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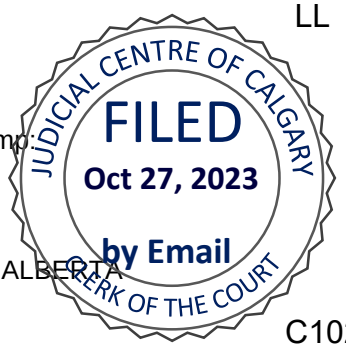
Clerk's stamp:



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COURT FILE NUMBER	2201-09184
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	MALGORZATA NOWAK PROFESSIONAL CORPORATION and MALGORZATA NOWAK
DOCUMENT	**AUTHORITIES OF ATB FINANCIAL**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8 Attn: Derek Pontin Ph. (403) 268-6301 Fx. (403) 268-3100 File No.: 141950-252

AUTHORITIES OF THE APPLICANT ATB FINANCIAL

VI. TABLE OF AUTHORITIES

Tab	Authority
1.	*Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co*, 2002 ABQB 430
2.	*Lindsey Estate v. Strategic Metals Corp*, 2010 ABQB 242
3.	*Re Schendel Management Ltd*, 2019 ABQB 545
4.	*Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*, 2010 CarswellBC 855
5.	*Enterprise Cape Breton Corp v. Crown Jewel Resort Ranch Inc*, 2014 NSSC 128
6.	*Bank of Montreal v. Sherco Properties Inc*, 2013 ONSC 7023
7.	*Valente v. Courey,* [2004] CarswellOnt 681
8.	*Sultan Management Group (Re),* 2022 ABQB 262
9.	*Sultan Management Group Inc. (Re),* 2023 ABCA 110
10.	*ATB Financial v Coredent Partnership*, 2020 ABQB 587, 2020 CarswellAlta 1802
11.	*Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35
12.	*Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37
13.	*Phoa v. Ley*, 2020 ABCA 195

Tab 1

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

Headnote

Receivers --- Appointment — General

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

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that

doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,[8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*[9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,[10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*[11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."[12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne[*]

***Romaine J.*:**

INTRODUCTION

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

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon.

Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

Should the ex parte receivership order have been granted?

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

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

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

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

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

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

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

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

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

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

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

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

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

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

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

Should the ex parte order now be set aside?

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

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

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-

backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

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

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

Should the order be stayed?

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

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

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

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

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

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on

in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

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

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

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

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

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

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

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

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

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

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

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

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

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

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

12 Para. 20.

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

Tab 2

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495,
[2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but

undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies and A Inc. were complicit in fraud perpetrated by B — S Corp. was placed into receivership — Investors brought application to have same receiver appointed over assets and undertakings of A Inc. and companies owned by B and S — Application granted — Although S was not involved directly in proceedings before commission, his companies and A Inc. were subject of investigation in view of flow of monies — B's companies, S's companies and A Inc. were involved in receipt and transfer of tens of millions of dollars which flowed freely between B's companies and S's companies — There was no evidence put forward by S to lend any credence to position that he was conducting legitimate business at arm's length with B — There was evidence which suggested contrary — S and his companies received over $50 million directly or indirectly from B and his companies and there was no accounting for any of these monies — B was directing mind of A Inc. and A Inc. shared address and director with S Corp. — There was real risk of irreparable harm in wasting of proposed receivership companies' assets if no order was made — Appointment of receiver would allow assets to be preserved which was essential given nature of claim — Balance of convenience favoured placement of receiver — Receiver would be able to preserve assets and further investigate whereabouts of any other assets — There was no evidence of any harm to companies by placement of receiver.

Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies were complicit in fraud perpetrated by B — Investors brought application for attachment order against S — Application granted — In order to obtain attachment order, investors had to show that there was reasonable likelihood of success at trial — S and his companies received between $50 and 80 million in investor funds — There had been no accounting with respect to these funds — S had to do more than simply say he never had contact with investors and that he did not solicit funds from them directly — Looking at conclusions of commission, there was little doubt that S and his companies were key element in raising and dissipation of funds — S appeared to have been key element in fraud perpetrated by B.

Table of Authorities

Cases considered by *G.C. Hawco J.*:

Alberta (Securities Commission) v. Brost (2008), 2008 ABCA 326, 2 Alta. L.R. (5th) 102, 2008 CarswellAlta 1325, 440 A.R. 7, 438 W.A.C. 7 (Alta. C.A.) — considered

APPLICATION by investors for receivership and attachment orders.

***G.C. Hawco J.*:**

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

4 Mr. Quilling is granted an Attachment Order against Mr. Sorenson.

Background

5 By way of brief background, in May and June of 2006, a hearing took place before the Alberta Securities Commission ("ASC") against Milowe Allen Brost, one of two Respondents, and others, with respect to allegations of misrepresentations and fraud, relating to Strategic and investors in Strategic. On February 16, 2007, the ASC found that Strategic and a number of their representatives, specifically Edna Forrest, Carol Weeks, Bradley Regier and Mr. Brost, were responsible for false or misleading statements in an Offering Memoranda and that all of those parties engaged in a course of conduct that amounted to a fraud on the shareholders of Strategic. Mr. Sorenson was not a named party to the ASC hearing and did not appear, but was featured prominently in the deliberations and findings of the ASC.

6 What appears to be fairly clear from the ASC hearings is that Mr. Brost and Strategic were involved in a massive fraudulent scheme whereby the Applicants and other investors were induced to trust Mr. Brost and his associates with large amounts of money to be invested on their behalf. The information which was provided to the investors has been determined to be false. The total amount of money received by Mr. Brost and his associates was upward of $500 million. None has been recovered.

7 The decision of the ASC was appealed to our Alberta Court of Appeal. On October 3, 2008, the Court dismissed the appeals by Mr. Brost, Strategic and others. *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (Alta. C.A.).

8 In paragraph 20 and 21 of the Court of Appeal's decision, it stated:

> 20. The Commission summarized the fraudulent scheme, and the roles of each of the Appellants played in that scheme as follows (at para. 13 of the *Sanctions Decision):*
>
> > ... Brost was at the centre of the activities of Strategic and alternatives and ... when he developed Strategic and his business plan, he had in mind the involvement of Gary Sorenson ("Sorenson") and Art (Arthur) Wigmore ("Wigmore") [neither of whom were involved in the proceedings before the Commission] and the funding of mining ventures of either or both of them (as indeed incurred in respect of ventures within the Merendon orbit).... [The] plan was to lure public investor (with promises of high returns and safety along with tantalizing references to gold) into putting money into securities of Strategic - essentially a shell of a company whose main (but undisclosed) function was to finance Sorenson's mining ventures. ...
>
> 21. The Commission described the materials that Alternatives put out to market Strategic shares as "highly promotional", "factually weak" and "clearly designed to entice investors." It noted blatant untruths and misrepresentations in those materials. For example, it noted that Strategic's shares were touted as being secured by precious metals when that clearly was not the case. The Commission was convinced that Strategic investors would not see the returns they expected to realize on their investments and was doubtful that they would recover much of the money they paid.

9 In paragraph 42, the Court concluded that it was reasonable for the ASC to conclude that each of the Appellants engaged in conduct that amounted to regulatory fraud. It went on to say, at para. 47:

> We are of the view that there was evidence upon which the Commission could reasonably conclude, on a balance of probabilities, that Brost was responsible for making false and misleading statements to, and participating in a fraud on, investors.

The Court went on to dismiss the Appeals.

10 Pursuant to a Notice of Hearing dated May 17, 2009, the ASC has commenced proceedings against Arbour, Brost, IFFL, Sorenson, MMCL and a number of additional parties. The Notice of Hearing alleges, among other things, that the Respondents engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors. That hearing is on-going.

Receivership

11 As mentioned, Strategic has been placed into receivership. Mr. Quilling has delivered two reports. The Applicants and others are, or were, investors who allege that the Respondents conspired and acted jointly together to defraud them of funds through the use of an investment scheme that operated in the same way as the investment scheme alleged and referred to in the ASC hearing in 2006 and in the Strategic action.

12 The hearing before the ASC and the matters heard by this Court and our Court of Appeal concerned Strategic and Mr. Brost. Mr. Sorenson and his companies (collectively referred to as the Merendon Companies) were not parties to those proceedings. Neither was Arbour a party.

13 The Applicants allege that Mr. Sorenson, the Merendon companies and Arbour are complicit in the fraud perpetrated by Mr. Brost. They seek to have Mr. Quilling appointed as Receiver of the Respondent companies and seek to have an injunction or attachment order against Mr. Sorenson.

14 Mr. Sorenson states that he was not a party to the original ASC hearings and denies even having anything to do with Mr. Brost's investment schemes. He admits to having been involved in "arm's length business dealings with Mr. Brost and certain of his corporate entities" but denies having been in business with Mr. Brost. I must assume he means that he has not conducted any nefarious business with Mr. Brost.

15 Mr. Sorenson objects to the evidence of Mr. Quilling being received because Mr. Quilling relies upon certain findings of the ASC. He argues that the ASC was not bound by the rules of evidence. Contrary to those rules, the ASC received and relied upon hearsay evidence. As neither Mr. Sorenson nor his companies were parties to that proceeding, the evidence ought not be relied upon. Nor should any of the ASC reasoning or findings be relied upon.

16 The argument of the Applicants is that their case is not founded upon any hearsay evidence which may be found in Mr. Quilling's affidavit, but rather upon the evidence of the financial documents which had been placed before the ASC and which have been examined by Mr. Quilling, as well as the affidavit of Mr. Sorenson and his cross-examination upon that affidavit.

17 What must be born in mind is that the Court of Appeal of this province has considered the decisions of the ASC in some detail and has upheld those decisions with respect to its findings relating to false and misleading statements and misrepresentations of Mr. Brost and others involved with Strategic and the related corporate vehicles. The ASC found that the Offering Memoranda "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money". The ASC further found that fraud had been perpetrated on the investors, who include the Applicants.

18 The Court considered the grounds of appeal of Mr. Brost and the others and, in its analysis referred to the arguments of the Appellants which included the objection to the admission of the hearsay evidence. In paragraph 34, the Court stated:"The Commission acknowledged that transcripts of investigative interviews are not the same as live testimony in that hearsay evidence can be problematic. It treated the impugned hearsay evidence with caution when assessing its value and reliability." In paragraph 36, the Court concluded that the Appellant's arguments (including its arguments to exclude the hearsay evidence) were without merit.

19 Clearly, Mr. Sorenson was not involved directly, as a party, in the previous proceedings before the ASC. Just as clearly, however, his Merendon companies and Arbour were the subject of investigation in view of the flow of monies that went through Mr. Brost, Strategic and his related companies including IFFL and Capital Alternatives. Mr. Brost was the principle of Strategic, Capital Alternatives, IFFL and Merendon Mining (Colorado). These companies and Mr. Sorenson's Merendon companies, and Arbour were involved in the receipt and transfer of tens of millions of dollars which flowed freely between Mr. Brost's companies and Mr. Sorenson's companies.

20 MMCL received over $26 million from Mr. Brost's company - IFFL. MMCL purchased a mine in Tulameen, British Columbia for $1 million and sold it shortly after to Strategic for $9.6 million. That mine was held out by Strategic to be a prime property. It was information and belief of Sgt. Fuller that it was a sham. That appears to be confirmed from Mr. Quilling's investigation.

21 Arbour went from an insolvent company to one loaning $39 million in investors funds in a matter of months to MMCL. Mr. Sorenson claims that MMCL extinguished its obligation to Arbour by selling back to Arbour 25% interest in Tar Sand Recovery Limited. Nothing has been presented by Mr. Sorenson to justify Tar Sand's worth.

22 SGD was another Brost/Sorenson company which received money from Strategic and then directed huge sums of money (over $50 million) to MMCL. Again, no accounting is offered by Mr. Sorenson. Mr. Sorenson simply says that these were monies lent to MMCL and that the debt was retired. The documentation as to how it was retired and the documentation with respect to the value of any assets transferred is sadly lacking. There is simply no evidence put forward by Mr. Sorenson to lend any credence to his position that he was conducting a legitimate business at arm's length with Mr. Brost. There is evidence which suggests the contrary.

23 Mr. Quilling's report of August 26, 2008 states that as a result of information he has received, the Merendon Mining operation in Honduras is a sham as well. I have already determined that the Tulameen mine is basically a sham.

24 Both Mr. Brost and Mr. Sorenson were shareholders of SGD which provided funds to MMCL. Mr. Sorenson was aware that funds were being provided to MMCL through SGD and that they were being sourced from IFFL.

25 SGD existed for the sole purpose of channelling tens of millions of dollars of IFFL members' money to MMCL in exchange for no discernable value.

26 Mr. Sorenson argues he is being tarred by Mr. Brost's brush yet says that he does not have to disprove what is alleged. He continues to argue that he had no involvement in Strategic. Yet, it was Mr. Brost's evidence that Mr. Sorenson initially agreed to, and did become, a director of Strategic.

27 Mr. Sorenson continues to assert that the Honduran mine is continuing to produce gold while the evidence of Mr. Quilling, as fully set out in his report, is that the mine is a sham.

28 Serious allegations have been made against Mr. Sorenson and his companies in these proceedings. Mr. Sorenson has filed an affidavit and has been cross-examined on it. However, he has failed to produce any documentation which would speak to the value of any companies owned by him or that would answer in any manner the allegations of either fraud or dissipation of assets within the companies. Indeed, neither Mr. Sorenson nor MMCL have put forth any independent or reliable evidence of legitimate operations or value in MMCL or any of its subsidiaries or to account for any of the tens of millions of dollars of investors funds that Mr. Sorenson admits that his companies received. His position is that "only" $26 million went to his companies through Mr. Brost and that these were arm's length transactions which were legitimately retired.

29 I am satisfied that Mr. Sorenson and his companies have indeed received over $50 million directly or indirectly from Mr. Brost and his companies. There is no accounting for any of these monies. Mr. Sorenson's explanation of repaying the $26 million loan lacks credibility.

30 With respect to Arbour, Mr. Brost was its directing mind. Arbour and Strategic shared an address and had at least one common director. Arbour received $820,000.00 from Strategic and has accounted for none of it. Arbour was used as a flow-through to send investment funds to Mr. Sorenson's company, MMCL. Arbour appears to be insolvent at this time. It is not carrying on business presently. It has been the recipient of at least $28 million from the Applicants and other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

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

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

38 Mr. Sorenson appears to have gone to great lengths to make himself judgment-proof. He claims that he has not dissipated assets yet refuses to answer specific questions on his cross-examination with respect to asset dissipation or the presence of any bank accounts he may have.

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements of Mr. Brost, Mr. Sorenson must do more than simply say that he never had any contact with these Applicants and that he did not solicit funds from them directly. When I looked at the conclusions of the ASC there is little doubt but that Mr. Sorenson and his companies were a key element in the raising and dissipation of those funds. He appears to have been a key element in the fraud perpetrated by Mr. Brost.

40 In the end result, I am satisfied that an Attachment Order is appropriate and such Order will issue together with the Receivership Order as indicated.

Application granted.

Footnotes

* Affirmed at *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.).

Tab 3

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

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

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

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

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Pursuant to s. 50(12) of BIA, proposal would not likely be accepted by creditors, and was deemed refused — ATB had true veto, it intended to vote no, and proposal would necessarily fail — ATB would vote no because it regarded proposal as unsatisfactory — Focus was on existing proposal — None of identified ATB steps showed absence of good faith or showed commercial unreasonableness — ATB was not attempting to pursue improper purpose, and was pursuing its interests and asserting its rights within bounds of and for purposes squarely within Canadian insolvency system — Given its secured position, BIA provisions governing secured creditors and approval of proposals, and proposal itself, and ATB was entitled to oppose proposal and seek deemed refused ruling — ATB believed, on reasonable or defensible or arguable grounds, that it would fare better by receivership than under proposal — ATB was not acting perversely or vindictively or otherwise than in its own economic interests, and it was

not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50(12).

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

Table of Authorities

Cases considered by *M.J. Lema J.*:

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — distinguished

Hypnotic Clubs Inc., Re (2010), 2010 ONSC 2987, 2010 CarswellOnt 3463, 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) — considered

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Murphy v. Cahill (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — considered

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

Promax Energy Inc. v. Lorne H. Reed & Associates Ltd. (2002), 2002 ABCA 239, 2002 CarswellAlta 1241 (Alta. C.A.) — considered

Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc. (2005), 2005 NBQB 394, 2005 CarswellNB 635, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 290 N.B.R. (2d) 278, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 755 A.P.R. 278, 17 C.B.R. (5th) 244 (N.B. Q.B.) — considered

The Bank of Nova Scotia v. 1934047 Ontario Inc. (2018), 2018 ONSC 4669, 2018 CarswellOnt 12568 (Ont. S.C.J.) — considered

Toronto-Dominion Bank v. Rismani (2015), 2015 BCSC 596, 2015 CarswellBC 991, 25 C.B.R. (6th) 127 (B.C. S.C.) — considered

West Coast Logistics Ltd. (Re) (2017), 2017 BCSC 1970, 2017 CarswellBC 3014, 53 C.B.R. (6th) 68 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50(4) — referred to

s. 50(12) — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 62(2)(b) — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — considered

s. 244 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

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

s. 13(2) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 66 — considered

APPLICATION by secured creditor for orders deeming refused joint proposal made by three related corporations, lifting proposal stay of proceedings, and appointing receiver and manager.

***M.J. Lema J.*:**

A. Introduction

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

2 I find, under ss. 50(12) BIA, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

• Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

• after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

• the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

• Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

• however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

• on March 22, 2019 and in response, Schendel filed a notice of intention to file a proposal under s. 50.4(1) BIA, triggering a stay (under s. 69.1 *BIA*) of enforcement action by ATB and other creditors;

• on April 18, 2019, Mah J. granted a 45-day extension and dismissed an application by ATB to lift the stay and appoint a receiver or interim receiver;

• on June 3, 2019, Little J. granted an interim extension to allow time for a further extension application;

• on June 11, 2019, Yamauchi J. granted a further extension, to July 11, 2019;

• on July 10, 2019, Schendel filed a proposal to ATB and its other creditors;

• the proposal treats ATB's claim (approximately $22 million) in two segments: it gauges the secured portion of ATB's claim at $11.2 million and the unsecured portion at $11 million. ATB's secured claim is the sole occupant of Secured Class; its unsecured portion joins other unsecured creditors in steerage. (Various other secured creditors are excluded from the proposal);

• by virtue of the solo nature of its secured claim, ATB has a veto over the proposal i.e. if it votes no to the proposal, it will fail, per para 62(2)(b) *BIA*. (ATB does not contest that aspect);

• for whatever difference it makes, ATB may also have a veto in the unsecured class, at least for Mechanical;

• ATB contends that, with no order consolidating the affairs of the three Schendel companies for proposal purposes, Schendel was not authorized to file a joint proposal;

• assuming that a joint proposal is authorized, the creditors' meeting to vote on it is set for July 31, 2019;

• on July 12, 2019, ATB applied for the deemed-refusal and stay-lifting orders described at the outset and heard at the application on July 16, 2019;

• ATB intends to vote no at the meeting, based on having lost confidence in Schendel's management, on Schendel's ongoing losses, on concerns about preferential payments having been made to certain pre-NOI creditors, on losing access (under the proposal) to personal guarantees, and on its perception that it will fare better in a bankruptcy or receivership than under the proposal (among other grounds);

• it argues that, in light of that position, which it maintains is fixed, the failure of the proposal on July 31, 2019 is a foregone conclusion and that, accordingly, the proposal should be "deemed refused" under ss. 50(12) or the s. 69.1 stay should be lifted (or both), followed the appointment of PwC as receiver-manager; and

• as noted, Schendel is opposed, citing the possibility of an amended (and enhanced) proposal between July 16 and 31 and, more fundamentally, based on what is perceives as the commercial unreasonableness of and inequitable and improper conduct by ATB. It believes the proposal process should continue until July 31 at which time the proposal (existing or amended) can be voted on by all of its creditors.

