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PLAINTIFF	**MAYNBRIDGE CAPITAL INC.**
DEFENDANTS	**GENCO HOLDINGS LTD., GENCO (WALDEN) LTD., PALI BEDI, TARLOK TATLA, JASBIR HANS, SOLO LIQUOR HOLDINGS LTD. AND SOLO LIQUOR STORES LTD.**
DOCUMENT	**BENCH BRIEF OF THE PLAINTIFF IN SUPPORT OF AN APPLICATION SCHEDULED BEFORE MADAM JUSTICE B. E. C. ROMAINE TO BE HEARD ON APRIL 5, 2019 AT 2:00 P.M.**
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**BENCH BRIEF OF THE PLAINTIFF, MAYNBRIDGE CAPITAL INC.,
IN SUPPORT OF AN APPLICATION
SCHEDULED BEFORE MADAM JUSTICE B. E. C. ROMAINE
TO BE HEARD ON APRIL 5, 2019 AT 2:00 P.M.**

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I. INTRODUCTION

1. This Brief is submitted on behalf of the Plaintiff in these proceedings, Maynbridge Capital Inc. ("**Maynbridge**"), in support of its application to appoint Ernst & Young Inc. ("**EY**") as the receiver and receiver-manager ("**Receiver**") of all of the current and future assets, undertaking and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**"), of the Defendants, Genco Holdings Ltd. ("**Genco**") and Genco (Walden) Ltd. ("**Walden**"; together with Genco, the "**Borrower**").

2. The Property over which Maynbridge seeks to appoint EY as receiver does not include: the Borrower's real property that is already the subject of a receivership order granted by this Honourable Court upon application of HSBC Bank Canada ("**HSBC**"), the Borrower's real property that is the subject of a separate application for the appointment of a receiver by HSBC, or lands which Maynbridge has otherwise agreed to exclude as set-out below in the requested relief section to this brief.

3. Maynbridge advanced $18,000,000 to the Borrower, which advance was secured by various security instruments. The security taken by Maynbridge includes the express authority to appoint a receiver in the event that the Borrower defaults on its loan obligations, or fails to repay funds advanced to it under its credit agreement with Maynbridge. The Borrower has defaulted on its loan obligations to Maynbridge and has failed to repay the funds advanced to it on demand. Maynbridge therefore has the contractual right to apply to appoint a receiver.

4. The Receivership Order is sought in order to preserve the Borrower's property, to permit the property to be sold in an orderly manner, to preserve any funds realized from the disposition of the property, and to gain transparency into the Borrower's prior dealings respecting the property.

II. STATEMENT OF FACTS

5. The facts in support of Maynbridge's application are set out in detail in the Affidavit of Stephen Davies, sworn on March 25, 2019 (the "**Affidavit**") and the Supplemental Affidavit of Stephen Davies, sworn on April 3, 2019 (the "**Supplemental Affidavit**").

6. Maynbridge provided a loan by way of a single advance in the amount of $18,000,000 (the "**Loan**") to the Borrower pursuant to a credit agreement dated December 22, 2017 (the "**Credit Agreement**"). The Credit Agreement provided that the indebtedness and obligations of the Borrower would be secured by various security granted by the Borrower to Maynbridge.[1]

7. The security granted by the Borrower to Maynbridge (the "**Security**") included, but was not limited to, General Security Agreements granted by each of Genco and Walden (together, the "**GSA**") and a collateral mortgage in the principal amount of $18,000,000 and registered over certain real properties (the "**Collateral Mortgage**").[2]

8. Pursuant to the GSA, the Borrower pledged (i) all of its present and after-acquired property, excluding any consumer goods, and (ii) a floating charge over all of its interest in personal, real, immovable and leasehold property including, without limitation, all fixtures, crops and improvements, both present and future, as collateral security for all outstanding obligations owing to Maynbridge.[3]

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[1] Affidavit at para 8 and Exhibit "E", article 8.
[2] Affidavit at paras 10(a) and 10(b), Exhibit "F" and Exhibit "G".
[3] Affidavit at para 10(a) and Exhibit F", clauses 1 and 2.

9. The Collateral Mortgage, in turn, created a fixed, specific mortgage and charge over the following properties:

(a) CONDOMINIUM PLAN 1711606
UNITS 1, 6, and 7
AND ALL APPLICABLE UNDIVIDED ONE TENTH THOUSANDTHS SHARES IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS
(the "**Walden Lands**"),

(b) CONDOMINIUM PLAN 9410576
UNITS 1 – 6, INCLUSIVE
AND ALL APPLICABLE UNDIVIDED ONE TENTH THOUSANDTH SHARES IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS, and

(c) PLAN A1
BLOCK 33
THE NORTH HALVES OF LOTS 1 AND 2 AND ALL OF LOTS 3 AND 4

(the properties described in subparagraphs 9(b) and 9(c) herein are collectively referred to as the "**Genco Lands**"; together with the Walden Lands, the "**Secured Lands**").[4]

10. It is an express term of the Credit Agreement and the Security that the total indebtedness owing by the Borrower was repayable upon the occurrence of an event of default.[5]

11. It is further an express term of the Security that, in the event of non-payment when due or other event of default, one of the remedies available to Maynbridge is the appointment of a Receiver over all or any portion of the property of the Borrower, including the Secured Lands.[6]

12. The Borrower has failed to make payments on the Loan as they come due, in accordance with the terms of the Credit Agreement, and has committed a number of defaults thereunder, as further particularized below.[7]

13. Among other things, each of Genco and Walden has granted and permitted the registration of a subsequent mortgage and/or land charge over its real property, including the Secured Lands, in favour of third parties, without obtaining the prior written consent of Maynbridge as required by the Credit Agreement.[8]

14. Further, Walden has permitted the accrual of over $300,000 in property tax arrears with respect to the Walden Lands (the "**Tax Arrears**"), contrary to its covenant under the Credit Agreement to pay property tax for the Secured Lands when due.[9]

15. The Borrower and its guarantors have also failed to meet the applicable financial reporting covenants under the Credit Agreement including, among other things, with respect to the provision

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[4] Affidavit at para 10(b) and Exhibit "G", clause 1 and Schedule "A".
[5] Affidavit at Exhibit "E", clause 17.4; Exhibit "F", clause 16; and Exhibit "G", clauses 3 and 8(a).
[6] Affidavit at Exhibit "F", clause 16(a); and Exhibit "G", clause 8(e).
[7] Affidavit at para 12 to 18.
[8] Affidavit at paras 14 and 15; Exhibit "E", clause 15.1; Exhibit "G", clause 6(h); and Exhibit "J".
[9] Affidavit at para 16; Exhibit "E", clause 14.4; and Exhibit "G", clause 6(b).

of financial information and updated environmental and remedial reports and a geotechnical report respecting the Walden Lands.[10]

16. In addition, despite requiring prior written approval of Maynbridge for the sale of the Secured Lands, the Borrower had listed these properties for sale without informing Maynbridge of its intention to market them. The Borrower only advised Maynbridge that the Secured Lands were being marketed for sale approximately two months after listing them. The Borrower has provided limited information, if any, respecting the sale process, the administration of property expenses, and the assignment of rents relating to the Secured Lands.[11]

17. On February 28, 2019, Maynbridge issued demand for repayment against the Borrower and its guarantors (the "**Demand**"). Subsequently, on March 1, 2019, Maynbridge issued each of Genco and Walden a Notice of Intention to Enforce Security (the "**Notices**") pursuant to Section 244 of the *Bankruptcy and Insolvency Act* ("***BIA***"). Since the issuance of the Demand and Notices, no portion of the Borrower's indebtedness has been repaid to Maynbridge. As of March 25, 2019, the total indebtedness owing was $18,257,346.29, together with legal fees, other chargeable costs and interest continuing to accrue thereon.[12]

18. On March 7, 2019, the Borrower provided Maynbridge with a spreadsheet evidencing calculations of the expected net rental payments from the Walden Lands for the month of April 2019 (the "**April Expected Net Rents**"). This spreadsheet showed expected April rents in the amount of $69,166.[13]

19. The spreadsheet showing the April Expected Net Rents from the Walden Lands also included calculation of a monthly operating cost for the Genco Lands of a management fee in the amount of $7,600/month. This suggests to Maynbridge that operating costs for the Genco Lands are being paid for by rents collected from the Walden Lands. As far as Maynbridge is aware, the Genco Lands consist of a vacant parking lot and a vacant office building in downtown Calgary. It is unclear what type of management services are being provided. Despite Maynbridge's requests for information, no explanation has been provided.[14]

20. On March 8, 2019, Maynbridge crystallized its floating charge over certain of the Borrower's real property, including, without limitation, parcels of bare lands legally described as follows:

(a) THE NORTH EAST QUARTER OF SECTION
TOWNSHIP 26
RANGE 1
WEST OF THE FIFTH MERIDIAN
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THE SOUTHERLY 1,320 FEET OF THE EASTERLY 1,320 FEET
CONTAINING 16.2 HECTARES (40 ACRES) MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS, and

(b) MERIDIAN 5 RANGE 1 TOWNSHIP 26
SECTION 9
THE SOUTHERLY 1320 FEET OF THE EASTERLY 1320 FEET
OF THE NORTH EAST QUARTER

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[10] Affidavit at para 18; and Exhibit "E", clauses 12.1 to 12.6, 14.11, and 14.12.
[11] Affidavit at paras 13, 20; Exhibit "E", clause 15.1.
[12] Affidavit at paras 25 to 27; Exhibit "L"; and Exhibit "M".
[13] Supplemental Affidavit at para 11; Exhibit "H".
[14] Supplemental Affidavit at paras 12-13; Exhibit "H".

