the lease. Such obligations can include, not only the failure to pay rent, but the tenant's breach of non-financial obligations, its insolvency, the seizure of the tenant's property by a creditor and the abandonment of the premises. The deposit can only be applied to rent if the tenant is not in default under the lease. Section 6(a) provides that the deposit is "security for the performance by the Tenant of its obligations" under the lease. There is a distinction between a "right to payment" and "security for that right" and the wording of the lease refers to the deposit as "security". Even though the disclaimer of the lease has extinguished any right to rent

beyond that provided by the *Bankruptcy and Insolvency Act*, the deposit remains as security under the lease, subject to these applications asserting competing claims.

31 The interest that must be considered in determining whether the deposit is an excluded interest failing within section 4(g) of the PPSA is the interest in the deposit, not an interest in the lease as a whole. This is consistent with the approach taken in *Dynex* and in *Couiyk*, where lease or rental payments were considered to fall within the exclusion, while other kinds of interests did not.

32 This approach is also consistent with the implied purpose of the exclusion. If an interest is in an excluded interest like an assignment of rents, it can be caveated as an interest in land. The ownership of prepaid rent passes on payment, so registration is not necessary. The deposit, not being an interest in land but simply an intangible personal property interest held to secure Surefire's obligations, cannot be protected in these ways but only through registration under the PPSA.

33 In *Ministre du Revenu national c. Caisse Populaire du bon Conseil*, 2009 SCC 29 (S.C.C.), the Court considered whether a certain contractual agreement gave rise to a "security interest" for the purposes of the *Income Tax Act*.

34 The Court noted that the question required that the terms of the contract be carefully considered to determine whether the parties intended to confer on one party an interest in the property of the other that secures payment or performance of an obligation. If the substance of the contract demonstrated an intention to create an interest in property to secure an indebtedness, a security interest existed.

35 In the course of his analysis, Rothstein J, stated that, if the intention of the parties was to create a security interest to ensure that a right of compensation or set-off would be an effective remedy, the characterization of the interest as a security interest would not change "simply because the parties have chosen one mechanism for realizing on the security, rather than another. What must be considered in the substance of the agreement": para 25.

36 He disagreed with the dissenting opinion that "any agreement that provided for contractual set-off is categorically excluded from the personal property security legislation of the common law provinces": para 41. He commented at para 42 that:

Given the functional approach to personal property security arrangements in these statutes, it is difficult for me to see how any transaction that confers an interest on a creditor in a debtor's property to secure an obligation could be categorically excluded unless that type of transaction has been defined and expressly excluded by the legislation itself. To my knowledge, an agreement that provides for security together with a right of set-off to realize on that security is not expressly excluded in any of the common law provincial personal property security statutes. What is required by the common law provincial personal property security statutes is a decision about whether a particular contract or agreement in a given case functions as a security interest. (emphasis added)

37 In other words, a security interest is not "tainted" by the inclusion of other elements, such as its application to rent if certain conditions occur, if the deposit functions in substance as a security interest.

38 I am satisfied from the wording of Section 6 of the lease and the function of the deposit under the lease that the deposit is not a "right to payment" but functions as security for Surefire's performance of its obligations under the lease. Thus, it is a "security interest" subject to the provisions of the PPSA and not excluded by section 4(g). It is subordinate to Alignvest's perfected security interest, as well as other interests that at law enjoy priority over an unperfected security interest.

39 York submits, without evidence, that requiring it to perfect its rights in the deposit by registration would upset the efficiency of commercial and residential leasing law, as it asserts that landlords do not register anything at the Personal Property Registry when they take a deposit under the lease. As I have indicated, whether a deposit falls within the section 4(g) exclusion depends upon its character and is largely to be determined by the specific provisions of the lease. The characterization of the deposit under this lease should not be taken as determinative of the characterization of deposits

under other forms of lease, and is limited to this specific lease and the intervention of a secured creditor with a perfected security interest.

C. Should the stay imposed by the receivership be lifted?

40 The test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.

41 Guidance can be drawn from the provisions of section 69.4 of the BIA in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.).

42 Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Ma, Re* at para 3.

43 York concedes that in order to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at paras 18 - 19.

44 York submits that if the stay remains in place, it would be deprived of a right under the lease that it had specifically bargained for. In that respect, the prejudice to York is no different qualitatively from that suffered by other creditors, who also will lose, in whole or part, the benefit of their contracts by reason of Surefire's insolvency. That the stay operates to deny a party a particular contractual remedy otherwise available to it is not a sufficient reasons to lift the stay.

45 York submits that it has suffered quantitatively more than other creditors, and describes the loss of its stream of income over the term of the lease and the ongoing expenses necessary to maintain the property.

46 While the magnitude of York's potential losses is substantial, absent mitigation by virtue of re-leasing the premises, that is a matter of degree in a worse-case scenario. With respect to unfairness, it must be noted that York entered into the lease with prior knowledge of Surefire's financial circumstances and the risk inherent in such a situation.

47 This is not a situation where York has not been paid ongoing rent due during the course of the receivership. Simply put, it wishes the stay to be lifted so that it can upgrade its position vis-à-vis Alignvest, despite its failure to perfect its security interest. The situation is similar to that described in *Ivaco Inc., Re* (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]) at para 7, where Farley, J. refused an application to lift a stay to allow an insurer to terminate insurance policies and benefit from an unearned premium, commenting that this would give an unsecured creditor "an inappropriate leg up on the other unsecured creditors, not to mention a leg up over secured creditors with priority."

48 In the circumstances, there are no unusual or compelling reasons that would warrant lifting the stay in the receivership, and I decline to do so.

V. Conclusion

49 In summary, the deposit is security for obligations under the lease and not prepaid rent. It does not fall under an exclusion to the provisions of the PPSA, and as a security interest should have been perfected by registration. As it was not, it is subject to Alignvest's perfected security interest. I decline to lift the stay under the receivership to allow York to exercise its rights under the lease with respect to the deposit, as York has not established material prejudice or inequity sufficient to justify lifting the stay.

50 If the parties are unable to agree on costs, they may make written submissions on that issue.

Application granted.

End of Document

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TAB 10

2012 ABQB 539
Alberta Court of Queen's Bench

Baytex Energy Ltd. v. MNP Ltd.

2012 CarswellAlta 1500, 2012 ABQB 539, [2012] A.W.L.D. 5023, 220 A.C.W.S. (3d) 15

**Baytex Energy Ltd., Applicant and MNP Ltd. as Receiver and
Manager of Sterling Eagle Petroleum Corporation, Respondent**

J. Strekaf J.

Heard: July 18, 2012
Judgment: August 29, 2012
Docket: Calgary 1101-1011

Counsel: Josef G.A. Kruger, Q.C., Adrienne Wong, for Applicant
C. Russell, Q.C., for Respondent

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

APPLICATION by creditor for order confirming validity of notices of abandonment issued to debtor through receiver/
manager.

J. Strekaf J.:

1. Introduction

1 Baytex Energy Ltd applied to lift the stay of proceedings in the receivership of Sterling Eagle Petroleum Corporation so that it could apply for an order compelling MNP Ltd, in its capacity as Receiver and Manager of Sterling, to accept the transfer of certain wells in the Darwin area of Alberta. MNP does not oppose the lifting of the stay effective May 18, 2012 for the purpose of the bringing of this application and that order was granted by me at the outset of the hearing of the application.

2. Relevant Facts

2 Baytex and Sterling were parties to two agreements (a Farm-in and Option Agreement dated October 11, 1995 and a Pooling Farm-out and Participation Agreement dated February 26, 1996), both of which incorporated the CAPL Operating Procedure. Baytex was the operator of the lands governed by the two agreements. Baytex and Sterling each had a 50 percent working interest in various producing wells and in four non-producing wells that had been drilled pursuant to the said agreements.

3 Sterling was placed into receivership pursuant to a Consent Receivership Order dated June 27, 2011, which appointed MNP as the Receiver and Manager. The Receivership Order contained the usual terms including a provision that all rights and remedies against Sterling were stayed and suspended except with the written consent of the Receiver or leave of the Court.

4 The Receivership Order was brought to the attention of Baytex on August 31, 2011.

5 Article XII of the CAPL Operating Procedure sets out the procedure for the abandonment of wells. It states in part:

1201 PROCEDURE FOR ABANDONMENT - If a party proposes to abandon a well on the joint lands ... it shall give notice of the proposed abandonment to the other parties. Within thirty (30) days of receipt of the notice, each of the other parties shall elect, by notice to the other parties, whether it wishes to take over the well. Failure by a party to respond to such notice shall be deemed to be an election by that party to take over, or participate in the takeover, of the well.

6 On January 24, 2012 Baytex delivered to MNP four notices of proposed abandonment of the four wells pursuant to the two agreements which were addressed to Sterling care of MNP. Attached to each Abandonment Notice were authorizations for expenditures (AFEs) setting out the costs of abandonment. The AFEs indicated that the total funds required from each of Baytex and Sterling to abandon the four wells was \$145,479.

7 Baytex received an inquiry regarding the Abandonment Notices from a representative of the Receiver on February 14, 2012.

8 On February 29, 2012, Baytex sent letters to Sterling care of MNP advising that the failure to respond to the Abandonment Notices with the 30 day period set forth in the CAPL Operating Procedure was deemed an election to take over the wells.

9 On March 6, 2012, the Receiver sent a letter to Baytex advising that the Receivership Order restrained parties from taking proceedings against Sterling or from exercising any contractual or other rights or remedies and refused to accept the transfer of the wells.

10 In addition to the wells for which Abandonment Notices were delivered, there are five producing wells on the lands governed by the 1996 Agreement which have been producing gas and generating revenues which were paid to the Receiver prior to and since the issuance of the Abandonment Notices.

11 On May 1, 2012, a notice was sent by counsel for MNP as Receiver and Manager to Baytex's counsel advising that the Receiver would consent to the lifting of the stay in the Receivership Order so that Baytex could proceed to issue Abandonment Notices under the CAPL Operating Procedure with respect to the four wells.

3. Issues

12 The principle issue to be determined on this application is whether Baytex was restrained from issuing the Notices of Abandonment by virtue of the Receivership Order. If not, is the Receiver entitled to relief from forfeiture, or should the Court direct the Receiver to accept transfer of the wells effective February 29, 2012.

4. Positions of the Parties

13 Baytex argues that a Receiver is obliged to adopt or disclaim executory contracts of a debtor company within a reasonable period of time. As seven months had passed since the Receiver was appointed during which time the Receiver received and accepted monies from wells produced under the 1996 Agreement and took no steps to disclaim either agreement, the Receiver elected to affirm the agreements and, as such, was subject to the provisions of the Agreements when the Notices of Abandonment were received. As a result, MNP, on behalf of Sterling, elected to take over the well by failing to respond within the 30 day deadline.

14 MNP's position is that the delivery of the Notices of Abandonment were ineffective as they were issued without leave of the Court or the consent of the Receiver and Manager and were contrary to the stay prohibiting the exercise of rights and remedies against Sterling in paragraph 9 of the Receivership Order and that it would not be appropriate for the Court to grant leave to authorize the issuance of the Notices *nunc pro tunc*.

15 MNP does not dispute that a receiver is required to disclaim or affirm an executory contract within a reasonable period of time and even acknowledges that it may have incurred contractual liabilities as a consequence of accepting

benefits under the 1996 Agreement. However, it submits that such implications do not have the effect of automatically overriding the express language in paragraph 9 of the Order requiring consent or leave before any rights are exercised against Sterling.

5. Analysis

16 It is the terms of the Receivership Order that govern the affairs of Sterling. Paragraph 9 of the Receivership Order states:

All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provision relating to health, safety or environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

17 The issue on this application is whether the delivery of a Notice of Abandonment which has the effect of triggering an obligation to respond within 30 days or be deemed to elect to takeover the well constitutes the exercise of a "right and remedy" within the meaning of paragraph 9 of the Order.

18 Baytex argues that it was not exercising a contractual right when it issued the Abandonment Notices but that it was complying with its duties as a well operator pursuant to the provision of the *Oil and Gas Conservation Act*, RSA 2000, c 0-6. Section 27 states that a licensee shall abandon a well when directed by the Energy Resources Conservation Board (ERCB) or required by regulation. Section 30 provides that the well suspension costs, abandonment costs and reclamation costs are to be paid by the working interest participants in accordance with their proportionate share in the well. The attachments to the Notices of Abandonment state that the wells were on the ERCB suspension list and that it would be more cost effective to fully abandon the wellbore than to suspend. This language suggests that the decision to abandon rather than suspend was a commercial rather than a regulatory decision. In any event, at issue is not whether the abandonment of the wells was required by the ERCB but Baytex's purported exercise of its contractual right to compel Sterling to take over the wells by issuing a Notice Of Abandonment in accordance with the CAPL Operating Procedure.

19 The circumstances are analogous to those in *Skyservice Airlines Inc., Re*, 2011 ONSC 703, 78 C.B.R. (5th) 193 (Ont. S.C.J. [Commercial List]) at paragraphs 77 - 89 where Morawetz J concluded that actions taken to terminate an aircraft lease constituted the exercise of a right that was contrary to a stay granted in a receivership action. Similarly, delivery of the Notices of Abandonment constituted the exercise of a contractual right against Sterling. As it was done without prior consent of MNP or leave of the Court as required by the Receivership Order, it is of no effect.

20 I am further of the view that it would not be appropriate to lift the stay and grant leave *nunc pro tunc* to authorize the issuance of the Notices of Abandonment as of January 24, 2012. Doing so would prejudice Sterling who would become obligated to assume Baytex's fifty per cent share of the well abandonment costs in the amount of \$145,479 as a result of a notice issued contrary to the stay. As MNP has acknowledged that it would consent to the issuance of the Notices of Abandonment, Baytex will be at liberty to reissue the same. I see no prejudice to Baytex, beyond depriving it of the ability to transfer its share of the well abandonment costs to Sterling despite its failure to comply with the requirements of the Receivership Order. There is no evidence that Baytex was prevented from seeking consent of the MNP or Court authorization prior to issuing the Notices. The circumstances are distinguishable from those in *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)* (2006), 2006 ABQB 572, 25 C.B.R. (5th) 273 (Alta. Q.B.).

21 In the circumstances, it is not necessary to consider the other issues raised on this application.

22 Baytex's application is dismissed.

Application dismissed.

End of Document

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TAB 11

2011 ONSC 703
Ontario Superior Court of Justice [Commercial List]

Skyservice Airlines Inc., Re

2011 CarswellOnt 3085, 2011 ONSC 703, 202 A.C.W.S. (3d) 232, 78 C.B.R. (5th) 193

**In the Matter of the Receivership of Skyservice Airlines
Inc., of the City of Toronto, in the Province of Ontario**

Amd In the Matter of an Application Pursuant to Section 9 of the Airport Transfer (Miscellaneous
Matters) Act, S.C. 1992, c.5 (Application by the Greater Toronto Airports Authority)

And In the Matter of an Application Pursuant to Section 56 of the Civil Air Navigation
Services Commercialization Act, S.C. 1996, c.20, as Amended (Application by NAV Canada)

Morawetz J.

Judgment: April 6, 2011
Docket: CV-10-8647-00CL

Counsel: Harvey Chaiton for Winnipeg Airports Authority

Clifton Prophet, Patrick Shea for NAV Canada

Heather Meredith for Receiver, FTI Consulting Inc.

Donald G. Gray, Deborah S. Grieve, Auriol Marasco for IAI V, Inc., MCAP Europe Limited

Steven Weisz, Chris Burr for Airways Limited, Sunwing Tours Inc.

Jane Dietrich for International Lease Finance Corporation

Mary Paterson for Thomas Cook Canada, Inc.

Allan D. Coleman, Shaun T. Irving for Greater Toronto Airports Authority, Ottawa MacDonald-Cartier International
Airport Authority

Pamela L.J. Huff for C.I.T. Leasing Corporation

Subject: Public; Insolvency

APPLICATIONS by airport authorities for aircraft seizure and detention orders; MOTIONS by lessors for declaration
in respect of entitlements of airport authorities.

Morawetz J.:

I Overview

1 On March 31, 2010, Thomas Cook Canada, Inc. ("TCCI") applied for an order pursuant to s. 243 (1) of
the *Bankruptcy and Insolvency Act* (the "BIA") and s. 101 of the *Courts of Justice Act* (the "CJA") appointing FTI
Consulting Canada Inc. (the "Receiver") as receiver of the assets, undertakings and properties of Skyservice Airlines Inc.
("Skyservice"). At 11:00 a.m. on March 31, 2010, Gans J. granted the receivership order (the "Receivership Order").

2 Priority disputes immediately arose involving the Greater Toronto Airports Authority ("GTAA"), the Ottawa
MacDonald-Cartier International Airport Authority ("OMCIAA"), Winnipeg Airports Authority Inc. ("WAA")
(collectively, the "Airport Authorities"), and NAV Canada on one side and International Lease Finance Corporation
("ILFC"), Thomson Airways Limited ("Thomson"), Sunwing Tours Inc. ("Sunwing"), IAI V, Inc. ("IAI") and MCAP
Europe Limited ("MCAP") on the other side.

3 In the hours after the granting of the Receivership Order, GTAA brought its application, in this Court, for aircraft seizure and detention orders and WAA brought an application for an aircraft seizure and detention order in the Court of Queen's Bench for Manitoba. NAV Canada verbally gave notice of its intention to bring an application for similar relief and formally brought its application on April 6, 2010. On April 6, 2010, OMCIAA brought an application, in this Court, for an aircraft seizure and detention order.

4 The Airport Authorities and NAV Canada respectively ground their applications in s. 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (the "*Airport Transfer Act*") and s. 56 of *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("CANSCA")

5 Section 9(1) of the *Airport Transfer Act* reads:

9 (1) Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.

6 Section 56(1) of CANSCA reads:

56 (1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

7 The aircraft lessors, ILFC, Thomson, Sunwing, IAI and MCAP, brought motions seeking declarations, among other things, that none of NAV Canada, GTAA, OMCIAA and WAA were entitled to seize or detain various aircraft for any amounts alleged to be owing by SkyService to any of the Airport Authorities or to NAV Canada.

8 There is no dispute that prior to the Receivership Order, SkyService operated commercial aircraft that landed at the various airports and used the facilities and services provided by the Airport Authorities and NAV Canada. Nor is it disputed that, as a consequence, SkyService owes GTAA, OMCIAA and WAA for landing fees, general terminal fees, airport improvement fees and/or other charges related to the use of the airports and, further, that SkyService owes monies to NAV Canada for air navigation services provided by NAV Canada.

9 The Airport Authorities and NAV Canada are attempting to recover amounts due to them from SkyService by enforcing their rights as against the aircraft formerly used by SkyService and which had been leased from the various lessors. The lessors take the position that circumstances are such that the Airport Authorities and NAV Canada do not have the right to seize and detain such aircraft and that the aircraft should be returned to the lessors without payment to the Airport Authorities and NAV Canada.

II Parties

A. SkyService

10 SkyService was a Canadian airline, headquartered in Toronto and incorporated pursuant to the laws of Canada, that offered charter flight air service both domestically and internationally.

11 Prior to the granting of the Receivership Order, Skyservice operated a fleet of 20 aircraft. A number of these aircraft were flown in and out of Toronto Pearson Airport and the Ottawa Airport on a regular basis. Aircraft also flew in and out of Winnipeg International Airport.

12 Ten of these aircraft were utilized for flight services provided by Skyservice primarily to TCCI. These aircraft had been returned to the lessors of those aircraft shortly before the Receivership Order was granted. The other ten aircraft, being the aircraft that are the subject of the applications (the "Aircraft"), were utilized for flight services provided by Skyservice, primarily to Sunwing. It is acknowledged by all parties that the leases in respect of the Aircraft are "true" leases pursuant to which Skyservice had, subject to the terms of the applicable leases, the right to possess and use the Aircraft but not legal title.

13 The Aircraft that are the subject of this application, each of which was on the ground at either Pearson Airport or Winnipeg International Airport at the time the *Status Quo* Order (defined below) was granted, consist of the following:

<i>Aircraft Type</i>	<i>Serial Number</i>	<i>Mark Model Number</i>	<i>Aircraft Lessor</i>	<i>Location</i>
Airbus A320	1605	C-GTDH	Thomson	Toronto
Airbus A320	1571	C-GTDG	Thomson	Toronto
Airbus A320	1411	C-FRAA	MCAP	Toronto
Airbus A320	1780	C-GTDP	ILFC	Toronto
Boeing 757	29941	C-FLEU	Thomson	Toronto
Boeing 757	25053	C-GMYH	CIT	Toronto
Boeing 757	32447	C-GTBB	Thomson	Toronto
Boeing 757	24772	C-GTSJ	IAI	Toronto
Boeing 757	26158	C-FLOX	Thomson	Winnipeg
Boeing 757	29944	C-FOBH	Thomson	Winnipeg

14 On March 31, 2010, and until some days thereafter, the Aircraft were all registered in the name of Skyservice.

B. The Airport Authorities and NAV Canada

i. GTAA and OMCIAA

15 GTAA is the operator of Pearson Airport and is a designated airport authority under the *Airport Transfer Act*. OMCIAA is the operator of the Ottawa Airport and is a designated airport authority under the *Airport Transfer Act*.

