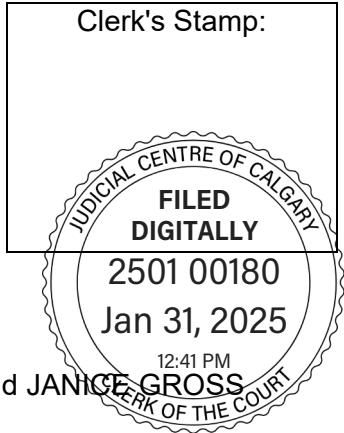


COURT FILE NUMBER 2501-00180
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANT ROYAL BANK OF CANADA
RESPONDENTS MACCABEE & CO. INC., DAVID GROSS and JANICE GROSS



DOCUMENT **BRIEF OF LAW**

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**Hearing via Webex before the Honourable Justice C.D. Simard
on the Commercial List, on February 12, 2025, commencing at 2:00PM.**

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I. INTRODUCTION

1. This is the Brief of Law of the Royal Bank of Canada ("**RBC**"), in support of its application (the "**Application**") to appoint BDO Canada Limited as the receiver and manager (the "**Receiver**") of all the current and future assets, undertakings and property (collectively, the "**Property**") of Maccabee & Co. Inc. ("**Maccabee**" or the "**Borrower**").
2. The Defendants David Gross ("**David**"), and Janice Gross ("**Janice**", and together with David, the "**Guarantors**") are individuals and residents of Alberta. David is the sole director of Maccabee. David and Janice are the shareholders of Maccabee.
3. RBC extended credit facilities and related services (the "**Loans**") to the Borrower pursuant to, among others¹:
 - (a) an RBC Royal Bank Visa Business Card Agreement dated May 31, 2023; and
 - (b) a Credit Agreement dated May 18, 2023;(collectively, the "**Loan Agreements**").
4. As at January 2, 2025, Maccabee was indebted to RBC for \$1,078,173.05 in respect of funds borrowed pursuant to the Loans, plus interest, excluding costs and legal fees, which continue to accrue (the "**Indebtedness**").²
5. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.³
6. BDO Canada Limited is qualified, prepared and has consented to act as Receiver.⁴
7. As the Borrower is in default of its obligations to RBC under both the Loan Agreements, and the Security (as defined below), RBC seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

¹ Affidavit of Nelly Bakker dated January 22, 2025 (the "**Bakker Affidavit**") at para 5.

² Bakker Affidavit at para 7.

³ Bakker Affidavit at para 18.

⁴ Bakker Affidavit at para 21.

8. Maccabee and the Guarantors have consented to the appointment of a Receiver as part of a Forbearance Agreement entered into by RBC, Maccabee, and the Guarantors.⁵

II. ISSUE

9. There is one main issue in this application:

(a) should this Honourable Court appoint a receiver over the Property of Maccabee?

III. RBC'S POSITION

10. The appointment of a receiver over the Borrower's Property is a contractual remedy that is available to RBC and RBC respectfully submits that it is just and convenient to appoint a Receiver of the Property in the present circumstances. It is RBC's position that it is most prudent and efficient to appoint a Receiver over the Borrower's Property which will generate the greatest possible return for the creditors of the Borrower. In this case, RBC also holds a Consent Receivership Order from Maccabee.⁶

IV. FACTUAL BACKGROUND

11. The facts in support of RBC's application are set forth in the Bakker Affidavit.⁷
12. The Borrower is a corporation, incorporated pursuant to the laws of Alberta, with being registered and having records offices located in Coaldale, Alberta.⁸

A. Security and Guarantee

13. The Borrower granted the Security in favour of RBC, which includes, but is not limited to:
- (a) a General Security Agreement ("**GSA**") dated May 18, 2023, creating a security interest in all present and after acquired personal property of Maccabee; and

⁵ Bakker Affidavit at para 16 and 18.

⁶ Bakker Affidavit at para 16 and 18.

⁷ Capitalized terms not otherwise defined herein have the meaning set forth in the Bakker Affidavit, RBC's Statement of Claim or RBC's Application.

⁸ Bakker Affidavit at para 3.

(b) a Master Lease Agreement dated September 13, 2023, creating a security interest in a 2023 CIM Bin Transport Trailer, Serial Number 2C9FS8B11PH167108 in favour of RBC;⁹

14. In addition, the Guarantors granted the following security interests and guarantees to RBC:

(a) a guarantee in the principal amount of \$2,000,000 dated May 31, 2023; and

(b) two postponements and assignments of claim dated May 18, 2023.