C. Issues

4 The issues are:

1. whether the proposal should be deemed refused under ss. 50(12), which has three separate triggers (any one of which is sufficient):

• the debtor has not acted, or is not acting, in good faith and with due diligence;

- the proposal will not likely be accepted by the creditors; or
- the creditors as a whole would be materially prejudiced if the application under this subsection is rejected;

2. in any case, whether the s. 69.1 stay should be lifted under s. 69.4, which has two separate triggers (either of which is sufficient):

- the creditor is likely to be materially prejudiced by the continued operation of s. 69.1; or
- it is inequitable on other grounds to make such a declaration; and

3. if ss. 50(12) is satisfied (in which case Schendel will be deemed bankrupt and ATB, as a secured creditor, will be free to enforce its security) or if the stay is lifted (permitting the same thing), ATB intends to enforce its security, and the issue becomes whether PwC should be appointed receiver and manager of Schendel.

D. Analysis

5 I start by examining the second branch of ss. 50(12), namely, whether the proposal will not likely be accepted by the creditors. (I see ss 50(12) as the more fundamental provision: if it applies, the proposal proceeding is eclipsed. The "stay lift" application contemplates an ongoing proposal.)

6 The answer is yes: the proposal will not likely to be accepted — in fact, it is almost *guaranteed* not to be accepted.

7 My reasoning is outlined below.

ATB veto

8 ATB has a true veto, which Schendel acknowledges: if ATB votes no, the proposal will necessarily fail. (ATB is the only creditor in the "Affected Secured Creditors" class, and the proposal require a yes vote by ATB for the proposal to succeed: Article 9.1.)

9 ATB intends to vote no. Its evidence is that that position will not change i.e. it would necessarily vote no at the July 31 meeting (if it occurs).

10 It would vote no because it regards the proposal as unsatisfactory, for reasons including:

- it is effectively being asked to take a 50 per cent discount on its claim;
- the "secured" portion of its claim will be replaced by two unsecured promissory notes, the payment of one of which depends on the (uncertain) outcome of certain events;
- the unsecured portion of its claim may be effectively blocked by the proposal mechanics;
- ATB already has first-position security on the assets out of which Schendel proposes to pay it under the proposal;
- it undercuts ATB's recourse against five guarantees provided by individuals associated with the Schendel; and
- overall, ATB believes it will fare better under a bankruptcy.

Uncertainty over possible amendments

11 While Schendel's evidence includes the details of a potential deal with a third party, which it described as "possibly" leading to a sweetened amended proposal, the evidence does not disclose the (even estimated) timing of the deal, its potential terms, the likelihood of consummation, or by how much the proposal's terms might be enhanced as a result.

12 Pointing to almost 40 possible deals or other lifelines disclosed by the Schendel's evidence, none of which came to fruition and the vague details of the latest potential deal, ATB sees next-to-no chance of an enhanced proposal coming forward at this stage.

Focus of ss 50(12) BIA on proposal "as is"

13 In any case, the focus is on the existing proposal. Subsection 50(12) refers to "the proposal" being deemed refused if the court is satisfied that "the proposal" will not likely be accepted i.e. nothing in the provision contemplates an amendment or how it might be received by the creditors.

14 Where a creditor seeks to have the proposal deemed refused, it is effectively saying that:

- it does not support the proposal; *and*
- it sees no prospect of an acceptable amended proposal.

15 Otherwise, the creditor would presumably be prepared to wait, through to the vote meeting, to see if worthwhile amendments might be proposed.

16 Subsection 50(12) allows a veto creditor in such circumstances (opposed to proposal; no prospect of acceptable amendments) to fast-forward to the inevitable result i.e. the proposal's termination.

17 The proposal proponent's reaction, as here, may be to say "wait, there may be a better proposal soon." The answer to that is:

- this is the proposal it made;
- the focus of the ss 50(12) exercise is the proposal *as filed*;
- the proposal cannot be withdrawn (ss 50(4) BIA);
- the applicant creditor had the option of waiting, until the vote meeting, for proposal "sweetening";
- if the applicant perceived the likelihood or even a real possibility of worthwhile amendments, it would not have brought the "deemed refused" application;
- even if it had seen such likelihood or possibility, it is entitled to balance the potential upside of waiting against the downside e.g. the costs associated with waiting;
- if the debtor had needed more time (i.e. to put forward a different, and better, proposal), it had the option (as here) of seeking another extension of the notice-of-intention period (six-month maximum had not been reached);
- having not done so (instead, filing the proposal now under review), the debtor must live with that proposal. For the ss. 50(12) exercise, *that* proposal is the only slide under the microscope. The possibility of a different, and better, slide is *not* a factor;
- in other words, by laying down a proposal, the proponent takes the risk that a creditor (or group of creditors) will say "this is not good enough" and move for termination under ss 50(12). The section weighs who is supporting and who is not and whether the outcome at the voting stage is "likely" refusal; and
- here, with ATB having an effective veto, its "opposed" stance is determinative: *this* proposal will fail. The possibility of a different proposal down the road does not enter into the equation.

Subsection 50(12) exists for a reason

18 If Parliament had intended an "unabridgeable" period between the proposal filing and the vote meeting (whether to ensure "full consideration" by the creditors, an opportunity for the debtor to propose amendments, or otherwise), it would not have included the "deemed refused" element in ss 50(4).

Case law recognizes impact of veto in "deemed refused" scenarios

19 In materially identical circumstances to those here, LaVigne J. held in *Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.* [1] :

> *Sport Maska* [the veto-position creditor] asserts that the Proposal will not succeed, as there is no chance [it] will accept this Proposal, or any Proposal made by RBI. It therefore submits that it is not necessary or indeed practical, that a meeting of creditors be held, since it is already known that [it] will vote to defeat the Proposal.
>
> *It is obvious that no plan of arrangement can succeed without [its] approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance it cannot succeed.*
>
> *It is apparent that Sport Maska is overwhelmingly opposed to the plan. No persuasive argument was put forward as to why the vote should proceed in those circumstances.*
>
> *I am of the view that it is fruitless to proceed to a further stage with this Proposal.*
>
> RBI argues that while it may be appropriate for the Court to use its discretion when the Proposal has not yet been tabled, the Court should not use its discretion in the present case since RBI has made its Proposal and a meeting date has been set. I find that *it is easier for the Court to make a finding as to what the creditors are likely to do when the terms of the Proposal are known, and the meeting of the creditors is set to occur in the very near future such as in situations contemplated in subsection 50(12)*, then when the terms of the Proposal are unknown and the date of the meeting of creditors is to happen sometime later.
>
> RBI also argued that it may obtain sufficient financing to pay off completely the debt actually owed to Sport Maska. In my view, that is highly unlikely considering the evidence presently before this Court.
>
> *A creditor does not have to show beyond certainty that a Proposal would be rejected in order to be successful on a Motion under subsection 50(12). A creditor simply has to show that the Proposal would not likely be accepted by the creditors.*
>
> Therefore, on a balance of probabilities, based on the evidence before this Court, I am satisfied that the Proposal that was filed by RBI will not likely be accepted by the creditors. [emphasis added]

20 *Sport Maska* is anchored on a body of case law (reviewed in the decision) taking the same approach: where the writing is on the wall (with a veto-position creditor steadfastly opposed), the proposal may be, and has been, deemed refused or the proceedings otherwise terminated.

Same approach taken under CCAA

21 The same approach has been taken under the *Companies' Creditors Arrangement Act*: see, for example, the analysis of Butler J. in *Marine Drive Properties Ltd., Re* [2] :

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

> *In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved*. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

Good faith

22 Schendel argues that ATB has not acted in good faith or in a commercially reasonable way during their dealings relating to the fall-out of the halting, in September 2018, of work on the Grande Prairie Hospital project, through to mid-March 2019, when ATB demanded repayment. In particular it says that "ATB's conduct . . . was not consistent with it proposing to take immediate steps to enforce its security" (Schendel brief, p 4). On that aspect, it points to:

- its ATB account manager advising over the course of fall 2018 to spring 2019 that ATB would work cooperatively with Schendel to restructure its loan commitments;

- Schendel believing, in late February 2019, that its account with ATB was still in the hands of the account manager i.e. not under the effective control of ATB's special-credit group i.e. ATB did not make plain to it that the special-credit group was involved;

- an early March 2019 meeting where ATB advised that it was patient, was working through the issues, and was considering parking Schendel's debt;

- at a Schendel-ATB meeting on March 13, 2019, ATB outlining restructuring steps for Schendel with a three- to six-month horizon, starting later in March, once Schendel had provided certain information to ATB;

- at the same meeting, ATB advising Schendel that "this [was] not the end", instead, was part of the process and restructuring;

- at that meeting, and although ATB did disclose an intention to seek a receivership if certain conditions of the three- to -six month restructuring period were not achieved, it making no mention then of an intention to issue payment demands;

- ATB obtaining payables information requested at that meeting (understood by Schendel to assist in working through the restructuring period) and using it as evidence of Schendel's inability to carry on business; and

- later on March 13, 2019, ATB issuing demand letters and s. 244 *BIA* (intention to enforce security) notices.

23 Schendel maintains that, if it had known earlier that ATB had shifted to viewing the Schendel loans as seriously troubled, it would have taken more, and earlier, restructuring steps.

24 It also points to ATB demanding "commercially unreasonable" terms in proposed forbearance agreements (before the NOI was filed) that ultimately led nowhere.

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.* [3] and *Toronto-Dominion Bank v. Rismani* [4], as well as *Good Faith as an Organizing Principle*

in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

26 I note as well that academic commentary on the subject of creditors acting in good faith in insolvency proceedings has not suggested good-faith testing of creditors voting on proposals or arrangements i.e. outside of the "improper purpose" (i.e. abuse of system) contexts discussed below. In "*What Does "Good Faith" Mean in Insolvency Proceedings*?" [5], the authors suggest that imposing an explicit "vote in good faith" duty on creditors may "ultimately have a paralyzing effect on negotiations, add greater litigation costs, impair efficiency, and alter the carefully calibrated balance between the rights of creditors and their insolvent debtors."

27 See also Professor Janis P. Sarra's article "*Requiring Nothing Less than Good Faith in Insolvency Proceedings*" [6], where she proposes a good-faith duty for creditors, but not to the extent of weighing voting decisions beyond "improper purpose" contexts.

28 In any case, I find that none of the identified ATB steps, alone or collectively, show an absence of good faith or show commercial unreasonableness. ATB had no duty to advise Schendel who at ATB was running or reviewing its account at any particular time. ATB was indeed working with, and funding, Schendel through a financial crunch for many months before and even after the hospital-work halt. [7] It was entitled to intensify its scrutiny of Schendel's loans and overall business condition as it did, to obtain more information via that scrutiny, and to demand payment (in light of commitment-letter defaults and, in any case, the demand character of the loans here) when it did, and to notify Schendel of its intention to enforce security per the *BIA*-prescribed notice period. ATB had no duty to forbear from enforcing its rights.

29 As for whether Schendel might have been able to pursue restructuring earlier and more effectively, and assuming that to be so, Schendel knew its own financial condition throughout. It was not incumbent on ATB to guide Schendel's rescue efforts. In any case, Schendel pointed to no material difference that earlier restructuring efforts might have made.

30 In any case, Schendel ended up filing a proposal, regardless of any perceived difficulties with ATB's conduct. That filing triggered a right for ATB (in fact, any Schendel creditor) to apply under ss. 50(12) for "deemed refusal." The narrow test (as noted) is whether the proposal is unlikely to be accepted.

31 As Schendel acknowledges, ATB is the sole occupant of the secured class, and the support of that class is necessary for proposal approval. Those are just "givens" in the circumstance here i.e. reflect ATB's position as Schendel's principal lender, its security, and the *BIA*'s treatment of secured creditors in proposals i.e. are not a function of ATB's conduct in its dealings with Schendel.

32 As for how ATB is using its veto position derived from those circumstances (i.e. to seek a "proposal deemed refused" ruling), Schendel argues that that decision is commercially unreasonable and inequitable. In support it cites cases such as *West Coast Logistics Ltd. (Re)* [8] and *Laserworks Computer Services Inc., Re* [9]

33 The Alberta Court of Appeal endorsed the *Laserworks* approach to "improper purpose" in *Promax Energy Inc. v. Lorne H. Reed & Associates Ltd.* [10]:

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He

> also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

34 Those cases are distinguishable. They deal with creditors attempting to use the insolvency system for an improper purpose e.g. attempting to drive a competitor out of business or escaping from a royalty regime.

35 No evidence here showed that ATB was attempting to pursue an improper purpose, whether within the meaning of those cases or otherwise. Instead, ATB was pursuing its interests and asserting its rights *within the bounds of, and for purposes squaring with, the Canadian insolvency system* i.e. recovering its loans.

36 In *Hypnotic Clubs Inc., Re* [11] , Cumming J. held:

> The intent and policy underlying the BIA is that *creditors* should consider and *vote* upon a *proposal* advanced pursuant to a NOI as they see fit in their own *self interest*. . . .
>
> . . .
>
> . . . the underlying policy of the BIA [includes] letting creditors *vote* as they choose in respect of accepting or rejecting a *proposal* .... [emphasis added]

37 Given its secured position, the *BIA* provisions governing secured creditors and the approval of proposals, and the proposal itself, ATB is entitled to oppose the proposal and, on the basis of that opposition, seek a "deemed refused" ruling.

38 By ATB's calculations it foresees materially greater recoveries in a bankruptcy or receiver than via the proposal. The proposal trustee is currently reviewing the "bankruptcy versus proposal" outcomes and is due to report shortly on that. Schendel does not agree with ATB; it filed the proposal on the basis it would produce a more favourable outcome for all the creditors, including ATB, than bankruptcy. It points to recovery estimates showing that ATB may fare better under the proposal than its low-end estimate of receivership recovery and may even recovery (slightly) more than its high-end estimate.

39 I make no ruling on the respective anticipated recoveries i.e. what is the likely better avenue recovery-wise. I simply note that ATB believes, on reasonable, or at least defensible, or at least arguable, grounds, that it will fare better by a receivership than under the proposal i.e. ATB is not acting perversely or vindictively or otherwise than in its own economic interests i.e. it is not pursuing any ulterior purposes.

40 To summarize here, I find that ATB has been acting in good faith and in a commercially reasonable way, including in deciding to oppose the proposal and seek a "deemed refused" ruling.

Enirgi Group Corp. v. Andover Mining Corp. ***also distinguishable***

41 Schendel also cited this decision. [12] It too is distinguishable, concerning a clash between a request for more time to file a proposal and a creditor seeking to terminate the proposal proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down "sight unseen."

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

Conclusion on "proposal deemed refused" application

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

E. Appointment of receiver

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

Test for appointing a receiver

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

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

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

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

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

Arguments

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

- "the debtors are unable to continue as viable entities or continue operations as
    - the Proposal is not viable;
    - the Debtors operate at a loss;
    - the Proposal will not be approved by [ATB]; and
    - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";

• per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";

• ATB has not provided evidence to support its receiver-related arguments; and

• more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

• Schendel is a large enterprise with complex construction projects underway;

• coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

• recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

• ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

• Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

• ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

• as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

54 I note that, under section 33 of the draft order, "any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver . . . "

G. Closing note

55 I thank all counsel for their very helpful briefs and submissions.

56 On a final house-keeping note, I grant the order sought by Ms. Fisher in her July 17, 2019 email (concerning the sealing of a certain affidavit).

Application granted.

Footnotes

1 2005 NBQB 394 (N.B. Q.B.) at paras 36-43

2 2009 BCSC 145 (B.C. S.C.) at paras 31 and 32

3 2018 ONSC 4669 (Ont. S.C.J.) at paras 13-15

4 2015 BCSC 596 (B.C. S.C.) at paras 31-37

5 Rogers, LA, Sieradzki D, and Kanter M, Journal of Insolvency in Canada, Vol 4 [2015] 55 at 77

6 2014 Annual Review of Insolvency Law (ed Janis P Sarra)

7 Affidavit of Alex Corbett filed April 4, 2019, paras 31-41

8 2017 BCSC 1970 (B.C. S.C.)

9 1998 NSCA 42 (N.S. C.A.)

10 2002 ABCA 239 (Alta. C.A.)

11 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) at paras 33 and 36

12 2013 BCSC 1833 (B.C. S.C.)

13 2002 ABQB 430 (Alta. Q.B.) at paras 26-32

14 2013 ABQB 335 (Alta. Q.B.) at para 71

Tab 4

2010 BCSC 477
British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

2010 CarswellBC 855, 2010 BCSC 477, [2010] B.C.W.L.D. 4567, [2010] B.C.W.L.D. 4568, [2010] B.C.J. No. 635, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171

Textron Financial Canada Limited (Plaintiff) and Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth (Defendants)

Willcock J.

Heard: February 10, 2010
Judgment: April 9, 2010
Docket: Vancouver S100268

Counsel: W.E.J. Skelly, B. La Borie for Plaintiff
A. Brown for Defendants

Headnote

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

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff demanded payment from C Ltd. and NHLP, issued notice of intention to enforce security under s. 244 of Bankruptcy and Insolvency Act, and made demand upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for, inter alia, order appointing receiver — Application granted in part — Just and convenient to grant receivership order — As parties stipulated in their contracts that plaintiff would be entitled to appoint receiver or apply for court-appointed receiver in event of default, relief sought not extraordinary — Defendants owed plaintiff significant sum, and had not reduced principal debt — No dispute as to amount of debt, nor that defendants were in default — No imminent prospect of repayment of principal from operations — There had not been full disclosure of defendants' refinancing plans — Interim plan to make partial payments would not indemnify plaintiff against interest accumulating in interim — No assurance interim payments could be made — There was risk to plaintiff's equity and doubt regarding prospect of recovery of principal — Defendants' plans did not provide for indemnity to plaintiff for losses incurred on ongoing basis — There was inadequate provision to minimize irreparable losses lender would incur — No persuasive evidence appointment of receiver would cause defendants undue hardship — Plaintiff should not have to leave its interests in hands of defendants.

Debtors and creditors --- Receivers — Order appointing receiver

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff, commercial lender, lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff made demand upon C Ltd. and NHLP for payment, and issued notice of intention to enforce security under provisions of s. 244 of Bankruptcy and Insolvency Act — Demand was also made upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for order appointing receiver, and that receiver have conduct of sale of hotel, subject to court approval — Application granted in part — Balancing rights of parties, it was just and convenient to grant receivership order — Order appointing receiver would not authorize receiver to have

conduct of sale of hotel — As conduct of sale precluded redemption, order sought was inconsistent with affording defendants redemption period — Special circumstances did not exist such that plaintiff should have order for sale before judgment and consideration of appropriate redemption period — It was not clear that value of security was diminishing — To contrary, there was some evidence that profitability and therefore value of hotel was likely to increase in interim — Some net income was being generated from operations — Receiver would be authorized to engage only in such sales as would occur in ordinary course of business of hotel.