16 As of March 31, 2010, Skyservice owed GTAA \$268,600.16 in respect of fees and charges related to its use of Pearson Airport. The largest portion of the amount owing to the GTAA by Skyservice is for Airport Improvement Fees ("AIF") collected by Skyservice from passengers on flights operated by Skyservice that departed from Pearson Airport during the months of February and March 2010. The AIF were collected by Skyservice on behalf of the GTAA. In addition, Skyservice owes an amount to the GTAA for aeronautical fees (e.g., landing fees, general terminal charges and aircraft parking fees) related to its use of Pearson Airport in the month of March 2010.

17 As of March 31, 2010, Skyservice owed OMCIAA \$223,913.93, related to its use of the Ottawa Airport. A portion of the amount owing to OMCIAA by Skyservice relates to the collection of AIF by Skyservice from passengers travelling on flights operated by Skyservice that departed from the Ottawa Airport in March 2010. The AIF were collected by Skyservice on behalf of the OMCIAA. The remaining amount owing to the OMCIAA is for aeronautical fees for the month of March 2010.

ii. WAA

18 The Receivership Order was obtained without notice to the WAA. On March 31, 2010, the WAA brought an application for an order lifting the stay and for the seizure and detention of the two aircraft located at the Winnipeg International Airport (the "Winnipeg Aircraft") pursuant to the *Airport Transfer Act*.

19 The application proceeded on an *ex parte* basis before the Manitoba Court of Queen's Bench on the afternoon of March 31, 2010. The WAA obtained the requested relief (the "Winnipeg Seizure Order") and proceeded to seize and detain the Winnipeg Aircraft.

20 After the granting of the WAA Seizure Order and the *Status Quo* Order, the Receiver and parties established a court-approved Release Protocol (defined below), providing, *inter alia*, that:

(a) If either of the GTAA or the OMCIAA seizure applications are successful, the WAA Seizure Order shall be considered a final seizure order, subject to any disputes concerning the quantum of the debt owed to WAA by Skyservice;

(b) Any dispute of the quantum of the WAA debt shall be determined in the Manitoba proceeding;

(c) In the event both GTAA and OMCIAA are unsuccessful, the Receiver and/or Thomson are permitted to proceed with their motions to set aside the WAA Seizure Order in Manitoba.

21 As a result of the Release Protocol, this Court has not been asked to determine whether WAA was entitled to the Winnipeg Seizure Order. WAA's agreed role in this proceeding is to support the applications brought by the GTAA, OMCIAA and NAV Canada.

iii. NAV Canada

22 NAV Canada is a private, not-for-profit corporation operating under CANSCA. NAV Canada owns and operates Canada's civil air navigation service and co-ordinates the safe and efficient movement of aircraft in Canadian domestic airspace and international airspace assigned to Canadian control by providing air traffic control, flight information, weather briefings, aeronautical information, airport advisory services, and electronic aids to navigation.

23 NAV Canada provided civil air navigation services in relation to the Aircraft and other aircraft owned or operated by Skyservice, and Skyservice incurred charges for these services, which have not been paid.

24 Skyservice owes NAV Canada \$1,100,561.67, plus applicable interest, for civil air navigation services provided to Skyservice. On March 2, 2010, NAV Canada issued invoice number CS098164 in the amount of \$558,786.47 to Skyservice for flights flown in February 2010. Skyservice has not paid the February 2010 invoice. On March 31, 2010, NAV Canada issued invoice number CS099563 in the amount of \$540,607.44 to Skyservice for flights in March 2010. In addition to these two invoices, NAV Canada is owed \$1,167.76 for flights which took place on March 31, 2010.

C. The Lessors

i. Thomson

25 Four of the Aircraft, bearing Canadian Registration Marks C-FLOX, C-FLEU, C-FOBH, and C-GTDG were leased to Skyservice by Thomson. The leases for these four aircraft are governed by an Aircraft Common Terms Agreement between Thomson and Skyservice, the terms of which are incorporated into each lease agreement for these aircraft. Under the terms of these leases, Skyservice has the right to possess and use the aircraft, subject to the terms of the leases, but Thomson remains the legal titleholder.

26 Thomson also arranged for Skyservice to lease from ORIX Aviation System Limited ("Orix") an aircraft bearing Canadian Registration Mark C-GTDH and to lease from Celestial Aviation Trading 23 Limited ("Celestial") an aircraft

bearing Canadian Registration Mark C-GTBB. In both of these cases, Thomson provided an indemnity to the legal titleholder. As a result, Thomson is functionally in the same economic position in respect of these aircraft as in respect of the four aircraft it leased to Skyservice directly. Since Skyservice's collapse, Thomson has been dealing directly with Skyservice and the Receiver in respect of these two aircraft. Celestial and Orix have assigned to Thomson certain of their rights against Skyservice in respect of the lease of these aircraft.

ii. *MCAP/IAI*

27 MCAP is a subsidiary of Mitsubishi Corporation and is the owner and legal and beneficial titleholder of one Airbus A320-200 aircraft, bearing manufacturer's serial number 1411 and formerly bearing Canadian registration marks C-FRAA. Skyservice and MCAP entered into a Novated Lease Agreement, dated September 28, 2000, as novated, supplemented, amended and restated on December 20, 2007 in respect of the MCAP Aircraft.

28 IAI is a subsidiary of Jetscape Inc. and is the owner and legal and beneficial titleholder of one Boeing 757-236 aircraft, bearing manufacturer's serial number 24772 and formerly bearing Canadian registration marks C-GTSJ. Skyservice and IAI entered into an Aircraft Lease Agreement, dated August 4, 2009 in respect of the IAI Aircraft.

iii. *ILFC/CIT*

29 ILFC and CIT are each lessors of one Aircraft to Skyservice. ILFC entered into an Aircraft Lease Agreement, dated January 11, 2001 as amended in respect of one Airbus A320-200 aircraft, bearing manufacturer's serial number 1780 and Canadian registration mark C-GTDP. CIT entered into an Aircraft Lease Agreement dated as of April 5, 2004, as supplemented and amended, in respect of one Boeing 757-236 aircraft, bearing manufacturer's serial number 25053 and Canadian registration mark C-GMYH.

III Facts

A. *Skyservice Insolvency, Cessation of Business, and Receivership*

30 On March 30, 2010, at approximately 5:30 p.m. all of Skyservice's officers and directors resigned.

31 Skyservice's directors and officers caused Skyservice to pay all statutory priority payables out of concern that it would not continue to operate after March 30, 2010.

32 On the morning of March 31, 2010, TCCI brought an *ex parte* application pursuant to section 243(1) of the BIA and s. 101 of the CJA for an order, *inter alia*, appointing a receiver over the assets, undertakings and properties of Skyservice.

33 At approximately 11:00 a.m., Gans J. granted the Receivership Order, appointing the Receiver of Skyservice and its assets, undertakings and properties, and imposing a stay of proceedings in respect of Skyservice.

34 The purpose of the Receivership Order was to wind-up Skyservice.

35 For the purposes of this application, the relevant portions of the Receivership Order are reproduced at Appendix "A".

36 The Receivership Order authorized the Receiver "to take possession of and exercise control over the Property" and to "permit any owner or lessor of, or person with an interest in, any such Aircraft Objects to take possession or control thereof", whether the Receiver has or has not taken prior possession or until thereof, on such terms (if any) as the receiver considers appropriate.

37 The Receivership Order did not allow either the "Receiver or Skyservice to carry on any business". The Receivership Order authorized, but did not obligate, the Receiver only "to wind down but not operate the business" of Skyservice.

38 On the morning of March 31, 2010, Skyservice issued a press release stating that it was ceasing operations.

39 A representative of Transport Canada, the airline's regulator, attended at the executive offices of Skyservice at or about the time of the Receivership Order and delivered a letter suspending the air operator certificate and aircraft maintenance organization licenses and authorities held by Skyservice under s. 103.07 (d) of the *Canadian Aviation Regulations*, SOR/96-433 (the "CARs") and s. 7.1(1)(b) of the *Aeronautics Act*, R.S.C. 1985, c. A-2, because Skyservice had ceased business and could no longer meet the requirements of its Air Operator Certificate, including possessing or having the authority or capacity to maintain or operate aircraft.

B. Termination of Leases, Seizure Applications and the Status Quo Order

40 Skyservice's cessation of business and the appointment of the Receiver constituted events of default under the various leases for the Aircraft and that, subject to the provisions in Receivership Order, those defaults would have permitted the legal titleholders to exercise remedies under the applicable leases.

41 At 1:00 p.m. on March 31, 2010, IAI instructed that the pre-signed termination of its lease that had been delivered to IAI by Skyservice when the lease was signed, be dated March 31, 2010, and, subsequently, delivered a confirmation of such termination to Skyservice at 4:39 p.m. on that day. Delivery of this confirmation of termination did not, however, result in any change of physical position, and IAI did not take physical possession or control of C-GTSJ.

42 Notwithstanding the Receivership Order, MCAP purported to terminate the lease for C-FRAA on March 31, 2010. MCAP did not take physical possession or control of C-FRAA.

43 There is no dispute that (a) only MCAP and IAI purported to terminate the leases in respect of Aircraft; and (b) none of the legal titleholders took physical possession of Aircraft, save and except after in accordance with the Release Protocol (defined below). Of all the lessors, MCAP and IAI took the most substantial and earliest action in seeking to repossess their aircraft.

44 It is also not disputed that Skyservice's cessation of business and the appointment of the Receiver constituted Events of Default under the Thomson Lease Agreements. Immediately upon being informed of the Receivership Order, Thomson attempted to contact the Receiver and was able to reach it by phone prior to 4:00 p.m. on March 31. The Receiver advised Thomson that it had neither the intention nor the power to take possession of the Thomson Aircraft. The Receiver agreed to assist Thomson in effecting the orderly return of the Thomson Aircraft and to assist Thomson in any way possible. Thomson referenced this conversation and sought additional information and confirmation concerning the security of the Thomson Aircraft in an email sent 6:12 p.m. Toronto time. There is no evidence that the Receiver provided its written consent to the actions of Thomson.

45 On the afternoon of March 31, 2010, at approximately 3:00 p.m. and four hours after the Receivership Order, GTAA issued its notice of application seeking an order authorizing it to seize and detain certain aircraft owned and operated by Skyservice then on the ground at the Pearson Airport. The initial hearing of the application commenced at approximately 5:00 p.m. on March 31, 2010.

46 Immediately upon becoming aware of the *ex parte* GTAA application and after the Receivership Order, solicitors for the lessors of the Aircraft attended in court to advise that the lessors of the Aircraft had issued, or were in the process of serving, terminations and/or confirmations of terminations of their leases. Counsel to the various lessors verbally requested the court to recognize such terminations and, if necessary, to lift any applicable stay of proceedings to allow the lessors of the Aircraft to protect their interests in the Aircraft, with appropriate evidence to be filed as soon as available. No order was made prior to the *Status Quo* Order. The lessors of the Aircraft subsequently filed their written motion on April 5, 2010.

47 Although GTAA's application was brought *ex parte*, counsel for the lessors of the Aircraft attended the first hearing. Counsel for NAV Canada also attended and verbally requested similar relief to that sought by the GTAA.

48 On April 6, 2010, NAV Canada served materials for its application pursuant to s. 56 of CANSCA seeking an order permitting it to seize and detain the Aircraft. While NAV Canada's Application was issued on April 6, 2010, NAV Canada had sought from the Court an order under s. 56 of the CANSCA on March 31, 2010, and the *Status Quo* Order refers to NAV Canada's application under s. 56 of CANSCA.

49 Under discussion during the afternoon of March 31, 2010 and fully anticipated by the parties during the afternoon, the *Status Quo* Order was granted, effective as of 6:30 p.m. on March 31, 2010. The *Status Quo* Order provided, among other things, that pending the hearing and determination of the GTAA and NAV Canada applications, no applications and no person, including the Receiver, would be permitted to take steps, or cause any steps to be taken, to possess or repossess the aircraft or to dispossess Skyservice of the Aircraft:

2. THIS COURT ORDERS that pending the hearing and determination of the Applications or further order of the Court obtained on notice to the Interested Parties, no person, including the Receiver, shall take or cause any steps to be taken to possess or repossess the Ontario Aircraft or any other aircraft owned or operated by the Debtor (with the Ontario Aircraft, the "Aircraft") or to dispossess the Debtor of the Aircraft, including, without limitation, the giving of any notice of termination under applicable leases, the seizure or taking control of any log books, certificates of registration or certificates of air worthiness, the changing of the registration of any Aircraft or the deregistration of any Aircraft.

50 Under the terms of the *Status Quo* Order, the lessors of the aircraft were permitted to take limited measures to protect and maintain the aircraft.

51 As indicated above, on March 31, 2010, the WAA also brought an application for an order lifting the stay and for the seizure and detention in respect of two of the Thomson Aircraft, which were at that time grounded at the Winnipeg International Airport. The application proceeded on an *ex parte* basis before the Manitoba Court of Queen's Bench on the afternoon of March 31, 2010. The Winnipeg Seizure Order was granted on March 31, 2010. The WAA proceeded to seize and detain the Winnipeg Aircraft, and both Thomson and the Receiver subsequently brought an application to have this order set aside.

52 Following the granting of the *Status Quo* Order, the parties negotiated a protocol for the release by GTAA, OMCIAA, WAA and NAV Canada of their claims against the Aircraft upon the lessors posting cash security with the Receiver for the amounts claimed to be owing to the various authorities by Skyservice (the "Release Protocol"). The Release Protocol was approved pursuant to an order dated April 9, 2010. The endorsement specifically provides:

Notwithstanding the cessation of the application of the provisions of the *Status Quo* Order to the Aircraft referenced above, the Seizure Application shall be determined based on facts and legal circumstances as they existed at 6:30 p.m. (Toronto time) on March 31, 2010, being the effective date of the *Status Quo* Order.

53 As part of the release of the Aircraft to the lessors contemplated by the Protocol Order, the Receiver sought and obtained court approval to enter into, *inter alia*, Return Agreements with the Lessors in the form specified in the Order dated April 15, 2010. The Aircraft Return Agreements specified the terms and conditions upon which Skyservice would transfer possession and custody and control of the Aircraft to the lessors.

54 The Lessors did not obtain possession and control of the Aircraft until after the issuance of the Aircraft Return Order on April 15, 2010.

IV Law

A. Canada 3000

55 Issues similar, if not identical, to those involved in this dispute have been the subject of extensive litigation. The Supreme Court of Canada addressed the issue in *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 (S.C.C.)

("Canada 3000"). In that case, the issue arose as a result of the collapse of Inter-Canadian (1991) Inc. Airline in 1999 and, in 2001, of Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000 Airlines").

56 In *Canada 3000*, Canada 3000 Airlines brought an application under the *Companies' Creditors Arrangement Act* ("CCAA"). An initial order was granted that stayed all proceedings by creditors pending the filing of a plan of arrangement. Motions were brought by various airport authorities for orders lifting the stay of proceedings and/or declarations that the stay did not affect them and for seizure and detention orders until all outstanding fees owed to the authorities had been paid. NAV Canada also brought a motion to lift the stay to allow it to make an application to seize and detain the aircraft and to lift the stay pursuant to s. 69.4 of the BIA and an order that the assignments in bankruptcy made by Canada 3000 Airlines was without prejudice to NAV Canada's statutory payment, seizure and detention rights. Cross motions were brought by various aircraft lessors seeking orders for declarations that the airport authorities and NAV Canada were not entitled to seize or detain the aircraft owned by them.

57 The lower court decisions of *Canada 3000* are reported at [2002 CarswellOnt 1598](#) (Ont. S.C.J.) and [2004 CarswellOnt 149](#) (Ont. C.A.).

58 Justice Binnie in *Canada 3000* set out the question considered by the Supreme Court of Canada:

1. When an airline collapses leaving unpaid bills for airport charges and air navigation services, the question becomes who takes the financial loss (or, as it is sometimes said, "the haircut"), the people who ultimately own the aircraft or the people who were obliged to (and did) provide the airport and navigation services?

2. The question lands before the court because of the collapse of Inter-Canadian (1991) Inc. Airline in 1999 and, in 2001, of Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"). The answer depends on the statutory interpretation to be given to provisions of the *Airport Transfer (Miscellaneous Matters) Act*, S. C. 1992, C.5 ("Airports Act"), and the *Civil Air Navigation Services Commercialization Act*, S. C. 1996, C.20 ("CANSCA"). The important context for this interpretation is the unusual nature of the modern airline business.

59 In the course of his reasons, Justice Binnie addressed the detention remedy with words that, if applicable, are of direct relevance to the present matter:

73. I agree with Cronk J.A. (at para. 133) that the detention remedy under the statutes is subject to several constraints: (i) the remedy is not automatic and requires prior court authorization; (ii) the remedy is discretionary and may be subject to such terms as the court considers necessary; (iii) under s. 9(3) of the *Airports Act*, and s. 56(3) (s) of *CANSCA*, the court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; ...

74. On the other hand, the conclusion of Juriansz J., dissenting, was correct that the "wording of the detention provisions makes apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons, who are not liable to pay the outstanding charges but have property interests in the aircraft, is of no consequence.

60 It seems to me that, given that this case will be determined by the applicability of *Canada 3000*, it is appropriate to reproduce the paragraphs of *Canada 3000* which are, in my view, most relevant to this case:

3. After decades of financial turbulence, an airline in the modern era may consist of little more than a name, with its aircraft leased, its suppliers on week to week contracts and even its reservation and yield management systems outsourced to one of the global service providers such as Sabre or Galileo. Start-ups are relatively easy, balance

sheets are often thin, and failure can be quick and (to outsiders) unexpected, as the history of Canada 3000 illustrates. When a financial collapse occurs (and these have been frequent in Canada and elsewhere in the past decade), there is little meat on the corporate bones for unsecured creditors. Doing business with such airline operators carries significant financial risks, yet the appellant Canadian airports operating under government supervision are obliged by statute to allow financially troubled airlines to make use of their services (and sometimes the airport will not know if an airline is in financial trouble or not). Airport costs are largely recovered through landing fees. If these and other fees go unpaid, the airport is out of pocket for the cost of the service it was obliged by law to provide.

.....

5. When Parliament adopted its policy of privatizing major airports and navigation services in the early 1990s putting such services on a commercial footing, potential investors were expected to insist on some assurance that they would in fact be financially viable serving the chronically unstable aviation business. Thus, Parliament decided to extend to the private operators of airport and navigation services a statutory power to apply to a superior court judge for an order to seize and detain aircraft until outstanding charges are paid, similar to the power Parliament had earlier conferred on the Crown in pre-privatization days under the *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 4.5.

.....

9. In my view, the appellants are entitled to obtain judicially-authorized seize and detain orders (hereinafter sometimes collectively referred to as the detention remedy) to be exercised against the security posted in substitution for the aircraft. The matters should be remitted to the motions judges to work out the details of the orders. Considered in the context in which the detention remedy was intended by Parliament to operate, the detention remedy cannot be circumvented as suggested by the respondents by the expedient of leasing arrangements made between the airlines and the aircraft lessors. The detention remedy is purely statutory and Parliament's intention to create an effective collection mechanism against the aircraft itself owned or operated by the person liable to pay the amount or charge must be given full effect.

.....

17. The termination provisions varied somewhat from lease to lease. Under some, the leases came to an end and the lessors became entitled to repossession upon the granting of the *CCAA* order, under others by the cessation of operations, and under the rest by the assignment in bankruptcy. The CCAA stay operated, in effect, as an interim bar to repossession (see s. 11.31 CCAA). At the time the detention remedy was sought, the aircraft sought to be seized were grounded at the Canadian airports listed in the style of cause of the various proceedings. (emphasis added)

.....