CONTAINING 40 ACRES MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS

(collectively, the "**160 Acre Lands**").[15]

21. On March 22, 2019, HSBC Bank Canada, a secured creditor to the Borrower, successfully sought the appointment of a receiver over the right, title and interest of Genco in certain real properties which the parties refer to as the "**634 Lands**", as well as all of its present and after-acquired personal property, of whatsoever kind, and wheresoever situate, relating to, used in, on or in connection with the 634 Lands (the "**HSBC Receivership Order**").[16]

22. On March 26, 2019, Maynbridge brought the within Application for the appointment of the Receiver returnable March 28, 2019.

23. Subsequent to filing its Application, Maynbridge entered into a consent order with the Borrower dated March 28, 2019 (the "**Consent Order**"). The Consent Order directed that the Borrower was to pay the net rents due on the Walden Lands to Maynbridge by April 2, 2019. The Consent Order also directed that the Borrower was to deliver its calculation of the net rents to Maynbridge by April 2, 2019, including a breakdown of rental income and operating expenses.[17]

24. As part of the discussions leading up to entering the Consent Order, the Borrower provided Maynbridge with a rent roll for the month of April 2019 (the "**April 2019 Rent Roll**"). Based upon its review of the April 2019 Rent Roll and the previously provided April Expected Net Rents spreadsheet, Maynbridge learned that:

(a) The unit occupied by the third largest tenant of the Walden Lands is now vacant;

(b) The monthly operating expenses for the Walden Lands has risen by approximately 24%. While prior operating expenses included payment of property taxes, it is not clear whether this increase comprises any payment of property taxes given the significant Tax Arrears that have accumulated on the Walden Lands; and

(c) The estimated monthly rents have decreased by approximately $7,800 over the course of the month of March 2019.[18]

25. On April 1, 2019, Maynbridge received payment from the Borrower in the amount of $61,297.71, which the Borrower advised represented payment of the net rents due for April 2019 on the Walden Lands. On April 2, 2019, the Borrower provided Maynbridge with a chart which purported to show the calculations respecting how the April net rents were arrived at; however, the information provided was deficient and, amongst other things, did not include a breakdown of the operating expenses as required by the Consent Order. Despite Maynbridge's request for further particulars of how the operation costs were calculated, as of end of business on April 2, 2019, the Borrower had not provided further information.[19]

26. In light of the breaches and defaults, and other acts committed by the Borrower, Maynbridge has significant concerns about the Borrower's ability to operate as a going concern. Furthermore, Maynbridge has great concern with management's continued control of the business and operations,

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[15] Supplemental Affidavit at para 4; Exhibit "A".
[16] Affidavit at para 17 and Exhibit "K".
[17] Supplemental Affidavit at paras 16-17; Exhibit "I".
[18] Supplemental Affidavit at paras 8-11, 14.
[19] Supplemental Affidavit at paras 18-22.

and its ability to address the indebtedness owing to Maynbridge in a proper manner. Among other things, Maynbridge is concerned that funds belonging to Walden may be used to satisfy other obligations of Genco, including through the improper use of rents collected for the Walden Lands.[20]

III. ISSUE

27. Should this Honourable Court exercise its discretion to appoint a Receiver over the Borrower and its Property?

IV. LAW AND ARGUMENT

A. This Honourable Court Has Jurisdiction under Statute to Appoint a Receiver and Manager in the Present Case

28. This Honourable Court's authority to appoint a receiver and manger is expressly codified in a number of statutes. In the present circumstances, the Court is provided ample statutory authority to appoint a receiver or a receiver-manager pursuant to Section 243(1) of the *BIA*, Section 13(2) of the *Judicature Act*, and Section 65(7) of the *Personal Property Security Act*.[21]

29. Pursuant to Section 243(1) of the BIA, the Court may appoint a receiver over the property of an insolvent person where it considers it to be just or convenient to do so. Section 243(1) of the BIA provides as follows:

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

The only procedural prerequisite to the appointment of a receiver thereunder is the delivery of a Notice under Section 244 at least ten days prior to the appointment. Maynbridge, as a secured creditor of the Borrower and having satisfied the notice requirement under Section 244, may properly seek the appointment of a receiver pursuant to Section 243(1) of the BIA.[22]

30. Section 13(2) of the *Judicature Act*, in turn, sets out the Court's broad discretion to appoint a receiver, separate and apart from the authority under the *BIA*. The test for the appointment of a

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[20] Affidavit at paras 19, 21-22.; Supplemental Affidavit at paras 12, 15, 20.
[21] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [***BIA***], s 243(1); *Judicature Act*, RSA 2000, c J-2 [***Judicature Act***], s 13(2); *Personal Property Security Act*, RSA 2000, c P-7 [***PPSA***], s 65(7).
[22] *BIA*, ss 243(1), (1.1), 244.

receiver under the *Judicature Act* is the same as the test under Section 243(1) of the BIA and turns on whether it would be just and convenient for the appointment to be made:

> **13(2)** An order in the nature of mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

This provision does not require the pre-requisite of filing an application for bankruptcy, and it does not limit the scope of powers of a receiver appointed under the section.[23]

31. Section 65(7) of the *PPSA* provides for similarly broad discretion for the appointment of a receiver when dealing with collateral security. Under Section 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give directions on any matter relating to the duties of a receiver:

> **65(7)** On the application of any interested person, the Court may
>
> **(a)** appoint a receiver;
>
> **(b)** remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;
>
> **(c)** give directions on any matter relating to the duties of a receiver;
>
> **(d)** approve the accounts and fix the remuneration of a receiver;
>
> **(e)** exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;
>
> **(f)** notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.[24]

32. Pursuant to the foregoing provisions and its inherent jurisdiction, this Honourable Court has broad discretion to grant the receivership order sought in the within application.

B. The Appointment of a Receiver and Manager in the Present Case is Just and Convenient

33. The appointment of a receiver is a discretionary remedy that is not lightly granted. When considering an application for a receiver, the Court "must carefully balance the rights of both the applicant and the respondent". The burden is on the applicant to establish that it is "just and convenient" to grant a receivership order after balancing the interests and positions of both parties.[25]

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[23] *Judicature Act*, s 13(2); *Alberta Health Services v Networc Health Inc*, 2010 ABQB 373 [**TAB 1**] at para 18.
[24] *PPSA*, s 65(7).
[25] *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127 [**TAB 2**] at para 17.

34. Maynbridge respectfully submits that this Honourable Court ought to exercise its discretion to appoint a receiver over the Borrower, as the factors which a court considers in such a case strongly indicate that the appointment of a receiver is appropriate in the present circumstances.

35. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, Romaine J. endorsed the following non-exhaustive list of factors that the Court may consider in determining whether the appointment of a receiver is just and convenient, drawing from *Bennett on Receiverships*:

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

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

(c) The nature of the property;

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

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

(f) The balance of convenience to the parties;

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

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

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

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

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

(l) The conduct of the parties;

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

(n) The cost to the parties;

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

(p) The goal of facilitating the duties of the receiver.[26]

36. Since the decision in *Paragon* was issued, *Bennett on Receiverships* has been updated and provides useful additional commentary. Among other things, the third edition of *Bennett on Receiverships*

[26] *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 [***Paragon***] [**TAB 3**] at para 27, citing *Bennett on Receiverships*, 2 ed (Toronto: Carswell, 1999) at 130.

adds the following factor: "the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity".[27]

37. In circumstances where the applicant has an explicit right to appoint a receiver pursuant to the relevant security documentation, the extraordinary nature of the relief sought is of muted significance. Indeed, in *Murphy v Cahill*, this Honourable Court endorsed the proposition that, "where a security holder's instrument provides for the appointment of a receiver, the security holder is *prima facie* entitled to that relief on proof of the required default."[28]

38. In *Kasten Energy Inc v Shamrock Oil & Gas Ltd*, an application to appoint a receiver was made before the Alberta Court of Queen's Bench by a creditor that had the right to appoint a receiver pursuant to the terms of the relevant security documentation. This Honourable Court applied a modified and less onerous version of the interlocutory test and held that:

> The Alberta Court of Appeal notes in *BG International Limited v Canadian Superior Energy Inc*, 2009 ABCA 127 at paras 16 17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.
>
> The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27.[29]

39. This approach is also supported by the decision of Burnyeat J. of the British Columbia Supreme Court in *United Savings Credit Union v F & R Brokers Inc*, in which he held:

> A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.[30]

40. The security documentation in the present case authorizes the appointment of a receiver and manager. It is an express term of the Security that, upon default, one of the remedies available to Maynbridge is the appointment of a receiver and manager over all or any portion of the Borrower's property. Accordingly, Maynbridge submits that this Honourable Court ought to give substantial weight to the explicit contractual remedy for receivership. Further, it is just and convenient to appoint a Receiver over the Borrower and its Property in the present circumstances.