***Willcock J.*:**

Introduction

1 Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

Background

2 Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

3 Chetwynd and NHLP built, own and operate the Hotel.

4 Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

> (a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;
>
> (b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and
>
> (c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

5 On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of $7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

> (a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");
>
> (b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;
>
> (c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;
>
> (d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");
>
> (e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

6 By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

7 The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

8 For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

9 On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of $7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

10 The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

11 On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

(1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

12 William Pomeroy describes himself as the president of a group of companies referred to as the "Pomeroy Group". The group operates and manages hotels and restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

13 It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

14 Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

15 Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

16 The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel generating net operating income of $457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

17 Chetwynd proposes to make an immediate payment to Textron in the amount of $20,000, and to pay all interest accruing to Textron on a monthly basis, approximately $20,000 per month, while the Pomeroy Group is pursuing restructuring.

18 Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

Issues

19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so

2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

20 The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

Applicable Law

Court-Appointed Receivers

21 Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

> 39(1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager 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.

22 Section 66 of *The Personal Property Security Act*, in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act.*

23 The *Rules of Court* provide the appointment may be on terms:

> 47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

24 In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 (B.C. S.C.), D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

25 The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

26 This judgment was cited with approval by Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55 (Y.T. S.C.)). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances 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.

27 In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

28 The Court was of the view the English line of authorities, of which in *Player v. Crompton & Co.*, [1914] 1 Ch. 954 (Eng. Ch. Div.); *Truman & Co. v. Redgrave* (1881), 18 Ch. 547 (Eng. Ch. Div.); and *Pratchett v. Drew*, [1924] 1 Ch. 280 (Eng. Ch. Div.) were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (B.C. S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]), where receivers were appointed without proof of jeopardy.

29 Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (B.C. S.C. [In Chambers]), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

30 Mr. Justice Burnyeat held, at paras. 15-17:

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.
>
> 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.

31 The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

> In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978),pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co.*,[1914] 1 Ch. 954).

32 The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

33 As Taylor J. noted in *Royal Bank v. Cal Glass Ltd.* (1978), 94 D.L.R. (3d) 84 (B.C. S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

34 The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: [*Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95 (Alta. Q.B.); and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.).

35 As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. [*Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd.*, (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

37 The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

38 The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential

investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

39 The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

40 In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was $5.7 million. The defendant did not dispute the default. It was prepared to make payments of $4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

41 The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

42 The parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

43 The defendant owed a significant sum of money;

44 There appeared not to be a dispute with the fact of the size of the indebtedness;

45 The defendant was in default;

46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

47 There were concerns with respect to the financial statements of the defendant; and

48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

51 Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088(Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> . . . . .
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who

loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

53 The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International*, at para. 17, the Court held:

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

54 In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in [*Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

56 Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
> > (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
> >
> > (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

57 A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (B.C. C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order

would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (B.C. S.C. [In Chambers]) and *Canlan Investment Corp. v. Gibbons* (1983), 42 B.C.L.R. 199 (B.C. S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

58 In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

> That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

60 The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

61 The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (B.C. C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (B.C. S.C.).

62 In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

> In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.

63 That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

64 The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

65 There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.) at para. 21; *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) [*Astor Hotel*], at para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (B.C. C.A.).

66 There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

67 At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

68 Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

69 In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes Ltd. v. Taplow Financial Ltd.* (1985), 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225 (B.C. S.C.); and *Astor Hotel*.

70 In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

72 In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union*
>
> [citation omitted].

73 In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific*, *Vista Homes*, *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (B.C. S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

74 In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

Discussion

Appointment of a Receiver

75 The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

76 The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

77 There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

78 There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

79 The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

80 If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

81 In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

82 The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

83 The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.*, that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

84 The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

85 Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

86 The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

87 The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

88 It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

89 I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

90 The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

91 The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

92 The parties have leave to apply for further directions if necessary.

Application granted in part.

Tab 5

2014 NSSC 128
Nova Scotia Supreme Court

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.

2014 CarswellNS 263, 2014 NSSC 128, 1084 A.P.R. 108, 12
C.B.R. (6th) 181, 239 A.C.W.S. (3d) 363, 343 N.S.R. (2d) 108

Enterprise Cape Breton Corporation, a body corporate, incorporated pursuant to the Enterprise Cape Breton Corporation Act, enacted as Part II to the Government Organization Act, Atlantic Canada, 1987, R.S., 1985, c. 41 (4th Supp.) ("ECBC"), Applicant v. Crown Jewel Resort Ranch, Inc., a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel") And I.N.K. Real Estate Inc., a body corporate incorporated Under the laws of Nova Scotia ("I.N.K."), Together the Respondents

Frank Edwards J.

Heard: March 5, 2014
Judgment: April 10, 2014
Docket: SYDJC 423486

Counsel: Robert Risk for Applicant
Nahman Korem for Respondent, Companies

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles

Respondent was indebted to applicant for mortgage and loans — Respondents defaulted on payments — Two principals of respondent were embroiled in divorce proceedings and resort ceased to function — Applicant decided not to enforce security until divorce outcome was known — Respondents were in serious arrears on loans — Applicant sought order appointing MGM as receiver and manager of all assets of respondents — Respondents objected asserting mortgage was not valid, one of companies was capable of making payments and it was not just and convenient to appoint receiver — Application granted; receiver appointed — Respondents' obligations and applicant's rights under mortgage remained in full force and effect — Mortgage was properly executed and duly recorded — Mortgage was given as security for promissory note — Applicant's lawyer was satisfied with promissory note and authorized applicant to disburse funds — There was realistic prospect that respondents would not ever be able to address their debts — Applicant extended respondents every opportunity to turn business around — Business became insolvent and was not in operation for some time — Applicant had no option but to enforce security — Respondents did not make any reasonable progress in obtaining alternate financing with view to paying out applicant's indebtedness — Other than cost of receiver there was no existing or imminent harm beyond potential future risk of receiver obtaining court approval of improvident sale — It was premature to argue irreparable harm.

***Frank Edwards J.*:**

1 The applicant is applying for an order appointing Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. ("MGM") as receiver and manager of all of the undertakings, property and assets of Crown Jewel and I.N.K. pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and/or Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240

2 *Grounds for Order:* The applicant is applying for the order on the following grounds:

1. A General Security Agreement made between Crown Jewel Resort Ranch, Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213736 on February 8, 2005, as amended by Registration No. 21915103 on October 11, 2013.

2. A Mortgage made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated February 4, 2005 registered at the Victoria County Registry of Deeds on February 8, 2005 as Document No. 81337157 (PID Nos. 85017614, 85079127 and 85155281), said Mortgage having been assigned to Enterprise Cape Breton Corporation pursuant to a General Conveyance, Assignment and Assumption of Liabilities Agreement dated March 31, 2008 and registered at the Victoria County Registry of Deeds on May 30, 2008 as Document No. 90774226;

3. A General Security Agreement made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213692 on February 8, 2005, as amended by Registration No. 13924725 on May 23, 2008 (together with the above the "Security")

4. The Respondent Companies (RC's) have defaulted on their payments and failed to honour their obligations pursuant to a Letter of Offer made between Crown Jewel, I.N.K. and ECBC dated on or about October 2, 2003 with respect to Project No. 8600338-1 (the "Letter of Offer").

5. The total amount of indebtedness secured by the Security is $226,134.00 as at October 8, 2013 together with overdue interest on arrears in the amount of $1,738.19 and interest thereafter at a per diem rate of $37.17.

6. The RC's were provided with respective Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act* on October 24, 2013.

7. Greg MacKenzie of MGM has agreed to act as the court-appointed receiver and manager of all of the undertakings, property and assets of both Crown Jewel and I.N.K. and the Applicant consents to his appointment.

8. The Applicant, ECBC relies on Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which reads:

> 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.

9. The Applicant, ECBC relies on Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, which reads:

> 43. (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought

to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

3 *Background:* The RC's had obtained financing from the Cape Breton Growth Fund Corporation (CBGF), the Atlantic Canada Opportunity Agency (ACOA), and the Applicant, Enterprise Cape Breton Corporation (ECBC).

4 ECBC succeeded CBGF when the latter wound up in 2008. ECBC delivers and administers all programs offered by ACOA.

5 The RC's' intent was to establish an upscale, four-season, fly-in active vacation resort near Baddeck, Nova Scotia. Operations commenced in 2006 but struggled financially from the outset. The financial problems multiplied when the two principals in the RC's, Nahman Korem (Korem) and Iris Kedmi (Kedmi) became embroiled in protracted divorce proceedings. These continued between 2010 and December, 2012 when the Nova Scotia Court of Appeal dismissed Kedmi's appeal. The resort essentially ceased to function as of the start of the domestic trouble between Korem and Kedmi in 2010.

6 By October 8, 2013, the RC's were in serious arrears on their loans. By that date, the total amount of indebtedness was as follows:

1. *ECBC Secured Letter of Offer:* $226,134.00 with overdue interest on arrears of $1,738.19 plus interest of $37.17 per day.

2. *ECBC Unsecured Letter of Offer:* $268,254.86 with overdue interest on arrears of $1,738.19 plus interest of $44.10 per day.

3. *ACOA Unsecured Loan:* $256,642.00 plus arrears of $4,425.80.

7 Throughout the period of 2005-2009 the RC's were able to make their regular scheduled payments on the ACOA Unsecured Loan, having repaid approximately $234,360.00 of the initial $500,000.00 loan disbursement. (Lane affidavit para. 22)

8 The RC's have, however, paid only approximately $6,000.00 toward the outstanding principal on the ACOA Unsecured Loan since 2009. Further, no repayments at all have been made on this loan within the 12 month period from December of 2012 to December of 2013. (Lane Affidavit para. 23)

9 With respect to both the ECBC Secured and Unsecured Letters of Offer, the RC's have to date made only a combined repayment in the approximate amount of $9,235.00. As noted above, these loans are in significant arrears. Furthermore, overdue interest is due and owing and is accruing daily. (Lane affidavit para. 24)

10 The Applicant gave the RC's Notices of Intention to Enforce Security on October 24, 2013. Korem knew by November 2013 at the latest that ECBC intended to apply to have a receiver/manager appointed by the Court. A General Security Agreement given to CBGF/ECBC by the RC's provided for the appointment of a private receiver upon default.

11 Despite the fact that the loans were already overdue, ECBC took a hands-off approach during the divorce proceedings. Korem and Kedmi were making competing claims regarding the assets of the RC's. ECBC thus decided not to enforce its security until the divorce outcome was known. After dismissal of the Kedmi Appeal in December, 2012, Korem became the effective owner of all the assets and liabilities of the RC's.

12 Korem insists that ECBC is partially responsible for the present situation because it allowed Kedmi to liquidate some of the assets. I reject any such notion. During the 2010 - 2012 period, the resort was clearly in survival mode. The two principals were locked in a particularly acrimonious marital dispute. The resort was generating no revenue. Kedmi was living on the resort property and was assuring ECBC that she was doing her best to maintain it.

13 It was in that context that ECBC allowed Kedmi to liquidate some assets that were not essential to the survival of the resort. ECBC also allowed her to liquidate assets which in fact had actually become liabilities. These included the horses which were very expensive to maintain but had no foreseeable prospect of generating revenue. Korem's grievance with ECBC is misplaced.

14 Korem now rests his hopes of financial recovery on the possibility of operating a timber cutting business. He presented ECBC with an appraisal of the timber resources on the resort property. The appraisal indicated that the value of the standing timber was 1.5 to 2 million dollars less harvesting costs.

15 ECBC gave Korem permission to do some limited wood harvesting but insisted upon the presentation of a business plan by July, 2013. The business plan Korem provided did not address how the RC's intended to service the ECBC and ACOA debts. Nor did it indicate how the RC's would finance the start-up of the timber business.

16 In October, 2013, ECBC again reviewed proposals put forward by Korem. Incidentally, ECBC learned that property taxes for the resort were $80,000.00 in arrears (Korem says it's now $75,000.00) and that a tax sale was imminent. ECBC decided it was time to apply to have a Receiver/Manager appointed.

17 *RC's' Objections to Appointment of Receiver/Manager*: Korem acted for the RC's without legal counsel. He put forward three objections to the appointment of a Receiver/Manager:

1. That the Mortgage dated February 4, 2005 is not valid;

2. That I.N.K. Real Estate Inc. is capable of making payments;

3. That it is not "just and convenient" to appoint a receiver.

18 I will deal with the objections in turn:

19 *1. The Mortgage is Valid:* It was properly executed by Korem and was duly recorded. Its repayment terms reflect those agreed to by Korem when he signed as president of I.N.K. Real Estate Inc. on October 2, 2003. Those repayment terms were subsequently modified (in I.N.K.'s favor) on March 23, 2005 and October 30, 2010. On both occasions, Korem signed. (See Lane Affidavit Tabs A & B).

20 The Mortgage was given as security for a Promissory Note dated January 21, 2005. Korem's objection seems to be based upon his view that ECBC's counsel at the time questioned the promissory note. On the contrary, the record shows that the lawyer was satisfied with the promissory note and authorized ECBC to disburse funds.

21 The RC's' obligations and ECBC's rights under the Mortgage remain in full force and effect.

22 *2. The RC's are not Capable of Making Payments:* As an aside, Korem seeks to claim that he cannot speak for Crown Jewel Resort Ranch Inc. (CJRR) because Kedmi still owns that company. At the same time Korem acknowledges that all CJRR's assets and liabilities have been transferred to him. Korem is the effective principal of both companies.

23 To service their debts to ECBC and ACOA, the RC's would have to make monthly payments of just under $19,000.00 per month. (To say nothing of the arrears). As noted they are also in substantial arrears regarding property taxes ($75,000.00) and owe contractor D.W. Matheson about $35,000.00.

24 Korem has provided no details to show how he can finance the start-up of the timber business. By his own estimate, he would need one to two years just to pay off the ECBC Secured debt. He give no indication of how much longer it would take to pay off the Unsecured debts. Korem has been given ample opportunity to seek re-financing with another lender. He admits that commercial lenders will not go near him. There is no realistic prospect that the RC's will ever be able to address their debts.

25 *It is Just and Convenient that a Receiver/Manager be Appointed*: What follows, I adopt, in large measure from the Applicant's Brief.

26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:

(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;

(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 that 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 on 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.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (Ont. S.C.J. [Commercial List]) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. 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. See **Textron Financial Canada Limited v. Chetwynd Motels Limited**, 2010 BCSC 477; Freure Village, supra; **Canadian Tire Corp. v. Healy,** 2011 ONSC 4616 and **Bank of Montreal v. Carnivale National Leasing Ltd**. and **Carnivale Automobile Ltd.**, 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc.* offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

(b) the terms of the mortgages permit the appointment of a receiver upon default;

(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

29 As noted at paragraph 33 of the Affidavit of Steve Lane, the General Security Agreement entered into by Crown Jewel provides ECBC with the specific authority to appoint by instrument a receiver or receiver and manager of the assets of the company upon default. The RC's are in default of the obligations owed to ECBC pursuant to the Secured Letter of Offer as referenced in paragraph 4 of the Affidavit of Steve Lane.

30 Certain other factors to be considered in determining whether it is just and convenient to appoint a receiver are particularly relevant to the case at Bar. These are:

(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;

31 Mr. Lane states at paragraphs 50 and 51 of his Affidavit that the RC's owe outstanding property taxes to Victoria County, Cape Breton in the approximate amount of $80,000.00 as of October, 2013 and that, failing payment, Victoria County intends to put the lands up for tax sale in March of 2014. Permitting this situation to continue will undoubtedly place ECBC's security interest at risk.

32 Paragraphs 58 and 59 of the Affidavit of Steve Lane sets out the concerns ECBC has with the alleged lease agreements entered into by Korem. Clearly Korem did not have, on behalf of the RC's, any authority to enter into these lease agreements without the consent of ECBC. Further, the lease agreements appear to have been made by the RC's under a different business name, notwithstanding the fact that this entity has no legal standing. Clearly the RC's can no longer be entrusted with protecting and safeguarding their assets and the actions they have taken with respect to these alleged lease agreements clearly places ECBC's security interest at risk.

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

33 It is apparent that Korem intends to continue with timber harvesting on the lands of the RC's that are subject to the ECBC security interest. Although limited timber harvesting was permitted by ECBC while Korem attempted to resolve the outstanding matrimonial property dispute, ECBC is understandably not confident that Korem will seek such consent in future. Given what appears to be an increasingly desperate financial situation of the RC's, ECBC holds a reasonable apprehension that the assets of the RC's, and in particular the timber resources, may be depleted or wasted.

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

34 Crown Jewel Resort is no longer in operation and has been closed down for quite some time. ECBC remains concerned as to whether the assets of the resort are being adequately preserved and protected. For instance, ECBC has no way of ensuring that Korem will continue to properly maintain the resort property. Further, ECBC is concerned as to whether the assets of the resort will be properly insured on a continuing basis.

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

35 As noted above, ECBC has the right to appoint a receiver by instrument under the General Security Agreement entered into by the Respondent, Crown Jewel. ECBC advised the RC's of its intention to appoint a private receiver with respect to this matter during the November 20, 2013 negotiation referenced at paragraph 53 of Mr. Lane's Affidavit.

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

36 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) granted the motion for appointment by the court of a receiver-manager, holding at paragraph 13:

> [13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

37 Mr. Lane, at paragraph 60 of his Affidavit, notes the concerns ECBC has with the ability of MGM to carry out its duties. It is clear from the email stream of correspondences referenced at paragraph 59 of the Affidavit that Korem intends to set up as many road blocks as he can with respect to both the appointment of the receiver and the subsequent carrying out of its duties. As in *Bank of Nova Scotia v. Freure Village on Clair Creek* above, it appears inevitable that Korem will continue to bring costly, protracted and unproductive litigation against both ECBC and its privately appointed receiver. Further, it appears clear that Korem will not agree on the proper approach to be taken to marketing and selling the assets of the RC's subject to the ECBC security interest. Certainly any such attempts to dispose of the property by the privately appointed receiver would be met with further litigious skirmishing.

(l) the conduct of the parties;

38 It is clear from a reading of Mr. Lane's Affidavit that ECBC has extended the RC's with every opportunity to turn the resort business around. Unfortunately, the business became insolvent and has not been in operation for some time. Ultimately, ECBC had no option other than to enforce its security in an attempt to recover some of the losses it incurred in relation to the loans granted to the RC's. Despite the personal investment Korem has made in the resort, as well as the arduous and extremely adversarial divorce proceedings with Kedmi in regard to the assets of the RC's, Korem has not, despite being given ample opportunity to do so, made any reasonable progress in obtaining alternate financing with a view to paying out the ECBC indebtedness. Further, Korem has yet to provide ECBC with a meaningful business plan outlining the timely repayment of the ECBC debt.

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

39 The most practical and prudent approach to maximizing the return to the parties, including the unsecured debt, would be to proceed with a sale of the resort as soon as possible. In the interim, it remains open to Korem, while the receiver is in place, to obtain alternate financing with a view to paying out the ECBC debt.

40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court. Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.

41 The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in Houlden, Morawetz and Sarra at p. 1024 below:

> The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: **Bank of Nova Scotia v. Freure Village on Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].

42 Finally, the authors note at p. 1024 of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In *Romspen Investment Corp. v. 1514904 Ontario Ltd.*, 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.

Conclusion

43 I therefore order the appointment of Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. as the receiver and/or manager of all of the undertakings, property and assets of the RC's, Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Applicant shall also have its costs in the amount of $1500.00 payable forthwith.

Application granted; receiver appointed.