(collectively, the "**Guarantor Security**") and together with the Borrower Security, the "**Security**").¹⁰

B. Defaults and Demand

15. The Borrower is in default of its obligations to RBC, including but not limited to, by reason of:

(a) the failure to make payments against the Loans as required by the Loan Agreement;

(b) the ability of the Borrower to repay the Indebtedness owing to RBC is, or is about to be, impaired; and

(c) RBC being of the opinion that there has been a material adverse change in the financial condition of the Borrower.¹¹

16. As a result of the Defaults, on or about August 6, 2024, RBC :

(a) demanded repayment of the Indebtedness (as it then was) from the Borrower (the "**Borrower Demand**") and concurrently delivered a 244 Notice pursuant to section 244 of the *BIA*;¹² and

⁹ Bakker Affidavit at para 8.

¹⁰ Bakker Affidavit at para 10.

¹¹ Bakker Affidavit at para 11.

¹² *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s.244 (as amended, the "**BIA**") [**Book of Authorities ("Authorities") Tab 1**].

(b) demanded payment of amounts from the Guarantors owing under the Guarantee (the "**Guarantor Demand**", and together with the Borrower Demand, the "**Demands**") in respect of the Indebtedness together with a separate 244 Notice.¹³

17. Despite the issuance of the Demands, the Borrower and the Guarantors have failed, refused or otherwise neglected to repay the Indebtedness.¹⁴

C. Forbearance Agreement and Consent Receivership

18. Effective August 30, 2023, as a result of, among other things, the Borrower's defaults under the Loan Agreements, RBC, the Borrower and the Guarantors entered into a Forbearance Agreement whereby, among other things, RBC agreed to forbear from exercising its rights under the Loan Agreements and the Security.¹⁵

19. Pursuant to the provisions of the Forbearance Agreement, the Respondents, among other things,¹⁶

(a) acknowledged that the Loan Agreements, the Guarantee and the Security, were properly executed and are valid, binding and enforceable in accordance with their terms;

(b) acknowledged the Indebtedness;

(c) waived their ability to dispute, in any way, the liability to repay the Indebtedness and acknowledged and agreed that they had no claim for set-off, counterclaim or damages on any basis whatsoever against RBC;

(d) released RBC from all causes of action brought by the Borrower or Guarantors;

(e) waived their defences to present any future legal actions or enforcement brought by RBC to collect the Indebtedness or enforce or realize upon the Security;

¹³ Bakker Affidavit at paras 12 and 13.

¹⁴ Bakker Affidavit at para 14.

¹⁵ Bakker Affidavit at para 15.

¹⁶ Bakker Affidavit at para 16.

- (f) acknowledged that RBC has not waived any of its rights in respect of the indebtedness, the Loans or any Events of Default (as defined in the Forbearance Agreement) contained in the Loan Agreements;
 - (g) agreed to appoint BDO Canada Limited ("**BDO**") as Receiver of Maccabee;
 - (h) confirmed that the Indebtedness would be reduced to \$0.00 by the expiry of the forbearance period being October 31, 2024; and
 - (i) executed a Consent Receivership Order.
20. The Borrower has consented to have RBC appoint a receiver and manager over the property, assets, and undertakings of the Borrower.¹⁷

V. LAW AND ARGUMENT

A. RBC is Entitled to Appoint a Receiver

21. RBC satisfied the procedural prerequisite to seeking the appointment of the Receiver in August 2024 when it served the 244 Notice on the Borrower.
22. Each of section 243 of the *BIA*¹⁸, section 13(2) of the *Judicature Act*¹⁹ and section 65(7)(a) of the *PPSA*²⁰ vest this Honourable Court with the authority to appoint a Receiver where it is just and convenient to do so.
23. RBC respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property, on the basis that:
- (a) it is just, convenient and otherwise appropriate in the circumstances;
 - (b) would be in accordance with the contractual terms agreed upon by RBC and the Borrower under the Security; and
 - (c) Maccabee has consented.

¹⁷ Bakker Affidavit at para 18.

¹⁸ *BIA* at s. 243 [**Authorities, Tab 1**].

¹⁹ *Judicature Act*, RSA 2000 c J-2, as amended (the "*Judicature Act*") at s. 13(2) [**Authorities, Tab 2**].

²⁰ *Personal Property Security Act*, RSA 2000 c P-7 ("*PPSA*") at s. 65(7)(a) [**Authorities, Tab 3**].

B. Considerations When Appointing a Receiver

24. Traditionally, when considering an application to appoint a receiver, Courts have used the same test used to determine if an interlocutory injunction is appropriate,²¹ but have loosened the test in cases where "the dictates of fairness are so overwhelming".²² In *Murphy*, Justice Veit confirmed that the interim relief of appointing a receiver may be justified even where one or more terms of the injunction test are not met.²³
25. The requirement to meet the injunction test is less relevant where a secured creditor is simply seeking to enforce its contractual rights.²⁴
26. There are a number of factors that are considered by a Court in appointing a receiver. In *Schendel*,²⁵ this Court affirmed the non-exhaustive list of factors set forth in *Bennett on Receiverships*, originally set forth by Justice Romaine in *Paragon* (the "**Paragon Factors**").²⁶

C. RBC is Not Required to Meet the Injunction Test

27. In *Kasten*, a secured creditor brought an application to appoint a receiver pursuant to the terms of its security documentation and this Honourable Court held that:

The security documentation in the present case authorizes the appointment of a Receiver [...] 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.²⁷

²¹ The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**")²¹ *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paras 83-85 [**Authorities, Tab 4**].