41. Having regard to the factors set out in *Paragon*, the present circumstances weigh strongly in favour of finding that it is just and convenient to appoint a Receiver with respect to the Borrower. The

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[27] *Bennett on Receiverships*, 3 ed (Toronto: Carswell, 2011) [**Bennett on Receiverships**] at 156-159 [**TAB 4**].
[28] *Paragon* [**TAB 3**] at para 28; *Murphy v Cahill*, 2013 ABQB 335 [**TAB 5**] at para 72.
[29] *Kasten Energy Inc v Shamrock Oil & Gas Ltd*, 2013 ABQB 63 [**TAB 6**] at paras 20 and 21.
[30] *United Savings Credit Union v F & R Brokers Inc*, 2003 BCSC 640 [**TAB 7**] at para 17.

deteriorating financial circumstances of the Borrower is such that Maynbridge has lost all faith in management's continued control and operation of the business. Maynbridge is also concerned that its Security is at serious risk of being eroded unless a receiver and manager is appointed with respect to the Property. For this reason, and for reasons further particularized below, Maynbridge respectfully submits that it is just and convenient to appoint a Receiver, and that no other remedy will adequately protect its interests.[31]

i. The Security Permits Appointment of a Receiver

42. The Security granted by the Borrower in favour of Maynbridge expressly authorizes the appointment of a receiver upon default.[32]

43. Maynbridge submits that this factor alone provides strong justification and support for the appointment of a receiver. As has been held by this Honourable Court in *Paragon* and *Kasten*, and by the British Columbia Supreme Court in *United Savings*, the express right to appoint a receiver in a loan and in security documents should be given significant weight.

44. At a minimum, such a covenant lowers the threshold for the test applicable to an application for the appointment of a receivership by eliminating the requirement that Maynbridge establish that it will suffer irreparable harm in the event a Receivership Order is not granted, and by making less essential the "extraordinary" nature of the relief sought. Accordingly, this factor is in favour of finding that it is just and convenient to appoint a receiver.

ii. The Balance of Convenience Favours Appointment of a Receiver

45. The balance of convenience to the parties also favours the appointment of a receiver in the circumstances. There is no justifiable defence available to the Borrower respecting the allegations of default. Further, the Borrower and its guarantors have failed to honour the demands, notices, and agreements between the parties.

46. The appointment of a receiver is the only efficient way of preserving and realizing upon the Borrower's assets in an orderly manner that preserves value for Maynbridge and other interested parties, and without incurring any potential payment obligations ranking in priority to Maynbridge. Without the appointment of a receiver, Maynbridge is at significant risk of incurring loss that can be measured in the millions of dollars.[33]

iii. Nature of the Property

47. The Property over which receivership is sought includes a number of real properties. The nature of the real property is such that judicial assistance is required to maximize the value therein. Realization of real property requires judicial assistance by way of an application to the Court for a sale approval and vesting order.

48. Further, the real properties are subject to a number of encumbrances. The appointment of a receiver and manager in these circumstances would best facilitate decision-making and provide the creditors with the opportunity to bring their concerns respecting significant transactions before this Court. This factor weighs in favour of appointing a receiver.[34]

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[31] Affidavit at paras 19, 21, 22, 24; Supplemental Affidavit at paras 12, 14, 15.
[32] Affidavit at Exhibit "F", clause 16(a); and Exhibit "G", clause 8(e).
[33] Affidavit at paras 8, 24.
[34] Affidavit, Exhibit "G"; Supplemental Affidavit, Exhibit "A".

iv. There is Significant Risk of Prejudice and Erosion of Value

49. In light of the Borrower's significant financial difficulty, combined with its actions to date, Maynbridge has lost all faith and confidence in the Borrower's management and in its ability to operate as a going concern. The Borrower has not remedied its breaches and defaults, nor has it given Maynbridge any reasonable assurance that it is able to make good on its obligation.[35]

50. The Borrower has also failed to be forthright with Maynbridge in relation to its breaches and defaults, and to its deteriorating financial condition including, without limitation, in the following ways:

(a) The Borrower failed to inform Maynbridge of its intent to market the Secured Lands prior to listing them. The Borrower only advised Maynbridge that the properties were being marketed for sale approximately two months after they were first listed;

(b) Despite repeated information requests, the Borrower has continuously failed to satisfy its reporting covenants in a timely manner, or at all, including information requests relating to the sales process regarding the Secured Lands, and most recently, a breakdown of the operating expenses associated with the Walden Lands;

(c) The Borrower permitted the accrual of the Tax Arrears and failed to disclose the extent and magnitude of such arrears to Maynbridge;

(d) The Borrower failed to disclose that it had granted subsequent mortgages and/or land charges over the Secured Lands;

(e) The Borrower failed to notify Maynbridge of the termination of the lease with the Borrower's third largest tenant of the Walden Lands; and

(f) The Borrower has failed to provide Maynbridge with information regarding payment of a management fee of $7,600/month respecting the Genco Lands, which fee appears to be being paid for by the rents collected from the Walden Lands. Additionally, as far as Maynbridge is aware, the Genco Lands consist of a vacant parking lot and vacant office building in downtown Calgary. It is unclear what type of management services are provided by the management fee.[36]

51. In light of its loss of trust in the Borrower and in management, Maynbridge is concerned that any further delay by the Borrower will cause Maynbridge further prejudice and cause value to further erode. Among other things, Maynbridge is concerned about potential use of funds with respect to the rents collected for the Walden Lands for other members of the Borrower's corporate group. The appointment of a receiver will allow the rents and operating expenses with respect to the Walden Lands to be administered by an independent court-officer, thereby preserving Maynbridge's Security and value for all of the Borrower's creditors.[37]

52. There is no evidence on the record to demonstrate that the Borrower has or will have the ability to satisfy its obligations, or that the Borrower may be successful in marketing its real properties. To the contrary, the evidence shows that the Borrower was aware of its dire financial situation before it breached its debt repayment covenant to Maynbridge, as the Borrower had listed the Secured Lands for sale prior to defaulting on its payment obligations. Given that the Borrower ultimately

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[35] Affidavit at paras 19-21.

[36] Affidavit at paras 13, 14, 15, 16, 18, 20; Supplemental Affidavit at paras 12-14.

[37] Affidavit at paras 21-22.

defaulted upon its March 1, 2019 payment, it is evident that the Borrower's attempt to remedy its defaults, if any, was ineffective. [38]

53. In addition, the appointment of a receiver over certain of Genco's real properties in the HSBC Receivership Order demonstrates uncertainty over the Borrower's ability to address at least a portion of its obligations.

54. Furthermore, the Tax Arrears also create a significant risk of prejudice against Maynbridge and of potential erosion of value.

v. Maynbridge Has Acted in Good Faith and the Appointment of a Receiver is Commercially Reasonable

55. Maynbridge has acted in good faith throughout the course of the parties' dealings. Despite the Borrower's breach of its financial reporting covenant at the outset of the advancement of the Loan, and its continued failure to provide requested information, Maynbridge only sought to declare a default of the Credit Agreement and to enforce the Security when the Borrower failed to meet its payment obligations on March 1, 2019, in conjunction with Maynbridge's discovery of the Borrower's conduct and grim financial position in and around the same time.

56. Further, the appointment of a receiver is commercially reasonable in this case given, among other things, the significant amount of liability incurred by the Borrower, the existence of and complexities involving multiple real properties over which Maynbridge has a properly registered mortgage or crystallized charge, and multiple creditors having potential competing claims to the Borrower's Property. Attached as **Schedule "A"** to this Brief is a schedule listing the Borrower's various real properties, amount of indebtedness, and description of competing claims.

57. Additionally, there is a cost-efficiency to the appointment of EY as receiver. EY is already the receiver of certain of the Borrower's real property pursuant to the HSBC Receivership Order. Maynbridge understands that HSBC is also seeking the appointment of EY as receiver over the Borrower's 160 Acre Lands, where HSBC holds a first ranking mortgage. Maynbridge has crystallized its floating charge over the 160 Acre Lands and also seeks to appoint EY as receiver over those lands.

58. Having one receiver administer all of the Borrower's Property, as well as all of the competing claims against the Property, will eliminate a multiplicity of proceedings and is therefore the most efficient and cost-effective means to maximize realizations to all of the Borrower's creditors, including Maynbridge. It is therefore commercially reasonable to appoint EY as receiver over all of the Borrower's Property.

59. The appointment of an objective third party that has expertise and experience in managing distressed businesses and assets, acting under the purview of the Court, is commercially reasonable in these circumstances.

60. The foregoing factors strongly indicate that it is just and convenient to appoint a receiver in the circumstances. Maynbridge respectfully submits that this Honourable Court should grant the within application to appoint a receiver over the Borrower's property, as the usual factors employed by established jurisprudence strongly favour such appointment.

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[38] Affidavit at para 13.