Tab 6

2013 ONSC 7023
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Sherco Properties Inc.

2013 CarswellOnt 16848, 2013 ONSC 7023, 235 A.C.W.S. (3d) 682

Bank of Montreal, Applicant and Sherco Properties Inc., Sherk Farm Limited, Cosher Properties Inc., and Donald Sherk, Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: December 3, 2013
Docket: CV-13-10244-00CL

Counsel: S.D. Thom, for Applicant
R.B. Moldaver, Q.C., for Respondents

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.C Mortgagee
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank — Application granted — Terms of security held by bank in respect of S Inc. and S Ltd. permitted appointment of receiver — Terms of mortgages permitted appointment of receiver upon default — Value of security continued to erode as interest and tax arrears continued to accrue — S had been unable to accomplish refinancing or sale of properties — It was appropriate to appoint receiver to arrange sale of properties.
Debtors and creditors --- Receivers — Appointment — Application for appointment — Person entitled to make application — Mortgagee
S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties

were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank — Application granted — Terms of security held by bank in respect of S Inc. and S Ltd. permitted appointment of receiver — Terms of mortgages permitted appointment of receiver upon default — Value of security continued to erode as interest and tax arrears continued to accrue — S had been unable to accomplish refinancing or sale of properties — It was appropriate to appoint receiver to arrange sale of properties.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to

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

Bank of Nova Scotia v. Sullivan Investments Ltd. (1982), 1982 CarswellSask 452, 21 Sask. R. 14 (Sask. Q.B.) — considered

Canadian Tire Corp. v. Healy (2011), 2011 ONSC 4616, 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]) — referred to

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

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

APPLICATION by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; APPLICATION by bank for receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank.

***Morawetz J.*:**

1 This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

2 Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

3 The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

4 The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

5 Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

6 Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

7 In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

8 As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

9 Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

10 Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

11 In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

12 The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

13 The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

14 In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

15 At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

16 Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

17 As of September 9, 2013, interest arrears total approximately $124,346.79.

18 In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;

(b) 325 Estate Court: $59,596.49.

19 The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

20 On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

21 On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

22 The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

23 The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

24 Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

25 The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

26 The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

27 Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

28 Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

29 In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

30 The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;

(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;

(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and

(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

31 The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

32 From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

33 Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

34 Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers 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.

40 Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. 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. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Sask. Q.B.) where Estey J. (as he then was) reasoned as follows:

> ...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.).

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

(b) the terms of the mortgages permit the appointment of a receiver upon default;

(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

48 In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

49 In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

50 I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

51 However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

52 In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

53 The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

54 The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

55 The Bank is also entitled to its costs on this application.

Application granted.

End of Document

Tab 7

2004 CarswellOnt 681
Ontario Court of Appeal

Valente, Re

2004 CarswellOnt 681, [2004] O.J. No. 635, 129 A.C.W.S. (3d) 453, 183 O.A.C. 191, 47 C.B.R. (4th) 317, 70 O.R. (3d) 31

IN THE MATTER OF THE BANKRUPTCY OF PETER VALENTE, of the City of Windsor, in the County of Essex, in the Province of Ontario

PETER VALENTE (Appellant) and GABRIEL J. COUREY, Executor of the Estate of Stephen Fancsy (Respondent)

Laskin, Feldman, Sharpe JJ.A.

Heard: October 1, 2003
Judgment: February 19, 2004
Docket: CA C39206

Proceedings: reversing *Valente, Re* (October 3, 2002), Doc. 35-082390T (Ont. S.C.J.)

Counsel: David Swift for Appellant
Rodney Godard for Respondent

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.2 Petition by only creditor
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.ii Agreement with creditor

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Petition by only creditor

Petitioning creditor, before his death, advanced $900,000 to debtor, evidenced by promissory note and secured by pledge of shares held by debtor in trust for his son, as sole recourse in event of default — Debtor defaulted, creditor obtained summary judgment on note and conducted judgment debtor examination which disclosed another outstanding judgment for $800,000 — In notice disputing petition, debtor denied that he failed to meet liabilities, acknowledged debt had not been paid but claimed creditor's estate representatives had agreed to take steps to realize on pledged shares but did not do so — Creditor obtained receiving order relying on one debt, judgment on promissory note and its recital that creditor had no security on debtor's property — Debtor appealed from receiving order — Appeal allowed — Receiving order was set aside and matter was remitted to bankruptcy court — Bankruptcy judge considered summary judgment as continuing demand, automatically constituting act of bankruptcy without considering whether special circumstances warranted it — Petition did not rely on other outstanding judgment nor did bankruptcy judge consider it acknowledgment by debtor of failure to meet liabilities — Creditor failed to meet onus to prove debtor was not able to pay debts as they fell due as it neglected to call evidence of continuation of debt by calling bank as witness or filing execution certificate.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Agreement with creditor

Petitioning creditor, before his death, advanced $900,000 to debtor, evidenced by promissory note and secured by pledge of shares held by debtor in trust for his son, as sole recourse in event of default — Debtor defaulted, creditor obtained summary judgment on note and conducted judgment debtor examination which disclosed another outstanding judgment for $800,000 — In notice disputing petition, debtor denied that he failed to meet liabilities, acknowledged debt had not been paid but claimed creditor's estate representatives had agreed to take steps to realize on pledged shares but did not do so — Creditor obtained receiving order relying on one debt, judgment on promissory note and its recital that creditor had no security on debtor's property — Debtor appealed from receiving order — Appeal allowed — Receiving order was set aside and matter was remitted to bankruptcy court — Bankruptcy judge considered summary judgment as continuing demand, automatically constituting act of bankruptcy without considering whether special circumstances warranted it — Petition did not rely on other outstanding judgment nor did bankruptcy judge consider it acknowledgment by debtor of failure to meet liabilities — Creditor failed to meet onus to prove debtor was not able to pay debts as they fell due as it neglected to call evidence of continuation of debt by calling bank as witness or filing execution certificate.

Table of Authorities

Cases considered by *Feldman J.A.*:

Aarvi Construction Co., Re (1978), 29 C.B.R. (N.S.) 265, 1978 CarswellOnt 210 (Ont. S.C.) — referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

Holmes, Re (1975), 9 O.R. (2d) 240, 20 C.B.R. (N.S.) 111, 60 D.L.R. (3d) 82, 1975 CarswellOnt 83 (Ont. Bktcy.) — followed

Malmstrom v. Platt (2001), 2001 CarswellOnt 830, 24 C.B.R. (4th) 70, 198 D.L.R. (4th) 285, *(*sub nom. *Platt (Bankrupt) v. Malmstrom)* 142 O.A.C. 332, *(*sub nom. *Platt v. Malmstrom)* 53 O.R. (3d) 502 (Ont. C.A.) — considered

Roy, Re (1982), 44 C.B.R. (N.S.) 86, 1982 CarswellOnt 220 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 42(1)(e) — referred to

s. 42(1)(j) — considered

s. 43(1) — considered

s. 43(2) — referred to

s. 43(6) — considered

s. 43(7) — considered

APPEAL by bankrupt from receiving order in judgment reported at 2002 CarswellOnt 5759, 47 C.B.R. (4th) 313 (Ont. S.C.J.).

***Feldman J.A.*:**

1 This appeal concerns a disputed petition for a receiving order. For the following reasons, I would allow the appeal, set aside the receiving order, allow the respondent to amend the petition and send the matter back to the bankruptcy judge.

FACTS AND FINDINGS

2 The petitioning creditor is the estate of Stephen Fancsy. Before he died, Mr. Fancsy advanced $900,000 to the debtor, Peter Valente, evidenced by a promissory note dated September 12, 1997. The note provided that interest would be at a rate of ten per cent and that the full amount was payable on September 15, 1998. The parties also entered into a share pledge agreement to secure the debt. The agreement provided that it was the sole recourse of the creditor in the event of default on the promissory

note. The debtor held the shares in trust for his son, and represented in the share pledge agreement that he had obtained the authorization of the beneficial owner of the shares to pledge them pursuant to the agreement.

3 The debtor never paid any monies under the note. The creditor's estate obtained summary judgment on the note on May 10, 2000, in the amount of $1,139,178.07 plus costs. No amount was ever paid on the judgment. The creditor conducted a judgment debtor examination on November 21, 2000, at which the debtor acknowledged that at that date there was another outstanding judgment against him for $800,000.

4 The petition for a receiving order relied on the one debt, the judgment on the promissory note, and recited that the creditor held no security on the debtor's property for payment on the debt. In his notice disputing the petition, the debtor denied that he had failed to meet his liabilities generally as they became due, acknowledged the petitioner's debt and that it had not been paid, but stated that following the judgment representatives of the creditor estate had agreed to take steps to realize on the pledged shares but had not attempted to do so.

5 The two issues for the bankruptcy judge were: (1) whether the one judgment debt over $1000 constituted the act of bankruptcy defined in s. 42(1)(j) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ceasing to meet liabilities generally as they become due; and (2) whether the creditor held security for the debt which it did not disclose in the petition.

6 The bankruptcy judge granted the petition. She held: (1) based on this court's decision in *Malmstrom v. Platt* (2001), 53 O.R. (3d) 502 (Ont. C.A.), the judgment automatically qualified as a special circumstance required for a single debt to constitute the act of bankruptcy under s. 42(1)(j); and (2) because the creditor had obtained judgment on the promissory note in the face of the provision in the share pledge agreement that made it the sole recourse for default under the note, the judgment on the note must be taken as a denial of the validity or effectiveness of the share pledge agreement and was *res judicata* on that issue. Consequently, the petitioning creditor was not a secured creditor and the affidavit to that effect did not constitute non-disclosure.

ISSUES ON APPEAL

> (1) Did the bankruptcy judge err in holding that the single debt owed to the petitioning creditor qualified under s. 42(1)(j) of the *B.I.A.* as "ceas[ing] to meet . . . liabilities generally as they become due"?
>
> (2) Did the bankruptcy judge err in finding that the petitioning creditor was not a secured creditor and therefore not obliged to value its security in the petition for the receiving order?

ANALYSIS

Issue One

7 The relevant sections of the *B.I.A.* are 43(1) and 42(1)(j). Section 43(1) sets out when a creditor may petition a debtor into bankruptcy. The section provides:

> 43(1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,
>
> (a) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

Section 42(1)(j) provides:

> A debtor commits an act of bankruptcy . . . if he ceases to meet his liabilities generally as they become due.

8 It is now well-settled in the case law that the failure to pay a single creditor can constitute an act of bankruptcy under s. 42(1)(j) when there are special circumstances, which have been recognized in three categories: (a) where repeated demands for payment have been made within the six-month period; (b) where the debt is significantly large and there is fraud or suspicious

circumstances in the way the debtor has handled its assets which require that the processes of the *B.I.A.* be set in motion; and (c) prior to the filing of the petition, the debtor has admitted its inability to pay creditors generally without identifying the creditors: *Holmes, Re* (1975), 9 O.R. (2d) 240 (Ont. Bktcy.); see also Houlden and Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2003) at 147 D§10(3).

9 The bankruptcy judge held that there was no evidence establishing criteria (b) or (c). In this case, the debt has been pursued to judgment. The petitioning creditor does not state that repeated demands were made for payment of the judgment debt. Rather, the petitioning creditor relied on the case of *Malmstrom*, *supra*, for the proposition that a judgment constitutes a continuing demand for payment and the failure to satisfy the judgment is a continuing refusal by the judgment debtor. The bankruptcy judge applied *Malmstrom* and found that the one judgment satisfied the first test from *Holmes* and constituted an act of bankruptcy under s. 42(1)(j).

10 In *Malmstrom* the issue before the court was whether the act of bankruptcy had occurred within the six months prior to the petition. The concern in *Malmstrom* was that there was no demand within the six months prior to the petition. The court noted that the theory behind the six-month limit is to ensure that a bankruptcy petitioner does not rely on stale-dated debts; however, it has been accepted that continued demands for payment following the debt and within the six-month period can have the effect of reviving the original debt, thus making the debt once again current: *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). The court also referred to a line of cases that has recognized that no demand is necessary within the six months if there is evidence of a continuing default. See, e.g. *Aarvi Construction Co., Re* (1978), 29 C.B.R. (N.S.) 265 (Ont. S.C.). The court held that a judgment debt is a continuing demand for payment and in that context, is able to satisfy the statutory time requirement, that is, it can be considered as one of the debts that forms part of an act of bankruptcy within the six-month period prior to the petition. The court stated at para. 18: "It is inappropriate to require a creditor who has proceeded properly through legal channels and become a judgment creditor to make frequent demands for payment to the judgment debtor, *only for the purpose of ensuring that the statutory time limitations are complied with"* (emphasis added).

11 The petition in *Malmstrom* relied on six debts, four of which were taken to judgment. Each of the debts predated the petition by more than six months. The court was satisfied based on the number of debts and the continuing failure to pay them, that an act of bankruptcy had been committed within the six-month limit.

12 However, that may not be the case where, for example, a single creditor obtains a judgment and either shortly thereafter petitions the debtor into bankruptcy based on the judgment and the implicit demands, or does nothing for an extended period, then petitions on the basis that the judgment constitutes a continuing demand. In neither case would the judgment be evidence of failure to meet obligations generally, as contemplated by the special circumstances doctrine.

13 Henry J. explained the philosophy behind allowing a single debt to be sufficient evidence of failing to meet liabilities generally as they become due in *Holmes, Re* at 243:

> Because this Court has in some of the recent decisions referred to, such as *Dixie Market* [*(Nurseries) Ltd.* (1971), 14 C.B.R. (N.S.) 281 (Ont. S.C.)], *Polyco* [*Distributors Ltd.* (1971), 14 C.B.R. (N.S.) 285 (Ont. S.C.)] and *King Petroleum* [*Ltd.* (1973), 2 O.R. (2d) 192 (Ont. S.C.)], made a receiving order on proof of failure to meet a liability to a single creditor, it is not to be taken to have established a new principle that a petitioning creditor need only prove default with respect to the debt owing to him. Those decisions in my judgment do not lay down such a principle; they are as I see it, merely the application to particular facts of the general rule (exemplified by the decision in *Re Elkind*, [(1966), 9 C.B.R. (N.S.) 274 (Ont. S.C.)]), that when relying on an act of bankruptcy described in s. 24(1) (j) the petitioning creditor must strictly establish that, in the words of the statute, the debtor "ceases to meet his liabilities generally as they become due"; in all of them the Court was influenced either by the existence of other creditors, or of one of the special circumstances I have set out above. In the non-exceptional case, as in the case at bar, that situation cannot be ordinarily proved by having regard to the experience of one creditor only, even though he may be a major creditor. Resort to the statutory machinery of the *Bankruptcy Act*, rather than to the remedies to enforce a debt or claim in the ordinary Courts, is intended by Parliament to be for the benefit of the creditors of a debtor as a class, and the act of bankruptcy described in s. 24(1)(j) is in my judgment, an act that singles out the conduct of the debtor in relation to the class, rather than to the individual (as is the case under

s. 24(1)(e)). It is for this reason that the Court must be satisfied that there is sufficient evidence from which an inference of fact can fairly be drawn that creditors generally are not being paid. This requires as a minimum some evidence that liabilities other than those incurred towards the petitioning creditor, have ceased to be met. The Court ought not to be asked to draw inferences with respect to the class on the basis of one creditor's experience where evidence of the debtor's conduct towards other members of the class could, with reasonable diligence, be discovered and produced. The Court's intuition is no substitute for the diligence of the petitioning creditor.

14 The question for this court is whether the concept that a judgment constitutes a continuing demand will render every debt that has been pursued to judgment a special circumstance making that one debt evidence of an act of bankruptcy.

15 Based on *Malmstrom*, once a debt has been pursued to judgment, because that judgment constitutes a continuing demand for payment, it can form the basis for a finding that it constitutes an act of bankruptcy based on special circumstances. However, one judgment debt will not necessarily constitute special circumstances in every case. Ultimately the issue for the bankruptcy court on a petition for a receiving order is whether the creditor has proved that the debtor committed the act of bankruptcy alleged in the petition. Sections 43(6) and (7) provide:

> 43(6) At the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.
>
> (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

16 Before the court can be satisfied that the failure to pay one judgment debt is tantamount to failing to meet liabilities generally as they become due, the court must examine and consider all of the circumstances including:

- the size of the judgment - a small unpaid judgment is less likely to indicate an act of bankruptcy than a very large one;
- how long the judgment has been outstanding - there may be reasons why a recently obtained judgment has not been paid as yet, including a potential appeal, the need to arrange for the marshalling of funds, the intent to make arrangements for payment over time or in the case of a default judgment, knowledge of the judgment;
- if a judgment has been outstanding for a long time, it may be that the debtor believes that the creditor is willing to wait for payment, and is paying his or her other debts as they fall due;
- whether the judgment creditor has conducted a judgment debtor examination and the results of that examination - if the judgment creditor can collect without invoking the mechanism of the bankruptcy process, a petition ought not to be granted;
- what steps the judgment creditor has taken to determine whether the debtor has other creditors and the results of those inquiries.

17 In this case, the bankruptcy court judge appeared to conclude that the one judgment automatically constituted special circumstances and an act of bankruptcy, without considering whether, in all of the circumstances, the petitioning creditor had proved that the debtor was not meeting his liabilities generally as they fell due.

18 The creditor had conducted a judgment debtor examination, the main thrust of which appeared to have been directed to the issue of the pledged shares. The record does not disclose whether other assets were pursued or whether the sheriff was sent to attempt to levy execution. (A report that there are no assets upon which to levy, itself constitutes an act of bankruptcy under s. 42(1)(e)).

19 In this case, the only other potentially relevant evidence is the existence of another large judgment debt of $800,000 in favour of the Canadian Imperial Bank of Commerce which was outstanding at the date of Mr. Valente's judgment debtor examination, November 2000, more than six months before the petition. The petition did not rely on this debt. Nor did the

bankruptcy judge consider this evidence an acknowledgement by the debtor that he was failing to meet his liabilities generally as they became due. The petitioning creditor provided no proof that that judgment remained outstanding at the time of the petition. The debtor filed an unsworn Notice of Cause Against the Petition which states that he is able to meet his obligations as they come due and denies committing an act of bankruptcy. Although the debtor could have provided proof that he had paid the Bank of Commerce debt, the onus is on the petitioning creditor to prove the act of bankruptcy: *Roy, Re* (1982), 44 C.B.R. (N.S.) 86 (Ont. S.C.). The creditor could have called the bank as a witness on the petition or filed an execution certificate showing the continued existence of the debt.

20 As the bankruptcy judge treated the judgment as automatically constituting an act of bankruptcy without considering the factors identified at para. 16 of these reasons, I would set aside the receiving order, but remit the matter to the bankruptcy judge for further consideration.

Issue 2

21 It appears from the record that it is not disputed that the creditor does retain the security of the pledged shares, whether or not the terms of the share pledge agreement were ignored in obtaining judgment on the note. It is therefore unnecessary to comment on the issue of *res judicata* referenced by the bankruptcy judge.

22 In those circumstances, the creditor may either value the pledged shares for the purpose of the petition, deducting that value from the debt, or disclaim the pledged shares in the context of the bankruptcy: s. 43(2). Once that is done, the bankruptcy court will be in a position to assess whether the single judgment at issue constitutes an act of bankruptcy.

CONCLUSION

23 Both at trial and on this appeal the creditor requested as alternative relief that it be allowed to amend the petition to value or disclaim the security under s. 43(2). In my view, in the circumstances it is appropriate that the creditor be allowed to amend its petition as advised (including in respect of other debts, if they exist) and the matter be referred back to the bankruptcy court in Windsor to consider the amended petition and any response by the debtor.