37. As this Court noted in 1915, part of the context is "the condition of things existent at the time of the enactment": *Grant Trunk Railway v. Hepworth Silica Pressed Brick Co.* (1915), 51 S.C.R. 81 (S.C.C.), at p. 88. At the time the measures in question here were enacted, airlines insolvencies and bankruptcies had become a fact of life throughout the airlines industry. Many of the planes flown in and out of and across Canada were leased to, and flown by, airlines in, or close to, bankruptcy protection. Under the interpretation offered by the respondents and the majority decisions of the Courts of Appeal, the detention remedy would be opposable to everybody but the titleholder, whose aircraft is often the only asset to survive the financial wreckage. Parliament would be taken to have intended a remedy that is least effective when it is most needed. It is more likely that Parliament fully appreciated that in dealing with aircraft flown in and out of jurisdictions under complex leasing arrangements, the only effective collection scheme is to render the aircraft themselves available for seizure, and thereafter to let those interested in them, including legal titleholders, registered owners, sublessors and operators, to resolve their dispute about where the money is to come from to pay the debts due to the service providers. I should add that I agree with Juriansz J. that the legal titleholders are not without benefit from the services provided, although the benefit is indirect. Without the day to day flight operations the legal titleholders would have no business. They lease the aircraft intending them to be used in the very activities for which the services are provided. By and large, the legal titleholders are sophisticated corporations. They are knowledgeable about the ways of the industry in which they have chosen to participate.

.....

62. If the legal titleholders are not directly liable for the charges due to the service providers, they argue that it would be unfair and contradictory to hold their aircraft hostage for the payment. Section 56 of *CANSCA* and s. 9 of the

Airports Act should be interpreted consistently with s. 55(1) of *CANSCA*, the legal titleholders argue, and their right to repossess the aircraft on termination of the lease should take priority over the statutory remedy.

63. On the other hand, Nuss J.A., dissenting the Quebec Court of Appeal, put the contrary position:

If the titleholder could obtain release of the seized aircraft without the payment of the outstanding charges or providing security, the intention and purpose of the Detention Provisions enacted by Parliament would be defeated. This is so because the debt is constituted of charges incurred by the operator of the aircraft (who is often, as in this case, the registered owner) and not by the titleholder. Thus, if the contention of [the titleholders] were to prevail, the titleholder, who is neither the operator nor the "owner" within the meaning of the statutes, could always obtain release of the aircraft and the charges would not be paid. The recourse provided by Parliament would, inevitable, be of not avail. [para. 126]

I believe that Nuss J.A. is correct on this point.

69. The legal titleholders argue that the claim of NAV Canada and the airport authorities to detain the aircraft must yield to their right under their respective leases to repossession. They liken the seizure and detention remedies to a *Mareva* injunction, in which the assets are frozen while various parties work out their respective entitlements; see *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). However, in my view, there is no need to resort to analogies, especially loose analogies (e.g. *Mareva* injunctions are interlocutory, whereas the detention remedy is available whether or not a judgment for the collection of the charge or amount has been obtained. Moreover, *Mareva* injunctions are directed at persons (*Aetna Financial Services*, at pp. 25-26), whereas the seizure and detention remedy targets the aircraft itself).

70. The *CARs*, adopted pursuant to the *Aeronautics Act*, provides that an "operator" in respect of an aircraft "means the person that has possession of the aircraft as owner, lessee or otherwise" (s. 101.01(1)). At the dates of the applications for seizure and detention orders, Canada 3000 and Inter-Canadian were still the registered owners of the aircraft. Accordingly, if the Court is to read the words of the detention remedy in the context of the realities of this industry previously discussed, it seems to me that those remedies must be available against the aircraft of Canada 3000 (except any aircraft already repossessed by the titleholder prior to the *CCAA* application on November 2, 2001) and Inter-Canadian. (Once a titleholder reclaims possession, it becomes an operator in possession within s. 55(1) of *CANSCA*. However, as its possession post-dates the charges, no personal liability is incurred on that account). (emphasis added)

72. The legal titleholders are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. The legal titleholders can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions with the airlines. In the case of aircraft at issue in these appeals, many if not all of the leases provided for substantial security deposits. For example, the total amount posted by Canada 3000 to the ILFC as security deposits for airport fees and charges was approximately \$15,305,500. It is unnecessary to catalogue all of the possible security arrangements, but these deposits demonstrate a legal titleholder's ability to negotiate protection at a time when the airline is solvent to cover the amounts in overdue charges that the airline may eventually be required to pay to the statutory service providers.

85. The titleholders argue that it would be extremely unfair that one titleholder's aircraft, however recently leased, may ultimately be held hostage for all of the unpaid user charges of the airline that flew it. They contend that if (which they deny) the titleholders must pay charges in order to recover an aircraft, they should only be required to pay the charges incurred by the individual aircraft sought to be released as opposed to the charges outstanding in relation to the whole fleet of the defaulting airlines.

86. However, the statute says that an aircraft operated by the person liable to pay the amount can be seized and, absent further court order, need not be released until the entire amount owed by that *operator* has been paid. This

point is made clearly by the release provisions in s. 9(3) of the *Airports Act* and s. 56(3) of *CANSCA*. The authorities must only release the aircraft if "the amount in respect of which the seizure was made is paid". Since s. 9(1) and s. 56(1) do not distinguish between the amounts accumulated by specific aircraft operated by a defaulting owner or operator, it seems clear that the amount in respect of which the seizure was made is the entire amount owned by that registered owner or operator. (emphasis in original)

61 *Canada 3000* stands for two important principles. The first is that the right to the detention remedy is subject to any stay that is in place. The second is that policy demands that the risk of default be shifted from airport authorities and NAV Canada onto independent private sector titleholders who are better positioned to protect themselves from default and, as a result, the CARs must be interpreted on terms favourable to airport authorities and to NAV Canada. For this reason, the term "operator" was defined by possession and repossession of the aircraft. If *Canada 3000* is taken to be the binding authority, the lessors must show that they regained physical possession of the aircraft prior the Receivership Order.

B. Zoom Airlines

62 Priority issues as between airport authorities, NAV Canada and aircraft lessors were again addressed in *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (Alta. C.A.) ("*Zoom*").

63 In *Zoom*, the lessor's agent actually boarded the aircraft in question and informed the pilot he was taking possession of the aircraft and took possession of the certificate of airworthiness, the certificate of registration and the log books. Subsequent to and unaware of the agent's actions, the airport authority obtained an *ex parte* order seizing and detaining the aircraft. Only after *both* of these actions took place did Zoom file a Notice of Intention under the BIA. The lessor then moved to set aside the seizure and detention order.

64 The decision of the Court of Appeal for Alberta, in considering *Canada 3000*, was that the Supreme Court of Canada made an exception to the airport authorities' detention remedy in cases where the titleholders repossessed aircraft prior to the issuance of an order under s. 9 of the *Airport Transfer Act*. The fact that the precedent in *Canada 3000* involved the CCAA did not prevent the application of the exception. At paragraph 36, Phillips J.A. and O'Brien J.A. stated:

What distinguishes this case from *Canada 3000* is that both *Canada 3000* and *Inter-Canadian*, the lessees and debtors, still owned their aircraft at the time the detention order was granted. More particularly, with respect to *Canada 3000*, the lessors had sought to reclaim possession of the aircraft after the CCAA stay had been imposed and after the airport authorities had applied for seizures orders. In this case, at the time of the detention order, unlike in *Canada 3000*, AERCAP had already taken active steps to obtain legal control and custody. In fact, it had repossessed GZUM and was, therefore, its owner, thus falling into the exception contemplated by Binnie J. at paragraph 70.

65 The majority went on to provide further comment on a submission made by the airport authority to the effect that the detention remedy is not a race to repossess the aircraft. At paragraph 37, the Court stated:

The authority raises concerns, on the basis of policy, whereby holding AERCAP's termination of the lease changed the ownership of GZUM, and precluded the authority's detention remedy from operating, the court has recreated a race to repossess the aircraft. This suggestion overstates the situation. No race will take place if the authority has taken the precaution of obtaining prior security. Failing that, the authority will be aware that its detention claim will be limited if a lessor has repossessed the aircraft prior to an order authorizing its seizure and detainment. The statute does not require that the lessor provide notice to the authority prior to repossessing the aircraft...

IV Issues

66 From the foregoing discussion, it seems to me that the following questions will be dispositive of the applications and motions:

1. Can the case at bar be distinguished from *Canada 3000*?
2. If *Canada 3000* cannot be distinguished, it becomes the controlling authority, and the sole question is whether any of the lessors repossessed the Aircraft prior to the Receivership Order and thus regained their status as owners and operators?

V The Parties' Submissions

67 The Lessors argued that there are sufficient factual differences such that *Canada 3000* principles should not apply. The Airport Authorities and NAV Canada take the opposite position, submitting that the *Canada 3000* decision applies equally to the issues raised in this case.

68 MCAP and IAI oppose the applications of the Airport Authorities and NAV Canada for detention orders on the grounds that SkyService was not the "owner" or "operator" of the leased aircraft at the time of the *Status Quo* Order was issued.

69 Counsel to MCAP and IAI submits that the principal issues to be decided are as follows:

(a) Were the Airport Authorities and NAV Canada entitled to Detention Orders over the leased aircraft at the critical time?

(i) Was SkyService the "owner" at the critical time?

(ii) Was SkyService the "operator" at the critical time?

(iii) Were the Airport Authorities and NAV Canada in a better position to protect themselves than were the aircraft Lessors?

(iv) Were the procedural requirements for the Detention Orders met?

(v) Does the Receivership Order stay the Airport Authorities and NAV Canada's proceedings?

(b) Were the Lease Terminations valid?

(i) Did the Receivership Orders stay the termination of the aircraft leases?

(ii) In the alternative, should this court lift the stay to allow termination *nunc pro tunc*?

70 Counsel to MCAP and IAI submit that paragraph 11 of the Receivership Order restrained suppliers from terminating the supply of such goods or services "as may be required by the Receiver". Pursuant to the Receivership Order, the Receiver and SkyService were prevented from carrying on business. Counsel further submits that the Receiver had indicated that it would not take possession of the aircraft. Consequently, since the leased aircraft were not "required by the Receiver", the termination of the Aircraft Leases was not restrained.

71 Alternatively, counsel submits that if the Receivership Order restrained the right of the lessors to terminate the aircraft leases, MCAP and IAI requested that the court lift the stay to authorize and ratify the lease terminations issued by them, *nunc pro tunc*, prior to the determination of any potential detention order against any aircraft.

72 Counsel also argues that it is not the intention of receivership proceedings to deprive creditors or other stakeholders of their property or rights.

73 Further, counsel submits that in restructuring proceedings under Part III of the BIA or the CCAA, a broad stay is required to grant a debtor significant protection from creditors so as to enable it to stabilize operations and formulate

a plan. In bankruptcy, by contrast, counsel submits that the protection is much more limited: creditors with claims provable in bankruptcy are stayed from enforcing remedies against the bankrupt or its property, and property not owned by the bankrupt is returned to its proper owner. In this case, where the purpose is to liquidate Skyservice, counsel submits that this proceeding is very similar to a bankruptcy.

74 Counsel further submits that any stay in these proceedings should not operate so as to prejudice the owners of assets such as the lessors and, in particular, the stay should not apply to prevent the lessors from protecting their rights in the Aircraft as against other stakeholders such as the Airport Authorities and NAV Canada.

75 Having identified the issue above as the application of *Canada 3000*, it seems to me that a number of the submissions of the lessors are miscast and need not be considered fully. The critical issue to be addressed is whether there was a repossession of the aircraft within the meaning of *Canada 3000* and *Zoom*.

VI Analysis

76 The *Canada 3000* and *Zoom* decisions both involved insolvent air carriers. Skyservice was also insolvent. The priority issue determined in *Canada 3000* and *Zoom* is, in many respects, the same issue that is placed before the court in this case.

77 I am required to address, as a preliminary matter, the lessors' argument that a stay in the receivership context cannot be equated with stays under the CCAA or Part III of the BIA because, unlike a receivership, the stays in the CCAA and Part III of the BIA demand that the debtor receive broad protection. It is sufficient to dispose of this submission by demonstrating that it is the language of the Receivership Order, and not the receivership context, generally, that defines its parameters.

78 The Receivership Order established a structured court-appointed process to wind up the affairs of Skyservice, as well as the role of the Receiver in that process. It also sets out control mechanisms that have the intent and effect of stabilizing the transition from an operating business to a wind-up of an operating business.

79 The combined effect of paragraphs 2 and 3 of the Receivership Order is that the Receiver has a role to play. The Receiver is empowered and authorized, but not obligated, to permit a lessor of Aircraft Objects (defined at paragraph 3(c) of the Receivership Order as "airframes, aircraft engines and related accessories, parts, equipment, manuals, records and other property") to take possession and control of the Aircraft Objects. While this provision does not obligate the Receiver to take action, it also does not permit the lessors to take unlimited or unsupervised action to obtain possession and control of the Aircraft Objects. Paragraph 3 is specifically addressed to the Receiver. In my view, the Receiver has to be involved and has to take certain steps to communicate to the lessor that it is entitled to take possession and control of the Aircraft Objects.

80 The role of the Receiver, in this respect, is consistent with accepted practice. Generally speaking, the situation at the time a receivership application is heard can be somewhat uncertain — even chaotic. The Receiver is called upon, as a court officer, to ensure that the rights and remedies of creditors and stakeholders are controlled and supervised to the degree required and to ensure that the rights and priorities of all creditors and stakeholders are respected in accordance with their relative rights and priorities. This includes, in my view, providing the Receiver with the opportunity to determine whether security is properly registered and perfected, or, in the case of an equipment lessor, to determine, in addition to registration, whether the lease is a true lease or a financing lease.

81 It is desirable, if not necessary, for the Receiver to be in control of the situation. The alternative is to create a situation where chaos will govern and a premium will be placed on self-help remedies with victory going to those who take swift action.

82 In order to preserve a degree of control, it is common for a receivership order to include control provisions to restrain creditors and stakeholders from taking self-help remedies absent the consent of the Receiver or leave of the Court.

83 In this case, such control provisions are outlined in paragraphs 7-11 and 13. The critical control point is set out in paragraph 9. Paragraph 9 is a stay of proceedings against the Debtor or the Property. It restricts the exercise of all rights and remedies against the Debtor, the Receiver, or affecting the Property. Rights and remedies are stayed and suspended except with the written consent of the Receiver or leave of the Court. The provision has certain exceptions that are not applicable here.

84 Even if it is accepted that the Receiver has no involvement in Aircraft Objects despite paragraph 3 (a position that I reject), the effect of paragraph 9 is to halt any action of the lessors to enforce remedies against SkyService, including termination of leases.

85 The announcement on the afternoon of March 30, 2010 gave rise to certain events of default in respect of certain leases, but that, in itself, does not amount to a repossession of the aircraft within the context of *Canada 3000* and *Zoom*. As of the end of March 30, 2010, the Aircraft had not been repossessed.

86 Certain lessors had embarked on a course of action which, absent the control provisions in the Receivership Order may have led to a repossession of the Aircraft. The required steps to terminate the lease and to repossess the Aircraft had not been completed by the time the Receivership Order was granted. There is no evidence that any lessor terminated an Aircraft lease prior to the Receivership Order.

87 The two lessors who were further advanced, namely, MCAP and IAI, had taken steps to deliver pre-signed notices of termination to the lessors, but as of the relevant time — 11:00 a.m. on March 31, 2010 — they had yet to repossess the aircraft or the critical log books. Default by SkyService alone does not constitute a repossession.

88 Upon the granting of the Receivership Order, the aforementioned control provisions were engaged.

89 Any action taken to terminate an Aircraft lease with SkyService after the granting of the Receivership Order is the enforcement of a remedy against SkyService, which, absent the written consent of the Receiver or leave of the Court, is expressly prohibited under paragraph 9 of the Receivership Order. No written consent of the Receiver was provided and no leave of the Court was granted.

90 It is acknowledged that MCAP and IAI delivered notices of termination to SkyService after the Receivership Order came into effect. The delivery of the notices of termination to SkyService was, in my view, a step taken by them to enforce rights and remedies against SkyService. The ultimate goal was to obtain possession of their asset but, in doing so, the lessors acted in a manner that required consent of the Receiver or leave of the Court, which, as noted, did not occur.

91 In this case, the Receiver did not participate or sign-off on the return of any equipment until April 15, 2010, long after the granting of the *Status Quo* Order and long after the applications had been filed by the Airport Authorities and NAV Canada.

92 I have no doubt that the lessors, being aware of the stay and the state of the law, took these steps in an effort to put forth the position that the leases had been terminated, that they were entitled to repossess the Aircraft, and that the effect was such that SkyService lost control of the airplanes and was not the owner or operator of the airplanes in question.

93 The fundamental difficulty and fatal flaw with this position was that proceedings to enforce any remedy as against SkyService were stayed.

94 Parties do not have an unfettered right to do as they please once receivership has been engaged. In my view, *Canada 3000* addresses all of the arguments put forth by the aircraft lessors and it is a complete answer to the position put forth by the aircraft lessors.

95 The outcome is, in my view, clear. There was no repossession of Aircraft prior to the Receivership Order. Repossession could not occur after the granting of the Receivership Order, absent consent of the Receiver or leave of the

court, neither of which occurred. Therefore, at the time that the *Status Quo* Order was granted, no lessor had completed repossession in the manner set out in *Zoom*. In fact, no repossession took place until the order of April 15, 2010.

96 At the time of the Receivership Order and the *Status Quo* Order, Skyservice was in possession of the airplanes. It was still the registered owner. It may not have had the ability to operate the Aircraft but, within the context of the principles set out in *Canada 3000*, it was, in my view, the "owner" or "operator" of the Aircraft. It remained "owner" or "operator" of the Aircraft as of April 6, 2010, by which time GTAA had amended its application, OMCIAA had formally commenced its application and NAV Canada had formally commenced its application. The priority dispute that then evolved with the Airport Authorities and NAV Canada was identical to that in *Canada 3000*.

97 This is not the scenario that occurred in *Zoom*, where specific steps were taken by the lessor that were clear and final and which were outside of a court process or a BIA process. In *Zoom*, it was not until the aircraft was repossessed that the Notice of Intention to file a proposal was filed under the BIA. That is not the situation in this case, which is, therefore, distinguishable on this basis, among others.

98 The Aircraft Authorities and NAV Canada take the position that they are not affected by the stay, as the Aircraft are not Property of Skyservice and they took no action as against Skyservice.

99 Any remedy that the Aircraft Authorities and NAV Canada have against Skyservice is as a creditor and the Aircraft Authorities and NAV Canada are stayed from exercising such remedies. However, the remedy that they have as against the Aircraft is based in the *Airport Transfer Act* or the CANSCA and can be exercised provided that Skyservice is the "owner" or "operator" of the Aircraft, and such remedy is unaffected by the stay.

100 The lessors take the position that the Aircraft were the subject of true leases as between the lessors and Skyservice. As such, the Aircraft do not form part of the Property of Skyservice, as it is their own. It follows, they argue, that they were, from the outset of the Receivership, not constrained from exercising their remedies under their various leases. I disagree. I have already determined that regardless of their position with respect to the stay, the lessors, by virtue of paragraph 9 of the Receivership Order, had not completed repossession prior to the *Status Quo* Order.

101 The functional result is that at the time of the *Status Quo* Order, the application of the Aircraft Authorities and NAV Canada had not been determined and neither had the demands of the lessors.

102 The period following the granting of the *Status Quo* Order was, in my view, equivalent to the position of the parties that were before the court in *Canada 3000*. I must follow the same result.

103 The law, set out in *Canada 3000*, as applied to the facts of this case require me to recognize the priority of the Aircraft Authorities, namely, GTAA and OMCIAA (as they brought applications prior to repossession) and WAA (by virtue of their protocol agreement) and by NAV Canada.

104 To hold otherwise, would provide the lessors with a remedy that the Supreme Court of Canada clearly indicated they do not have. Absent a completed repossession, priority goes to the Aircraft Authorities.

105 The final issue for consideration is whether s. 56 of the CANSCA s. 9 of the *Airport Transfer Act* afford the Court the discretion to refuse the granting of a seizure order where the statutory prerequisites have been satisfied.

106 The lessors submit that there is such a discretion and it should be exercised in this case so as to avoid the result sought by the Airport Authorities and NAV Canada.

107 On this issue, I am in agreement with the argument of counsel to WAA, who submits that the wording in s. 9 of the *Airport Act* does not explicitly confer a discretion on the court with respect to whether or not a seizure order should be granted (s. 56 of the CANSCA has the same provision.) The statute does not provide that the court "may issue an order". The statute only speaks to the court's discretion with respect to the terms of the seizure order.

108 The court's role is to determine whether the statutory prerequisites have been met, and, in this case, I have determined they have been. Based on the analysis in *Canada 3000*, which is applicable in this case, the Airport Authorities have satisfied the prerequisites under s. 9 of the *Airport Transfer Act* and NAV Canada has satisfied the prerequisites under s. 56 of CANSCA.