C. A Subsequent Security Holder May Bring a Receivership Application Even When Prior Ranking Security Holders Object

61. There is no prohibition against subsequent security holders seeking to invoke the court's jurisdiction to appoint a receiver. In *Bennett on Receiverships*, the author states:

> If the security holder held a real property mortgage, the former common law provided that the legal mortgagee could apply for a court-appointed receiver. Subsequent mortgagees had equitable charges that only Courts of Chancery could enforce. With the merging of the English courts in 1873 and those of the Province of Ontario in 1881, the court permitted a subsequent mortgagee to enforce its security subject to the rights of and without prejudice to the prior security holder who might initiate the appointment of its own receiver. <u>There is now no prohibition against subsequent security holders from invoking the jurisdiction of the court to appoint a receiver.</u> [39]

62. Courts have granted applications by subsequent mortgagees to appoint a receiver and to include real property in the scope of the receivership over the objections of prior ranking mortgagees. In so doing, the courts have emphasized that the principal test remains as whether it is "just and convenient" that a receiver be appointed in the circumstances. Among other things, courts have found that, where there is the prospect of protracted litigation involving multiple parties, the appointment of a receiver can enhance the likelihood of maximizing the return on and preservation of the property.[40]

63. In the circumstances, it is just and convenient to appoint a receiver and manager with respect to the Borrower's property. It is clear that from the materials filed in the within proceeding, and from the limited receivership granted pursuant to the HSBC Receivership Order, that the Borrower is over-leveraged and owes significant obligations to multiple parties, including the municipality with respect to the Tax Arrears. The appointment of a receiver and manager on a global basis would benefit the creditors collectively by avoiding protracted litigation and a multiplicity of proceedings.[41]

D. A Receiver May Be Appointed over Real Property and, in Particular, Bare Lands

64. This Honourable Court should appoint the receivership as sought by Maynbridge notwithstanding that the Borrower's property includes bare lands. For all of the reasons noted above, it is just and convenient in the circumstances that a receiver be appointed over the Borrower's Property, including the 160 Acre Lands which consist of bare lands.

65. Courts routinely grant applications for receivership over real property. In particular, receiverships over enterprises involved in real estate development almost invariably include real property. In the present case, the Borrower is involved in the development of commercial and retail property and its obligations to Maynbridge and numerous other creditors are, in part, secured by real property. That the Borrower's assets includes real property does not prevent the appointment of a receiver. Indeed,

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[39] Bennett on Receiverships at 160-161 [**TAB 4**].

[40] *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (OntCJ) [**TAB 8**] at paras 12-13; *Caisse Desjardins de Bois-Francs v River Rock Financial Canada Corp*, 2013 ONSC 6809 [**TAB 9**] at paras 20-22.

[41] Affidavit, Exhibit "K"; Supplemental Affidavit, Exhibit "C" and Exhibit "D".

this Court has already appointed a receiver over certain of the Borrower's real property pursuant to the HSBC Receivership Order.[42]

66. Further, courts have appointed a receiver over bare or undeveloped lands. In *Pirbhai Estate v Pirbhai*, Scarth L.J.S.C. of the British Columbia Supreme Court granted the plaintiff's application for a receiver-manager over the defendant and its business and undertaking, including over one parcel of bare land. In *Reid v Waddingham*, McRae J of the Ontario High Court of Justice appointed an interim receiver over the property of an unincorporated partnership, which includes an undeveloped parcel of land. In *Citibank Canada v Calgary Auto Centre*, McDonald J. of this Honourable Court granted a receivership application that involved, among other things, undeveloped land that was otherwise subject to foreclosure. Under these circumstances, the test remains whether it is just and convenient to appoint a receiver.[43]

67. The fact that the 160 Acre Lands are bare lands does not preclude the appointment of a receiver over these lands. There would be only an incremental increase of costs to include these lands in the receivership. At present, there is no evidence that the Borrower has an alternative source of funding or sale of properties sufficient to repay Maynbridge. There is no evidence on the record to demonstrate that the exclusion of the 160 Acre Lands would in any way provide relief to the Borrower's dire financial state. To the contrary, the evidence overwhelmingly suggests that management's continued control and authority with respect to Maynbridge's security, in any measure, risks further erosion of value. Accordingly, Maynbridge respectfully submits that it is just and convenient to appoint a receiver over the entirety of the Borrower's Property, including over the 160 Acre Lands.

68. Maynbridge understands that HSBC intends to bring an application at the same time appointing EY as receiver and receiver-manager over the 160 Acre Lands. Maynbridge is supportive of that application. In the event that application is unsuccessful, Maynbridge also seeks to include the 160 Acre Lands in the receivership order it is seeking.

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[42] *Romspen Investment Corp v 1514904 Ontario Ltd*, 2010 ONSC 832 [**TAB 10**] at paras 6, 16; *Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 7023 [**TAB 11**] at paras 1, 5, 52; Affidavit, Exhibit "K".

[43] *Pirbhai Estate v Pirbhai*, [1988] BCWLD 3340 (BCSC) [**TAB 12**] at paras 8, 9, 17; *Reid v Waddingham*, (1986) 38 ACWS (2d) 67 (OntSCJ) [**TAB 13**] at paras 2-3; *Citibank Canada v Calgary Auto Centre*, [1989] AWLD 622 (ABQB) [**TAB 14**] at paras 31-32.

V. RELIEF REQUESTED

69. Maynbridge respectfully requests this Honourable Court grant an Order :

(a) Appointing Ernst & Young Inc. as the receiver and receiver-manager of the Property of Genco Holdings Ltd. and Genco (Walden) Ltd., excluding:

i. the 634 Lands, which are already the subject of the HSBC Receivership Order;

ii. the 160 Acre Lands, which are the subject of a pending application by HSBC for the appointment of a receiver, unless such application fails, in which case Maynbridge seeks to have the 160 Acre Lands comprise part of the Property; and

iii. the lands, buildings, fixtures and personal property located at the real property municipally located at 1108-4 Street S.W., Calgary AB.

(b) Awarding costs of the within Application on a solicitor and his own client basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of April, 2019.

BORDEN LADNER GERVAIS LLP

Per: ______________________________

Matti Lemmens / Jessica L. Cameron
Counsel for Maynbridge Capital Inc.

TABLE OF AUTHORITITES

TAB	AUTHORITY
1.	*Alberta Health Services v Networc Health Inc*, 2010 ABQB 373
2.	*BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127
3.	*Paragon Capital Corp v Merchants &Traders Assurance Co*, 2002 ABQB 430
4.	*Bennett on Receiverships*, 3 ed (Toronto: Carswell, 2011)
5.	*Murphy v Cahill*, 2013 ABQB 335
6.	*Kasten Energy Inc v Shamrock Oil & Gas Ltd*, 2013 ABQB 63
7.	*United Savings Credit Union v F & R Brokers Inc*, 2003 BCSC 640
8.	*Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (OntCJ)
9.	*Caisse Desjardins de Bois-Francs v River Rock Financial Canada Corp*, 2013 ONSC 6809
10.	*Romspen Investment Corp v 1514904 Ontario Ltd*, 2010 ONSC 832
11.	*Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 7023
12.	*Pirbhai Estate v Pirbhai*, [1988] BCWLD 3340 (BCSC)
13.	*Reid v Waddingham*, (1986) 38 ACWS (2d) 67 (OntSCJ)
14.	*Citibank Canada v Calgary Auto Centre*, [1989] AWLD 622 (ABQB)

SCHEDULE "A"

The Borrower's Real Properties, Amount of Indebtedness, and Description of Competing Claims

Lands	Creditor Registrations (*Caveat/lien registration only)	Indebtedness	Receivership Proceedings
The Genco Lands	Maynbridge Capital Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Crown Capital LP Partner Funding Inc.*:	$18,000,000 $2,000,000 $33,000,000 Unknown Unknown	Maynbridge's Receivership Application
The Walden Lands	Maynbridge Capital Inc.: 1523674 Alberta Ltd.: Crown Capital LP Partner Funding Inc.*:	$18,000,000 $2,000,000 Unknown	Maynbridge's Receivership Application
The 160 Acre Lands	HSBC Bank Canada: HMT Holdings Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Maynbridge Capital Inc.*: Crown Capital LP Partner Funding Inc.*:	$3,300,000 $3,500,000 $2,000,000 $33,000,000 Unknown $18,000,000 Unknown	HSBC's Receivership Application Maynbridge's Receivership Application
The 1108 Lands	Canadian Western Bank 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Maynbridge Capital Inc.*: Crown Capital LP Partner Funding Inc.*:	$7,700,000 $2,000,000 $33,000,000 Unknown $18,000,000 Unknown	Excluded from Proposed Receivership Proceedings
The 634 Lands	HSBC Bank Canada: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Bolero Enterprises Inc.: ATB Financial Omicron Construction Ltd.*: Crown Capital LP Partner Funding Inc.*:	$1,300,000 $3,650,000 $5,750,000 $33,000,000 $1,768,785 Unknown	Included in the HSBC Receivership Order

1. The Genco Lands

Legal Description	CONDOMINIUM PLAN 9410576 UNITS 1 – 6, INCLUSIVE AND ALL APPLICABLE UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS	
Municipal Address	608 7 Street SW, Calgary, Alberta	
Proceedings	Maynbridge's within receivership application	
Amount of Indebtedness Registered * caveat registration only	Maynbridge Capital Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Crown Capital LP Partner Funding Inc.*:	$18,000,000 $2,000,000 $33,000,000 $N/A $N/A
Competing Claims	Maynbridge Capital Inc.: Mortgage and Assignment of Rents and Leases registered on January 18, 2018 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on July 4, 2018 ATB Financial: Mortgage registered on March 5, 2019 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Land Charge registered on March 6, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019	