24 The costs of the appeal are fixed at $3,000 inclusive of G.S.T. and disbursements and shall be payable in the cause of the petition.

***John Laskin J.A.*:**

I agree

***Robert Sharpe J.A.*:**

I agree

Appeal allowed.

Tab 8

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Miceli v. Stagewest Winery Limited Partnership | 2023 BCCA 357, 2023 CarswellBC 2677 | (B.C. C.A., Sep 8, 2023)

2022 ABQB 262
Alberta Court of Queen's Bench

Sultan Management Group (Re)

2022 CarswellAlta 972, 2022 ABQB 262, [2022] 11 W.W.R. 348, [2022] A.W.L.D. 2568, 2022 A.C.W.S. 987

In the Matter of The Bankruptcy of Sultan Management Group Inc.

Royal Bank of Canada (Applicant) and Sultan Management Group Inc. (Respondent)

K.S. Feth J.

Heard: February 7, 2022
Judgment: April 13, 2022
Docket: Edmonton 24-116194

Counsel: Preet Saini, Kourtney Rylands, for Applicant
R.J. Daniel Gilborn, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.c Act of bankruptcy within 6 months prior to petition
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy within 6 months prior to petition
Debtor borrowed substantial funds from creditor pursuant to loan and credit card agreements — Events of default occurred under loan agreements, creditor issued statement of claim against debtor, parties entered into forbearance agreement and debtor consented to judgment against it for full amount owing in event of expiry or termination of forbearance period — Default occurred under forbearance agreement, debtor did not cure default and no further payment had been made to creditor — Debtor owed creditor $868,672.30 plus fees, costs, expenses and legal fees — Creditor applied for bankruptcy order against debtor under s. 43(1) of Bankruptcy and Insolvency Act — Application granted — Affidavit of verification did not need to be sworn on or after day application was signed by applying creditor — Parliament created pattern of expressly stating sequence and timing of various steps in Act, but s. 43(3) of Act contained no such sequencing, and omission in s. 43(3) suggested that sequencing for filing application and swearing affidavit that debtor proposed was not contemplated by legislation — As valuation offered by creditor was not absurdly low or sham, no independent evidence was required to sustain valuation — Creditor satisfied its evidentiary obligation to verify at least $1,000 of debt remaining after exercising its security — Creditor demonstrated that debtor was not meeting its liabilities generally as they became due, given arrears it owed to Canada Revenue Agency (CRA) and indebtedness it owed to creditor — While evidence of debtor's sole director was accepted that liability owing to CRA was being addressed through arrangement as of November 22, 2021, his evidence did not establish that arrangement was in place when application was submitted on July 8, 2021, and debtor was not meeting CRA liability as it became due during six months before application — Indebtedness owing to creditor remained outstanding, no payments had been made since September 2020, and continuing demand for payment was reasonably inferred from circumstances — Creditor's representations and pattern of

conduct between parties conveyed to debtor ongoing expectation that liability was payable and recovery was being sought, and debtor ceased to meet liability as it fell due — Substantial liabilities were due and owing to both CRA and creditor during six months preceding application, and creditor had proven act of bankruptcy under s. 42(1)(j) of Act — Debtor had not provided credible concrete evidence that it was able to pay its debts — No evidence of improper motive for bankruptcy application was provided and no abuse of process was established Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 43(3).

Table of Authorities

Cases considered by *K.S. Feth J.*:

ATB Financial v. Coredent Partnership (2020), 2020 ABQB 507, 2020 CarswellAlta 1555, 19 Alta. L.R. (7th) 273 (Alta. Q.B.) — referred to

ATB Financial v. Coredent Partnership (2020), 2020 ABQB 587, 2020 CarswellAlta 1802, 20 Alta. L.R. (7th) 174 (Alta. Q.B.) — considered

ATI Technologies ULC v. Henderson Robb Group (2008), 2008 CarswellOnt 1418, 41 C.B.R. (5th) 94 (Ont. S.C.J.) — referred to

Aarvi Construction Co., Re (1978), 29 C.B.R. (N.S.) 265, 1978 CarswellOnt 210 (Ont. S.C.) — referred to

Appleyard, Re (2006), 2006 CarswellOnt 2706, 21 C.B.R. (5th) 192 (Ont. S.C.J.) — referred to

Appleyard, Re (2008), 2008 ONCA 88, 2008 CarswellOnt 630, 38 C.B.R. (5th) 198 (Ont. C.A.) — referred to

Baker, Re (1937), 19 C.B.R. 73, 1937 CarswellOnt 94 (Ont. S.C.) — referred to

Banque nationale de Paris (Canada) v. Opiola (1998), 1998 CarswellAlta 1076, (sub nom. *Banque Nationale de Paris (Canada) v. Opiola (Bankrupt))* 231 A.R. 398, 6 C.B.R. (4th) 184, 1998 ABQB 965 (Alta. Q.B.) — referred to

Black & White Sales Consultants Ltd., Re (1979), 33 C.B.R. (N.S.) 87, 1979 CarswellOnt 272 (Ont. Bktcy.) — considered

C. Tokmakjian Ltd., Re (2003), 2003 CarswellOnt 4616, 46 C.B.R. (4th) 227, [2003] O.T.C. 1027 (Ont. S.C.J.) — considered

Cappe, Re (1993), 18 C.B.R. (3d) 229, 1993 CarswellOnt 198 (Ont. Gen. Div. [Commercial List]) — referred to

Cappe, Re (1994), 1994 CarswellOnt 2604 (Ont. C.A.) — referred to

Chopra (Syndic) (2015), 2015 QCCS 5169, 2015 CarswellQue 10542 (Que. Bktcy.) — referred to

Consoli, Re (1982), 41 C.B.R. (N.S.) 203, 1982 CarswellOnt 163 (Ont. Bktcy.) — referred to

Cormie v. Principal Group Ltd. (Trustee of) (1989), 66 Alta. L.R. (2d) 340, 74 C.B.R. (N.S.) 124, 99 A.R. 1, 1989 CarswellAlta 335 (Alta. Q.B.) — referred to

Federal Business Development Bank v. Poznekoff (1982), [1983] 3 W.W.R. 1, 41 B.C.L.R. 273, 143 D.L.R. (3d) 370, 1982 CarswellBC 337 (B.C. C.A.) — referred to

Fengar Investments Corp., Re (1993), 17 C.B.R. (3d) 167, 1993 CarswellOnt 194 (Ont. Bktcy.) — considered

Fischel, Re (1990), 80 C.B.R. (N.S.) 25, 108 N.B.R. (2d) 210, 269 A.P.R. 210, 1990 CarswellNB 17 (N.B. Q.B.) — considered

Fischel, Re (1991), 10 C.B.R. (3d) 282, 84 D.L.R. (4th) 236, 119 N.B.R. (2d) 61, 300 A.P.R. 61, 1991 CarswellNB 25 (N.B. C.A.) — referred to

Four Twenty-Seven Investments Ltd., Re (1985), 55 C.B.R. (N.S.) 183, 1985 CarswellOnt 171 (Ont. S.C.) — referred to

Frosinon Group Inc., Re (1983), 48 C.B.R. (N.S.) 266, 1983 CarswellOnt 229 (Ont. Bktcy.) — referred to

Fundy Supplies Ltd., Re (1971), 3 N.B.R. (2d) 723, 20 D.L.R. (3d) 615, 1971 CarswellNB 47 (N.B. C.A.) — considered

Groia & Company Professional Corporation v. Medcap Real Estate Holdings Inc. (2021), 2021 ONSC 7986, 2021 CarswellOnt 18987, 95 C.B.R. (6th) 73 (Ont. S.C.J.) — referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

Hayes, Re (1979), 34 C.B.R. (N.S.) 280, 1979 CarswellBC 589 (B.C. S.C.) — referred to

Haywood Securities Ltd. v. Witwicki (1995), 32 C.B.R. (3d) 103, 7 B.C.L.R. (3d) 372, (sub nom. *Haywood Securities Ltd. v. Witwicki (Bankrupt))* 56 B.C.A.C. 120, (sub nom. *Haywood Securities Ltd. v. Witwicki (Bankrupt))* 92 W.A.C. 120, 1995 CarswellBC 389 (B.C. C.A.) — referred to

Home Hardware Stores Ltd. v. R Home Supply Centre Ltd. (2015), 2015 BCCA 500, 2015 CarswellBC 3466, 380 B.C.A.C. 91, 655 W.A.C. 91, 83 B.C.L.R. (5th) 36 (B.C. C.A.) — referred to

Hugh M. Grant Ltd., Re (1982), 41 C.B.R. (N.S.) 28, 1982 CarswellOnt 156 (Ont. S.C.) — referred to

Hyman Weiss & Co., Re (1925), 5 C.B.R. 491, 1925 CarswellQue 7 (C.S. Que.) — referred to
Joyce, Re (1984), 51 C.B.R. (N.S.) 152, 1984 CarswellOnt 143 (Ont. Bktcy.) — referred to
Kaussen Estate, Re (1986), [1986] R.J.Q. 2683, 25 E.T.R. 99, 64 C.B.R. (N.S.) 97, 1986 CarswellQue 35 (C.S. Que.) — referred to
Kaussen Estate, Re (1988), 67 C.B.R. (N.S.) 81, [1988] R.L. 424, (sub nom. *Kaussen Estate, Re)* 31 E.T.R. 85, 12 Q.A.C. 39, (sub nom. *Bayerische Hypotheken - und Wechsel-Bank Aktiengesellschaft v. Kaussen Estate)* 47 D.L.R. (4th) 626, 1988 CarswellQue 30 (C.A. Que.) — referred to
LaHave Equipment Ltd., Re (2007), 2007 NSSC 283, 2007 CarswellNS 423, 36 C.B.R. (5th) 75, (sub nom. *LaHave Equipment Ltd. (Bankrupt), Re)* 258 N.S.R. (2d) 238, (sub nom. *LaHave Equipment Ltd. (Bankrupt), Re)* 824 A.P.R. 238 (N.S. S.C.) — referred to
Lambert, Re (2001), 2001 CarswellOnt 2419, 26 C.B.R. (4th) 235, [2001] O.T.C. 514 (Ont. S.C.J.) — considered
Lambert, Re (2002), 2002 CarswellOnt 2659, 216 D.L.R. (4th) 330, (sub nom. *Lambert (Bankrupt), Re)* 162 O.A.C. 132, (sub nom. *Buth-na-bodhiaga Inc. v. Lambert)* 60 O.R. (3d) 787, 36 C.B.R. (4th) 256 (Ont. C.A.) — referred to
Malmstrom v. Platt (2001), 2001 CarswellOnt 830, 24 C.B.R. (4th) 70, 198 D.L.R. (4th) 285, (sub nom. *Platt (Bankrupt) v. Malmstrom)* 142 O.A.C. 332, (sub nom. *Platt v. Malmstrom)* 53 O.R. (3d) 502 (Ont. C.A.) — considered
Mastronardi, Re (2000), 2000 CarswellOnt 4792, 21 C.B.R. (4th) 107, 195 D.L.R. (4th) 631, (sub nom. *Mastronardi (Bankrupt), Re)* 140 O.A.C. 392 (Ont. C.A.) — referred to
McKelvey, Re (1983), 47 C.B.R. (N.S.) 229, 1983 CarswellOnt 200 (Ont. S.C.) — considered
Omni-Stone Corp., Re (1991), 4 O.R. (3d) 636, 1991 CarswellOnt 698 (Ont. Bktcy.) — referred to
Relectra Ltd., Re (1979), 30 C.B.R. (N.S.) 141, 1979 CarswellOnt 194 (Ont. Bktcy.) — referred to
Royal Bank v. Saskatoon Petroleum Services Ltd. (2003), 2003 SKQB 25, 2003 CarswellSask 56, 40 C.B.R. (4th) 143 (Sask. Q.B.) — considered
S.C.M. Farms Ltd. v. W-4 Holdings Ltd. (2007), 2007 MBQB 268, 2007 CarswellMan 445, [2008] 2 W.W.R. 731, (sub nom. *S.C.M. Farms Ltd. (Bankrupt), Re)* 221 Man. R. (2d) 196 (Man. Q.B.) — referred to
Salloway v. McLaughlin (1942), 24 C.B.R. 90, 1942 CarswellQue 18 (C.A. Que.) — referred to
Smith, Re (1992), 13 C.B.R. (3d) 47, (sub nom. *Smith (Bankrupt), Re)* 80 Man. R. (2d) 216, 1992 CarswellMan 22 (Man. Q.B.) — referred to
Solid Holdings Ltd. v. Grant Thornton Limited (2019), 2019 BCCA 231, 2019 CarswellBC 1760, 27 B.C.L.R. (6th) 25 (B.C. C.A.) — considered
Solid Holdings Ltd., Re (2019), 2019 BCSC 126, 2019 CarswellBC 199 (B.C. S.C.) — referred to
The Pas Foundation & Excavation Ltd., Re (1975), 21 C.B.R. (N.S.) 154, 1975 CarswellMan 4 (Man. Q.B.) — referred to
Toronto Dominion Bank v. Langille (1983), 55 N.S.R. (2d) 629, 114 A.P.R. 629, 45 C.B.R. (N.S.) 49, 1983 CarswellNS 37 (N.S. C.A.) — referred to
Valente, Re (2004), 2004 CarswellOnt 681, (sub nom. *Valente (Bankrupt) v. Courey)* 183 O.A.C. 191, 47 C.B.R. (4th) 317, (sub nom. *Vakebte v. Fancsy Estate)* 70 O.R. (3d) 31 (Ont. C.A.) — considered
Wekerle, Re (2015), 2015 ONSC 1260, 2015 CarswellOnt 3593 (Ont. S.C.J.) — referred to
Winant (Succession), Re (2011), 2011 QCCS 1190, 2011 CarswellQue 2586, 2011 CarswellQue 12282 (C.S. Que.) — referred to
Zinman, Re (1929), 10 C.B.R. 469, 1929 CarswellQue 2 (C.S. Que.) — referred to
307309 B.C. Ltd., Re (1991), 11 C.B.R. (3d) 187, 1991 CarswellBC 446 (B.C. S.C. [In Chambers]) — referred to
484030 Ontario Ltd., Re (1992), 12 C.B.R. (3d) 302, 8 O.R. (3d) 243, 90 D.L.R. (4th) 218, 1992 CarswellOnt 171 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "insolvent person" — referred to

s. 14.01(3)(b) [en. 1992, c. 27, s. 9(1)] — referred to

s. 40(1) — referred to

s. 42(1)(j) — referred to

s. 43(1) — referred to

s. 43(1)(b) — referred to

s. 43(2) — referred to

s. 43(3) — referred to

s. 43(7) — referred to

s. 46(1) — referred to

s. 81(2) — referred to

s. 187(9) — referred to

Civil Enforcement Act, R.S.A. 2000, c. C-15

Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 70 — referred to

R. 70(1) — referred to

R. 70(2) — referred to

R. 72 — referred to

APPLICATION by creditor for bankruptcy order against debtor.

***K.S. Feth J.*:**

Introduction

1 Royal Bank of Canada (RBC) applies for a bankruptcy order against Sultan Management Group Inc. (Sultan).

2 Sultan opposes on procedural and substantive grounds. Specifically, Sultan argues:

a. The application does not satisfy the formal requirements of a bankruptcy application because the supporting affidavit of verification was filed long before the signed application was submitted to the Court and is otherwise deficient;

b. RBC has not proved an act of bankruptcy; and

c. The application is an abuse of process because RBC has been simultaneously pursuing enforcement of a consent judgment against Sultan for the same debt.

3 For the reasons to follow, the application is granted.

Background

4 Sultan borrowed substantial funds from RBC pursuant to loan and credit card agreements (Loan Agreements). Under two security agreements, including a general security agreement, Sultan granted to RBC a security interest in all of Sultan's present and after-acquired personal property.

5 Events of default occurred under the Loan Agreements, and in July 2019, RBC demanded immediate payment in full of the total amount outstanding. Repayment was not made.

6 On September 6, 2019, RBC filed a Statement of Claim against Sultan seeking judgment for the amount outstanding.

7 On December 9, 2019, Sultan and RBC entered into a forbearance agreement acknowledging $806,197.44 was owing as of November 13, 2019. A repayment schedule was accepted by Sultan. RBC agreed not to take any steps to enforce its rights and remedies against Sultan and its guarantor, Sultan Zamman, until the earlier of October 15, 2020 or a termination event as defined in the agreement. Sultan consented to a judgment (Consent Judgment) against it for the full amount owing in the event of the expiry or termination of the forbearance period.

8 The forbearance agreement was amended in May and September 2020, following payment defaults by Sultan. The amendments revised the payment schedule and extended the forbearance period.

9 By letter dated November 2, 2020, RBC informed Sultan that another default had occurred under the forbearance agreement because Sultan failed to make a payment of $55,000 on or before October 27, 2020.

10 Sultan did not cure the default. No further payment has been made to RBC since September 28, 2020.

11 From early 2021 until June 2021, the parties were engaged in settlement discussions.

12 As of July 2021, Sultan owed $868,672.30 to RBC, plus an additional $35,678.93 in fees, costs, expenses, and legal fees (the Indebtedness).

13 RBC submitted a signed application for a bankruptcy order to this Court on July 8, 2021, asserting that Sultan had ceased to meet its liabilities generally as they became due.

14 The Consent Judgment contemplated under the forbearance agreement was filed in this Court by RBC on July 16, 2021, but was not immediately served on Sultan. RBC had given notice to Sultan on June 9 of its intention to file the Consent Judgment, but service was not effected until September 23, 2021.

15 BDO Canada Limited has consented to being appointed as the trustee in bankruptcy.

Analysis

Statutory grounds for the bankruptcy application

16 RBC's application for a bankruptcy order is brought under s 43(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B–3 (BIA):

> 43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

17 Section 42(1)(j) prescribes that a debtor commits an act of bankruptcy "if he ceases to meet his liabilities generally as they become due."

Objections to the affidavit verifying the facts alleged in the application

18 The affidavit of verification is an essential part of the application: *Re Consoli*, [1982] OJ No 2456, 41 CBR (NS) 203 (Ont SC). In the absence of an affidavit of verification, the Court will not grant a bankruptcy order: Re Hyman Weiss & Co (1925), 5 CBR 491 (Que SC).

19 RBC's bankruptcy application is supported by an affidavit sworn on April 26, 2021 by Natalie Naraine, RBC's manager in the Special Loans and Advisory Services Group. The Naraine Affidavit identifies three outstanding liabilities to Sultan's creditors that were not being met during the six months before RBC filed the application:

a. An outstanding judgment owing to Lafarge Canada Inc. for $36,371.50;

b. An arrears owing to Canada Revenue Agency of $230,294.29; and

c. RBC's Indebtedness totalling $904,351.

20 The Naraine Affidavit estimates the value of Sultan's assets as $131,030 leaving a substantial part of the Indebtedness unsecured.

21 Due to administrative complications in this Court during the COVID-19 pandemic, the actual filing of the application was delayed until September 7, 2021. Sultan takes no issue with the institutional delay after July 8, 2021, so the date of submission has been treated as the filing date. (The email from this Court acknowledging receipt of the application stated the filing date was to be the date of receipt.) However, Sultan objects to the affidavit of verification being sworn approximately 10 weeks before the signed application was submitted. Further, Sultan contends that the Naraine Affidavit fails to demonstrate a reasonable foundation for the estimated value of Sultan's assets.