109 It seems clear that, having made this determination, the seizure order must issue, subject to such terms as the court considers necessary.

110 Guidance on the appropriate terms is provided by Binnie J. in *Canada 3000*, at paragraphs 91 and 92, specifically that the judge can work out the terms, "provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled."

111 As counsel to WAA points out, the comments of Binnie J. taken as a whole, do not afford the court discretion to refuse to grant a seizure order where the statutory prerequisites have been satisfied. Rather, the court is to grant the order and fashion the terms to ensure payment of unpaid fees. To do otherwise would frustrate the intent of the statutory provision.

112 In the alternative, if there is a discretion conferred by statute not to grant a seizure order, I would decline to exercise such discretion in favour of the lessors for two reasons. First, I am satisfied that the conduct of the Airport Authorities and NAV Canada was not improper and, secondly, the denial of an effective remedy would run counter to the opinion of the Supreme Court of Canada as set out in *Canada 3000*.

VII Disposition

113 The Applications of the GTAA, OMCIAA and NAV Canada for aircraft seizure and detention orders are not affected by the stay, are granted and are enforceable up to the full amount owing to GTAA, OMCIAA and NAV Canada.

114 The motions brought by the Aircraft lessors for the requested declaration in respect of the entitlements of the Airport Authorities and NAV Canada are dismissed.

115 Issues relating to quantum can be addressed at a 9:30 a.m. appointment, if necessary.

116 If the parties are unable to reach agreement in costs, written submissions to a maximum of four pages may be filed within 30 days by the parties.

Applications granted; motions dismissed.

Appendix "A" — Excerpts of Justice Gans' March 31, 2010 Receivership Order

Appointment

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, FTI Consulting Canada Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

Receiver's Powers

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property in respect of the preservation, protection, collection and realization thereof and, without in any way limiting the generality of the foregoing (but subject to the limitations in clause (d) below), the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part of parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) in the case of Property consisting of airframes, aircraft engines and related accessories, parts, equipment, manuals, records and other property ("Aircraft Objects"), to permit any owner or lessor of, or other person with an interest in, any such Aircraft Objects to take possession or control thereof, whether the Receiver has or has not taken prior possession or control thereof, on such terms (if any) as the receiver considers appropriate;

.....

(l) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

.....

(t) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

.....

No Proceedings Against the Receiver

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continue against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Debtor or the Property

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

No Exercise of Rights or Remedies

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA to the same extent that counterparties are entitled to exercise remedies thereunder pursuant to section 65.1 of the BIA in proposal proceedings, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

No Interference with the Receiver

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

Continuation of Services

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software,

communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal price or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

.....

Employees

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of any or all such employees. In this regard, the Receiver may confirm the continuation of the employment, by the Debtor, of the employees pursuant to a letter from the Receiver on behalf of the Debtor. The Receiver shall not be liable for any employee-related liabilities, including any successor or other employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay on behalf of the Debtor, or in respect of its obligations under section 81.4(5) or 61.6(3) of the BIA or under the Wage Earner Protection Program Act.

TAB 12

B.C. Statutes

Oil and Gas Activities Act

Part 3 — Oil and Gas Activities (ss. 21-43)

Division 2 — Rights and Obligations

S.B.C. 2008, c. 36, s. 39

s 39. Suspension of activity

Currency

39. Suspension of activity

39(1) If a permit holder begins an oil and gas activity but ceases to have the interests in land or authorization referred to in section 34 necessary to carry out that activity, the permit holder must immediately suspend all oil and gas activities and related activities being carried out on that land, unless the commission approves the continuation of those activities under subsection (2).

39(2) The commission, on application by a permit holder referred to in subsection (1), may

- (a) approve the continuation of the permit holder's oil and gas activities and related activities, and
- (b) on granting an approval under paragraph (a), impose additional conditions on the permit holder's permit and authorizations, if any.

39(3) A permit holder with permission to drill or operate a well must immediately suspend its drilling and operations if

(a) the permit holder ceases

- (i) to be the owner of the petroleum and natural gas rights or the holder of the location in respect of the well,
- (ii) to have a valid agreement with the owner of the rights or the holder of the location referred to in subparagraph (i) authorizing the drilling or operation, as applicable, or
- (iii) to hold a storage reservoir lease issued under section 130 of the *Petroleum and Natural Gas Act*, or

(b) the minister rescinds a declaration made under section 24(5) with respect to the permit holder and those activities.

39(4) A permit holder who suspends activities under subsection (1) or (3) must

- (a) immediately notify the commission of the suspension,
- (b) comply with the prescribed requirements, and
- (c) carry out any actions as directed by the commission.

Amendment History

2010, c. 9, s. 27

Currency

British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

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B.C. Statutes

Oil and Gas Activities Act

Part 3 — Oil and Gas Activities (ss. 21-43)

Division 1 — Permits

S.B.C. 2008, c. 36, s. 24

s 24. Application for permit and authorization

Currency

24. Application for permit and authorization

24(1) Subject to subsection (4), a person may apply to the commission for a permit by submitting, in the form and manner the commission requires,

- (a) a description of the proposed site of the oil and gas activity,
- (b) the information, plans, application form and records required by the commission,
- (c) a written report, satisfactory to the commission, regarding the results of the consultations carried out or notification provided under section 22, if any,
- (d) the prescribed information,
- (e) the prescribed records, and
- (f) the security required under section 30.

24(2) An application for a permit under subsection (1) may be consolidated with an application for an authorization.

24(3) Despite anything in a specified enactment, the commission may not grant an authorization to a person for a related activity unless the person meets the prescribed requirements.

24(4) A person may not submit an application for a permit to drill or operate a well, other than a water source well, unless

- (a) the person is the owner of the petroleum and natural gas rights or is the holder of the location in respect of the well,
- (b) the person has an agreement with the owner or the holder of the location referred to in paragraph (a) authorizing the drilling or operation, as applicable,
- (c) the person is the holder of a storage reservoir lease issued under section 130 of the *Petroleum and Natural Gas Act*, or
- (d) the minister has approved the submission under subsection (5).

24(5) For the purposes of subsection (4)(d), the minister may

- (a) approve the submission by a person of an application for a permit to drill a well if the well is to be drilled for exploratory or research purposes only, and

(b) in approving a submission under paragraph (a), declare that, if a permit is issued to the person on the basis of the submission, the person is not required to be an owner or holder referred to in subsection (4) or have the agreement referred to in that subsection in order to drill or operate the well for the purposes referred to in paragraph (a).

Amendment History

2010, c. 9, s. 18; 2014, c. 10, s. 3; 2015, c. 40, s. 5

Currency

British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

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B.C. Statutes

Oil and Gas Activities Act

Part 5 — Compliance and Enforcement (ss. 48-68)

Division 2 — Orders

S.B.C. 2008, c. 36, s. 53

s 53. Control of oil and gas activities

Currency

53. Control of oil and gas activities

53(1) If, in the commissioner's opinion,

(a) a permit holder has engaged in a pattern of conduct that shows that the person is unfit to carry out the oil and gas activities permitted by the permit holder's permit, and

(b) there is a risk to public safety, the environment or petroleum and natural gas resources,

the commission may

(c) enter, seize and take control of any well, pipeline, facility or storage reservoir together with any associated chattel and fixture and any pertinent records,

(d) either discontinue all activity or take over the management and control of the well, pipeline, facility or storage reservoir,

(e) take the steps the commission considers necessary

(i) to prevent the flow or release of petroleum, natural gas or other substances from any stratum that a well enters, including plugging a well at any depth, or

(ii) for public safety or to protect the environment, and

(f) carry out any other prescribed actions.

53(2) If the commission takes control of a well, pipeline, facility or storage reservoir,

(a) the commission may issue orders concerning the well, pipeline, facility or storage reservoir to

(i) the permit holder, and

(ii) an officer, employee, agent and contractor of the permit holder operating the well, pipeline, facility or storage reservoir,

and, if the commission issues an order to a person referred to in either subparagraph (i) or (ii), the order applies to both the person referred to in subparagraph (i) and the persons referred to in subparagraph (ii), and

(b) subject to section 55, the commission may take, deal with and dispose of all petroleum, natural gas or other substances from the well, pipeline, facility or storage reservoir.

53(3) The commissioner may order by whom and to what extent costs and expenses incurred as a result of proceedings taken under this section are to be paid.

Currency

British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

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B.C. Statutes

Oil and Gas Activities Act

Part 3 — Oil and Gas Activities (ss. 21-43)

Division 2 — Rights and Obligations

S.B.C. 2008, c. 36, s. 34

s 34. Required ownership, interest or authorization

Currency

34. Required ownership, interest or authorization

34(1) In this section:

"entry agreement" means an agreement

(a) that is between

(i) a specified permit holder, and

(ii) a land owner of an area of land, and

(b) that authorizes the specified permit holder to enter, occupy or use the land owner's area of land for the purposes of constructing and operating a pipeline other than a flow line;

"specified permit holder" means a pipeline permit holder who holds a permit respecting a pipeline other than a flow line.

34(2) Subject to sections 23 and 39 and subsection (3) of this section, a permit holder must not begin or carry out an oil and gas activity on or under an area of land unless the permit holder,

(a) if the area of land is not a highway, either is the owner in fee simple of the area of land or has acquired the area of land or the necessary interests in the area of land in accordance with

(i) the *Land Act*,

(ii) Part 16 or 17 of the *Petroleum and Natural Gas Act*, or

(iii) subsection (3) of this section, or

(b) if the area of land is a highway, has obtained an authorization required under an enactment to enter, occupy or use the area of land.

34(3) Subject to subsection (4), if a specified permit holder has failed to obtain an entry agreement, the specified permit holder may expropriate, in accordance with the *Expropriation Act*, as much of the land or interests in it of any person as may be necessary for constructing and operating the pipeline authorized by the permit.

34(4) The land that may be expropriated under subsection (3) must not exceed 18 m in breadth.

34(5) On application by a specified permit holder, the commission may authorize, on any conditions the commission considers appropriate, an expropriation, in accordance with the *Expropriation Act*, that exceeds the breadth specified in subsection (4).

Amendment History

2010, c. 9, s. 24

Currency

British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

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TAB 13

2001 CarswellOnt 1019
Ontario Court of Appeal

Ma, Re

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

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

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

Abella, Charron, Sharpe JJ.A.

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

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

Counsel: *Chi-Kun Shi*, for Appellant

Bruce S. Batist, for Respondent

William J. Meyer, Q.C., for Trustee in Bankruptcy

Subject: Insolvency; Civil Practice and Procedure

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

Endorsement. *Per curiam*:

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

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

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

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against

the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

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

Appeal dismissed.

TAB 14

2018 ABQB 356
Alberta Court of Queen's Bench

Alberta Treasury Branches v. COGI Limited Partnership

2018 CarswellAlta 847, 2018 ABQB 356, [2018] A.W.L.D. 1958, [2018] A.W.L.D.
2002, [2018] A.W.L.D. 2024, 291 A.C.W.S. (3d) 647, 60 C.B.R. (6th) 138

**Alberta Treasury Branches (Plaintiff) and COGI Limited Partnership,
Canadian Oil & Gas International Inc., and Conserve Oil Group
Inc. by its Receiver and Manager MNP Ltd. (Defendants /
Applicants) and Firenze Energy Ltd. (Respondent / Cross-Applicant)**

K.M. Horner J.

Judgment: May 1, 2018
Docket: Calgary 1501-12220

Counsel: G. Brian Davison, Q.C., Ryan Algar, for COGI Limited Partnership et al
James Hanley, for Firenze Energy Ltd.
Gunnar Benediktsson, for Crescent Point Energy Corp.
Ashley Garbe, for Alberta Energy Regulator

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

APPLICATION by receiver for payment of amounts owing under terms of joint operating agreements; CROSS-APPLICATION by current operator for contractual and/or equitable set-off and for lifting of stay of proceedings.

K.M. Horner J.:

I. Introduction

1 This is an application and cross-application relating to the operation of certain jointly owned oil and gas producing properties following the insolvency of one of the Joint-Operators. The Applicant/Cross-Respondent, MNP Ltd. (the "Receiver"), acts as the receiver and manager for the insolvent Joint-Operator, COGI Limited Partnership and Canadian Oil & Gas International Inc. (together, "COGI"). The Respondent/Cross-Applicant, Firenze Energy Ltd. ("Firenze"), is the current Operator under the relevant joint operating agreements.

2 The Receiver is seeking, among other things, \$849,208.44, which it claims is the amount owed by Firenze to COGI due to the operation of the jointly owned oil and gas properties. Meanwhile, Firenze is seeking to have its indebtedness set-off against debts it claims are owed by COGI. Firenze is also seeking to lift the stay of proceedings that currently prevents it from enforcing the payment of what it claims are COGI's share of the costs arising from the operation of the jointly owned oil and gas properties.

3 For the reasons that follow, I grant the Receiver's application in part and dismiss Firenze's cross-application.

II. Background

A. Relationship Between COGI and Firenze

4 COGI and Firenze are (or were) joint owners and operators of oil and gas properties in the Carmangay, Joffre, Nevis/Claresholm, Marten Creek, and Gull Lake areas of Alberta, as well as in Weyburn, Saskatchewan. Pursuant to the

Marten Creek and Gull Lake joint operating agreements, COGI and Firenze are 50% working interest partners in those two properties. COGI originally acted as Operator under the Marten Creek and Gull Lake joint operating agreements.

5 The Marten Creek and Gull Lake joint operating agreements both adopt the 1990 CAPL Operating Procedure ("*CAPL 1990*"), which governs the relationship between the parties. In the current circumstances, the most relevant provisions of CAPL 1990 are Articles 202(a), 505(b), 1201, and 1901-02:

(a) Article 202(a) provides for the replacement of the Operator upon bankruptcy, insolvency, or receivership.

(b) Article 505(b) allows the Operator to contractually set-off debts owed by the Joint-Operator if the Joint-Operator fails to pay its portion of the operating expenses. It also prevents a Joint-Operator from claiming set-off against the Operator.

(c) Article 1201 allows the Operator to initiate the procedure for abandoning wells by issuing an abandonment notice to the Joint-Operator, which in effect proposes to abandon certain wells and divide the costs of doing so equally between the parties.

(d) Articles 1901 and 1902 allow the Operator to classify the Joint-Operator as a delinquent party if the Joint-Operator cannot be located or contacted. This classification allows the Operator to withhold the delinquent party's operational proceeds of sale in trust, as well as to recover certain outstanding joint operating expenses from those trust funds.

B. COGI's Insolvency and the Marten Creek/Gull Lake Properties

6 In March 2015, Firenze stopped paying its share of the operating costs for the Marten Creek and Gull Lake properties.

7 On August 28, 2015, Romaine J. granted an order providing COGI with protection from its creditors pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].

8 On October 26, 2015, Macleod J. granted an order placing COGI in receivership and appointing MNP Ltd. as receiver and manager (the "*Receivership Order*"). Paragraph 10 of the Receivership Order imposes a stay of proceedings that precludes creditors from enforcing "all rights and remedies" against COGI, which specifically includes "set-off rights."

9 On December 23, 2015, COGI filed an assignment into bankruptcy pursuant to section 49 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. MNP Ltd., as receiver and manager, was appointed as trustee of COGI's estate. The Receiver subsequently retained Niven Fischer Energy Services Inc. ("*Niven Fischer*") to manage COGI's oil and gas assets.

10 On January 5, 2016, I granted a consent order whereby Firenze invoked Article 202(a) of CAPL 1990 in order to replace COGI as Operator under the Marten Creek and Gull Lake joint operating agreements (the "*Operatorship Transfer Order*"). However, the Alberta Energy Regulator (the "*AER*") subsequently objected to the transfer of the relevant well licenses from COGI to Firenze. As a result, COGI continued to act as Operator for several months after the Operatorship Transfer Order was issued.

11 On April 12, 2016, the Receiver demanded payment for what it claims Firenze owes to COGI. Firenze rejected the Receiver's demand on the grounds that it had set-off rights against COGI that significantly reduced the claimed amount.

12 On September 1, 2016, the transfer of most of COGI's well licences became effective and Firenze assumed the role of Operator (the "*Effective Transfer Date*"). Although seven wells remain licenced to COGI, Firenze still acts as Operator for those wells. Much of the \$849,208.44 claimed by the Receiver represents the overheard costs incurred while COGI remained Operator between the time of the Operatorship Transfer Order and the Effective Transfer Date.

13 I note that following the AER's objection to the license transfers, the Receiver and Firenze discussed the feasibility of Firenze becoming Operator prior to the transfer of the licences. However, nothing was ever agreed between the parties. Further, at no time did Firenze come back before this Court in an attempt to enforce the Operatorship Transfer Order on notice to the AER prior to the Effective Transfer Date.

14 In October 2016, Firenze issued abandonment notices to the Receiver for 29 wells on the Marten Creek and Gull Lake properties that had become uneconomic or were previously suspended (the "*Abandonment Notice*"). This abandonment process was done in accordance with Article 1201 of CAPL 1990 and Firenze duly sought COGI's share of the abandonment costs.

15 The amounts demanded by Firenze as a result of the Abandonment Notice included speculative future costs that had yet to be incurred. The Receiver responded by informing Firenze that issuing the Abandonment Notice represented the improper invocation of a contractual right that was stayed pursuant to paragraph 10 of the Receivership Order.

16 On November 1, 2016, Firenze issued a Notice to Revoke Take-in-Kind, which retroactively revoked COGI's right to take its production in kind from the Marten Creek and Gull Lake properties (the "*Revocation Notice*"). In taking this action, Firenze again purported to invoke its contractual rights pursuant to Articles 1901 and 1902 of CAPL 1990. This process was effected by classifying COGI as a delinquent party, which allowed Firenze to hold COGI's portion of the proceeds of sale from the Marten Creek and Gull Lake properties in trust.

C. The Carmangay, Joffre, Nevis/Claresholm, and Weyburn Properties

17 Part of the \$849,208.44 claimed by the Receiver includes pre-receivership amounts related to the operation of the Carmangay, Nevis/Claresholm, and Weyburn properties. In response, Firenze claims that it is entitled to set-off amounts related to the purchase and sale agreements arising from COGI's sale of its interest in the Weyburn and Nevis/Claresholm properties to Firenze.

D. Positions of the Parties

18 The Receiver argues the \$849,208.44 that Firenze allegedly owes to COGI is a valid and payable debt, which cannot be further set-off by Firenze. This argument is premised on the position that Firenze did not become Operator of the Marten Creek and Gull Lake properties until the Effective Transfer Date (i.e. September 1, 2016), which prevents Firenze from setting-off any amounts owed by COGI prior to that date.

19 Any set-off claims arising after September 1, 2016 are also precluded by the stay of proceedings in the Receivership Order. Further, there is no basis to provide Firenze with an equitable right of set-off due to its refusal to pay its share of the operating costs for the Marten Creek and Gull Lake properties after March 2015.

20 Firenze argues that the Receiver's claim of \$849,208.44 is not valid because it neglects Firenze's right to contractually and equitably set-off certain other amounts, including those related to the Weyburn and Nevis/Claresholm purchase and sale agreements. Firenze also claims for damages due to COGI's anticipatory breach of the Marten Creek and Gull Lake joint operating agreements. As a result, Firenze asks this Court to only decide the relevant principles of equitable and contractual set-off, and refrain from making a determination on the exact amounts owed without a more fulsome hearing.

21 Firenze's argument is premised on the position that it became *de jure* (if not *de facto*) Operator of the Marten Creek and Gull Lake properties at the time of the Operatorship Transfer Order (i.e. January 5, 2016). Therefore, it should enjoy the relevant contractual right of set-off as of that date.

22 Firenze's cross-application argues that the stay of proceedings should be lifted in order to retroactively ratify the Abandonment Notice and Revocation Notice as effective to their date of issue. This argument is premised on the position

that lifting the stay is a practical necessity in the circumstances. Failure to lift the stay would effectively prevent Firenze, as Operator, from taking necessary steps in relation to the joint-operating assets in the ordinary course of business.

23 The Receiver argues there are no grounds for Firenze's cross-application because the denial of a contractual remedy is insufficient to justify lifting the stay of proceedings. Lifting the stay is not a routine matter and Firenze must cite exceptional circumstances to justify it, which Firenze has failed to do. As a result, the Receiver asks this Court to declare that the Abandonment Notice and the Revocation Notice were improperly issued in violation of the stay and, therefore, of no effect.