Legal Description	PLAN A1 BLOCK 33 THE NORTH HALVES OF LOTS 1 AND 2 AND ALL OF LOTS 3 AND 4
Municipal Address	735 6 Avenue SW, Calgary, Alberta
Proceedings	Maynbridge's within receivership application

Amount of Indebtedness Registered * caveat registration only	Maynbridge Capital Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Crown Capital LP Partner Funding Inc.*:	$18,000,000 $2,000,000 $33,000,000 $N/A $N/A
Competing Claims	Maynbridge Capital Inc.: Mortgage and Assignment of Rents and Leases registered on January 18, 2018 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on July 4, 2018 ATB Financial: Mortgage registered on March 5, 2019 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Land Charge registered on March 6, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019	

2. **The Walden Lands**

Legal Description	CONDOMINIUM PLAN 1711606 UNITS 1, 6, and 7 AND ALL APPLICABLE UNDIVIDED ONE TEN THOUSANDTHS SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS	
Municipal Address	19605 Walden Boulevard SE, Calgary, Alberta	
Proceedings	Maynbridge's within receivership application	
Amount of Indebtedness Registered * caveat registration only	Maynbridge Capital Inc.: 1523674 Alberta Ltd.: Crown Capital LP Partner Funding Inc.*:	$18,000,000 $2,000,000 $N/A
Competing Claims	1124294 Alberta Ltd.: Caveat registered on December 19, 2014 Maynbridge Capital Inc.:	

	Mortgage and Assignment of Rents and Leases registered on January 18, 2018 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on June 21, 2018 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019

3. The 160 Acre Lands

Legal Description	THE NORTH EAST QUARTER OF SECTION TOWNSHIP 26 RANGE 1 WEST OF THE FIFTH MERIDIAN CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS EXCEPTING THE SOUTHERLY 1,320 FEET OF THE EASTERLY 1,320 FEET CONTAINING 16.2 HECTARES (40 ACRES) MORE OR LESS EXCEPTING THEREOUT ALL MINES AND MINERALS	
Municipal Address	17507 6 Street NW, Calgary, AB	
Proceedings	Maynbridge's within receivership application HSBC's receivership application	
Amount of Indebtedness Registered * caveat registration only	HSBC Bank Canada: HMT Holdings Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Maynbridge Capital Inc.*: Crown Capital LP Partner Funding Inc.*:	$3,300,000 $3,500,000 $2,000,000 $33,000,000 $N/A $18,000,000 $N/A
Competing Claims	HSBC Bank Canada: Mortgage and Assignment of Rents and Leases registered on June 5, 2014 HMT Holdings Inc.: Mortgage and Assignment of Rents and Leases registered on June 5, 2018 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on July 4, 2018	

	ATB Financial: Mortgage registered on March 5, 2019 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Land Charge registered on March 6, 2019 Maynbridge Capital Inc.: Land Charge registered on March 8, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019

Legal Description	MERIDIAN 5 RANGE 1 TOWNSHIP 26 SECTION 9 THE SOUTHERLY 1320 FEET OF THE EASTERLY 1320 FEET OF THE NORTH EAST QUARTER CONTAINING 40 ACRES MORE OR LESS EXCEPTING THEREOUT ALL MINES AND MINERALS	
Municipal Address	19605 Centre Street NW, Calgary, AB	
Proceedings	Maynbridge's within receivership application HSBC's receivership application	
Amount of Indebtedness Registered * caveat registration only	HSBC Bank Canada: HMT Holdings Inc.: 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Maynbridge Capital Inc.*: Crown Capital LP Partner Funding Inc.*:	$3,300,000 $3,500,000 $2,000,000 $33,000,000 $N/A $18,000,000 $N/A
Competing Claims	HSBC Bank Canada: Mortgage and Assignment of Rents and Leases registered on June 5, 2014 HMT Holdings Inc.: Mortgage and Assignment of Rents and Leases registered on June 5, 2018 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on July 4, 2018 ATB Financial:	

	Mortgage registered on March 5, 2019 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Land Charge registered on March 6, 2019 Maynbridge Capital Inc.: Land Charge registered on March 8, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019

4. The 1108 Lands

Legal Description	MERIDIAN 5 RANGE 1 TOWNSHIP 26 PLAN C BLOCK 84 LOTS 1 TO 7 INCLUSIVE EXCEPTING HTEREOUT THE WESTERLY 5 FEET THROUGHOUT THE SAID LOT 1	
Municipal Address	1108 4 Street SW, Calgary, AB	
Proceedings	Excluded from proceedings	
Amount of Indebtedness Registered * caveat registration only	Canadian Western Bank 1523674 Alberta Ltd.: ATB Financial: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.*: Maynbridge Capital Inc.*: Crown Capital LP Partner Funding Inc.*:	$7,700,000 $2,000,000 $33,000,000 $N/A $18,000,000 $N/A
Competing Claims	Canadian Western Bank: Mortgage, Assignment of Rents and Leases and Lease Interest registered on December 2, 2015 1523674 Alberta Ltd.: Mortgage and Assignment of Rents and Leases registered on February 20, 2019 ATB Financial: Mortgage registered on March 5, 2019 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Land Charge registered on March 6, 2019 Maynbridge Capital Inc.:	

	Land Charge registered on March 8, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019

5. The 634 Lands

Legal Description	ALL MINES AND MINERALS WITHIN, UPON OR UNDER PLAN SA1 BLOCK 29 LOTS 37 & 38	
Municipal Address	634 6 Avenue SW, Calgary, AB	
Proceedings	Subject to HSBC Receivership Order	
Amount of Indebtedness Registered * caveat or lien registration only	HSBC Bank Canada: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Bolero Enterprises Inc.: Omicron Construction Ltd.*:	$1,300,000 $3,650,000 $5,750,000 $1,768,785
Competing Claims	HSBC Bank Canada: Mortgage, Assignment of Rents and Leases and Lease Interest registered on July 4, 2012 Amending Agreement registered on October 1, 2013 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Mortgage and Assignment of Rents and Leases registered on October 1, 2013 City of Calgary: Development Agreement registered on March 6, 2014 Bolero Enterprises Inc.: Mortgage, Assignment of Rents and Leases and Rights of First Refusal registered on April 20, 2015 Omicron Construction Ltd.: Builder's Lien registered on September 15, 2015 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Amending Agreement registered on March 4, 2016 Omicron Construction Ltd.: Certificate of Lis Pendens registered on March 9, 2016	

Legal Description	CONDOMINIUM PLAN 1610979 UNITS 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 20, 21 AND ALL APPLICABLE UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS	
Municipal Address	634 6 Avenue SW, Calgary, AB	
Proceedings	Subject to HSBC Receivership Order	
Amount of Indebtedness Registered * caveat or lien registration only	HSBC Bank Canada: Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Bolero Enterprises Inc.: ATB Financial: Crown Capital LP Partner Funding Inc.*:	$1,300,000 $3,650,000 $5,750,000 $33,000,000 $N/A
Competing Claims	HSBC Bank Canada: Mortgage and Assignment of Rents and Leases registered on July 4, 2012 Amending Agreement registered on October 1, 2013 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Mortgage and Assignment of Rents and Leases registered on October 1, 2013 City of Calgary: Development Agreement registered on March 6, 2014 Bolero Enterprises Inc.: Mortgage, Assignment of Rents and Leases and Rights of First Refusal registered on April 20, 2015 Bancorp Growth Mortgage Fund II Ltd. and Bancorp Financial Services Inc.: Amending Agreement registered on March 4, 2016 City of Calgary: Tax Notification registered on April 25, 2018 ATB Financial: Mortgage registered on March 5, 2019 Crown Capital LP Partner Funding Inc.: Land Charge registered on March 21, 2019	

TAB 1

Court of Queen's Bench of Alberta

Citation: Alberta Health Services v. Networc Health Inc., 2010 ABQB 373

Date: 20100601
Docket: BK01 094004
Registry: Calgary

Between:

Alberta Health Services

Applicant

- and -

Networc Health Inc.

Respondent

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] On May 3, 2010 Alberta Health Services applied for the appointment of an interim receiver of the financial records and accounts of Networc Health Inc. ("Networc"). On May 11, 2010, Alberta Health applied to continue the receivership. Various interested parties opposed these applications and brought counter-applications. I granted a receivership order on May 3, 2010 and continued it on May 11, 2010. These are my reasons.

Facts

[2] Networc operates an accredited non-hospital surgical facility in Calgary under the name of the Health Resource Centre. In December, 2006, Networc and the Calgary Health Region (now Alberta Health Services) entered into an agreement whereby Networc would provide orthopaedic surgical services to the public in Alberta, the cost of which would be covered by

Alberta Health. This agreement expires on March 31, 2012. Alberta Health submits that this arrangement was intended as an interim measure to assist it in dealing with capacity constraints until a new Alberta Health-owned surgical facility could be constructed. Currently, it is expected that this new facility will be operational in January, 2011. The agreement between Networc and Alberta Health limits the maximum annual number of procedures that can be performed at the Health Resource Centre, but Alberta Health has no obligation to fund any minimum number of procedures.