Timing of the affidavit of verification

22 Section 43(3) of the BIA directs:

> The application **shall be verified** by affidavit of the applicant, or someone duly authorized on their behalf having personal knowledge of the **facts alleged in the application**. [Emphasis added]

23 Sultan argues that s 43(3) requires the affidavit to be sworn *after* the notice of application is signed and submitted by the applicant, relying on Re Zinman (1929), 10 CBR 469 (Que SC). On this basis, Sultan contends the application is a nullity because no proper supporting affidavit is before the Court.

24 *Re Zinman* is a short decision in which Pannetong J gave no reasons for his interpretation of s 43(3). However, counsel for Sultan submits that the past tense in the words "shall be verified" implies that the affidavit must be sworn after the application is signed by the applying creditor. He identifies no public policy rationale or legislative purpose for this approach.

25 In ATI Technologies ULC v Henderson Robb Group, [2008] OJ No 1017, 41 CBR (5th) 94 (ON SC) [*ATI*], the principle in *Re Zinman* was interpreted to mean that the affidavit of verification must be sworn on or after the date the application is signed by the applying creditor. Again, no analysis of s 43(3) was offered.

26 A contrary interpretation was adopted in Groia & Company Professional Corporation v Medcap Real, 2021 ONSC 7986 at paras 97–101, where Justice Pattillo concluded that neither the *BIA* nor the Bankruptcy and Insolvency General Rules, CRC 1978, c 368 (the Rules) requires the affidavit of verification to be sworn at the same time as, or after, the application is made. Rule 70(1) provides:

> A notice indicating the time and place of the hearing of the bankruptcy application, together with a certified copy of the application and of the affidavit referred to in subsection 43(3) of the Act, must be served on the debtor, on the trustee

named in the application and on the Division Office **at least 10 days, or any shorter period** that the court may order, before the hearing. [Emphasis added]

27 I am not persuaded by either *Re Zinman* or *ATI* that the affidavit of verification must be sworn on or after the day the application is signed by the applying creditor.

28 Neither s 43(3) of the BIA nor Rule 70 expressly addresses the sequencing of the notice of application and the affidavit.

29 In contrast, several provisions in the *BIA* and the Rules prescribe timing requirements, including the order in which steps must be taken. Examples include:

- Rule 70(1): notice of the hearing must be served "at least 10 days, or any shorter period that the court may order, *before the hearing*";
- Rule 70(2): a copy of application must be filed "*immediately* . . . at the office of the Registrar";
- Rule 72: proof of service must be filed "at least two days *before the date of the hearing* set out in the application";
- s. 14.01(3)(b) of the BIA: written notice of the delegation of powers is given "either *before the power is exercised or at the time the power is exercised*" ;
- s. 40(1) of the BIA: any unrealizable property must be returned to the bankrupt "*before the trustee's application* for discharge";
- s. 46(1) of the BIA: an interim receiver may be appointed for the protection of the estate "at any time *after the filing of an application* for a bankruptcy order and *before a bankruptcy order* is made";
- s. 81(2) of the BIA: a trustee must admit a claim or send notice that a claim is disputed [to persons claiming property in the bankrupt's possession] "within 15 days *after the filing of the claim* or within 15 days *after the first meeting* of creditors, whichever is the later".

30 As a principle of statutory interpretation, Parliament is presumed to use language carefully and consistently so that the same words have the same meaning and different words have different meanings, and the same principle applies to recurring patterns of expression: *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at]§8.32 and]§8.38. In this case, Parliament created a pattern of expressly stating the sequence and timing of various steps in the *BIA* and the Rules. However, s 43(3) contains no such sequencing for the affidavit and the notice of application. The omission in s 43(3) and Rule 70(1) suggests that the sequencing for filing the application and swearing the affidavit as proposed by Sultan was not contemplated by the legislation.

31 Section 43(3) contemplates evidence verifying the facts on which the application is grounded. However, since the act of bankruptcy might occur anytime during the six months preceding the application, the verification need not be on or after the date the bankruptcy application is submitted. The evidence is only required to demonstrate the "facts alleged in the application", which might be known prior to the application date. From those facts, an inference may be drawn about the continuing nature of the act of bankruptcy until the application is filed. To require the affiant to have specific knowledge of the ongoing non-payment of liabilities up to and on the date of the application imposes an impractical burden.

32 I reject Sultan's argument that the past tense in the words "shall be verified" implies that the affidavit of verification must be sworn at or after the time the application is signed. That approach is grammatically incorrect, needlessly technical, and serves no legislative purpose. Moreover, if a responding debtor is concerned about the continuing accuracy of the information in the affidavit of verification, the debtor may challenge that evidence through cross-examination on affidavit or by filing contrary evidence.

33 Here, the requisite facts were known 10 weeks before the application was signed: a) the amount of the debt owing to the applicant creditor; and b) the specific act of bankruptcy - the failure to meet liabilities as they generally became due during some part of the six months preceding the application. The magnitude of the Indebtedness and the pattern of not paying liabilities generally as they became due during most of the six months preceding the application, as discussed later in these Reasons, invited the reasonable inference that the act of bankruptcy continued until the application date.

34 Accordingly, I conclude that no defect or irregularity is present.

35 Even if the timing of the affidavit of verification had failed to comply with s 43(3), the defect or irregularity could have been cured under s 187(9) of the BIA:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

36 Creditors who seek to benefit from bankruptcy proceedings must strictly comply with the legislation. However, the Court only invalidates applications for errors of substance, not for technical formalities: Haywood Securities Ltd v Witwicki, 1995 CanLII 3249, 32 CBR (3d) 103 (BC CA) at para 6 [*Haywood];* Cormie v Principal Group Ltd (Trustee of), 1989 CanLII 3162, 74 CBR (NS) 124 (AB QB) at para 15; ATB Financial v Coredent Partnership, 2020 ABQB 507 at paras 42–43 [Coredent #1]. The distinction between matters of form and substance depends on the circumstances of each case: *Haywood* at para 6.

37 Any defect or irregularity here would not have been substantive. The timing of the affidavit of verification and the sequencing in relation to signing the application did not prejudice Sultan. The facts on which RBC relies did not change. Sultan's ability to respond to the application with other evidence was not compromised. The alleged defect could have been cured without substantively changing the objecting party's position.

38 In sum, no substantial injustice was caused by the alleged defect or irregularity.

39 In *Coredent #1* at paras 68 — 84, my colleague Lema J questioned whether the distinction between substantive and formal defects is still warranted. In light of my conclusions, I need not address that issue.

A reasonable estimate of the assets' value

40 As a secured creditor, RBC is required to show that an unsecured portion of its claim exceeds the $1000 threshold in s 43(1) of the BIA after estimating the value of its security.

41 Section 43(2) states:

> (2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall . . . **give an estimate of the value of the applicant creditor's security**, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor. [Emphasis added]

42 The Naraine Affidavit describes RBC's estimated valuation of Sultan's assets as $131,030. A specific valuation report is not mentioned.

43 In determining the estimated value, Ms. Naraine deposes that RBC considered the following:

> a. Depreciation of assets;
>
> b. Actual liquidation value of assets;
>
> c. Costs of removal and sale; and

d. Claims against the assets by the Canada Revenue Agency (CRA) for amounts owing on priority payables.

44 Sultan contends that RBC must prove its estimate is reasonable, failing which the evidence supporting the application is deficient.

45 In demonstrating that at least $1000 of unsecured debt is owing, a secured creditor is not required to prove the value of its security. "It need only provide an estimate which it must establish is not a sham or absurdly low": C Tokmakjian Ltd (Re), 2003 CanLII 17288, 46 CBR (4th) 227 (ON SC), at para 34 [*Tokmakjian*]. See also: ATB Financial v Coredent Partnership,2020 ABQB 587 [Coredent #2] at para 74; Home Hardware Stores Ltd v R Home Supply Centre Ltd, 2015 BCCA 500 at paras 28 and 34–37; LaHave Equipment Ltd, Re, 2007 NSSC 283 at paras 51–55; Re Hugh M. Grant Limited (1982), 41 CBR (NS) 28 (Ont SC) at para 20.

46 The "only obligation upon a petitioning creditor in such circumstances is to make a reasonable estimate of the value of its securities": *Re McKelvey*, 1983 CarswellOnt 200, 47 CBR (NS) 229 (Ont SC) at para 4. A formal appraisal of the security is not necessary: *Tokmakjian* at paras 36-37.

47 The estimate is not required to be the "true value": In Re Clifford N. Baker[1937] OJ No 291, 19 C.B.R. 73(Ont HCJ) at para 9 [*Baker*]. It is "not necessary for the creditor to establish the process by which it valued its security unless its estimate is considered by the court to be a sham or absurdly low": *Re 484030 Ontario Ltd*, 1992 CanLII 8602, 1992 CarswellOnt 171, (ON SCGD) at para 17 of CanLII, para 20 of Carswell; see also: *Baker* at para 9.

48 In Re Black & White Sales Consultants Ltd (1979), 33 CBR (NS) 87 (Ont SC) the creditor gave a vague estimate of its valuation of the security — "a sum less than $1,000,000." The court nevertheless found the estimate to be sufficient, noting at para 11 that no evidence was presented showing that the security had been undervalued. The implication was that the "sham or absurdly low" nature of the estimate must be readily apparent or that the debtor must raise some evidence to challenge the creditor's estimate.

49 Sultan submits that RBC's obligation to prove a reasonable asset valuation is supported by paras 9 and 10 of *Saskatoon Petroleum Services Ltd (Bankruptcy of),*, 2003 SKQB 25, 40 CBR (4th) 143. However, I do not read that commentary to say anything contrary to the long line of jurisprudence already mentioned.

50 In *Saskatoon Petroleum*, the petitioning creditor relied on an appraisal from a professional appraiser to value the assets. The responding debtor contested the valuation but provided no similar evidence to contradict the appraiser. Justice Barclay stated at para 10:

> A petitioner is entitled to rely on its own valuation of its security, and as long as that valuation is not a sham, the Court should not enter into an inquiry about that valuation: ***Re Hugh M. Grant Limited*** (1982), 41 C.B.R. 28(Ont. S.C.). The only obligation on a petitioner is to make a reasonable estimate of the value of its security: ***Re McKelvey*** (1983), 47 C.B.R. 229(Ont. S.C.). In the case at hand, the Royal Bank relies on an appraisal from the same company that the respondent entrusted to sell its assets, McDougall Auctioneers.

51 Justice Barclay made no finding that the creditor was compelled to prove the reasonableness of its estimate. In that case, the creditor provided evidence of a professional appraisal, but no requirement to do so was imposed. A "reasonable estimate" merely required that the valuation not be a sham or absurd.

52 In contrast, Justice Barclay held at para 9 that the debtor bears a greater burden:

> The mere fact that a respondent makes an assertion of fact about the value of its assets is not grounds to refuse to issue a receiving order. There must be documentary evidence to support the assertion . . .

53 The parties are facing different requirements: the applying creditor need only establish that it has an unsecured position of at least $1000 relying on an estimate, while the responding debtor is trying to prove the creditor has undervalued the debtor's

assets. The former merely requires an estimate that is not absurd or a sham; the latter must raise sufficient evidence to establish that the estimate is absurd or a sham — a much higher bar.

54 RBC, as a chartered bank, is a sophisticated and federally regulated lender. I infer from the Loan Agreements, the acquisition of the security agreements, the negotiation of and amendments to the forbearance agreement and the payment schedules, and the nature of RBC's business that it likely familiarized itself with Sultan's assets, which were ongoing security for the amount owing. A Personal Property Registry Search Results Report dated March 15, 2021, and forming part of the Naraine Affidavit, lists numerous assets bearing serial numbers to which the general security interest attached. The bank therefore probably had substantial knowledge about Sultan's assets. The Naraine Affidavit demonstrates the basic methodology applied to the estimated value of the assets. Nothing suggests the estimate is a sham or absurdly low.

55 As the valuation offered by RBC is not absurdly low or a sham, no independent evidence is required to sustain that valuation. RBC has satisfied its evidentiary obligation to verify at least $1000 of debt remaining after exercising its security.

56 Sultan has not introduced evidence to contradict RBC's valuation. Moreover, Sultan's counsel cross-examined Ms. Naraine on her Affidavit, confirming that the valuation analysis had not been shared with Sultan, but did not request a copy of, or explore the contents within, any valuation analysis or report. The estimate was left unchallenged.

57 Accordingly, I accept the estimated value advanced in the Naraine Affidavit.

An act of bankruptcy

58 Sultan submits that RBC has failed to prove an act of bankruptcy during the six months preceding the filing of the application. Specifically, Sultan contends that RBC's evidence does not prove that Sultan failed to meet its liabilities generally as they became due. Moreover, Sultan denies being insolvent.

Proof of an act of bankruptcy

59 RBC contends that a combination of liabilities owing to multiple creditors or, in the alternative, the Indebtedness to RBC alone establishes the act of bankruptcy.

Not paying liabilities generally to multiple creditors

60 RBC asserts that three liabilities demonstrate Sultan was not meeting its liabilities generally as they became due during the requisite six months:

a. the outstanding judgment owed to Lafarge Canada Inc. for $36,371.50;

b. the arrears owing to Canada Revenue Agency of $230,294.29; and

c. the Indebtedness owed to RBC.

I will address each of them in turn.

61 First, the evidence of the Lafarge debt is a writ of enforcement registered at the Personal Property Registry for an outstanding judgment in that amount. The writ was discovered through a search of the registry on March 21, 2021. The judgment issued on July 22, 2020.

62 Sultan provides an affidavit from its sole director, Sultan Zamman, deposing that the judgment was settled before May 27, 2021. Appended to Mr. Zamman's Affidavit is a letter from the creditor confirming that as of May 27, 2021, no amount was overdue or owing.

63 I accept that as of May 27, 2021, no outstanding liability remained owing to Lafarge Canada Inc. Therefore, no unpaid liability existed when the application for a bankruptcy order was submitted to the Court.

64 The relevant date for determining whether the debtor has ceased to meet liabilities generally as they become due is the time when the signed application is filed with the Court: TD Bank v Langille, [1983] NSJ No 69, 45 CBR (NS) 49 (CA) at para 18; Re Solid Holdings Ltd, 2019 BCSC 126 at para 14 [Re Solid Holdings]; aff'd 2019 BCCA 231; Relectra Limited (Re) [1979] OJ No 3343, 30 CBR (NS) 141 (Ont SC) at para 13. Here, that date is treated as July 8, 2021.

65 The outstanding judgment owed to Lafarge Canada does not assist RBC.

66 Second, the arrears owing to CRA is derived from a Notice of Assessment dated June 27, 2019 showing that Sultan owed $230,294.29 at that time. More current evidence is not offered. Sultan does not contest the accuracy of the contents of the Notice of Assessment. A substantial debt during the six months preceding the application is not denied.

67 Sultan responds, however, that the debt owed to the CRA is being serviced to the government's full satisfaction by way of a compromise reached between the parties. In Mr. Zamman's Affidavit sworn on November 22, 2021, long after the application was filed, he deposes briefly to that arrangement. However, he does not describe the arranged terms or when the arrangement was reached.

68 Attached to the Zamman Affidavit is a printout from a CRA payroll deduction account showing some payments from Sultan to CRA during the period from June 28 to November 15, 2021. Only one recorded payment preceded RBC's application, in the sum of $10,000 on June 28, 2021. The transaction entry for that payment does not indicate whether it was made pursuant to the arrangement referenced by Mr. Zamman.

69 The first payment to be described as an "arrears payment" was received by CRA on July 22, 2021, two weeks after the bankruptcy application was submitted.

70 The printout reveals that on November 1, 2021, Sultan's account was charged by CRA as follows:

- Assessed a failure to remit penalty of $43,451.17;
- Assessed for a failure to remit for 2020 of $217,255.85;
- Assessed a failure to remit penalty of $505.46;
- Assessed a failure to remit for 2019 of $5,054.55.

71 Mr. Zamman's affidavit does not address any of these entries. The assessments suggest that penalties for remittance arrears were still being imposed by November 1, 2021 and that past assessments were possibly being re-calculated. However, the payment history does not adequately demonstrate that the arrangement mentioned in Mr. Zamman's Affidavit was in place before RBC submitted its application for a bankruptcy order.

72 While I accept Mr. Zamman's evidence that the liability owing to the Canada Revenue Agency was being addressed through an arrangement as of November 22, 2021, his evidence does not satisfy me that the arrangement was in place when the application was submitted on July 8, 2021.

73 I therefore find that Sultan was not meeting the CRA liability as it came due during the six months before the application.

74 The "fact that accounts are paid or satisfied after the date of the petition does not alter the fact that they were overdue and unpaid as at the date of the filing of the petition": *Lambert, Re,*, [2001] OJ No 2776, 26 CBR (4th) 235 (Ont SC) at para 52; aff'd [2002] OJ No 3163, 36 CBR (4th) 256 (CA). See also: Re Frosinon Group Inc, [1983] OJ No 969, 48 CBR (NS) 266 (Ont SC) at para 3; Wekerle (Re),2015 ONSC 1260, at para 1, in which partial payments between the date of application and before the hearing did not result in the dismissal of the application.

75 Accordingly, the arrangement between Sultan and CRA described in November 2021 does not alter the finding that this liability was not being met during the relevant period preceding the application.

76 Third, the Indebtedness owing to RBC remains outstanding. No payments have been made since late September 2020.

77 Sultan does not deny the amount of the Indebtedness or that it remains owing. Instead, Sultan replies as follows:

a. RBC made no demand for payment during the six months before the application;

b. Sultan has not refused to pay the Indebtedness;

c. Sultan did not know the Consent Judgment was filed until several weeks after the bankruptcy application was filed.

78 The purpose of the six-month time period in s 43(1)(b) was explained in Malmstrom v Platt, 2001 CarswellOnt 930 (Ont. C.A.) (Ont. C.A.) , 24 CBR (4th) 70 (ON CA) at para 8 [*Malmstrom*]:

> The theory behind the six-month period appears to be that a petitioning creditor should not be permitted to rely upon stale-dated debts which have not been pursued in order to establish current acts of bankruptcy. However, it has been accepted that even in situations where a debt has become due more than six months before the date of the petition, a demand for payment made within the six-month period revives the original debt. Such a demand makes the debts current and failure to act on such a demand can serve as a current act of bankruptcy.

79 The authorities are divided, however, on whether a demand during the six-month period is required. Some cases hold or suggest that a demand is necessary: Solloway v McLaughlin (1942), 24 CBR 90, 1942 CarswellQue 18 (Que CA); *Re Harrop of Milton Inc*, (1979), 22 OR (2d) 239, 29 CBR (NS) 289 (SC) at para 15; Federal Business Development Bank v Poznekoff, [1983] 3 WWR 1, 41 BCLR 273 (CA) at paras 17–18; Re 307309 BC Ltd, [1991] BCJ No 4057, 11 CBR (3d) 187 (SC) at para 9.

80 Many cases assert the contrary, principally by advancing a purposive approach to s 43(1)(b): see as examples, Kaussen Estate, Re1986 CarswellQue 35 at para 85, (1986), 64 CBR (NS) 97 at para 82 (Que SC), affirmed (1988), 67 CBR (NS) 81 (Que CA), leave to appeal dismissed [1988] SCCA No 190; 69 CBR (NS) xxx ; Re Aarvi Construction Co., [1978] OJ No 2623, 29 CBR (NS) 265 (Ont SC) at para 4; *Re The Pas Foundation & Excavation Ltd*, [1975] MJ No 233, 1975 CarswellMan 4 (QB) at paras 5, 7 and 11.