24 Crescent Point Energy Corp. also made brief submissions in support of the Receiver's position.

III. Issues

25 The hearing of this matter raises two issues that must be determined:

- 1) Does Firenze have a valid claim for set-off and, if so, to what extent?
- 2) Should the stay of proceedings be retroactively lifted in order to ratify the Abandonment Notice and the Revocation Notice?

IV. Analysis

26 This matter was heard over the course of a half-day. The evidence before the Court included affidavits of various employees from Firenze and Niven Fischer, as well as transcripts of questioning of those employees. The contents of many of the affidavits and transcripts contradict and challenge each other's fundamental calculations and conclusions.

27 I agree with Firenze's argument that it would be inappropriate to make a determination on the exact amounts owing without a more fulsome hearing. There is insufficient evidence before the Court at this time to make a proper determination on certain of the more controversial matters. Therefore, my reasons will only address general legal principles as they are applicable to Firenze's claim for set-off and the cross-application to lift the stay of proceedings. If my decision is insufficient to allow the parties to agree on the amounts owing amongst themselves, then they may re-apply to this Court for a more fulsome hearing in the future.

Issue #1: Does Firenze Have a Valid Claim for Set-Off and, if so, to What Extent?

28 Firenze claims both contractual and equitable set-off. Its claim for contractual set-off relates to amounts stemming from the Marten Creek and Gull Lake joint operating agreements. These contractual amounts include things such as outstanding surface lease rentals and property taxes.

29 Firenze's claim for equitable set-off relates to amounts stemming from the Nevis/Claresholm and Weyburn purchase and sale agreements. These equitable amounts include: (1) adjustments to the Nevis/Claresholm purchase and sale agreement due to the cost of paying an unanticipated lien; and (2) adjustments to the Weyburn purchase and sale agreement due to the cost of replacing a defective Group Treater.

A. Contractual Set-Off

30 Firenze's claim to contractual set-off rests in Article 505(b) of CAPL 1990, which allows the Operator to set-off debts owed by the Joint-Operator. As a result, any contractual claim that Firenze may have will be dependent on when precisely it replaced COGI as Operator under the Marten Creek and Gull Lake joint operating agreements.

31 Article 202(a) of CAPL 1990 grants Firenze the contractual right to replace the insolvent COGI as Operator "upon notice to such effect being served by any party to the other parties . . ." However, upon COGI entering CCAA protection on August 28, 2015, this contractual right was stayed. Therefore, Firenze required the Receiver's consent or a court order

to effect the transfer of operatorship: *Bank of Montreal v. Bumper Development Corp.*, 2016 ABQB 363 (Alta. Q.B.) at paras 16-18 [*Bumper Development*] (which deals with CAPL 2007); *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 92 A.R. 81, 1988 CarswellAlta 318 (Alta. Q.B.) at paras 48-50 (which deals with CAPL 1981).

32 Based on Article 202(a) of CAPL 1990, Firenze argues that, at the latest, it became Operator as of the date of the Operatorship Transfer Order (i.e. January 5, 2016). The Receiver counters that, due to the intransigence of the AER, COGI remained Operator until the Effective Transfer Date (i.e. September 1, 2016). After all, COGI incurred all of the costs and liabilities associated with being Operator up to that date. This issue is also relevant in that it will determine whether the Receiver can claim those operatorship overhead costs incurred by COGI between the date of the Operatorship Transfer Order and the Effective Transfer Date.

33 I note that updates to the 2007 version of the CAPL Operating Procedure recognize the fact that insolvency-triggered change of operatorship is not an instantaneous process: see Craig Spurn, Jana Prete & Melissa Zerebeski, "The 2007 CAPL Operating Procedure" (2009) 46.2 Alta L Rev 427 at 432-34. Instead, change of operatorship appears to be a function of result rather than intention.

34 I find that Firenze became Operator as of the Effective Transfer Date. As a result, Firenze would only be eligible to claim contractual set-off as of that date (with those rights still subject to the stay of proceedings). The Operatorship Transfer Order did entitle Firenze to become Operator as of the date of that order. However, operatorship never actually transferred until September 1, 2016 due to the impediment of AER regulatory action.

35 The AER delayed the regulatory transfer of the necessary well licences for another nine months after the Operatorship Transfer Order. As a result, COGI remained legally liable for operatorship and was unable to abdicate those liabilities to Firenze. COGI and Firenze attempted to resolve this impasse between themselves, but were unable to do so before the Effective Transfer Date. Further, Firenze chose not to bring the matter back before this Court in order to overcome the regulatory impediments. Therefore, at this juncture, it would be inappropriate to interfere with the discretionary regulatory authority of the AER.

36 The simple fact is that, between the Operatorship Transfer Order and the Effective Transfer Date, COGI continued to exercise the duties of Operator. It also bore the costs and liabilities associated with operatorship. Firenze was fully aware that COGI continued to pay those costs during that time. Yet Firenze now retroactively seeks all of the contractual benefits of operatorship without having assumed any of the requisite burdens. Such a result would be inconsistent with the fundamental purpose and function behind Article 505(b) and CAPL 1990 as a whole.

B. Equitable Set-Off

37 A party may explicitly or implicitly contract out of their right to both contractual and equitable set-off: *National Foundation for Hepatitis C (Trustee of) v. GWE Group Inc.*, 1999 ABQB 66 (Alta. Q.B.) at paras 25-27 (Alta Master).

38 Article 505(b)(iv) of CAPL 1990 precludes a Joint-Operator from claiming a right to set-off in response to an Operator's claims for unpaid amounts. Therefore, Firenze cannot claim in equitable set-off what it contracted out of in CAPL 1990. Firenze can only claim equitable set-off where it is eligible to also claim contractual set-off (as it relates to the Marten Creek and Gull Lake joint operating agreements). What remains is Firenze's equitable set-off claim regarding the Névis/Claresholm and Weyburn purchase and sale agreements.

39 Paperny J.A. outlined the test for equitable set-off in *Trilogy Energy LP v. SemCAMS ULC*, 2009 ABCA 275 (Alta. C.A.) at para 22, refusing leave to appeal *SemCanada Crude Co., Re*, 2009 ABQB 397 (Alta. Q.B.):

The chambers judge correctly set out the test for equitable set-off, being the principles laid out in *Holt* at 212. These are that [cites omitted]:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims.

40 Most relevant in the present circumstances is the third principle of equitable set-off, which is the "clearly connected" requirement. I find there is no clear connection between COGI, in its role as Operator pursuant to the Marten Creek and Gull Lake joint operating agreements, and Firenze, in its role as purchaser pursuant to the Nevis/Claresholm and Weyburn purchase and sale agreements. Further, it would not be manifestly unjust to allow the Receiver to enforce COGI's claims as Operator without taking into consideration Firenze's claims as purchaser.

41 The lack of a clear connection and manifest injustice is the result of the unique nature of operatorship pursuant to a joint operating agreement. Operatorship is legally distinct from that of a vendor pursuant to a purchase and sale agreement. The unique nature of an Operator was described by Romaine J. in *SemCanada Crude Co., Re*, 2009 ABQB 397 (Alta. Q.B.) at paras 38-68, leave to appeal refused *Trilogy Energy LP v. SemCAMS ULC*, 2009 ABCA 275 (Alta. C.A.).

42 In short, COGI, as vendor, entered into the relevant purchase and sale agreements in its own corporate capacity. Whereas COGI, as Operator, acted under the relevant joint operating agreements for a distinct, special purpose. Operatorship requires that the operating partner act as an administrator over accounts and assets owned by all joint-partners that are subject to the joint operating agreement. This status creates different obligations and liabilities for the Operator when compared to if it was only acting in its own corporate capacity.

43 The special status of COGI, as Operator, creates an important and well recognized legal distinction that prevents a clear connection with its activities as vendor. Firenze may have a separate cause of action against COGI for what it claims is owed pursuant to the purchase and sale agreements. However, the unique status of operatorship, and ensuring the proper function of joint operating agreements in insolvency situations, militates against allowing Firenze to advance its claims in equitable set-off.

44 I make no finding regarding whether Firenze would be able to satisfy the other elements of the equitable set-off test.

Issue #2: Should the Stay of Proceedings be Retroactively Lifted?

45 The Receivership Order's stay of proceedings restrains Firenze from invoking its contractual rights under CAPL 1990, including by issuing the Abandonment Notice and Revocation Notice: *Baytex Energy Ltd. v. MNP Ltd.*, 2012 ABQB 539 (Alta. Q.B.) at para 19 [*Baytex*], citing *Skyservice Airlines Inc., Re*, 2011 ONSC 703 (Ont. S.C.J. [Commercial List]) at paras 77-89, aff'd 2012 ONCA 283 (Ont. C.A.).

46 Firenze therefore requires either the consent of the Receiver or the leave of this Court before issuing the Abandonment Notice and Revocation Notice. However, Firenze received neither the required consent nor leave prior to taking the action that it did. As a result, Firenze now asks this Court to lift the stay *nunc pro tunc* and ratify its otherwise invalid Abandonment Notice and Revocation Notice.

47 Firenze argues the lifting of the stay is necessary because it must be allowed to act in the ordinary course of business in order to fulfill its obligations under the Marten Creek and Gull Lake joint operating agreements. Since both

agreements pre-date the Receivership Order, the Receiver remains subject to those agreements: see *Associated Investors of Canada Ltd., Re* (1989), 69 Alta. L.R. (2d) 318, 1989 CarswellAlta 362 (Alta. Q.B.).

48 Firenze also cites the decision in *Bumper Development* at para 19 as authority for the proposition that the stay should be lifted because there is no reason to interfere with its contractual rights when those rights are not affected by security.

49 I note that Firenze concedes its justification for issuing the Abandonment Notice and Revocation Notice is primarily economic in nature. There is currently no outstanding regulatory requirement to abandon the wells cited in the Abandonment Notice. Further, the Revocation Notice is primarily being used to retain enough of the production revenue to cover COGI's outstanding operational expenses and share of the prospective abandonment costs.

50 The Receiver opposes Firenze's cross-application to lift the stay on the grounds that there is no sound reason to grant such an order. It cites *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 44 [*Alignvest QB*], aff'd on other grounds *York Realty Inc. v. Alignvest Private Debt Ltd.*, 2015 ABCA 355 (Alta. C.A.) [*Alignvest CA*], as authority for the proposition that the loss of a pre-receivership contractual right is insufficient justification for lifting the stay. Further, the Receiver argues that lifting the stay would provide Firenze with an inappropriate "leg up" on COGI's secured and unsecured creditors by allowing it to retain funds otherwise owed to COGI.

A. There are Insufficient Grounds to Lift the Stay

51 In *Alignvest QB* at paras 40-42, citing the Ontario Court of Appeal's decision in *Ma, Re* (2001), 24 C.B.R. (4th) 68, 2001 CarswellOnt 1019 (Ont. C.A.), Romaine J. outlined the relevant test for determining whether to lift a stay of proceedings:

The test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.

Guidance can be drawn from the provisions of section 69.4 of the *BIA* in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.**J. No. 1189 (Ont. C.A.).

Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Ma, Re* at para 3.

[The applicant] concedes that in order to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v.**. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.**R. (5th) 62 (Ont. S.C.J.) at paras 18 - 19.

52 In *Alignvest QB* at paras 44-48, Romaine J. found that depriving the applicant of rights that it had specifically bargained for under a lease did not constitute material prejudice. The applicant entered into the contract knowing the risks. A similar conclusion can be drawn in the present circumstances.

53 Firenze has provided insufficient evidence that it is likely to be materially prejudiced by the stay or that there is an equitable basis to lift the stay and ratify the Abandonment Notice and Revocation Notice. There is a distinct lack of special harm that Firenze will suffer if the stay is not lifted. After all, Firenze concedes that it has acted primarily for economic reasons, which is a justification that was rejected by Strekaf J. (as she was then) in *Baytex* at paras 18-19.

54 In other words, there is no regulatory requirement dictating the immediate abandonment of the wells subject to the Abandonment Notice. Firenze is abandoning those wells only because it claims its actions are economically prudent. Even assuming that the abandonment must go forward in the future, those costs may very well be shared by whatever entity steps into COGI's place (which Firenze freely acknowledges).

55 Further, COGI's failure to pay its portion of the operating costs is a risk that every Operator must endure when faced with the insolvency of a Joint-Operator. It does not constitute material prejudice or equitable grounds sufficient to justify lifting the stay to allow the Revocation Notice. Firenze should not, without more, be able to retain funds to satisfy its own claims at the expense of COGI's other creditors (who may be equally entitled to those funds).

56 Firenze's current situation can be distinguished from that of the applicant in *Bumper Development*, wherein Macleod J. did order the stay to be lifted *nunc pro tunc*. In that case, the stay was lifted to grant the applicant its contractual right to take over as Operator under CAPL 2007 (a right which this Court has already granted to Firenze). Had Macleod J. not lifted the stay, it would have caused the applicant material prejudice, as the applicant would have lost its right to operatorship despite having an agreement with the receiver to the contrary. Further, lifting the stay would not have prejudiced the insolvent Joint-Operator's creditors, as the operatorship was not something otherwise secured and transferable.

V. Conclusion

57 I grant the Receiver's application as it relates to defining Firenze's right to contractual and equitable set-off. However, any declaration of the exact amounts owing will require a more fulsome hearing. Further, I dismiss Firenze's cross-application to lift the stay of proceedings *nunc pro tunc*.

58 Firenze became Operator pursuant to the Marten Creek and Gull Lake joint operating agreements as of the Effective Transfer Date (i.e. September 1, 2016). Therefore, Firenze is only eligible to claim any related right to contractual and/or equitable set-off as of that date.

59 Firenze is not eligible to use amounts claimed pursuant to the Weyburn and Nevis/Claresholm purchase and sale agreements to equitably set-off amounts owed pursuant to the Marten Creek and Gull Lake joint operating agreements.

60 The Abandonment Notice and Revocation Notice are subject to the stay of proceedings and were issued without the consent of the Receiver or the leave of this Court. Further, there are insufficient grounds to lift the stay and retroactively ratify those orders. Therefore, the Abandonment Notice and Revocation Notice are declared to be of no effect.

61 If the parties cannot agree on costs then they may apply to this Court for a determination thereof.

Application granted in part; cross-application dismissed.

TAB 15

2005 BCCA 154
British Columbia Court of Appeal

New Skeena Forest Products Inc. v. Kitwanga Lumber Co.

2005 CarswellBC 578, 2005 BCCA 154, [2005] B.C.W.L.D. 2755, [2005] B.C.W.L.D.
2957, [2005] B.C.J. No. 546, 137 A.C.W.S. (3d) 1137, 210 B.C.A.C. 185, 251
D.L.R. (4th) 328, 348 W.A.C. 185, 39 B.C.L.R. (4th) 327, 9 C.B.R. (5th) 267

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation, Kitwanga Lumber Co. Ltd. (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd., and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corporation (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation (Respondents / Petitioners) And Main Logging Ltd. (Appellant / Respondent)

Southin, Braidwood, Oppal JJ.A.

Heard: February 17, 2005

Judgment: March 18, 2005

Docket: Vancouver CA032519, CA032539, CA032528

Proceedings: affirmed *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.* ((December 13, 2004)), Doc. Vancouver L033220 ((B.C. S.C.))

Counsel: P. Voth, Q.C., M.S. Oulton for Appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.

R.A. Millar for Respondents, Ernest & Young Inc.

F.M. Kirchner for Respondents, Coast T'simshian Resources

S.B. Jackson for Appellant, Main Logging

R. Leong for Attorney General of Canada

D.J. Hatter for H.M.T.Q. in Right of British Columbia

S.R. Ross for Intervenor, Truck Loggers Association

Subject: Natural Resources; Insolvency

APPEAL by logging companies from order allowing receiver to dispose of assets of company under protection of Companies' Creditors Arrangement Act.

Braidwood J.A.:

1 This is an appeal from an order of Brenner C.J.S.C. in which he vested all assets of New Skeena Forest Products Inc. ("New Skeena") in the court-appointed receiver of New Skeena, Ernst & Young (the "Receiver"), free and clear of the interests of all creditors and contractors.

2 There are two main issues in this case. First, there is a question of the relationship between the replaceable contract scheme under the *Forest Act*, R.S.B.C. 1996, c. 157, which is intended to give financial security to contractors in the forest industry, and bankruptcy proceedings. Specifically, the appeal concerns the rights of the appellant forestry contractors to continue their harvesting contracts on Tree Farm Licence 1 ("TFL-1") after a sale by the Receiver of the TFL. Second, there is an issue of the power of the Receiver to disclaim contracts like the contracts held by the contractor appellants.

Facts

3 The continuing saga of Skeena Forest Products is well known in this province, and indeed in these courts. The respondent New Skeena, the newest corporate incarnation of Skeena Cellulose Inc., after several reorganization attempts filed for bankruptcy in August 2004. Subsequently, a court appointed the Receiver in September 2004 and the Receiver thereafter commenced liquidating New Skeena's assets. The appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging and Construction Ltd., had contracts with New Skeena under which they harvested trees from TFL-1. TFL-1 is a forest licence granted by the Province to New Skeena under which New Skeena has the exclusive harvesting rights over certain lands around Terrace. The TFL is a significant asset of the company.

4 In November 2004, the Receiver entered into an asset purchase agreement for TFL-1 with the respondent Coast Tsimshian Resources Limited Partnership ("Coast Tsimshian"). The agreement is contingent on Coast Tsimshian taking TFL-1 free and clear of any obligations to the appellants under the replaceable contracts. In the court below, Chief Justice Brenner found the Coast Tsimshian offer for TFL-1 "highly favourable". Indeed, none of the other offers made to the Receiver came close to the Coast Tsimshian offer. The other offers also required cancellation of the appellants' replaceable contracts.

5 The replaceable forest licence scheme is set out in the *Forest Act* and *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/1996 [*Timber Harvesting Regulation*]. Chief Justice Brenner described the replaceable forest licence scheme at paragraph 13 of his reasons for judgment. According to his Lordship:

The essential policy behind this regime is that it imposes an obligation on holders of replaceable licences such as TFL-1 to harvest a proportion of the timber from the licence through contractors that have entered into these replaceable contracts. The replaceable contract is, in essence, a contract that will continue so long as the contractor's performance under the contract is satisfactory. Provided that continues to be the case, the contractor is entitled to receive replacement contracts from the licence holder under substantially similar terms for as long as the licence subsists.

6 On 2 June 2004, the Province amended the *Timber Harvesting Regulation* to remove the requirement that future contracts under a replaceable licence must also be replaceable. However, the amendment also grandfathered any replaceable contracts, such as the appellants', in existence on the date of the amendments. In addition, the amendments added s. 12(4) to the regulation. Section 12(4) reads:

If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contractors must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.

The appellants attached much significance to this addition to the regulation both in this Court and in the court below.

Trial Judgment

7 In his reasons for judgment, Chief Justice Brenner noted that a court-appointed liquidator is entitled to disclaim executory contracts, and persons who have contracted with the bankrupt thereafter have a claim in the bankruptcy for damages. He observed that the court-appointed receiver must have regard to equitable considerations when deciding whether to disclaim a contract, and a court considering an application to transfer assets to a receiver must also weigh equitable considerations when deciding whether to transfer assets to a receiver free of contractual obligations. His Lordship then reviewed the equitable considerations supporting the respective positions of the contractors and the Receiver. The appellants appear to take no issue with his weighing of the equities.

8 Regarding the effect of the June 2004 regulatory amendments, Chief Justice Brenner considered the key question was whether the regulatory amendment conferred a statutory right or a right greater than a simple contractual right for the benefit of the appellants. In his view, the amendments did not, with one proviso. Under s. 12(4) of the *Timber Harvesting Regulation*, there is a new statutory right in the event of termination because of default. However, as contractor default was not in issue in the case before him, his Lordship was not of the view that the regulation created an *in rem* or proprietary right that attached to the tree farm licence itself or would run with the tree farm licence in the event of a bankruptcy.

Analysis

9 The appellants argue in this Court that Chief Justice Brenner erred first in finding the *Forest Act* and the *Timber Harvesting Regulation* did not give rise to an ongoing statutory duty on the part of New Skeena to enter into replaceable contracts unless the contractor is terminated for cause; and, second, in finding that the *Timber Harvesting Regulation* did not create an *in rem* or proprietary right that attaches to the tree farm licence and runs with the licence in bankruptcy.

10 In the appellants' submission, forest contractors have a crystallized statutory right because under the legislation licencees must use replaceable contracts for at least 50 per cent of their harvesting, must re-issue replaceable contracts on their termination or expiry, and must ensure replaceable contracts are offered on substantially the same terms and conditions as a contract they replace. According to the appellants, the addition of s. 12(4) to the regulation further clarifies that the obligation to enter into a replacement contract is not personal to the licence holder, but rather integral to the licence itself.