[3] Networc also performs surgeries for the Alberta Workers' Compensation Board and out-of-province or federal insurers, but Alberta Health is its primary source of income. According to the first report of the Interim Receiver, the surgeons and anaesthetists who perform the procedures are not employees of Networc and bill Alberta Health directly for their services, but the Health Resource Centre employs about one hundred other staff members.

[4] Networc planned to expand its surgical capacity and in 2008 and 2009 entered into various lease and construction agreements related to two new facilities which are not yet completely constructed.

[5] On April 1, 2010, 4040 Properties Corp., Cambrian (Foothills) I Properties Corp. and Cambrian Wellness I Development Corp. (the "Cambrian Group") applied for a bankruptcy order against Networc. The Cambrian Group alleged that Networc was indebted to them in the amount of approximately $636,000.00 pursuant to two lease agreements. They alleged that Networc had admitted that it was no longer capable of meeting its obligations under the leases, relying on a letter from Networc that stated that, as Networc had received only partial commitment from Alberta Health with respect to business volumes for the budget year commencing April 1, 2010, Networc did not have the ability to pay lease costs on the two buildings that were the subject of the leases. The letter also suggested the renegotiation of one of the leases. Networc denied these allegations in a Notice of Dispute and was directed by court order to provide an affidavit setting out details of its position by Friday, April 30, 2010.

[6] Alberta Health says that it followed the status of this application carefully, and on April 30, 2010, it applied for the appointment of an interim receiver of Networc and an order staying the bankruptcy proceedings commenced by the Cambrian Group by way of Notice of Motion returnable on May 3, 2010.

[7] Alberta Health's application was made pursuant to section 46(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA") and section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

[8] While there is nothing on the face of this legislation that requires such an application for the appointment of a receiver to be made by a creditor, Alberta Health submitted that it was in fact a contingent creditor of Networc as a result of filing a Statement of Claim against Networc alleging that it had breached its agreement with Alberta Health by committing an act of insolvency and claiming unquantified damages.

[9] The application by Alberta Health originally included an application to stay the application commenced by the Cambrian Group to petition Networc into bankruptcy.

[10] The whole of the application was opposed for a number of reasons by the Cambrian Group, which sought an adjournment to file a responding affidavit and to cross-examine on the affidavits. The arguments made by the parties are summarized later in this decision. Submissions were made during a hearing that commenced in the morning of May 3, 2010 and was adjourned for a few hours. When the hearing recommenced, Alberta Health advised the court that it would adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings to a later date and would remove any reference to a stay of the bankruptcy proceedings from its application for an interim receiver. Ultimately, I appointed an interim receiver, adjourned the application to stay the bankruptcy proceedings and directed Networc to file its affidavit in response to the Cambrian Group's application for a bankruptcy order by the end of the next day. The matter was put over to May 11, 2010 on the basis that submissions could be made on all relief sought, including the issue of whether the appointment of an interim receiver should continue.

[11] Between May 3, 2010 and May 11, 2010, the complexion of the application changed dramatically. Networc filed an affidavit denying the alleged indebtedness to the Cambrian Group and raising a number of defences to the bankruptcy application. Alberta Health acquired the interest of the Canadian Imperial Bank of Commerce in Networc's current secured borrowing facilities. According to the Interim Receiver's first report to the Court, the Canadian Imperial Bank of Commerce was in the process of considering its options, including the enforcement of its security (which it appears it would be entitled to do, relying on a breach of Networc's working capital covenant associated with its operating line of credit). The Cambrian Group subsequently agreed with Networc to discontinue its application to petition Networc into bankruptcy.

[12] According to the Interim Receiver's first report, on the basis of its information as of May 10, 2010 and its calculations based on that information, if the Interim Receiver were discharged, Networc would not be able to carry on its operations and repay the CIBC loans and pre-receivership payables, including construction indebtedness and the Cambrian Group's claim for rent, without a cash injection of approximately $7.2 million. I continued the interim receivership and made some ancillary orders.

Analysis

Status of Alberta Health to Apply for Receivership

[13] Alberta Health based its original application for an interim receiver on section 46(1) of the BIA and section 13(2) of the *Judicature Act*. These statutory provisions are set out in Appendix A to this decision.

[14] Neither of these provisions requires that an application for a receivership be made by a creditor, but it is clear from case authority that it is usually a creditor that makes such an application. Section 46 follows the sections of the BIA that deal with an application made by a creditor against a debtor for a bankruptcy order, and it requires that such an application has been filed before an application for an interim receiver can be made. There do not appear to be any reported decisions of an application under section 46 being made by a party other than a creditor, although applications under section 47.1 of the BIA, which allows the appointment of a receiver in different circumstances, have been made by trustees in bankruptcy and even by debtors themselves on occasion: for example, *Bruce Agra Foods Inc. v. Everfresh Beverages Inc.* (1996), 45 C.B.R. (3d) 169 (Ont.Gen.Div.)

[15] As noted by Professor Jacob Ziegel in Part II of "The Personal Liabilities of Insolvency Practitioners under Insolvency Legislation: A Comparative Analysis of the Canadian, English and American Positions" in J. Sarra, ed., 2006 Annual Review of Insolvency Law (Toronto: Carswell 2007) at 277-338, receivers are creations of equitable origin and have served a variety of functions in many different contexts. In determining whether Alberta Health had status to apply for the appointment of an interim receiver, it was helpful to look briefly at the history of the development of receiverships under the BIA.

[16] Section 46 of the BIA has long provided for the appointment of an interim receiver where an application for a bankruptcy order has been filed if the court is satisfied that such appointment is shown to be necessary for the protection of the estate of a debtor, and an undertaking with respect to damages is provided by the applicant. The appointment of an interim receiver under section 46 is for conservatory purposes and is limited specifically by section 46(2) such that the interim receiver shall not unduly interfere with the debtor except to the extent necessary for such conservatory purposes or to comply with the order of appointment. Sections 47 and 47.1 were added to the BIA in 1992 and were intended to give greater protection and flexibility to secured creditors during the period of time when they were in the process of enforcing their security. An interim receiver appointed under these sections may exercise broader powers.

[17] As noted by Professor Ziegel, these 1992 amendments radically transformed insolvency administrations, as they became very popular with secured creditors. Orders were granted that gave receivers extensive powers and remained in effect, not on an interim basis, but for lengthy periods of time. Some courts and commentators were critical of this broad use of what was described as an interim remedy under the BIA, and, in September 2009, amendments to sections 47 and 47.1 came into effect that had the result of limiting the period of time of an interim receiver appointment under these sections unless otherwise ordered by a court, and limiting the powers available to such interim receivers. However, a new provision was added to the BIA, section 243, which is available to secured creditors and allows a court to give such receiver (commonly referred to as a "national receiver") broad powers equivalent to those previously available to interim receivers under sections 47 and 47.1. It is noteworthy that these amendments did not affect section 46, either in terms of scope of powers or duration of appointment.

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

[19] In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc. While counsel for the Cambrian Group suggested that Alberta Health had only the status of a "customer" of Networc, and that to allow a mere customer the use of the remedy of a receivership would open the proverbial floodgates, Alberta Health's interest in ensuring that citizens of the Province who require the surgical services performed in the facility provided by Networc were not deprived of those services gives it an interest far greater than that of a mere customer of goods or services. The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the *Judicature Act*, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.

[20] The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556, the Supreme Court commented:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

Initial Application

[21] The focus of the case law interpreting section 46 of the BIA is on protecting the debtor against unwarranted intrusion from petitioning creditors. The courts have recognized the serious consequences that the appointment of an interim receiver has on the business of a debtor, and thus, section 46 requires that the applicant establish that:

a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case, the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and

b) there is an immediate need for the protection of the debtor's estate.

[22] Networc consented to Alberta Health's application to appoint a receiver at the initial application. The Cambrian Group, while it opposed the application, was vehement, at least on May 3, 2010, with respect to the strength of its application for an order petitioning Networc into bankruptcy.

[23] Alberta Health deposed that there was an immediate need for the protection of Networc's estate. It submitted that if the bankruptcy threatened by the Cambian Group's application occurred, a trustee in bankruptcy would face huge obstacles to the continuance of Networc's operations, including exposure to liability, problems arising from the fact that the agreement between Networc and Alberta Health was not assignable without the consent of Alberta Health and the Minister of Health and the dearth of potential assignees that could properly be designated and accredited to run the facility. If Networc had to cease operations, surgeries would be disrupted, highly-skilled employees would be left jobless and physicians would be left without facilities in which to operate. Alternatively, allowing Networc to operate under the supervision of an interim receiver would alleviate this disruption and would allow Networc to generate income for the benefit of creditors.

[24] The Cambrian Group applied for an adjournment of the application in order to file further materials and to cross-examine on the affidavits. Initially, given the careful consideration that a court must give to the appointment of a receiver, I considered granting a brief adjournment to May 11, 2010 without appointing an interim receiver, contingent upon the Cambrian Group agreeing not to proceed further with the bankruptcy application during this period of time. Counsel for Alberta Health submitted that in the absence of a stay, there were other parties that may take action during the week's adjournment. I asked counsel to identify this risk when the hearing recommenced in the early afternoon of May 3, 2010. At that time, Alberta Health produced an affidavit that indicated that the publicity of the proceedings had caused significant disruption to Networc's operations and uncertainty among patients, employees and suppliers, providing additional evidence of an immediate need for the protection of Networc's estate.