81 In *Re Fischel*, 1990 CarswellNB 17, 80 CBR (NS) 25 (QB), affirmed 1991 CarswellNB 25, 10 CBR (3d) 282 (CA) at paras 19–20, Chief Justice Richard observed:

> It is not necessary for a Creditor to continue making fresh demands when it is obvious that the Debtor cannot or will not pay. The Creditor is entitled to consider a default that has been clearly established to continue in effect . . . [citations omitted] Where specific demands for payment would have been to no avail, the absence of such demands does not preclude the Petitioner from recourse to Section 43 of the Act.

82 These competing views may be reconciled to this extent: a formal demand of payment within the six months before the application is not necessary where the course of conduct between the parties impliedly communicates an ongoing demand for payment and a continuing refusal to pay. This approach aligns with the purpose of the six-month period in s 43(1)(b), reflects commercial reality, and respects the conventional view that stale defaults should not be treated as acts of bankruptcy.

83 RBC relies on the overall pattern of conduct to show a continuing expectation of payment during the six months preceding the application and a refusal by Sultan to pay. I find that a continuing demand for payment is reasonably inferred from the following circumstances:

a. Sultan filed an Amended Statement of Claim against Sultan on September 6, 2019 seeking judgment for the outstanding indebtedness;

b. The parties entered into a forbearance agreement effective December 9, 2019 under which Sultan acknowledged that $806,197 was owing to RBC and that interest, fees, costs, and expenses, including full indemnity legal fees, continued to accrue;

c. Under the forbearance agreement, the parties agreed that RBC was only suspending enforcement of its rights and remedies for the collection of the amounts owing and that the suspension period continued until no later than October 15, 2020 or earlier if a default in payment occurred. Further, Sultan acknowledged that the Loan Agreements and security agreements were valid, binding and enforceable;

d. Under the forbearance agreement, Sultan agreed to the granting of the Consent Judgment and a consent receivership order against it in the event the forbearance period was terminated or expired;

e. Sultan defaulted during the forbearance period, resulting in amendments to the payment schedule and the forbearance agreement in May and September 2020; the implication from the amendments and revisions to the payment schedule was that RBC intended to keep pursuing the recovery of the amount owing to it;

f. Following another default in November 2020, the parties engaged in without-prejudice settlement discussions concerning payment; after those discussions failed to satisfy RBC's recovery expectations, RBC notified Sultan on May 10, June 1, and June 9, 2021 of its intention to enter the Consent Judgment.

84 Those events negate any concern about stale defaults. RBC actively and persistently represented by word and conduct, continuing well into the six months before the application, that it was pursuing recovery of the full debt. In that context, informing Sultan that the Consent Judgment would be entered was impliedly a demand for payment. The communication was pressuring Sultan to pay, given the possibility of judgment enforcement. Sultan was aware of those efforts, but still refused to make payment. On that basis, I conclude that Sultan was not meeting the RBC liability as it came due during the six months preceding the application and was actively refusing to pay.

85 RBC also submits that if a formal demand within the six months preceding the application was necessary, filing the Consent Judgment against Sultan was a continuing demand for payment: *Malmstrom*, at paras 18-19; Re Appleyard (2006), 21 CBR (5th) 192 (Ont SC), at para 26, aff'd 2008 ONCA 88.

86 In *Malmstrom*, at para 19, the Ontario Court of Appeal held:

> Once a judgment or order has been **entered** against a debtor, that judicial decree, even if entered more than six months before the filing of the petition, constitutes sufficient evidence of an act of bankruptcy having been considered within the six months of the filing date. [Emphasis added]

87 RBC argues that entering the Consent Judgment was sufficient to trigger a continuing demand for payment, even if the debtor had not been served with the filed judgment and was unaware the judgment had been entered.

88 I have two concerns with RBC's argument. First, the Consent Judgment was not filed until July 16, 2021, eight days *after* the signed application was submitted. Consequently, the constructive "demand" was not made during the six months preceding the application.

89 Second, I am not convinced that entering a judgment without service on the judgment debtor is a circumstance contemplated in *Malmstrom* and *Appleyard*. Indeed, *Malmstrom* at para 22 suggests otherwise by assuming the judgment would be communicated to the debtor. In the absence of service, the debtor is not aware that payment is expected (unless other facts communicate that expectation). The debtor might reasonably perceive the debt as stale, find comfort in s 43(1)(b), and be ambushed by the late disclosure of the judgment.

90 Here, Mr. Zamman deposes that Sultan was unaware the Consent Judgment was entered until September 23, 2021, many weeks after the application was submitted. Sultan was therefore unaware of any continuing demand communicated by the judgment. A demand that is not delivered to the intended recipient is no demand at all.

91 I conclude that the Consent Judgment does not assist RBC in satisfying the requirement of s 43(1)(b). However, as explained, that is not necessary. The balance of RBC's representations and the pattern of conduct between the parties conveyed to Sultan the ongoing expectation that a liability was payable and recovery was being sought. Sultan ceased to meet that liability as it fell due.

92 If the applying creditor provides evidence of other unpaid debts along with his own, an act of bankruptcy has been established: *Re Cappe*, [1993] OJ No 775, 18 CBR (3d) 229, 1993 CarswellOnt 198 (Ont Gen Div) at para 22, affirmed [1994] OJ No 3860, 1994 CarswellOnt 2604 (CA); Re Joyce [1984] OJ No 2294, 51 CBR (NS) 152 (Ont SC) at para 5; *Re Mastronardi*, (2000), 195 DLR (4th) 631, 21 CBR (4th) 107 (Ont CA) at para 24.

93 In *Coredent #2* at paras 87-95, Justice Lema canvassed the prevailing authorities and held that one other creditor is usually sufficient to demonstrate the debtor has ceased to meet its liabilities generally as they became due. I agree with his conclusion.

94 The evidence before me establishes that substantial liabilities were due and owing to both RBC and CRA during the six months preceding the application. I conclude that RBC has proven an act of bankruptcy under s 42(1)(j), which shifts the burden to Sultan to demonstrate an ability to pay its debts.

Special circumstances to establish an act of bankruptcy

95 As an alternative argument, RBC contends that even if the Indebtedness had been the only liability Sultan failed to meet during the six months before the application, an act of bankruptcy under s 42(1)(j) still would have been established. I agree.

96 A debt payable to a single creditor is sufficient to ground an act of bankruptcy if "special circumstances" are present: *Re Solid Holdings Ltd* ; and *Re Valente*, 2004 CarswellOnt 681, 47 CBR (4th) 317 (Ont CA).

97 In *Re Valente* at para 8, the Ontario Court of Appeal recognized three categories of special circumstances:

> a. where repeated demands for payment have been made within the six-month period;
>
> b. where the debt is significantly large and fraud or suspicious circumstances are present in the way the debtor has handled its assets which require that the processes of the *BIA* be set in motion; and
>
> c. prior to the filing of the application, the debtor has admitted its inability to pay creditors generally without identifying the creditors.

98 In *Re Fundy Supplies Ltd*, 1971 CanLII 1070, 20 DLR (3d) 615 at 620 (NB CA), Justice Hughes of the Nova Scotia Court of Appeal explained some of the rationale for allowing a single creditor to engage the benefit of the *BIA*:

> In my opinion there is nothing in the Act which prevents a single remaining creditor from presenting a petition for receiving order on the basis that the debtor ceased to meet a single liability when it became due. To so construe the Act would result in circumstances such as those of the present case where the debtor could use the proceeds of sale of the petitioning creditor's merchandise to meet all other creditors' demands and thereby deprive the petitioning creditor from the advantage of the Bankruptcy Act and frustrate the equitable distribution of the debtor's assets, which is the primary purpose of the Act.

99 Some authorities indicate that "special circumstances" are not limited to the three categories in *Re Valente: Coredent #2* at para 114; Banque Nationale de Paris (Canada) v Opiola, 1998 ABQB 965 at para 8; *Re Smith (WA)*, (1992), 80 Man R (2d) 216, 13 CBR (3d) 47 (QB) at para 19; Winant (Syndic de la succession de), 2011 QCCS 1190 at paras 54–58. In *Coredent #2*,

at paras 115-123, Justice Lema held that a large debt, substantially greater than the debtor's assets and resulting in a "massive anticipated shortfall", could be a special circumstance. The shortfall in that case was approximately $800,000.

100 I concur that an assessment of special circumstances is contextual and must take into account the purpose of the legislation. Special circumstances are not confined to three closed categories.

101 Here, if I had found Sultan entered into a payment arrangement with CRA during the six months before the application, I would have concluded there were special circumstances based on the following:

a. RBC is by far the largest creditor and its debt grossly exceeds the estimated value of Sultan's assets resulting in a "massive anticipated shortfall" owed to RBC;

b. Preferential treatment was given to other creditors, Lafarge Canada Inc. and CRA, during the six month period preceding the application: the Lafarge judgment was paid in full, and CRA and Sultan entered into a payment arrangement by which substantial payments were subsequently made to CRA, including $20,000 in "arrears payments", while nothing was paid to RBC; and

c. Sultan met its other liabilities during the six months before the application at RBC's expense.

102 The processes of the *BIA* would have been properly engaged to investigate and address the preferential treatment and the massive shortfall, and to provide for the orderly and fair distribution of Sultan's property among the creditors on a *pari passu* basis, subject to priorities. That outcome would have been supported by either the second of the three categories described in *Re Valente* or, alternatively, the more contextual and purposive approach to special circumstances endorsed here.

Bald denial of insolvency to prove an ability to pay the debts

103 Section 43(7) of the BIA provides that if the Court "is *satisfied by the debtor that the debtor is able to pay their debts*, or that for other sufficient cause no order ought to be made, it shall dismiss the application."

104 Sultan resists the bankruptcy application by contending that it is currently "solvent" despite any act of bankruptcy during the six-month period. Mr. Zamman deposes in his Affidavit, sworn several months after the application was signed, that other than the debt to RBC, Sultan continues to meet its liabilities as they become due. He opines that "Sultan remains a solvent corporation."

105 RBC did not cross-examine Mr. Zamman on his affidavit. Sultan therefore contends that its solvency is uncontested. I do not agree. RBC has plainly asserted through its application that Sultan is insolvent. Requiring RBC to put that proposition to Mr. Zamman through cross-examination on affidavit is needlessly technical.

106 More fundamentally, Sultan has not satisfied me that it is able to pay its debts.

107 Solvency is a legal conclusion — a question of mixed fact and law - not a fact. In the present context, the Court applies the known evidence to the definition of "insolvent person" in s 2 of the BIA, which reads:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

108 A person cannot simply declare themselves to be solvent and thereby shield themselves from the Court's inquiry. To the extent such a statement constitutes the evidence of the affiant, it is subject to the Court's assessment of weight. Moreover, Mr. Zamman's assertion about Sultan's solvency is really an opinion about a legal conclusion. The Court is not bound by that opinion.

109 A debtor must present "[s]ome form of credible concrete evidence" to satisfy its onus under s 43(7): *Fengar Investments Corp*, [1993] OJ No 422, 17 CBR (3d) 167 (Ont Gen Div) at para 55. See also: Re Hayes (1979), 34 CBR (NS) 280 (BCSC) at para 2; *First City Trust Co v Omni-Stone Corp*, 1991 CarswellOnt 698, 4 OR (3d) 636 (Ont Gen Div) at para 15; and *Re 484030* at paras 37-38 of Carswell, at paras 24-25 of CanLII *(*referring to "clear and independent evidence" and "financial accounts or statements").

110 Sultan offers scant evidence about the company's financial circumstances. For example, no financial statements are presented. Information is not provided about Sultan's total indebtedness, revenues, profits, assets and liabilities, or cash flow. The CRA records are selective and incomplete, covering only a short period of time. No meaningful explanation is offered for failing to pay the Indebtedness since September 2020. I reject the suggestion that RBC has not been pressing for payment.

111 In short, no credible concrete evidence is provided. I am not satisfied that Sultan is able to pay its debts.

Abuse of process

112 After submitting the application for a bankruptcy order to this Court, RBC continued to pursue enforcement of the Consent Judgment by exercising its rights under the Civil Enforcement Act, RSA 2000, c C–15, including a demand that Sultan complete a Form 14 *Statutory Declaration of Debtor*. Through a Form 14, Sultan is required to list its corporate assets, liabilities, and transfers of property. The disclosure required through a Form 14 is like the information provided through a Statement of Affairs provided by a debtor in a bankruptcy proceeding.

113 Sultan's corporate representative was also compelled to attend a questioning in aid of enforcement a few days before this application was heard.

114 Sultan contends that the dual proceedings are abusive, causing increased expense and inconvenience, and invites the Court to refuse a bankruptcy order on that basis.

115 Section 43(7) of the BIA authorizes the Court to dismiss an application if it concludes "that for other sufficient cause no order ought to be made." No authority is cited by Sultan for the proposition that pursuing civil enforcement of a judgment against a debtor precludes a bankruptcy order.

116 A creditor seeking a bankruptcy order need not exhaust all other remedies available before resorting to an application under the *BIA*: *Re Cappe* at para 18; *Re Mastronardi* at para 28.

117 In Bankruptcy of S.C.M. Farms Limited, 2007 MBQB 268 at para 36 — 40, Justice Menzies held that where a judgment creditor commenced other processes to realize on its judgment, the creditor was not prevented from pursuing bankruptcy relief. The creditor was entitled to avail itself of all legal remedies. See also: Chopra (Syndic de), 2015 QCCS 5169 at para 21.

118 Pursuing a bankruptcy order to gain remedies not available outside of bankruptcy, including a thorough investigation of the debtor's affairs by a trustee, is not an abuse of process or an improper purpose: *Re Four Twenty-Seven Investments Limited et al*, [1985] OJ No 1733, 55 CBR (NS) 183 (Ont SC) at para 18 of OJ.

119 I agree with the approach adopted in these authorities. Until a bankruptcy order is granted, the applicant does not know whether any duplication might arise. The appointment of a trustee might provide access to additional information and remedies facilitating the collection of the outstanding liabilities. Priorities between creditors might be reversed.

120 If a bankruptcy order is granted and the judgment creditor persists with a collateral civil enforcement process, issues might then arise about the duplication of effort and unnecessary expense, which could potentially be addressed in the other

action through a costs award, a stay, or the voluntary suspension of the other proceeding. However, no such duplication has yet arisen; the concern is premature.

121 No evidence of an improper motive for the bankruptcy application has been tendered. No abuse of process has been established. I decline to exercise my discretion to dismiss the application on this ground.

Conclusion

122 I conclude that Sultan is bankrupt. The application for a bankruptcy order is granted.

123 BDO Canada Limited is hereby appointed as trustee, without security.

124 RBC proposes that costs of and incidental to this application and the bankruptcy order be paid to RBC on a full indemnity, solicitor and his own client basis, out of the assets of the estate of Sultan. No contrary submissions were provided by Sultan.

125 If the parties cannot settle the costs within 10 days, they may contact me for a brief oral hearing to resolve the issue.

Application granted.

Tab 9

2023 ABCA 110
Alberta Court of Appeal

Sultan Management Group (Re)

2023 CarswellAlta 829, 2023 ABCA 110, [2023] 9 W.W.R. 481, [2023] A.W.L.D. 3386, 2023 A.C.W.S. 1373

Royal Bank of Canada (Respondent / Applicant) and Sultan Management Group Inc. (Appellant / Respondent)

Jack Watson, Michelle Crighton, Bernette Ho JJ.A.

Heard: March 29, 2023
Judgment: March 31, 2023
Docket: Edmonton Appeal 2203-0085AC, 2203-0104AC

Proceedings: affirming *Sultan Management Group (Re)* (2022), 2022 ABQB 262, [2022] 11 W.W.R. 3482022 CarswellAlta 972, K.S. Feth J. (Alta. Q.B.)

Counsel: R.J.D. Gilborn, for Appellant
D. Shouldice, P. Saini, K. Rylands (no appearance), for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.c Act of bankruptcy within 6 months prior to petition
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy within 6 months prior to petition
Debtor borrowed substantial funds from creditor pursuant to loan and credit card agreements (Loan Agreements) — Events of default occurred under Loan Agreements, creditor issued statement of claim against debtor, parties entered into forbearance agreement and debtor consented to judgment against it for full amount owing in event of expiry or termination of forbearance period — Default occurred under forbearance agreement, debtor did not cure default and no further payment had been made to creditor — Debtor owed creditor $868,672.30 plus fees, costs, expenses and legal fees — Creditor's application for bankruptcy order against debtor under s. 43(1) of Bankruptcy and Insolvency Act was granted — Trial judge found affidavit of verification did not need to be sworn on or after day application was signed by applying creditor — Trial judge found that as valuation offered by creditor was not absurdly low or sham, no independent evidence was required to sustain valuation — Trial judge found creditor satisfied its evidentiary obligation to verify at least $1,000 of debt remaining after exercising its security — Trial judge found creditor demonstrated that debtor was not meeting its liabilities generally as they became due, given arrears it owed to Canada Revenue Agency and indebtedness it owed to creditor — Trial judge found debtor had not provided credible concrete evidence that it was able to pay its debts — Trial judge found no evidence of improper motive for bankruptcy application was provided and no abuse of process was established Act — Debtor appealed — Appeal dismissed — Arguments regarding timeliness of application were raised for first time on appeal and verged on abuse of process — No error in chambers judge's determination of correct filing date, which was supported by procedural history and evidence, and was owed deference — Even if date of filed application was different, debtor acknowledged that it had failed to meet its liabilities as they became due — Sworn statement that debtor "has not refused to pay" substantial debt was not sufficient to contradict evidence that act of bankruptcy had occurred during relevant time — Debtor provided none of its financial statements, and tax records it relied on

were selective and incomplete — Burden of proof was not reversed — Trial judge did not err in finding special circumstances that justified conclusion there was sufficient evidence of "act of bankruptcy" within meaning of s 42(1)(j) of Act.

Table of Authorities

Cases considered:

ATB Financial v. Coredent Partnership (2020), 2020 ABQB 587, 2020 CarswellAlta 1802, 20 Alta. L.R. (7th) 174 (Alta. Q.B.) — considered

Dow Chemical Canada ULC v. NOVA Chemicals Corporation (2021), 2021 ABCA 153, 2021 CarswellAlta 1153 (Alta. C.A.) — referred to

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9, 20 Alta. L.R. (7th) 23, 14 B.L.R. (6th) 161, 457 D.L.R. (4th) 1 (Alta. C.A.) — referred to

R. v. Heikel (1992), 72 C.C.C. (3d) 481, 125 A.R. 298, 14 W.A.C. 298, 10 C.R.R. (2d) 72, 1992 CarswellAlta 679, 1992 ABCA 142 (Alta. C.A.) — referred to

Ross v. McRoberts (1999), 1999 CarswellAlta 686, (sub nom. *Ross v. Whissell Estate (Bankrupt))* 237 A.R. 344, (sub nom. *Ross v. Whissell Estate (Bankrupt))* 197 W.A.C. 344, 1999 ABCA 227 (Alta. C.A.) — referred to

Susan Riddell Rose, et al. v. PricewaterhouseCoopers Inc., et al. (2021), 2021 CarswellAlta 1651, 2021 CarswellAlta 1652 (S.C.C.) — referred to

Valente, Re (2004), 2004 CarswellOnt 681, (sub nom. *Valente (Bankrupt) v. Courey)* 183 O.A.C. 191, 47 C.B.R. (4th) 317, (sub nom. *Vakebte v. Fancsy Estate)* 70 O.R. (3d) 31 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 42(1) — referred to

s. 42(1)(j) — referred to

s. 43 — referred to

s. 43(1) — referred to

s. 187(9) — referred to

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

s. 8 — referred to

Rules considered:

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

R. 13.14(1) — referred to

R. 13.14(1)(a) — referred to

R. 13.14(1)(c) — referred to

R. 13.15 — referred to

APPEAL by debtor from judgment reported at *Sultan Management Group (Re)* (2022), 2022 ABQB 262, 2022 CarswellAlta 972, [2022] 11 W.W.R. 348 (Alta. Q.B.), granting creditor's application for assignment in bankruptcy.