²² *Murphy v Cahill*, 2013 ABQB 335 ("**Murphy**") at para 8 [**Authorities, Tab 5**].

²³ *Murphy* at para 62 [**Authorities, Tab 5**].

²⁴ *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("**Paragon**") at para 28 [**Authorities, Tab 6**].

²⁵ *Re Schendel Management Ltd.*, 2019 ABQB 545 ("**Schendel**") at para 44 [**Authorities, Tab 7**].

²⁶ *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("**Lindsey**") at para 32 [**Authorities, Tab 8**]. *Paragon* at para 27 [**Authorities, Tab 6**]. Among the *Paragon* Factors are two of the three elements of the Injunction Test, with the "serious issue to be tried" question omitted. The five factors from *Lindsey* are also captured in the *Paragon* Factors.

²⁷ *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* ("**Kasten**") 2013 ABQB 63 at para 21 [**Authorities, Tab 9**].

28. In *Paragon*, Justice Romaine confirmed that parties' contractual interests should be honored above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm in the absence of a Court appointing a receiver:

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.²⁸

29. This approach was also confirmed by the Ontario Superior Court in *RMB*:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.²⁹

30. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, essentially reversing the onus as to whether or not a receiver should be appointed. The Court confirmed that, where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.³⁰

31. Having regard for the *Paragon* Factors and the Security, RBC respectfully submits that it is just and convenient to appoint BDO Canada Limited as Receiver over the Property for, among others, the following reasons:

- (a) it is an express term of the Security that, upon default, one of the remedies available to RBC is the appointment of a receiver;³¹
- (b) it is not necessary for RBC to provide the existence of irreparable harm in the event a receiver is not appointed;
- (c) RBC has lost confidence in the Borrower's management;³²

²⁸ *Paragon* at para 28 [**Authorities, Tab 6**].

²⁹ *RMB Australia Holdings Ltd. v Seafield Resources Ltd.*, 2014 ONSC 5205 ("*RMB*") at para 29 [**Authorities, Tab 10**].

³⁰ *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.*, 2012 BCSC 437 ("*Can-Pacific Farms*") at para 14 [**Authorities, Tab 11**].

³¹ Bakker Affidavit at para 17.

³² Bakker Affidavit at para 18.

- (d) the Borrower has committed numerous defaults under the Security and the Loan Agreements;³³
- (e) the Borrower has had ample time following the Borrower Demand to repay the Indebtedness but has failed to do so notwithstanding RBC's patience and forbearance;³⁴ and
- (f) there are no compelling commercial or other reasons to not appoint BDO Canada Limited as Receiver, and Maccabee has consented to the same.

32. RBC respectfully submits that it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over the Borrower's business and to maximize recovery for stakeholders.

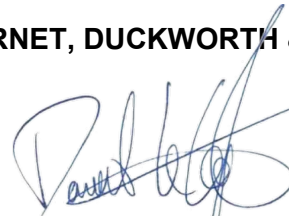
VI. CONCLUSION

33. For the reasons set forth above, RBC seeks a Receivership Order, substantially in the form appended as Schedule "A" to the Application in order to maximize value for all of the Borrower's stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31ST DAY OF JANUARY, 2025.

BURNET, DUCKWORTH & PALMER LLP

Per:



David LeGeyt
Solicitor for the Royal Bank of Canada

³³ Bakker Affidavit at para 11.

³⁴ Bakker Affidavit at para 16.

LIST OF AUTHORITIES

TAB	DOCUMENT
1.	<u>Bankruptcy and Insolvency Act, RSC 1985, c B-3.</u>
2.	<u>Judicature Act, RSA 2000, c J-2.</u>
3.	<u>Personal Property Security Act, RSA 2000 c P-7.</u>
4.	<u>RJR — MacDonald Inc. v Canada (Attorney General) [1994] 1 SCR 311 (SCC).</u>
5.	<u>Murphy v Cahill, 2013 ABQB 335.</u>
6.	<u>Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co., 2002 ABQB 430.</u>
7.	<u>Re Schendel Management Ltd., 2019 ABQB 545.</u>
8.	<u>Lindsey Estate v Strategic Metals Corp., 2010 ABQB 242.</u>
9.	<u>Kasten Energy Inc. v Shamrock Oil & Gas Ltd., 2013 ABQB 63.</u>
10.	<u>RMB Australia Holdings Ltd. v Seafield Resources Ltd., 2014 ONSC 5205.</u>
11.	<u>Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc., 2012 BCSC 437.</u>