[25] Alberta Health also indicated that it would agree to adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings and had removed any reference to that relief from its application for an interim receivership order. I was satisfied that Alberta Health had established the basis for an interim receivership order, particularly as the alleged prejudice to the Cambrian Group arising from a stay of its right to proceed with the bankruptcy proceedings was no longer a major issue. I was satisfied that the supplemental affidavit provided persuasive evidence that the bankruptcy application and the subsequent receivership application had created significant uncertainty and concern and a heightened risk of an interruption in medical services

at the Networc facility. I was therefore satisfied that there were strong public interest reasons to appoint an interim receiver until the matter could be more thoroughly argued.

Applications on May 11, 2010

A. Status of Parties

[26] As previously described, Alberta Health had stepped into the shoes of a secured creditor between the initial appointment and May 11, 2010, and there was no longer an issue of whether it was entitled to apply for a receivership order under bankruptcy legislation. While it would be entitled to use section 47 and/or new section 243 of the BIA, Alberta Health applied to continue the receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* for reasons that will be discussed later in this decision.

[27] As a result of the affidavit filed by Networc denying its indebtedness to the Cambrian Group and denying that it had committed an act of insolvency, the next step in the bankruptcy application would have been the trial of an issue under section 43 of the BIA. After a bankruptcy judge had heard evidence in this proceeding, he or she would have the option of:

> (a) granting a bankruptcy order against Networc if satisfied with the Cambrian Group's evidence;
> (b) dismissing the application if satisfied with Networc's defences, or
> (c) determining that there was a *bona fide* dispute with respect to the debt that could not be decided in bankruptcy court and should be litigated in the normal course.

[28] The Cambrian Group, however, announced that it had agreed with Networc that it would withdraw its application to petition Networc into bankruptcy on the basis that neither party would be liable for costs, and applied for an order of the court allowing such withdrawal. Counsel for the Cambrian Group suggested that it was satisfied by Networc's recent affidavit that Networc could not be said to have committed an act of insolvency. It is, of course, also clear that if no application for a bankruptcy order exists, an interim receivership under section 46 of the BIA may no longer be sustainable.

[29] Networc filed a Notice of Motion on May 4, 2010 applying to dismiss the bankruptcy proceeding and to terminate the interim receivership. However, on May 11, 2010, Networc did not oppose either the continuation of the receivership or the Cambrian Group's application to approve the agreement to withdraw the bankruptcy application.

[30] Networc filed a supplemental affidavit on May 11, 2010 attaching a letter from its controller to its CEO projecting a more optimistic operating profit for Networc than that projected by the Interim Receiver. The controller gives his opinion that Networc's financial difficulties are due to the development of the new facilities and not Networc's normal operations.

[31] Networc's current landlord, Healthcare Property Holdings Ltd., (the "Landlord") which supported Alberta Health's application on May 3, 2010, brought an application returnable on May 11, 2010 to require the Interim Receiver to either personally affirm and adopt the remainder of the lease with Networc or to abandon the premises or to allow the Landlord to terminate the lease and obtain vacant possession.

[32] The Interim Receiver filed its first report and applied for the authority to make certain pre-filing payments to employees at Networc and to deposit money collected by the Interim Receiver on accounts receivable into its account established for the purpose.

B. Continuation of the Receivership

[33] Alberta Health sought to continue the interim receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* rather than substituting an application for a receivership under section 47 and/or section 243 of the BIA, and opposed the Cambrian Group's application for leave to withdraw its bankruptcy application.

[34] Section 43(14) of the BIA provides that a petition for an order in bankruptcy cannot be withdrawn without the leave of the Court. The Court will not lightly permit such a withdrawal. An agreement to withdraw between the petitioning creditor and the debtor is not necessarily enough. As noted in Houlden, Morawetz & Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2009) at p. 155:

> Since bankruptcy proceedings are for the benefit of all creditors and since the date on which an application is filed may be of crucial importance in attacking fraudulent transactions, the court will not allow an application to be withdrawn or dismissed unless it is satisfied that the debtor is solvent and that other creditors will not be prejudiced by the withdrawal or dismissal.

[35] The Cambrian Group has provided no evidence that Networc is solvent or that no other creditors would be prejudiced by the withdrawal. In fact, Alberta Health, now a secured creditor, would be prejudiced by the withdrawal.

[36] Since Networc has agreed with the Cambrian Group not to oppose the withdrawal, the Cambrian Group bears no risk of a costs application if the withdrawal is delayed for a period of time. Counsel to the Cambrian Group could not identify any specific prejudice if the application for an order in bankruptcy remains in place during the course of a receivership, other than a vague reference to how this may affect the Cambrian Group's ability to pursue other options.

[37] Alberta Health's concern over the withdrawal and the necessity that this may require the receivership to continue under a different statutory provision relates to the complexity of insurance coverage now put in place for the benefit of the Interim Receiver in recognition of its limited role under the section 46 receivership and the concern that a termination of a section 46 receivership and the commencement of a receivership authorized under section 47 or section 243 may create practical issues with respect to the possibility of two estates, or give rise to a perceived interruption in the stay of proceedings.

[38] In addition, Alberta Health submits that allowing the Cambrian Group to withdraw its petition at this point in the proceedings would be contrary to the integrity of the process, and that creditors should be discouraged from filing for and then withdrawing petitions for receiving orders for strategic reasons. Alberta Health submits that adjourning the bankruptcy application to January 15, 2011 would preserve the existing process and prevent the possibility of complications arising from converting the receivership from a section 46 receivership to a section 47 or section 243 receivership.

[39] Clark Builders, identified in the Interim Receiver's report as a major creditor of Networc with respect to the development of new facilities, opposed neither the withdrawal of the bankruptcy petition nor the continuation of the interim receivership. Counsel for Clark Builders noted that the situation would be no different in outcome if this was an application for a receivership under section 47 of the BIA.

[40] The Landlord supported the Cambrian Group's application to withdraw its application in bankruptcy, alleging that Alberta Health's application was a misuse of the receivership remedy. The Landlord's submissions were tied to its application to lift the stay for certain purposes, and will be discussed in greater detail later in these reasons.

[41] The Cambrian Group did not satisfy me that its application to withdraw its petition for a receiving order should be allowed. In particular, it did not prove the solvency of Networc, the lack of prejudice to other creditors or that the withdrawal would not undermine the integrity of the process. In addition, to allow the withdrawal and then force Alberta Health into the formality of an application under section 47 or 243 of the BIA would only create additional expense in the receivership, expense which I am aware would likely be borne by the taxpayers of Alberta. At any rate, even if the bankruptcy application that triggered Alberta Health's ability to apply under section 46 were now to disappear, there is no such prerequisite to the granting of a receivership order under section 13(2) of the *Judicature Act.*

[42] Farley, J in *Canada (Minister of Indian Affairs & Northern Developments) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 at 185, in reference to the court's powers under then section 47(2)(c) (which have now been transferred to section 243(1)(c)), remarked famously that Parliament did not intend to take away from the court when fashioning an order in receivership the ability to do not only what "justice dictates" but also what "practicality demands". He noted, accurately, that:

> It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

[43] While a certain amount of strategic posturing among creditors and stakeholders can be expected in the chaotic conditions that surround a situation of alleged insolvency, what is involved in this case is not just the rights of private creditors *inter se* but also the public interest in preserving the uninterrupted provision of surgical services in Alberta.

[44] Counsel for the Cambrian Group submitted that the Court should not refuse it leave to withdraw its application for a receiving order since if the Court did so, it would be perceived by the public to be assisting Alberta Health in a manner not justified by law, suggesting that Alberta Health needed the bankruptcy proceedings to continue in order to justify its receivership application. As I have indicated in these reasons, that is a mischaracterization of the law and ignores the Cambrian Group's failure to satisfy the Court that its application should be withdrawn. These competing applications have raised public policy issues about the provision of health care services in Alberta by private contractors, but those issues are not issues for this Court except to the extent that the public interest in uninterrupted health care services may validly affect the exercise of any discretion granted to the Court in the appointment of a receiver.

[45] It may be argued that the adjournment of the Cambrian Group's application for a receiving order for the period of time requested by Alberta Health is, in effect, a stay of these proceedings, although the Cambrian Group has now by virtue of its agreement with Networc made it clear that it will not be taking steps in the application in any event. While it is doubtful that the principles relating to an application for a stay apply to the circumstances as they have now evolved, I have considered whether the relief sought by Alberta Health would meet the tests for a stay.