11 On the other hand, both respondents say an earlier decision of this Court involving Skeena and other logging contractors with replaceable contract rights, *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.), is binding on this Court. In *Skeena Cellulose Inc., Re*, which involved the issue of Skeena's ability to terminate replaceable contracts during a reorganization under the *Companies Creditor Arrangement Act*, Madam Justice Newbury concluded that the elimination of the contractors' replaceable contract rights did not amount to overriding the licence-holder's statutory obligation to replace the contracts, and that accordingly, in approving an arrangement in which the debtor corporation terminated a replaceable logging contract, a court did not override provincial legislation. (The appellants, of course, argued vigorously that *Clear Creek* could be distinguished for several reasons, notably because it concerned a reorganization rather than a bankruptcy.)

12 The respondents also argue that nothing in the 2004 amendments elevated the rights enjoyed by the appellants from the contractual rights described by Madam Justice Newbury to statutory rights claimed by the appellants.

13 The intervenor Truck Loggers Association submits that allowing the termination of replaceable contract rights during a bankruptcy will reduce the number of replaceable contracts in the province, and thus undermine an important protection against financial uncertainty for logging contractors. It argues that the 2004 amendments were intended to maintain a province-wide pool of replaceable contracts except where they are cancelled pursuant to specific provisions of the legislation, and that even if this Court does not find the appellants' replaceable contracts must be assumed by the purchaser, the new licence holder for TFL-1 should be obligated to replace the appellants' contracts with other new replaceable contracts.

14 After considering the parties' submissions on the issue of the nature of the contractors' replaceable contract rights, I agree in substance with Chief Justice Brenner's reasons. I see no error in principle in what he has said on the matter. In addition, I find these comments of Mr. Justice Thackray, who was then a judge of the Supreme Court, in the context of an earlier reorganization by New Skeena, persuasive:

I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts....

(See *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.), at para. 7). In my view, there is nothing in the recent amendments that changes this basic proposition.

15 However, the Intervenor raises another question, which is the power of the Receiver to disclaim contracts like those at issue in this case. It submits that as there is no statutory power for trustees to disclaim contracts, there is no such power in the Receiver. The Intervenor relies on a decision of Donald J., as he then was, in *Erin Features No. 1 Ltd., Re* [1991 CarswellBC 498 (B.C. S.C. [In Chambers])] 15 C.B.R. (3d) 66 [*Erin Features*]. In *Erin Features*, Donald J. "[a]ssumed without deciding that a trustee in bankruptcy generally possesses a power to disclaim" (at para. 3). However, he observed that a trustee's power to disclaim is only "weakly supported" by *dicta* in Canadian authorities (at para. 4) and that the issue was "fraught with difficulty" (at para. 6).

16 However, Ernst & Young in this case is not a trustee, but rather a court-appointed receiver, and the situation is somewhat different in such a case. In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, 2002 ABQB 706 (Alta. Q.B.), Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:

The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

17 Frank Bennett in his text, *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341 writes:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

18 I also observe that in *Erin Features*, Donald J. did not appear to take issue with the assertion of the applicant trustee in that case that "a receiver... can confidently be said [to] possess the right to disclaim an executory contract" (at para. 6).

19 In another leading case, *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S. C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

20 The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:

.....
(c) *apply for any vesting Order or Orders which may be necessary or desirable in the opinion of the Receiver in Order to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the Assets....*

[Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

21 Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

22 There is no provision in the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The *Act* only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1) (k) of the *Bankruptcy & Insolvency Act* the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

23 The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English *Bankruptcy Act, 1869* (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, *Insolvency Act 1986* (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (*Bankruptcy Act 1966*, (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

24 However, the power of trustees to disclaim contracts has its roots in the English law where there was a common-law power in assignees (who took control of debtor property prior to use of trusteeships in bankruptcy) to disclaim contracts. There is a weight of authority supporting the existence of such a power prior to the enactment of the *1869 Act*.

25 In his 1922 text, Lewis Duncan, in *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 304-5, cites several venerable English cases for the proposition that:

There is no section in the Canadian *Act* corresponding with section 54 of the English *Act* [earlier s. 23] which gives the trustee the right to disclaim onerous contracts or property. The law under *The [Canadian] Bankruptcy Act* will be the same as the law in England before the Act of 1869 was passed, with the exception that section 44 of the *Bankruptcy Act* gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it.

26 In *Sneezum, Re* (1876), 3 Ch. D. 463 (Eng. C.A.), at 472, James L.J. said that at common law, prior to the passing of the *1869 Act*, assignees in bankruptcy had the option of deciding whether or not to carry on with performance of an executory contract.

27 To similar effect, in *Gibson v. Carruthers* (1841), 8 M. & W. 321 (Eng. Ex. Ct. Pleas), at 326 -27, a case in which the assignees wished to assume a contract under which the defendant, who had contracted with the bankrupt, had agreed to deliver 2000 quarters of linseed to a charter ship, Gurney B. said:

...it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate.

28 In Canada, the Ontario Supreme Court Appellate Division in *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.) recognized such a power; see also *Denison v. Smith* (1878), 43 U.C.Q.B. 503 (U.C. Q.B.); *Stead Lumber Co. v. Lewis (No. 2)* (1957), 37 C.B.R. 24, 13 D.L.R. (2d) 34 (Nfld. T.D.), at 43; *Salok Hotel Co., Re* (1967), 11 C.B.R. (N.S.) 95, 66 D.L.R. (2d) 5 (Man. Q.B.), at 8.

29 In more recent times, L.W. Houlden & G.B. Morowetz in their text *Bankruptcy and Insolvency Law of Canada*, 3d ed, looseleaf (Toronto: Thomson Carswell, 2004) at F§45.2 state quite unequivocally that a trustee may disclaim a contract entered into by the bankrupt. Similarly, in a case comment on *Potato Distributors Inc. v. Eastern Trust Co.* (1955), 35 C.B.R. 161 (P.E.I. C.A.), at 166, L.W. Houlden writes:

It is well established law that a trustee may elect to carry on with a contract entered into prior to bankruptcy, provided he pays up arrears and is ready to perform the contract. The trustee could also, if he saw fit, elect not to go on with the contract in which event the vendor would have the right to prove a claim for damages.

30 I observe that several Canadian commentators have recently opined that in the absence of an express statutory power, trustees in Canada may not disclaim executory contracts, specifically licences: see Piero Ianuzzi, "Bankruptcy and the Trustee's Power to Disclaim Intellectual Property and Technology Licensing Agreements: Preventing the Chilling Effect of Licensors Bankruptcy in Canada" (2001) 18 C.I.P.R. 367; Gabor F.S. Takach and Ellen Hayes, "Case Comment," *Re Erin Features #1 Ltd.* (1993) 15 C.B.R. (3d) 66 (B.C.S.C.); Mario J. Forte and Amanda C. Chester, "Licences and the Effects of Bankruptcy and Insolvency Law on the Licensee" (2001) 13 Comm. Insol. R. 25. However, the position taken by the authors of these articles departs from the traditional understanding of the law in this area.

31 In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

32 I observe that recently, in its 2002 *Report on the Operation of the Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangements Act*, Industry Canada's Marketplace Framework Policy Branch considered the extent to which insolvency law should intervene in private contracts to ensure fair distribution or maximize value during an insolvency. The Report notes there is not universal support for the enactment of a detailed statutory provision like the American one. In a 2001 report on business insolvency law reform, the Insolvency Institute of Canada and the Canadian Association of Insolvency & Restructuring Professionals proposed the enactment of more detailed rules for both powers of trustees to disclaim executory contracts (<http://www.insolvency.ca/papers/2001ReportScheduleA.html>). Ultimately, it may therefore be preferable for the legislature to move to include a power in the statute, but until that time, in my view, trustees enjoy the power protected by the common law.

33 In the result, the order of 20 September 2004 grants the Receiver the power here exercised and I see no reason in principle that would cause me to alter that result.

Disposition

34 Accordingly, I would dismiss the appeal and order costs payable to the Receiver by the appellants.

Oppal J.A.:

I agree.

Southin J.A.:

35 I have had the privilege of reading in draft the reasons for judgment of my colleague, Braidwood J.A., concurred in by my colleague, Oppal J.A.

36 While I am uneasy, without the opportunity for further study, as to his conclusions on both issues, further study would require time. Being alive both to the importance to the parties of a decision being pronounced promptly and to the lack of practical value either to the parties or to the law of a dissent, if that is where I arrived after further study, I do not dissent from his conclusion that the appeal should stand dismissed.

Appeal dismissed.

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TAB 16

2009 BCSC 17
British Columbia Supreme Court

Pope & Talbot Ltd., Re

2009 CarswellBC 88, 2009 BCSC 17, [2009] B.C.W.L.D. 1794, 174 A.C.W.S. (3d) 1067, 50 C.B.R. (5th) 99

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

AND AN APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

D. Brenner C.J.S.C.

Heard: November 19, 2008
Judgment: January 22, 2009
Docket: Vancouver S077839

Counsel: K. Jackson for Pope & Talbot
V. Tickle for PriceWaterhouseCoopers
F. Dearlove for Westcoast Energy Inc.
P. Rubin for Ableco

Subject: Insolvency; Corporate and Commercial

APPLICATION by gas supply company for payment by receiver.

D. Brenner C.J.S.C.:

1 The issue on this application is whether PricewaterhouseCoopers ("PWC"), the court-appointed receiver of Pope & Talbot Ltd ("P & T") is required to pay contractual standby charges to Westcoast Energy Inc. ("Westcoast") in respect of natural gas supply that continued to be available at two of the P & T mills from the date the receiver took possession until the mills were sold to third party purchasers.

2 P & T used the firm transportation services of Westcoast under the Firm Service Agreement ("FSA") to supply natural gas to its mills at Mackenzie and Fort St. James. Firm transportation service entitled P & T to a specified maximum daily capacity in the relevant zone of Westcoast's pipeline system. A fixed monthly charge known as the "Demand Toll" was payable in respect of this available capacity and a variable charge (the "Commodity Toll") calculated on the basis of gas actually delivered was also payable.

3 On May 10, 2008 the Receiver was appointed by the court as receiver of the assets and undertakings of P & T, but by the terms of the order was prohibited from taking possession of the two mills and from operating the business formerly carried on by P & T at the mills. On June 16, 2008 the court expanded the receivership to include the mills, but the receiver continued to be barred from operating the mills.

4 The Fort St. James mill sale completed August 22, 2008; the Mackenzie mill sale closed September 22, 2008. At no time from May 10 to September 22, 2008 did the receiver ever operate either mill.

5 Under the terms of the receivership order all suppliers including Westcoast were obliged to continue their contractual obligations to supply goods and/or services to Pope & Talbot as "may be required by the receiver". However since it never operated either mill, PWC never used natural gas from Westcoast.

6 On June 23, 2008 Westcoast's counsel wrote to the receiver. After noting the provision of the receivership order requiring Westcoast to continue providing the "firm service", its counsel asked for confirmation that the receiver would honour Westcoast's invoices. PWC never replied; periodic billings from Westcoast were never paid.

7 The amount outstanding from May 10 to September 30 is \$147,190.01.

8 On June 30, 2008 as part of P & T's post filing creditors claim process, Westcoast filed a proof of claim seeking \$44,855.78 for services for the month of April and May 1 to 9, 2008 in respect of unpaid firm service charges for the pre-receivership CCAA period. It also filed a contingent claim for \$548,249.75 for the period May 10, 2008 to October 31, 2009 (the end of the term of the FSA) in the event the receiver sought to terminate the FSA.

9 On July 24, 2008 the receiver issued a notice of disallowance in respect of the contingent claim; it allowed the pre-receivership claim.

10 On August 18, 2008 the receiver advised Westcoast of the status of its efforts to sell both mills. It raised the possibility that if sold, the purchasers might want to take an assignment of the supply contracts with Westcoast. Sales of both have now closed; neither purchaser has requested an assignment.

11 The receiver denies liability to pay on the basis that no natural gas was ever supplied during the billing period and that it never affirmed the contract. It contends that since no natural gas was being supplied, it was not obliged to make an election to affirm or disclaim the contract until called upon to do so by Westcoast. No such demand was ever made.

12 Westcoast's response is that it was entitled to treat the contract as on foot until such time as the receiver made an election. Since the receiver never disclaimed the contract Westcoast says it was entitled to treat the contract as in good standing and that it is entitled to be paid the firm service charges. Westcoast billed periodically under the terms of the contract, but its accounts were never paid by the receiver.

13 The issue is this: on these facts, which party had a positive duty to act? Did the receiver have the obligation to assess this contract and make a decision whether to affirm or disclaim and notify Westcoast, or did Westcoast have a duty to call on the receiver to make the election and, in the absence of a response, apply to the court to force the receiver to make an election? Here neither party took such a step during the billing period. The question is: which party should bear the loss for its failure to act?

14 It is well settled law that, in the absence of an affirmation, a court appointed receiver is not bound by existing contracts made by the debtor. See *New Skeena Forest Products Inc., Re*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

15 In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication. Here there was clearly no express affirmation.

16 The question is whether, on the particular facts of this case, the receiver's silence or its August 18 letter constituted an implied affirmation.

17 Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether

it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

18 In this case, no goods were actually being supplied. While the contract did require the payment of a standby charge known as the Demand Toll, the mills were never operated and hence no natural gas ever flowed. By sending its invoices and the June 23 letter, Westcoast gave clear notice to the receiver that it expected to be paid for its standby charges. But it received no response to its letter and no payment of its invoices.

19 In the August 18 letter, PWC did not agree to pay the Demand Tolls. What it did was to advise Westcoast that sales for the two mills were pending. PWC raised the possibility that the outstanding amounts might be paid, in whole or part, by such purchasers.

20 In these circumstances can it be said that the receiver's conduct constituted affirmation of the contract?

21 In my view, on the rather unusual facts of this case where no actual goods or services were being supplied, the receiver did not come under an obligation to affirm or disclaim the contract until required to do so. In a receivership of this nature a receiver is in the position of having to assess many contracts and to decide whether to continue or terminate them.

22 If goods or services are being supplied, the receiver will be forced to complete this assessment and make its decisions within a reasonable time. But where no actual services or goods are being supplied, it is my view that the onus of taking a step rests with the other contracting party. It would have been a simple procedure for Westcoast to apply to the court for an order requiring the receiver to make its election. Other parties in this case did just that.

23 Here the receiver never gave any indication of ever wanting supply from Westcoast. It never made any payments nor indicated any intention of doing so. At best it raised the possibility that either or both of the mill purchasers might make the payment indicated to Westcoast. It was open to Westcoast to cease providing the firm transportation services under the FSA and to terminate the contract (or if in doubt to seek an order from the court permitting it to do so). It never did this and accordingly its application will be dismissed.

24 It is also clear that the receiver never had any intention of affirming this contract. That being the case it is apparent that this contract came to an end at a date prior to the date of this application. I will invite submissions from the parties as to when that effective date should be declared by this court.

Schedule A

Pope & Talbot, Inc.

MacKenzie Pulp Land Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

Application dismissed.

End of Document

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TAB 17

2015 ABQB 208
Alberta Court of Queen's Bench

Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc.

2015 CarswellAlta 569, 2015 ABQB 208, [2015] A.W.L.D.
2057, 24 C.B.R. (6th) 143, 252 A.C.W.S. (3d) 397, 611 A.R. 189

In The Matter of the Bankruptcy of 3 Eau Claire Developments Inc.

Avison Young Real Estate Alberta Inc., Applicant and Bosa Properties (Eau Claire) Inc., Respondent

S.J. LoVecchio J.

Heard: February 13, 2015
Judgment: March 30, 2015
Docket: Calgary B101-859192

Counsel: Alexis Teasdale for Applicant, Avison Young Real Estate Alberta Inc.
John Sandrelli for Respondent, Bosa Properties (Eau Claire) Inc.

Subject: Insolvency; Restitution

APPLICATION by unsecured creditor to receive commission in priority to secured creditors.

S.J. LoVecchio J.:

Introduction

1 Avison Young Real Estate Alberta Inc. applies for an Order directing payment of a commission to Avison in the amount of \$350,000 plus GST in priority to all other claims in the bankrupt estate of 3 Eau Claire Developments Inc. A secured creditor Bosa Properties (Eau Claire) Inc. opposes the Application.

Background

2 3 Eau Claire was incorporated in 2008 for the purpose of developing a mixed-use commercial and residential condominium project at 633-3rd Ave SW, Calgary, Alberta. In March 2013, Bosa and 3 Eau Claire launched negotiations to form a joint-venture partnership. Under the proposed partnership, Bosa would provide development expertise and some equity, while 3 Eau Claire would provide certain undeveloped land (the "Lands") and obtain third party financing for the project.

3 While the parties continued to negotiate, Bosa advanced certain funds to 3 Eau Claire. Repayment of the funds was secured and the ranking enforceability of Bosa's secured claim is not in dispute. In early 2014, negotiations collapsed and Bosa withdrew from the project.

4 3 Eau Claire sought a new strategy, and on March 12, 2014, 3 Eau Claire and Avison entered into an Exclusive Commercial Listing Agreement whereby Avison would act as the agent of 3 Eau Claire in order to sell the Lands or to procure a new development or joint-venture partner. The agreement remained in force between Avison and 3 Eau Claire at all times material to this Application.

5 Under the Listing Agreement, 3 Eau Claire agreed to pay Avison a \$400,000 commission in the event the Lands were sold, or \$800,000 upon a binding partnership agreement, payable on the closing date of the applicable agreement.

The Listing Agreement also provided that deposits called for in offers to purchase were to be held in trust by Avison and could be used to offset the commission earned.

6 On April 2, 2014, Bosa made a demand for payment and gave a Notice of Intention to Enforce Security on 3 Eau Claire. On April 11, 2014, 3 Eau Claire filed a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*¹. Deloitte Restructuring Inc. consented to act as Trustee of 3 Eau Claire's proposal.

7 3 Eau Claire was granted several extensions to the initial 30-day stay of proceedings to give it additional time to file a proposal and an Administrative Charge to secure payment of the professional fees of Deloitte and its Counsel was established. The amount of this charge was in the end set by the Court at \$100,000.

8 On August 15, 2014, Deloitte was appointed as Receiver without security over all of 3 Eau Claire's current and future assets, undertakings and properties pursuant to a Limited Receivership and Extension Order. As Receiver, it was granted certain powers including the power to engage agents to assist with the exercise of its duties, and the power to market any or all of the property of 3 Eau Claire including the Lands.

9 The Receiver continued to rely on Avison's services in a limited way and in September 2014, Deloitte asked Avison whether it would accept a discounted commission of \$350,000. Avison agreed.

10 On September 25, 2014, the Court expanded Deloitte's powers and also granted a first priority charge on the estate of 3 Eau Claire, to be ranked *pari passu* with the Administrative Charge, in favour of the Receiver and its legal counsel in order to secure payment of the Receiver's reasonable fees and disbursements. The obligation of 3 Eau Claire for the payment of the reduced commission was never brought under the umbrella of either the Administrative Charge or the Receiver's Charge contemplated by the September 25, 2014 Order.

11 The Court also approved the sale of the Lands to Bentall Kennedy (Canada) LP with the net proceeds from the sale to stand in place and stead of the Lands. Under that Order, all encumbrances on the Lands were discharged but attached with the same validity and priority and in the same amounts to the proceeds of sale as if the property had not been sold. The proceeds of the sale, amounting to \$39.4 million, were paid to the Receiver in November 2014.

12 At the hearing, Bosa stated for the first time that it intended to oppose the payment of Avison's commission in priority to its secured claim.

13 On September 29, 2014, the extension of the stay of proceedings lapsed without 3 Eau Claire having filed a BIA proposal. Accordingly, 3 Eau Claire was deemed to have made an assignment in bankruptcy and Deloitte was appointed as trustee of the bankrupt estate.

14 As of September 29, 2014, Deloitte had filed four reports as Proposal Trustee and one report as Receiver. The reports describe in detail Avison's marketing activities. Avison had continued its services pursuant to the Listing Agreement with 3 Eau Claire during the proposal period. It assisted the Trustee in marketing the Lands, assessing interested parties, analyzing their offers, and negotiating purchase agreements. Avison's direct involvement in the marketing process ended by the August 15, 2014 hearing.

15 As of September 29, 2014, 3 Eau Claire had seven listed secured creditors who held registered mortgages against the Lands. The total secured claims amounted to approximately \$47.5 million. As such, the claims exceeded the total proceeds held by the Receiver.