[46] Section 43(11) of the BIA provides under the description "Stay of proceedings for other reasons" that the court, for reasons other than the denial of the facts set out in an application for a bankruptcy order against the debtor, may "for other sufficient reason" make an order staying the proceedings. The general tests developed with respect to this section of the BIA do not apply to this particular circumstance. Under the common law, the tri-partite test for injunctive relief applies in determining whether a stay of a bankruptcy application should be granted: *R.J.R.-MacDonald v. Canada* [1995] 3 S.C.R. 199, 127 D.L.R. (4^{th}) 1 . Applying this test to the current circumstances, I am satisfied that there would be several serious issues to be tried (including whether the Cambrian Group should be allowed to withdraw its application, and if not, whether the application should be stayed), that there may be irreparable harm to the public interest if the existing application was terminated and Alberta Health was required to reapply under a different provision of the BIA, and that the balance of convenience favours Alberta Health's interest in having the application remain in place and be stayed as opposed to the Cambrian Group's application to have it withdrawn.

C. The Landlord

[47] The Interim Receiver reports that, as the Canadian Imperial Bank of Commerce froze Networc's operating line of credit when the receivership order was granted, the automatic debit for May rent did not go through. On May 5, 2010, the Interim Receiver advised the Landlord that the Interim Receiver would pay the May rent as soon as it had a bank account in place and funding was obtained. On May 7, 2010, the rent was paid, including NSF charges.

[48] Thus, Networc is not in default of its covenant to pay rent. The fact of the receivership, however, gives rise to a default under the lease which, but for the stay created by the receivership order, would entitle the Landlord to terminate it.

[49] As a general rule, in a receivership, a tenant's interest in a lease does not rest with the receiver but remains in the name of the debtor. In a court-appointed receivership, the receiver is not bound by the debtor's existing contracts, nor is it personally liable for the performance of those contracts: Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 341; *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.LR. (4th) 127, at 143-147 (N.S.C.A); *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 at 167-172.

[50] If the receiver occupies the premises, it may be liable for occupation rent, but that is not the situation in this case, given the Receiver's limited role. Nevertheless, Alberta Health has agreed to pay rent due and owing during the course of the receivership and has assured the Landlord that rent will be paid until at least January 31, 2011. The Landlord is not prejudiced except to the extent that its right to terminate the lease for breach of a covenant not to be insolvent is stayed during the course of the receivership.

[51] The Landlord relies on *Re North America Steamships Ltd.*, 2007 BCSC 267 in which the court considered the necessity of a trustee in bankruptcy affirming certain forward swap agreements between a bankrupt and creditors if the trustee wished to take the benefit of the agreements. The first thing of note is that this decision deals with a trustee in bankruptcy, not a receiver. The relevance of this is set out in paragraphs 11 and 18 of the decision, discussing the position of a trustee in bankruptcy with respect to the debtor's business. The decision also deals with the special aspects of forward swap agreements: para. 15. It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination: Section 84.2 (7) (8) and (9) of the BIA. While the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract. In summary, this case does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor.

[52] The present case can be distinguished even further by the fact that the receivership is a limited one, with the powers of the Receiver limited to records and financial affairs, and not a situation where a receiver-manager has been appointed.

[53] The Landlord also relies on an oral decision of Brenner, J. in Re *Pope & Talbot Ltd.* dated May 20, 2008. This was a complex matter, primarily involving a filing under the CCAA, but certain properties of the debtor were also subject to a receivership order. This specific decision involved a contract for the supply of wood chips between a third-party sawmill owner, Canfor, and Pope & Talbot with respect to one of its mills under receivership. From the date of the initial order under the CCAA in November 2007 to April 25, 2008, Pope & Talbot paid monthly for the supply of wood chips. After that, it stopped paying, and on May 10, 2008 a receiver was appointed. At the time of the application, invoices for two months supply of wood chips were outstanding and Canfor submitted that it was suffering additional prejudice with respect to storage costs, space issues and contamination of stored stock. Brenner, J. considered the use of the CCAA in an insolvency that was clearly heading towards a liquidation and noted that Canfor was no longer being paid for goods supplied even though a receiver-manager was in place. He referred to *North America Steamships*, and commenting that he was "balancing the equities as best as I can", gave the receiver until June 13, 2008 to decide whether to affirm the contract. In this case, the supplier was not being paid for the supply of materials, and the termination of the contract in question had been stayed, first by the CCAA order and then by the receivership order for seven months. Like *North America Steamships*, this case was driven by its specific and complex facts.

[54] The Landlord deposes that, at the time the application for a receivership order was being made by Alberta Health, it was negotiating a new lease with the principals of Networc. The new tenant was to be a company related to Networc, which would take up Networc's business, subject to Alberta Health agreeing to issue a contract to this new tenant. The concept was that Networc would sell its assets to this new company through a proposal under the BIA, leaving the Cambrian Group litigation to be resolved separately. Counsel for the Landlord in a letter attached to the Landlord's affidavit notes that the Cambrian Group intends to withdraw its bankruptcy application and remarks "(t)here seems to be subterfuge here, but what that subterfuge is escapes me at the moment". The letter outlines the many details that would have to be resolved as part of this proposal.

[55] The Landlord also deposes to receiving expressions of interest from possible new tenants for the Networc space. It submits that the uncertainty over how long Networc may continue to be a tenant is prejudicial to its ability to re-lease the premises. What the Landlord proposes is that either Alberta Health or the Receiver assume the liabilities of Networc under the lease for the balance of its term or that it be allowed to terminate the lease.

[56] Even in cases where a receiver has become liable for the supply of goods and services as a result of the use of these goods or services during the course of the receivership, this liability normally extends only during the course of the receivership, and does not place the receiver in the position of the debtor for the balance of the contract: *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)* 2001 ABQB 223 at paras. 3, 4.

[57] As noted by Alberta Health, even if a trustee in bankruptcy choses to affirm a contract, it does so on behalf of the debtor company, and any subsequent breach will only result in liability to the debtor company or its estate and not personally to the trustee: *Re North America Steamships* at para. 20- 23 and 25 - 26; BIA section 31(4).

[58] The Landlord submits that the limited role of the receiver in this case, and the limited scope of its powers may preclude the stay from applying to the Landlord. While the limited language of the receivership order is consistent with the cautionary language of section 46, that the receivership should not unduly interfere with the debtor carrying on its business, the stay imposed by the receivership must be broad enough to ensure that the goal of conservatory measures is effective. The Landlord, somewhat disingenuously, suggests that the "simple solution" would be to direct that the stay is not effective against it, and that it "would not act precipitously."

[59] Allowing the Landlord to terminate the lease and evict Networc would certainly destroy the purpose of this receivership: to ensure that surgical services provided by Networc to the public in Alberta are not interrupted. As noted by Alberta Health, the Landlord's "simple solution" is to make the Landlord's problem the problem of Alberta Health and to allow the Landlord an advantage over other creditors and stakeholders that is not justified in the circumstances. The receivership is not, as argued by the Landlord, an "artificial construct".

[60] Alberta Health has an interest as a major stakeholder, and now as a secured creditor, in applying for a receivership order. Its valid interest on behalf of the public of Alberta need not be postponed to that of the Landlord, who will continue to receive rent during the course of the receivership.

[61] Given the strong public policy issues involved in this receivership, the fact that rent will continue to be paid and that the prejudice to the Landlord is limited to a delay in its ability to enforce its rights under the lease, I declined to lift the stay to allow the termination of the lease. I dismissed the Landlord's application to compel the Receiver to affirm or disclaim the lease.

[62] If the parties are unable to agree on costs, they may be the subject of a later application.

Heard on the 3rd and 11th day of May, 2010.
Dated at the City of Calgary, Alberta this 1th day of June, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

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C. Michael Smith
Smith Mack LaMarsh
Richard Dixon
Dixon & Associates
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David G. Loader
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Howard A. Gorman
Anne L. Kirker
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for the Interim Receiver PricewaterhouseCoopers

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Appendix A

Bankruptcy and Insolvency Act

46.(1) **Appointment of interim receiver –** The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

(2) **Powers of interim receiver –** The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Judicature Act

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

TAB 2

In the Court of Appeal of Alberta

Citation: BG International Limited v. Canadian Superior Energy Inc., 2009 ABCA 127

Date: 20090407
Docket: 0901-0048-AC
Registry: Calgary

Between:

BG International Limited

Respondent
(Plaintiff)

- and -

Canadian Superior Energy Inc.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Whole of the Interim Orders by
The Honourable Madam Justice B.E.C. Romaine
Dated the 11th day of February, 2009
Filed on the 11th day of February, 2009
(Docket: 0901-02012)

Memorandum of Judgment

The Court:

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

Facts

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

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

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

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

Standard of Review

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

Appointment of the Receiver

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

[8] The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

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

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

to irreparable damage to all parties.

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

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

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

[14] The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and

indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

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

Conclusion

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

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

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

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

[18] The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that

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

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

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

Appeal heard on March 10, 2009

Memorandum filed at Calgary, Alberta
this 7th of April, 2009

Berger J.A.

Slatter J.A.

Rowbotham J.A.

Appearances:

V.P. Lalonde and M.A. Thackray, Q.C.
for the Appellant

C.L. Nicholson and M.E. Killoran
for the Respondent

T.S. Ellam
for interested/affected party Challenger Energy Corp.

H.A. Gorman
for the interested/affected party Canadian Western Bank

L.B. Robinson, Q.C.
for the receiver Deloitte & Touche Inc.

TAB 3

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

Date: 20020429
Action No. 0101 05444

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

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

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

Defendants

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

APPEARANCES:

Judy D. Burke
for the Plaintiff

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

INTRODUCTION