16 Avison filed this Application on December 12, 2014 seeking payment to Avison in the amount of \$350,000.00 plus GST out of the sales proceeds of the Lands in priority to all other claims against 3 Eau Claire and the Lands. Avison and Bosa exchanged Briefs of Law and Argument on January 23, 2015. Bosa submitted a Supplemental Bench Brief on January 27, 2015.

Parties Arguments

Avison's Arguments

17 Avison argues that equity demands payment of its commission for successfully marketing the Lands on behalf of 3 Eau Claire and raises four distinct legal paths to justify payment in priority to Bosa.

18 First, it argues that the Listing Agreement creates an express trust over Avison's commission. In Avison's view, the subject-matter of the trust is the commission due to Avison — \$400,000 plus GST upon sale of the Lands; the object of the trust, Avison, is also certain. Avison further argues that the Listing Agreement also establishes certainty of intention. The Agreement provides that deposits called for in offers to purchase are to be held in trust by Avison and may be deducted for commission earned. Further, 3 Eau Claire irrevocably assigns any and all additional commission owing by 3 Eau Claire to Avison from the proceeds of the sale of the Lands. In Avison's view, the Asset Purchase Agreement with Bentall contemplated that deposits would be paid to 3 Eau Claire's solicitors in trust, and that 3 Eau Claire was responsible for commissions due to Avison. As such, the commission does not form part of 3 Eau Claire's estate and is not divisible amongst 3 Eau Claire's creditors.

19 Second, Avison argues that section 65.1(1) of the BIA required Avison to continue its services after the Notice of Intention to Make a Proposal was filed as the section prohibits persons from terminating any agreement with the insolvent person after said person files a Notice of Intention to Make a Proposal for the reason of that person's insolvency. Avison argues that it therefore could not terminate the Listing Agreement, and, pursuant to section 65.1(4) of the BIA, is entitled to seek immediate payment for services.

20 Third, Avison argues that the Limited Receivership Order gave Deloitte the authority to pay Avison's commission. That Order gave Deloitte the power to market 3 Eau Claire's property and engage agents to assist in the process. The Amended and Restated Receivership Order gave Deloitte power to control proceeds from a sale and settle any indebtedness owing by 3 Eau Claire. Avison argues that Deloitte exercised that authority to agree to payment of a \$350,000 commission.

21 Fourth, Avison argues that Bosa would be unjustly enriched if it were to receive the Commission, and that a remedial constructive trust is the appropriate way to avoid that result. The test for unjust enrichment requires: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. Avison argues that Bosa will be directly enriched if Avison's application is denied, with a corresponding deprivation to Avison. Avison then argues that there is no juristic reason for the defendant to retain the enrichment. Avison specifically argues that the BIA's priority scheme is irrelevant given its previous arguments that the BIA required Avison to continue to render services to 3 Eau Claire and entitles it to be paid for its services, and that trust property is excluded from the scheme.

22 Avison concludes that the appropriate remedy is declaration of a remedial constructive trust. Avison argues that a money judgment against 3 Eau Claire is inadequate given that as an unsecured creditor, Avison would surely have no recovery. Avison further argues that there is a direct link between its services and the subject of the trust, the sales proceeds.

Bosa's Arguments

23 Bosa's principal argument is that Avison failed to act in a timely manner to protect its position by either seeking a priority charge or contracting with the Receiver, and that Bosa, as a secured creditor, should not be punished as a result.

24 Bosa argues that Avison failed to protect its financial interest in accordance with section 64.2 of the BIA, which permits the Court to order that part of the bankrupt's property may be subject to a charge in respect of the fees of experts such as Avison. In Bosa's view, Avison was aware of the applications to this Court through-out the process and knew

or should have known that Deloitte, Miller Thompson and Blakes sought and received priority charges with respect to their fees. Accordingly, Avison should have sought a priority charge for the payment of its commission as an advisor to 3 Eau Claire or Deloitte.

25 In its Supplemental Bench Brief, Bosa responds to Avison's arguments.

26 First, Bosa argues that the Listing Agreement does not create a valid trust. On intention, Bosa argues that the Listing Agreement does not establish that 3 Eau Claire intended to create a trust in favour of Avison. Bosa argues that instead, the Agreement evinces an intention to create a contractual agreement to pay Avison for its services, and provides that Avison will hold any deposit in trust for 3 Eau Claire, not for Avison itself. On subject matter, Bosa argues that the commission was not identifiable or held apart in trust for Avison. Rather, the \$2.0 million dollars held in trust flowed from the purchaser to the bank account of the purchaser's solicitors subject to the terms of the Asset Purchase Agreement. That agreement was between the Receiver and Bentall as purchaser, with no relevance to the commission.

27 Second, Bosa argues that section 65.1(1) of the BIA is not applicable. Bosa argues that the section is intended to prevent contracting parties from taking advantage of clauses allowing for termination based solely upon insolvency and not for any other breach of contract. Bosa argues that the section is primarily with respect to the supply of goods which are necessary for the continuation of a debtor's business, and as Avison was not supplying goods upon which 3 Eau Claire relied for operations, Avison could have terminated, or at least sought direction from the Court. Further, Bosa argues that even if Avison was not entitled to terminate, it was not required to make advance of credit to 3 Eau Claire. In addition, Bosa argues that regardless, Avison could have secured a priority charge. Thus, by not terminating and continuing to market the lands without entering into a listing agreement with the Receiver or seeking a priority charge, Avison chose to provide services on unsecured credit.

28 Third, Bosa argues that the Receiver does not have unilateral authority to approve the payment of a commission to Avison where doing so would alter the priorities set out in the BIA. Absent an express assumption of the Listing Agreement or a section 64.2 priority charge, an obligation of 3 Eau Claire cannot be elevated to priority status.

29 Fourth, Bosa contests Avison's argument of unjust enrichment. Bosa argues that any deprivation suffered by Avison was not caused by Bosa but rather was due to the financial status of 3 Eau Claire and Avison's failure to contract with the Receiver or to seek a priority charge pursuant to section 64.2 of the BIA. Bosa also argues that the operation of the BIA, including its statutory regime establishing the relative priority of claims, is an adequate juristic reason for any enrichment to a bankrupt estate or its creditors. In particular, Bosa points to the valid security interest as the juristic reason for permitting the enrichment of the secured lender and the corresponding deprivation of unsecured claimants. Bosa objects to Avison's estoppel argument on the basis that it is permitted to protect its position when Avison seeks to subvert the BIA. In Bosa's view, Bosa had no obligation to compel Avison to exercise options available to it under the BIA. Bosa argues that it has no legal relationship with Avison and thus any estoppel argument fails.

Decision

30 This Court has some sympathy for Avison. The company successfully secured a lucrative sale of the Lands to the benefit of all creditors including Bosa. At the end of the day, however, Avison failed to protect its own financial position and remains an unsecured creditor after a long line of secured creditors.

Discussion

31 Avison's arguments must be viewed in the context of the alternative steps it could have taken.

32 Avison had an agreement with 3 Eau Claire. That agreement was never affirmed by the Receiver so there is no privity of contract between Avison and the Receiver. And, the Receiver is not bound by existing contracts made by 3 Eau Claire.²

33 It is a matter of record that Avison attended every court date in the proceedings and was in regular contact with Deloitte. It was almost certainly aware that priority charges were granted in favour of Deloitte, Miller and Blakes. Avison failed to pursue a similar course of action to its own detriment. That is what could have been. But it was not so I must address each of Avison's arguments.

Existence of an Express Trust

Avison's argument that the Listing Agreement creates an express trust is unpersuasive. Section 67(1)(a) of the BIA provides that "[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person" As the Alberta Court of Appeal sets out in *Carling Development Inc. v. Aurora River Tower Inc.*, an express trust requires three elements: (i) certain beneficiaries; (ii) clear subject matter; and (iii) intention to create a trust.³ The third element, intention, is not present here.

34 Clauses 5 and 7 the Listing Agreement provide as follows:

5. **Payment of Commission.** We will unconditionally and without any set off or deduction, pay the Commission on the closing date provided for in any Agreement, or upon the execution of a partnership agreement provided that all of the buyer's conditions have been satisfied or waived, whether or not closing of the purchased and sale of the Property has occurred (the "**Closing Date**"). In the event the Property is sold or deemed to be sold or a partnership agreement is entered into during the Term other than by way of Agreement, the Property will be deemed to be sold for a price equal to the gross sale price payable by the buyer, and the Commission will be fully earned, due and unconditionally payable to Avison Young immediately upon such disposition taking place.

...

7. **Deposit.** We agree that Avison Young will hold any deposit called for in any Agreement (the "**Deposit**") and that the Deposit will be held by Avison Young in its trust account. We authorize Avison Young to deduct earned Commission and other amounts that may be or become owing by us to Avison Young from any such Deposit held when such Commission becomes payable. In the event of a sale not being completed as result of a default by the buyer, and the Deposit being forfeited by the buyer, we authorize Avison Young to deduct and pay to itself one-half of the Deposit, up to a sum equivalent to the Commission. The remaining balance of the Deposit will then be paid to us.

35 In my opinion, the Listing Agreement does not disclose an intention to create a trust. Read plainly, Clause 5 provides that the commission will be payable on the closing date. Clause 7 authorizes Avison to deduct funds from the trust to offset its commission when the commission becomes payable. The Agreement in no way transfers ownership of the funds to Avison; no beneficial property rights attach to the deposit in favour of Avison. Rather, 3 Eau Claire may use the funds to satisfy its contractual obligation to pay Avison for its services. That the funds are held in a real estate trust account does not create a trust relationship: it is simply a mechanism for efficient payment.

36 This language is consistent with the circumstances in *Allan Realty of Guelph Ltd., Re.*⁴ In that case, the insolvent Allan Realty was a listing broker and at the time of bankruptcy held in trust a purchaser's deposit on a property. Another broker was responsible for the sale of the property. Under that trust, on completion, the vendor was entitled to the deposit, and the broker could access the funds to satisfy the claim for commission. As the Court observed at para 31:

It will be at once apparent that this is not a case in which the source of funds can be described as the settlor. It is clear that at the time the contract of purchase and sale comes into existence and the deposit is paid, neither the purchaser, who is the source of the deposit, nor the vendor, upon whom ultimately the obligation to pay commission will rest,

has the intention of creating a trust in favour of either listing or selling broker. If, therefore, a trust is to be found, it is not at that stage of the transaction, nor with respect to the deposit.

37 Avison points to paragraph 18 of the same decision, which notes that the agreement to pay commission contains the added direction by which the vendor instructs his solicitor "to pay direct to the said agent any unpaid balance of commission from the proceeds of sale." This distinction is irrelevant. It simply clarifies the means by which the funds will be directed out of the trust account.

38 Accordingly, I do not agree that the Listing Agreement creates an express trust thereby excluding the commission from 3 Eau Claire's estate.

Section 65.1 of the BIA

39 Avison's next argument is that it was prohibited from terminating the Listing Agreement under section 65.1(1) of the BIA and is therefore entitled to require payment under section 65.1(4). However, section 65.1(1) is irrelevant here.

40 In essence, the section only precludes counterparties to agreements with 3 Eau Claire upon its filing of a Notice of Intention from terminating those agreements or from claiming an accelerated payment solely by reason of the insolvency. The section does not prohibit termination on the basis of failure to pay. Indeed, as section 65.1(4) explicitly states, nothing bars the counterparty from demanding immediate payment for any services provided *after* the filing and section 65.1(4) of the BIA states that a creditor such as Avison is not required to advance such services on credit. It is quite common for post-petition creditors to be protected for services provided post-petition but that was not done by Avison. Avison cannot rely on section 65.1 to advance its priority position.

Payment Approval by the Receiver

41 Avison's next claim is that the Receiver (i) had authority to approve payment of Avison's commission, and (ii) approved such payment. In my view, neither is true.

42 As Avison observes, the Limited Receivership Order gave Deloitte the authority to, *inter alia*, (i) market all or any of 3 Eau Claire's property, including advertising and soliciting offers in respect of the property, and negotiating the terms and conditions of sale; and (ii) engage consultants, agents, and such other persons to assist with the exercise of the Receiver's powers and duties. As of September 25, 2014, the Receiver's powers were expanded under an Amended and Restated Receivership Order to include taking possession and exercising control over 3 Eau Claire's property and any proceeds arising therefrom. The Receiver was also granted power to settle, extend or compromise any indebtedness owing by 3 Eau Claire.

43 These Orders do not, however, confer authority on the Receiver to unilaterally approve a commission in priority to secured lenders in the context of a receivership except as permitted under the BIA.

44 Nor did the Receiver even purport to approve payment of the commission. Avison has not provided any clear statements from the Receiver guaranteeing payment. The Receiver notes in paragraph 34 of its First Report that a commission "may be payable to Avison Young pursuant to the Listing Agreement, which could total up to \$400,000." The Receiver's Second Report also hedges at para 32:

As previously reported, the Receiver is not subject to any agreement with Avison with respect to the Marketing Process. The Receiver recognizes, however, the contribution of Avison in bringing forward key interested parties, including the Purchaser, throughout the Marketing Process and in keeping these parties engaged during the Marketing Process. As such, the Receiver would not oppose the payment of a discounted commission of \$350,000 (plus GST) to Avison to recognize the contribution that Avison made to the Marketing Process despite the fact that they were not involved in the final negotiations with the Purchaser. The Receiver has discussed this with Avison and they are agreeable to the discounted commission described herein.

The Receiver's Third Report contains similar language stating that, while it would not oppose payment, the Receiver is not agreeing to make payment. To the extent there is any validity to Avison's allegations that it was misled, its quarrel is with the Receiver and not with the estate.

Unjust enrichment

45 Avison's final argument is that Bosa would be unjustly enriched if it were to receive the commission, and that a remedial constructive trust is the appropriate remedy.

46 The Supreme Court of Canada set out the test for unjust enrichment in *Becker v. Pettikus*.⁵ There are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment.

47 The Supreme Court set out the two part test for juristic reasons in *Garland v. Consumers' Gas Co.*⁶ :

[T]he proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery... . The established categories that can constitute juristic reasons include a contract (*Pettikus, supra*), a disposition of law (*Pettikus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations.

48 It is clear here that the \$350,000 will either go to Avison, if the application is granted, or to Bosa, if the application is denied. The difficulty with Avison's argument lies in proving that allocation to Bosa is unjust.

49 Avison rests its argument primarily on the reasonable expectations of the parties; in particular, the nature of the risk they assumed in the project and Bosa's subsequent conduct implying its acquiescence to payment of Avison's commission. Avison relies on *General Motors Corp. v. Peco Inc.*⁷ In that case, the moving party, Mantum Corporation entered into an agreement with PECO whereby Mantum would assess and seek to recover Workers' Compensation refunds due to overpayment. On August 22, 2005, Mantum secured \$234,577.77 in a successful appeal before the Workplace Safety and Insurance Appeals Tribunal. Mantum was contractually entitled to 35% of the refund. Mantum learned in early August that PECO was in receivership, and the controller of PECO, under authority from the receiver but without the receiver's knowledge, told Mantum that it would be paid in full.

50 On Mantum's application to obtain the refund, Cumming J. found that "[t]here is an *enrichment*, in that the Receiver has in hand 100% of the Refund rather than 65%, being all to which PECO was entitled. There is a corresponding *deprivation* inasmuch as Mantum is short the 35% of the Refund to which it is entitled."⁸ The Court concluded that whereas Mantum had a reasonable expectation of receiving the 35% interest, PECO had no corresponding interest in retaining that interest. The Court also noted that the funds never became part of PECO's general funds, but were kept separate. The Court pointed out that the money would either go to Mantum, or to a single secured creditor, and should go to Mantum. Finally, the Court noted that the Receiver, through its surrogates, authorized Mantum to continue its

efforts. Accordingly, the Court found no juristic reason for the Receiver to retain the 35% Refund and ordered payment to Mantum.

51 In my view, the General Motors case is distinguishable. Here a clear juristic reason prevails: the priority scheme set out in the *BIA*. As this Court has consistently held, "[i]n bankruptcy situations, the creditors who benefit from the failure of a trust claim are not 'enriched', but merely recover what they are owed according to the pro-rata distribution requirements set out in the *Bankruptcy and Insolvency Act*."⁹

52 Moreover, in *Peco*, the Receiver was bound and assumed the contract between the debtor and lender. The instant case is much more analogous to *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.*,¹⁰ wherein the applicant Capitalink entered into an agreement with Beta Limited/Beta Brands Limited to market its assets and property for sale in exchange for a fee. Capitalink completed its efforts in December 2006 and in January 2007, Beta Brands entered receivership. The Court rejected Capitalink's quantum meruit claim on the basis that there was no reasonable expectation that the services were compensable. The Court writes as follows at paras 41-42:

41 The difficulty that arises in respect of Capitalink's claim is that the efforts rendered by Capitalink did not create a reasonable expectation that such were compensable by the Receiver. Capitalink's arrangement for payment extended only to Beta Brands. Capitalink engaged in marketing efforts in order to fulfill the contractual agreement established with Beta Brands. The court order approving the Bremner Transaction is insufficient to establish a reasonable expectation that the Receiver should compensate Capitalink for its efforts.

42 In addition, this is not a situation where there is an absence of a juristic reason for the enrichment. The Receiver had an obligation to deal with Beta Brands' assets in a commercially reasonable manner. In relying on the marketing efforts of Capitalink, the Receiver was simply complying with this obligation. In my view this represents a sufficient juristic reason for non-payment.

53 Avison seeks to distinguish this case on the basis that Capitalink's services were complete before the receivership commenced, and thus the receiver could not change the situation, whereas in the instant case, the Receiver continued to engage Avison. I have seen no evidence, however, that the Receiver assured Avison of payment, and regardless, without a priority charge, such assurances are unlikely to provide a basis for a retroactive reordering of priorities.

54 In the absence of unjust enrichment, no constructive trust arises.

Conclusion

55 Granting the application would upend the BIA's statutory scheme and, in doing so, prejudice the rights of the secured creditors of 3 Eau Claire. The application is dismissed.

Costs

56 The parties may speak to costs if they wish in the 30 days following the date of this decision.

Application dismissed.

Footnotes

1 RSC 1985, c B-3.

2 See *Bank of Montreal v. Scaffold Connection Corp.*, 2002 ABQB 706 (Alta. Q.B.) at para 11, [2002] A.J. No. 959 (Alta. Q.B.).

3 2005 ABCA 267 (Alta. C.A.) at para 51.

- 4 1979 CarswellOnt 184, 24 O.R. (2d) 21 (Ont. Bkcty.) (noted with approval in *Century 21 Brenmore Real Estate Ltd., Re*, 1980 CarswellOnt 126 (Ont. C.A.) at para 24, (1980), 28 O.R. (2d) 653 (Ont. C.A.)).
- 5 [1980] 2 S.C.R. 834 (S.C.C.) at para 38.
- 6 [2004] 1 S.C.R. 629 (S.C.C.) at paras 44-46.
- 7 2006 CarswellOnt 987, [2006] O.J. No. 636 (Ont. S.C.J.) [*Peco*].
- 8 *Ibid* at para 18.
- 9 *Hoard, Re*, 2014 ABQB 426 (Alta. Q.B.) at para 29, [2014] A.W.L.D. 3827 (Alta. Q.B.) citing *Bassano Growers Ltd. v. Price Waterhouse Ltd.*, [1997] A.J. No. 860, 214 A.R. 380 (Alta. Q.B.), aff'd (1998), 216 A.R. 328 (Alta. C.A.).
- 10 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.).

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TAB 18

2000 CarswellAlta 1659
Alberta Court of Queen's Bench

Bank of Montreal v. Probe Exploration Inc.

2000 CarswellAlta 1659, [2000] A.J. No. 1752, 33 C.B.R. (4th) 173

Bank of Montreal, Plaintiff and Probe Exploration Inc., Defendant

Fraser J.

Heard: May 15, 2000

Judgment: May 15, 2000 *

Docket: Calgary 0001-02917

Proceedings: affirmed 2000 CarswellAlta 1621 (Alta. C.A.)

Counsel: *Ms K. Horner*, for Applicant, PricewaterhouseCoopers Inc., Receiver/Manager of Probe Exploration Inc.
V.P. Lalonde, D. Kearl, for Respondent, Midcoast Canada Operating Corporation

Subject: Corporate and Commercial; Insolvency

APPLICATION by receiver/manager of P Inc. for order authorizing termination of agreements between P Inc. and M Corp.

Fraser J. (orally):

1 PricewaterhouseCoopers Inc., the Receiver/Manager ("Receiver/Manager") of Probe Exploration Inc. ("Probe"), applies for an order authorizing the Receiver/Manager to immediately terminate or to terminate at a time established in its discretion certain agreements which Probe had entered into with Midcoast Canada Operating Corporation ("Midcoast") in connection with the purchase by Midcoast of Probe's gas processing facility at Calmar, Alberta. Leave will not be granted as applied for by the Receiver/Manager.

2 Midcoast is a midstream operator; it is in the business of providing natural gas producers with transportation, gathering, processing and marketing facilities. It does not own any petroleum or natural gas reserves in the area of the Calmar facility which it purchased from Probe on March 23, 1999. Midcoast processes all of Probe's sour gas reserves produced in the area plus a small volume of third party reserves.

3 Midcoast argues that without the processing provided by the Calmar facility all of Probe's sour gas production, as well as its natural gas liquids and crude oil reserves which are associated with its sour gas production in the area, would be unmarketable.

4 It argues further that without the services of Midcoast Probe's sour gas wells and oil wells with associated sour gas would be shut-in.

5 The Receiver/Manager argues in response that alternative facilities are available, albeit on the basis that new infrastructure, including a pipeline, would have to be built to use them. All of the Probe's sour gas processed at the Calmar facility is delivered to the facility through Probe's upstream gathering facilities, and all of the gas processed by it leaves the Calmar facility via Probe's downstream transmission line.

6 Midcoast also argues that the development of any such alternative facilities would take at least a year. If the Calmar facility was not available to it during the year Probe's production would be shut-in during that period at a loss to Probe, as argued by Midcoast, of revenue of approximately \$31,500,000.

7 Prior to March, 1999, Probe experienced severe financial difficulties, it was substantially indebted to the Bank of Montreal ("the Bank"). The bank was Probe's senior secured creditor.

8 As a result of financial problems, Probe sold the Calmar facility to Midcoast for \$20 million. Midcoast argues that the purchase was made on terms designed to ensure the long-term viability of the facility. Those terms included the guarantee of minimum deliveries of sour gas, the dedication of gathering facilities, and the granting of a security interest in Probe's production and gathering facilities.

9 The terms were incorporated into a series of related agreements which will be described below. For the moment, it is sufficient to say that the Receiver/Manager now submits that termination of each of three of the agreements would enhance the value of Probe's interest in certain gas producing lands owned by Probe near the Calmar facility for the benefit of all creditors of Probe.

10 It is appropriate to note at this point that the bank is its is Probe's first secured creditor, and that the opinion was expressed on cross-examination by a manager of the Receiver/Manager that the bank was unlikely to be paid out from the proceeds of the liquidation of Probe. It would follow that Midcoast as Probe's second secured creditor, and ordinary creditors would not likely be paid anything following the completion of the liquidation of Probe.

11 The first of the three agreements which the Receiver/Manager wishes leave to terminate is termed a Gas Gathering and Treatment Agreement (the "GGT Agreement"). In that agreement, Probe agreed with Midcoast to dedicate all the gas which Probe produced from its interests and certain formations located near the Calmar facility for processing by Midcoast in the Calmar facility. The essence of the agreement is that Probe is required to deliver specified minimum volumes of gas during each of the first eight years of the agreement for processing at an initial rate of 55 cents per Mcf.

12 Midcoast has a charge and security interest over all of Probe's interest in the gas produced and the lands from which it is produced as security for the Probe performance of Probe's obligations under the agreement. The security interest is subordinate to the interest of the bank.

13 The evidence of the Receiver/Manager is its belief based on the current production of Probe from the dedicated land that a purchaser of the lands will be unlikely to meet the volume requirements of gas to be produced in years four to seven of the term of the agreement but will nevertheless be required to pay the aggregate minimum processing fees for those years. The aggregate processing fees payable in respect of the shortfall of gas would be approximately \$2.2 million which the Receiver/Manager terms a penalty. The amount of the shortfall is based on current production and does not take into account a continuation of the decline in production which has occurred in recent years and which will not cease or increase without significant capital investment by a purchaser. The effect of the decline would be to increase the so-called penalty. The belief of the Receiver/Manager with respect to the effect of the GGT Agreement would appear to me to be reasonable.

14 The second agreement which the Receiver/Manager wishes to terminate is termed the Area of Interest Agreement (the "AOI Agreement"). In that agreement, Probe agreed to notify Midcoast of, among other things, any gas services it requires, unsolicited third party offers for gas services and natural gas pipelines or facilities it wishes to sell within certain lands, all of which are adjacent to or near the Calmar facility and the lands described in the GGT Agreement.

15 The AOI Agreement effectively gives to Midcoast a right of first refusal to match any third party offers to deal with Probe with respect to any of the matters covered by the agreement. The belief of the Receiver/Manager is that the AOI Agreement has the effect of reducing the realization value of Probe's interest in the lands covered by the agreement. The belief of the Receiver/Manager with respect to the effect of the agreement also appears to me to be reasonable and logical.

16 The third agreement which the Receiver/Manager wishes to terminate is the Probe System Gathering Agreement (which I will term the "PSG Agreement"). By that agreement, Probe granted Midcoast the right to use at no charge certain gas gathering facilities upstream from the Calmar facility to transport gas to the facility and to use certain transportation facilities downstream from the facility to enable Midcoast to transport gas from the facility at a fee of 1 cent per MCF. The obligations of Probe are covenants running with the land interest, forming part of Probe's upstream and downstream facilities.

17 Recent arrangements have been made by Probe for the use of similar facilities at fees from 8 to 12 cents per MCF. The Receiver/Manager is of the belief that termination of the PSG Agreement would increase the value of Probe's interest in the facilities governed by the agreement for the benefit of all of the creditors of Probe.

18 A fourth argument made between Probe and Midcoast at the time of the sale of the Calmar facility is also relevant to the application of the Receiver/Manager. It is termed the Intercreditor Agreement which provides for the subordination of the security interests of Midcoast granted under the GGT Agreement and the PSG Agreement to the security interest of the bank and the assets of Probe.

19 Clause 4 of the Intercreditor Agreement provides that where the bank or an agent of the bank or a private receiver appointed by the bank takes possession of the assets subject to the GGT Agreement or the PSG Agreement, such party shall assume the obligations of Probe under those agreements. The agreement is not stated to apply to a court-appointed Receiver/Manager.

20 The Receiver/Manager has engaged third party assistance to conduct a sale of the assets of Probe. The sale is being conducted on a liquidation rather than on a going-concern basis. The Receiver/Manager therefore submits that preservation of the goodwill of Probe is not a factor to be considered with respect to this application. I accept that such submission is reasonable.

21 The Bank and Probe agreed on March 1, 2000 to an order granting judgment to the bank against Probe in the amount of \$108,629,412.07 plus interest and costs. PricewaterhouseCoopers Inc., which had previously been retained by the bank as its agent to review the financial affairs of Probe, was then appointed by the court without notice to Midcoast as the Receiver/Manager of Probe.

22 On May 2, 2000, the person, who is a manager of the Receiver/Manager, expressed the opinion on a cross-examination on his affidavit that it is highly unlikely that the bank will be paid out from the proceeds of the sale of Probe's assets.

23 Midcoast argues that the existence of the three agreements which the Receiver/Manager wishes leave to terminate does not detrimentally affect the realization value of Probe's assets. It argues with respect to the GGT agreement that the industry standard processing fee for gas is 90 cents per MCF which is much higher than the fee of 55 cents payable under the GGT Agreement. Midcoast submits that the savings in the processing fee would not be enjoyed by Probe if the agreement is terminated, and that would be a disadvantage to the creditors. While that may be true, the uncontradicted evidence is that the volumes of gas likely to be available will not be such in the first eight years of the agreement to allow Probe or a successor in ownership to benefit from the lower fee to allow it to escape the penalty which appears likely on the evidence to be imposed by the agreement. Any other view would, with respect, appear on the evidence to be speculation.

24 Midcoast argues that the Probe obligations under the AOI Agreement are not a hindrance in any way to a purchaser of Probe's assets. With respect, that argument is also difficult to accept. The existence of the right of first refusal means that unless Midcoast is, for whatever reason, publicly known to be out of the market to buy or deal, an unlikely eventuality, so long as Midcoast owns the Calmar facility, a third party purchaser would in bidding to deal with Probe merely be setting the price or terms at which Midcoast could buy or on which it could deal. That fact must

discourage any third party from dealing with Probe, let alone detrimentally affecting the value of the Probe asset being bought. With respect, the agreement of Midcoast about the effect of the AOI Agreement is therefore rejected.

25 Midcoast also argues that the PSG Agreement does not reduce the realization value of Probe's interest in the lands related to the agreement. That argument is also rejected because if a third party is buying the transportation facilities governed by the agreement, it would be prevented from earning the return on them which is set according to normal industry standards. Given that the return would not be available, the value of the facilities must be depressed.

26 For this and the other reasons as stated, I would accept the contention of the Receiver/Manager that the agreements which it seeks leave to terminate must depress the value of the assets of Probe affected. It remains, however, to consider whether the court should grant leave to terminate the agreements.

27 The primary argument made by the Receiver/Manager in support of its application is that because the operation being carried out is a liquidation of the assets of Probe, goodwill is not a factor, and the Receiver/Manager should therefore be entitled to terminate the contracts. It cites statements from the text *Bennett on Receivership*, and comments from *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.L.R. (4th) 127 (N.S. C.A.), in support of its arguments. In particular, it cites the following statement from Bennett at page 342:

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any monies that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of the existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor or likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.

28 The argument is that because Probe is essentially in litigation it has no goodwill. Termination would therefore not adversely affect the goodwill because Probe has no goodwill because it is in litigation.

29 The Receiver/Manager also refers to another quotation from a previous edition of Bennett cited in the Bayhold Financial decision. That quotation reads as follows:

As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business.

30 The decision in Bayhold Financial also contains at page 137 the following additional statement:

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

31 The case of *Newdigate Colliery Ltd., Re*, [1912] 1 Ch. 468 (Eng. Ch. Div.) is authority for the following proposition at page 478:

... the security of the mortgagee is on the undertaking and all the property present and future, including the uncalled capital, of this company. So that the property for which the receiver and manager is responsible includes this business and undertaking, and it is his duty to do, and our business to see that he does, everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it. The order asked for is an order directing the receiver and manager to disregard the interests of one of his constituents, the mortgagor, in

order to benefit another of his constituents, namely, the mortgagee. It seems to me that such an order is necessarily wrong. No precedent has been cited for such an order. I have never heard of such an application before, and it seems to me in principle to be wrong. It is the duty of the judge who is taking control of the assets to deal with those assets with due regard to the interests of everybody concerned, and not to advance the interests of one of the persons concerned at the expense of the other.

32 Again the argument of the Receiver/Manager is that it does not have a duty to honour contracts because the company has no goodwill which the receiver is obligated to preserve. However, in my view, the receiver and the manager must have an overriding regard to the interests of all of its constituents including Midcoast.

33 Midcoast argues in response to the argument of the receiver and manager about goodwill that the three agreements which the Receiver/Manager wants terminated were entered into for valid consideration, namely the purchase price of the Calmar facility. To terminate the agreements, would involve the entry by the court into a transaction made between two parties for the benefit of one but the detriment of the other. It would be unfair to Midcoast for the court to interfere.

34 Midcoast argues that the Receiver/Manager has a duty to act with respect to the conduct of the receivership for the benefit of all the persons interested in it. In support of this argument, it cites the passage from the Newdegate decision which I have quoted. In my view, the grant of leave to terminate the contracts which I have described would prefer the interests of Probe and its primary secured creditor, the Bank, over the interests of another interested party Midcoast, although Midcoast is not a creditor at this time.

35 If the view of the person who was cross-examined on behalf of the Receiver/Manager is correct, the effect of termination would likely be to relegate it to the status of an ordinary creditor in respect of its claim for damages for the breach of contract or resulting from the termination. At the same time termination would free Probe from the disadvantages and losses imposed by the contracts at the expense of Midcoast.

36 The receiver and manager is at page 478 of the *Newdegate* decision termed "an equitable mortgagee." Equity would, in my view, require it to deal fairly with all interested parties in the exercise of its duties as Receiver/Manager with respect to the equity of redemptions. To deal with Midcoast in the manner suggested by the receiver and manager would not, in my view, be fair and it should therefore not be allowed to breach its duty to be fair, at least in the circumstances now before the court.

37 I have in mind that the termination of the agreements would, among other things, deprive Midcoast of rights it bargained to get for the benefit of the Calmar facility. Termination would not appear to impose any similar disadvantage or loss of contractual right to Probe. The unequal treatment of the two parties imposed for the benefit of one of the parties or of the bank as its creditor would not, in my view, be equitable or fair.

38 The view expressed in the previous paragraph is reinforced by the fact that the Intercreditor Agreement, to which reference has been made above, clearly evidences a mutual intent to have a purchaser from Probe bound by the agreements now sought to be terminated. The fact that the agreement is not stated to apply to a court-appointed Receiver/Manager may well be taken to evidence the assumption that a court-appointed receiver would be seen by all parties to have an obligation of fairness towards Midcoast imposed by the court, if necessary.

39 For the reasons which I have described, leave is not granted to the Receiver/Manager at this time to terminate the GGT Agreement, the AOI Agreement, or the PSG Agreement now existing between Probe and Midcoast.

40 I might add that the duties of a Receiver/Manager are not limited, in my view, to the preservation of goodwill of Probe. Such duties must primarily involve the conduct of the business or of the liquidation of the corporation which is the subject of the receivership. The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

41 The parties may, if they wish, speak to me regarding costs at their convenience.

42 Ms. Horner, Mr. Lalonde, is there anything further you wish me to deal with?

43 MR. LALONDE: No, I think we could deal with the costs at another occasion. I could seek instructions.

44 There is just one factual correction, My Lord. You indicated in your Reasons for Judgment that Midcoast, my client, is not a creditor of Probe at this point in time. It is to the extent of about \$780,000 for arrears.

45 THE COURT: I'm sorry, I did not have a record of that having been spoken to during the hearing.

46 MR. LALONDE: It may not have been in the material, but I believe I submitted it to you in oral argument.

47 THE COURT: Thank you.

48 MS. HORNER: Thank you, My Lord.

49 MR. LALONDE: Thank you, My Lord.

Application dismissed.

Footnotes

* Affirmed 2000 CarswellAlta 1621, 33 C.B.R. (4th) 182 (Alta. C.A.).

TAB 19

2008 BCSC 897

British Columbia Supreme Court [In Chambers]

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.

2008 CarswellBC 1421, 2008 BCSC 897, [2008] B.C.W.L.D. 5281, [2008] B.C.W.L.D. 5336,
[2008] B.C.W.L.D. 5337, [2008] B.C.W.L.D. 5338, [2008] B.C.W.L.D. 5414, [2008] B.C.J.
No. 1297, 169 A.C.W.S. (3d) 102, 44 C.B.R. (5th) 171, 72 R.P.R. (4th) 68, 86 B.C.L.R. (4th) 114

bcIMC Construction Fund Corporation (Petitioner) and Chandler Homer Street Ventures Ltd., Chandler Development Group Inc., Mark Chandler, Cooper Pacific II Mortgage Investment Corporation, P3 Holdings Inc., 636455 B.C. Ltd., Lower Mainland Steel (1998) Ltd., Susan Richards Investments Ltd., Susan Freeman, and Theodore Freeman a.k.a. Ted Freeman (Respondents)

bcIMC Speciality Fund Corporation (Petitioner) and Cook and Katsura Homes Inc.,
Chandler Katsura Developments Inc., Mark Chandler, Chandler Development Group Inc.,
636455 B.C. Ltd., BCMP Mortgage Investment Corporation, Susan Richards Investments
Ltd., Theodore Freeman a.k.a. Ted Freeman, and Susan Freeman (Respondents)

Burnyeat J.

Heard: March 27, 2008; April 14, 2008; May 29, 2008; June 9, 2008

Judgment: July 9, 2008 *

Docket: Vancouver H070700, H070699

Counsel: D.D. Nugent for Petitioner

H.M.B. Ferris for Bowra Group Inc., Receiver & Manager of Chandler Homer Street Ventures Ltd., Cook & Katsura Homes Inc.

S.R. Andersen for Farouk Ratansi, Salim Jiwa, Sui Chun Chao-Dietrich

G.J. Gehlen for 636455 B.C. Ltd.

A.H. Brown for Crestmark Holdings Corp.

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

APPLICATION by receiver in two foreclosure actions for directions; APPLICATION by contract holder for liberty to commence action against receiver and developers for specific performance.

Burnyeat J.:

1 These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security ("Receiver and Manager"), of all of the assets, undertakings and properties of Chandler Homer Street Ventures Ltd. ("Chandler") and Cook and Katsura Homes Inc. ("Cook"). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: "... manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor".

2 It was further provided in each of the Orders that:

... no proceeding or enforcement process in any Court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

... no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph.

3 Each of the Orders also provided the Receiver and Manager was empowered and authorized but not obligated to do any of the following where the Receiver considered it "necessary or desirable":

(2)(c) manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor; ...

(k) market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof out of the ordinary course of business . . .

(ii) with the approval of this Court in respect of any transaction in which the purchase price [exceeds \$10,000.00] or the aggregate purchase price exceeds [\$10,000.00] ...

(m) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; ...

(s) take any steps reasonably incidental to the exercise of these powers.

4 In both Actions, the Receiver and Manager now applies for "Directions" concerning either to disclaim certain contracts of purchase and sale ("Contracts") or to allow it to sell the strata lots involved at current market value free and clear of any obligation of Chandler or Cook that may arise under the Contracts on the bases that the discount contained in the Contracts constitutes payment of a pre-receivership unsecured claim or that the purchase price set out under the Contracts does not represent fair market value as at the date of those Contracts.

Background

5 Action H070699 relates to a 192 unit project in Yaletown ("Vancouver Project"). Action H070700 relates to two residential towers in Richmond ("Richmond Project"), being 9188 Cook Road ("Tower I") and 633 Katsura Road ("Tower II").

6 The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) *Vancouver Project*: \$59,800,000.00 (Petitioner); \$1,000,000.00 (New Home Warranty provision); \$1,000,000.00 (borrowings of the Receiver and Manager); \$3,500,000.00 (second charge holder); \$6,300,000.00 (third charge holder); \$20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project); (b) *Richmond Project*: \$25,400,000.00 (Petitioner); \$1,000,000.00 (New Home Warranty provision); \$1,000,000.00 (borrowings of the Receiver and Manager); and \$20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim \$30,100,000.00 against the Vancouver Project and \$32,300,000.00 against the Richmond

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

96 I cannot conclude that the Strata Lots are of an unique character and of particular value to Crestmark. Even if I could conclude that Crestmark had an equitable interest, I would also conclude that it was appropriate for the Receiver and Manager to disclaim the Contracts relating to these four Strata Lots. The four August 10, 2007 Contracts provide for "decoration" allowances totalling \$277,980.00. Unless Crestmark and the Receiver and Manager are prepared to execute a further Addendum removing those decoration allowances, the significant reductions from the "gross sale price" agreed to and the significant reduction from the "minimum pre-sale requirements set by the Petitioner" allows me to conclude that, if the Contracts are not disclaimed, Crestmark and Wong will receive significant preferences not otherwise available to other unsecured creditors of Chandler or Cook. Assuming that Crestmark has an equitable interest in the four Strata Lots, equity would require that I not approve any sales which would incorporate such significant preferences. The "analysis" performed by MPC and the minimum pre-sale requirement set by the Petitioner allow me to conclude that the Contracts were at prices not in accordance with fair market value at the time of the Contracts.

97 Accordingly, I provide the Direction to the Receiver and Manager that it can disclaim the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95 of the Richmond Project or alternatively, offer for sale those Strata Lots at current market value free and clear of any obligation of Chandler that might arise under the Contracts with Crestmark.

The Application of Crestmark

98 The application is that Crestmark be at liberty to commence an action against Chandler, Cook and the Receiver Manager for specific performance. The application of Crestmark pursuant to Rules 47 and 50 of the Rules of Court and the inherent jurisdiction of the Court is dismissed to the extent that the order sought relates to an action claiming specific performance. Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. Accordingly, there can be no action against the Receiver and Manager for specific performance. Regarding the proposed action against Chandler or Cook, Crestmark will be at liberty to commence an action claiming damages against either or both of those companies. However, Crestmark will not be at liberty to commence an action against either Chandler or Cook for specific performance. Crestmark has not met the onus of establishing a reasonable cause of action is disclosed.

Costs

99 The Receiver and Manager will be at liberty to speak to the question of costs against Crestmark Holdings Corp., Farouk Ratansi, Salim Jiwa, and Sui Chun Chao-Dietrich.

Order accordingly.

Footnotes

* A corrigendum issued by the court on October 16, 2008 has been incorporated herein.