***Per curiam*:**

1 Sultan Management Group Inc ("Sultan") appeals a chambers decision granting a bankruptcy order after Sultan failed to make payments on its loan and credit card debts to the respondent, Royal Bank of Canada ("RBC"): 2022 ABQB 262 (the "Decision"). In a related appeal, Sultan seeks to have the full indemnity costs awarded against it set aside should the bankruptcy order be overturned.

2 We have reviewed the Decision, the arguments of the parties and the record, and find there is no merit to any of the grounds of appeal.

3 Both parties agree with the chambers judge's background facts set out in paragraphs 4-15 of the Decision as follows:

> Sultan borrowed substantial funds from RBC pursuant to loan and credit card agreements (Loan Agreements). Under two security agreements, including a general security agreement, Sultan granted to RBC a security interest in all of Sultan's present and after-acquired personal property.
>
> Events of default occurred under the Loan Agreements, and in July 2019, RBC demanded immediate payment in full of the total amount outstanding. Repayment was not made.
>
> On September 6, 2019, RBC filed a Statement of Claim against Sultan seeking judgment for the amount outstanding.
>
> On December 9, 2019, Sultan and RBC entered into a forbearance agreement acknowledging $806,197.44 was owing as of November 13, 2019. A repayment schedule was accepted by Sultan. RBC agreed not to take any steps to enforce its rights and remedies against Sultan and its guarantor, Sultan Zamman, until the earlier of October 15, 2020 or a termination event as defined in the agreement. Sultan consented to a judgment (Consent Judgment) against it for the full amount owing in the event of the expiry or termination of the forbearance period.
>
> The forbearance agreement was amended in May and September 2020, following payment defaults by Sultan. The amendments revised the payment schedule and extended the forbearance period.
>
> By letter dated November 2, 2020, RBC informed Sultan that another default had occurred under the forbearance agreement because Sultan failed to make a payment of $55,000 on or before October 27, 2020.
>
> Sultan did not cure the default. No further payment has been made to RBC since September 28, 2020.
>
> From early 2021 until June 2021, the parties were engaged in settlement discussions.
>
> As of July 2021, Sultan owed $868,672.30 to RBC, plus an additional $35,678.93 in fees, costs, expenses, and legal fees (the Indebtedness).
>
> RBC submitted a signed application for a bankruptcy order to this Court on July 8, 2021, asserting that Sultan had ceased to meet its liabilities generally as they became due.
>
> The Consent Judgment contemplated under the forbearance agreement was filed in this Court by RBC on July 16, 2021, but was not immediately served on Sultan. RBC had given notice to Sultan on June 9 of its intention to file the Consent Judgment, but service was not effected until September 23, 2021.

4 There were "administrative complications" with the filing RBC's bankruptcy application during the pandemic and it was not formally stamped filed by the Court of Queen's Bench until September 7, 2021: Decision at para 21. The stamp date was contrary to an email received from Queen's Bench by RBC's counsel on July 8, 2021, which confirmed receipt of the application, advised it would be processed in due order, and stated: "If accepted, it will be filed with the date that it was received, regardless of processing times".

5 Noting that Sultan did not take issue with the "institutional delay after July 8, 2021", the chambers judge determined the date the application was filed was July 8, 2021, for the purpose of assessing whether there was an act of bankruptcy during the six-month period set out in s 43(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B–3 (“BIA”).

Bankruptcy application

> 43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

Acts of bankruptcy are defined out in s 42(1) of the *BIA*, and include the following:

> **Acts of bankruptcy**
>
> **42 (1)** A debtor commits an act of bankruptcy in each of the following cases:
>
> . . .
>
> **(j)** if he ceases to meet his liabilities generally as they become due.

6 On appeal, Sultan argues that the chambers judge erred in finding the application was filed on July 8, 2021, instead of its stamp date of September 7, 2021, and that the trial judge misunderstood its concession on institutional delay. This argument is difficult to reconcile with paragraph 12 of Sultan's written chambers materials which provided as follows:

> The gap in issue is an approximately 2.5 month delay between the swearing of the Affidavit (April 26) and the date of the Application for Bankruptcy Order was signed by the Applicant's counsel (July 8). The Respondent takes no issue with the delay after that (it being an institutional issue). However, the original gap is nonetheless fatal to this Application. [Emphasis added]

7 At the hearing, the chambers judge further confirmed with both counsel that the "only outstanding issue is the timing of the supporting affidavit", whether there was an act of bankruptcy and any abuse of process. This court has said, albeit in a different context, that " . . . A presiding justice is entitled to treat a statement by counsel as having that meaning which a reasonable person would infer from the statement. The presiding justice is not there to cross-examine counsel concerning the subtleties or nuances of a statement to the court in order to eliminate the possibility that some hidden meaning lurks in the background*:* R v Heikel,1992 ABCA 142, 72 C.C.C. (3d) 481, at para 24.

8 At all times, it was clear that the appellant's objection about timing was that the "Application for Bankruptcy Order was filed months after the Affidavit was sworn and there was no explanation with the delay". We agree with the respondent that any issue with the application being filed on July 8, 2021, rather than September 7, 2021, is being raised for the first time on appeal. Leaving aside that this is not an issue that should be dealt with in the absence of a hearing record raising this argument (see generally Ross v McRoberts, 1999 ABCA 227 at para 18, 237 AR 344), there was no "palpable misunderstanding" by the chambers judge as to the appellant's concession on institutional delay.

9 Further, this late argument skirts the border of abuse of process, which is another reason to refuse to permit it. As said in Dow Chemical Canada ULC v NOVA Chemicals Corporation, 2021 ABCA 153 at para 69, [2021] AJ No 616 (QL) (citing earlier authority): an "appellate court is not "a never-closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal". A party is reasonably expected to exhaust their argument potentials at first instance, a point signaled by s 8 of the Judicature Act, RSA 2000, c J–8.

10 In this instance and against this record, the proposed new argument would not just be moving the timeline to supplement the argument against the statutory interpretation offered by the chambers judge about when the affidavit of verification was to be filed under s 43 of the BIA. It would also putatively slide the 6-month limit and seek to enhance the appellant's argument about whether there was an "act of bankruptcy" in relation to the appellant's dealings with the Canada Revenue Agency ("CRA") in that period. This Court cannot entertain such manoeuvres.

11 Sultan had maintained that it was the delay between the affidavit being sworn and the signing and filing of RBC's application that was "fatal", that is April 26 to July 8, 2021. Its primary arguments were that the affidavit should have been sworn *after* rather than before the application was signed and filed, and that the affidavit did not establish a proper foundation for the required estimation of Sultan's assets.

12 In our view, there was no error in the chambers judge's determination that the correct filing date was July 8, 2021, which was supported by the procedural history and evidence before him and is owed deference. Sultan relies on R13.15 of the Alberta Rules of Court, Alta Reg 124/2010 ("Rules"), which provides that "(a) document is filed when the court clerk of the judicial centre acknowledges on the document that the document is filed in the action" to argue September 7, 2021, is the correct filing date. However, RBC's bankruptcy application was a commencement document subject to R13.14(1) which provides:

> **13.14(1)** When the court clerk is presented with a commencement document for filing, the court clerk must
>
> (a) endorse on the document an action number assigned to the action by the court clerk, and the date that the document is filed,
>
> (b) ensure that the document to be filed has endorsed on it the name of the judicial centre where the document is filed, and
>
> (c) stamp the document as filed. [Emphasis added]

13 This did not occur on July 8, 2021, when RBC's application was presented due to a processing backlog in Queen's Bench at that time. In response to this backlog, the July 8, 2021 email from the court to RBC provided that the application, if accepted, would be filed as of the date it was received; it further provided that Masters Chambers matters such as this one, were backlogged to June 4, 2021. Despite RBC's diligent efforts to follow up with the court over the next two months, it took until September 7, 2021 for the court to complete the filing process, stamp the application, and provide a bankruptcy number - all things that otherwise "must" be done upon the court being presented with a commencement document: R13.14(1).

14 When considered in this context, the determination that the filing date was July 8, 2021 was neither "unprecedented [or] without authority" as argued by Sultan. Further, the chambers judge's proper reliance on s 187(9) of the BIA as curing any technical defect, if any, related to the sequence in time of the supporting affidavit and the application itself, applies equally to the institutional delay relating to the processing backlog and the actual filing date.

> **Formal defect not to invalidate proceedings**
>
> **(9)** No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

There was no "substantial injustice" to Sultan and the facts and dates relied upon by RBC with respect to the act of bankruptcy and the estimated value of Sultan's assets in the application, remain the same and were within six months of either July 8 or September 7, 2021, thus satisfying ss 42(1)(j) and 43(1) of the BIA.

15 In particular, the RBC's supporting affidavit provided that "[a]s of the date of this [ ] affidavit [April 26, 2021], Sultan had paid none of [its] Indebtedness" to RBC, calculated at March 2, 2021 to be in the amount of $833,705.58. As between either a July 8 or September 7, 2021 filing date, the chambers judge's decision that RBC had proven Sultan committed an act of bankruptcy during the preceding six month period, namely that it had "cease[d] to meet [its] liabilities generally as they be[came] due", is owed deference.

16 Even if the date of the filed application was September 7, 2021 on its best evidence, Sultan acknowledged in its affidavit dated November 22, 2021 that it had failed to meet its liabilities to RBC as they became due:

> 14. *Other than the debt to RBC, which Sultan has not refused to pay, Sultan continues to meet its liabilities as they become due* . . . Sultan remains a solvent corporation and denies committing any acts of bankruptcy in the last six months, as alleged, or at all.
>
> 15. *The only failure to meet any liability is to a sole creditor, the RBC*, which did not make Sultan aware of the judgment against it being entered until after serving the Application for Bankruptcy Order. No demands pursuant to that Judgment were ever received prior to the Application and Sultan was not even aware the Judgment was entered.

17 In the context of this admission, a sworn statement that Sultan "has not refused to pay" its substantial debt, is not sufficient to contradict RBC's evidence that an act of bankruptcy had occurred during the relevant time. Further, as the chambers judge found, Sultan provided none of its financial statements ("indebtedness, revenues, profits, assets and liabilities or cash flow") and the CRA records it relied on were "selective and incomplete. No meaningful explanation [was] offered for failing to pay the Indebtedness since September 2020": Decision at para 110. We agree that Sultan's statement that it was solvent was nothing more than an unsubstantiated statement, and the chambers judge did not err in determining that a debt of more than $1,000 was owed and RBC had been pressing for payment since Sultan stopped meeting its liabilities.

18 While Sultan states that relevant CRA records were not properly considered after the application's filing date was found to be July 8, 2021, in our view those records offer no assistance. The listed amounts in Sultan's CRA records relate to *arrears* interest and payments, not payments being made on liabilities as they became due. The chambers judge otherwise carefully reviewed the evidence related to Sultan's liabilities, fairly finding that various debts and judgments were not of assistance to RBC, while others remained owing, including those owing to RBC since late September 2020, and CRA debts where Sultan had made some, but not all, back payments.

19 Sultan also argues the chambers judge reversed the onus of proof and required Sultan to prove that RBC's estimated value was unreasonable, a sham or absurdly low. We do not agree. Regardless of who bears the onus, the question is one of mixed fact and law and the record amply supports the chambers judge's decision to accept the estimate in the supporting affidavit as being reasonable.

20 As the chambers judge found, while Sultan's cross-examination of the affiant confirmed that the valuation analysis had not been provided to Sultan, the estimation therein was not otherwise challenged, through Sultan's responding affidavit or otherwise. Nor was the estimate of $131,030 so low as to require independent evidence before it could be accepted as satisfying RBC's obligation to prove that a debt of at least $1000 would remain even if it exercised its security: Decision at paras 55-56.

Special Circumstances

21 Finally, Sultan argues the chambers judge erred in finding that special circumstances existed in the circumstances of this case. The chambers judge said at para 95:

> [95] As an alternative argument, RBC contends that even if the Indebtedness had been the only liability Sultan failed to meet during the six months before the application, an act of bankruptcy under s 42(1)(j) still would have been established. I agree.

22 The chambers judge noted Re Valente Bankruptcy (2004), 47 CBR (4th) 317, [2004] OJ No 635 (QL) at para 8 which reads:

> It is now well-settled in the case law that the failure to pay a single creditor can constitute an act of bankruptcy under s. 42(1)(j) when there are special circumstances, which have been recognized in three categories: (a) where repeated demands for payment have been made within the six-month period; (b) where the debt is significantly large and there is fraud or suspicious circumstances in the way the debtor has handled its assets which require that the processes of the B.I.A. be set in motion; and (c) prior to the filing of the petition, the debtor has admitted its inability to pay creditors generally without identifying the creditors: ***Holmes, Re*** (1975), 9 O.R. (2d) 240(Ont. Bktcy.); see also Houlden and Morawetz, The 2004 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2003) at 147 D§10(3).

23 The chambers judge went on to say that the categories in *Valente* were not exhaustive - in that respect concurring with the view expressed in ATB Financial v Coredent Partnership (Re Coredent #2, 2020 ABQB 587 at paras 109–123, [2020] AJ No 1048 (QL). The chambers judge stated, at para 100:

> [100] I concur that an assessment of special circumstances is contextual and must take into account the purpose of the legislation. Special circumstances are not confined to three closed categories.

24 The chambers judge, at para 101 of his reasons, was skeptical of Sultan's actions in making a deal with the CRA and paying out Lafarge Canada Inc in full, and meeting "its other liabilities during the six months before the application at RBC's expense". At para 102, he stated that he interpreted Sultan's actions as bringing its conduct within the second and third categories of *Valente* or, alternatively, the "more contextual and purposive approach to special circumstances endorsed here".

25 Sultan argues this amounted to a *finding* of preferential treatment contrary to law and was "tainted by obvious errors". This argument is without merit.

26 First, when observing that the investigative processes under the *BIA* were "properly engaged to investigate and address the preferential treatment", the chambers judge did not make a finding of "preference" in the legal sense. Rather, he recognized there was an apparent choice to prefer the payment of debts as between creditors, and the *BIA* was not, therefore, improperly invoked. There is no palpable and overriding error in that as an inference of fact. Second, it is not an "obvious" error that the chambers judge did not condone the payment to CRA as non-preferential treatment. That inference is inescapable in circumstances where the debtor seeks to arrange priority treatment to CRA before *BIA* proceedings are brought.

27 In the end, we are satisfied the chambers judge did not err in finding special circumstances that justified a conclusion there was sufficient evidence of an "act of bankruptcy" within the meaning of s 42(1)(j) of the BIA. We need not go on to make a conclusive finding as to what the chambers judge characterized as a "more contextual and purposive approach to special circumstances endorsed here" because he also specifically found the conduct qualified under the second category in *Valente.* We observe only that the language of "special circumstances" is not unfamiliar to the law, and it generally does not require evidence of more than a basis to inquire further. Similarly, a bankruptcy trustee is entitled to inquire into a debtor's liabilities and rights and is not obliged to the debtor to reach a final opinion about them beforehand: compare PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16 at paras 202–225, 457 DLR (4th) 1, leave denied [2021] SCCA No 79 (QL).

28 As Sultan has failed to prove that the chambers judge committed any error, the appeal of the bankruptcy order is dismissed.

29 As a result, Sultan's appeal of the costs award is also dismissed.

Appeal dismissed.

Tab 10

2020 ABQB 587
Alberta Court of Queen's Bench

ATB Financial v. Coredent Partnership

2020 CarswellAlta 1802, 2020 ABQB 587, [2021] A.W.L.D. 572, [2021] A.W.L.D. 573, [2021] A.W.L.D. 575, [2021] A.W.L.D. 576, 20 Alta. L.R. (7th) 174, 327 A.C.W.S. (3d) 322

ATB Financial (Applicant) and Coredent Partnership, A.J. Seehra Professional Corporation, A.S. Lotey Professional Corporation, Amarjit Seehra Professional Corporation, Amandeep Lotey, Amarjit Singh Seehra (Respondents)

M.J. Lema J.

Heard: September 23, 2020
Judgment: October 6, 2020
Docket: Edmonton 1803-23827

Counsel: Ryan Zahara, Molly McIntosh, for Applicant
Rodger C Gibbs, for Respondents
Spencer Norris, for Interim Receiver

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.b Act of bankruptcy
III.1.b.i Ceasing to meet liabilities generally
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.6 Practice and procedure on petition
III.6.h Miscellaneous
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.2 Choses in action
VIII.2.d Insurance policies of bankrupt
VIII.2.d.iii Life insurance
VIII.2.d.iii.C Miscellaneous
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.d Dealings with security after bankruptcy
X.1.d.i By secured creditor
X.1.d.i.B Valuation of security

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Valuation of security

Dental partnership, which was composed of three professional corporations, owed creditor millions of dollars — All of bankruptcy-order targets (principals of two of corporations and three corporations), supplied guarantees of partnership's debts to

creditor — Creditor brought application that sought bankruptcy orders against bankruptcy-order targets — Application granted — Creditor's estimates of value of its security against each target were reasonable and, in any case, plainly meet low bar of "not absurd or a sham" — Valuation requirement came from s. 43(2) of Bankruptcy and Insolvency Act, which required secured-creditor applicant to either abandon or value its security, in latter case showing unsecured portion of its claim, and as creditor did not abandon its security, second branch applied here — Creditor denied holding any additional security that counted for s. 43(2), and it admitted that underlying indebtedness here was that of corporate partnership, which also granted creditor general security agreement — Creditor also acknowledged that debts of each of guarantors and of principal 1 stemmed from their liability as guarantors of debt, but creditor was not seeking bankruptcy order against partnership, so general security agreement from it did not enter into s. 43(2) equation Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 43(2).

Bankruptcy and insolvency --- Property of bankrupt — Choses in action — Insurance policies of bankrupt — Life insurance — Miscellaneous

Dental partnership, which was composed of three professional corporations, owed creditor millions of dollars — All of bankruptcy-order targets (principals of two of corporations and three corporations), supplied guarantees of partnership's debts to creditor — Creditor brought application that sought bankruptcy orders against bankruptcy-order targets — Application granted — Collective security argument was rejected, and as was targets' approach to assignments of life insurance obtained by creditor — As part of its overall security package for loans to partnership, creditor obtained, or at least asked for, assignments of certain life insurance policies held by two principals — Creditor provided sufficient evidence to prove that, at least according to insurer-provided summaries, all three policies were term policies, with no cash surrender value and, in any case, based on premiums to date, would have no material cash surrender value, at least nowhere remotely close to asserted face values — In absence of contrary evidence, term life-insurance policies were typically treated as having no particular monetized value — Targets did not provide any actuarial, or other, evidence of value of term insurance policies.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Ceasing to meet liabilities generally

Dental partnership, which was composed of three professional corporations, owed creditor millions of dollars — All of bankruptcy-order targets (principals of two of corporations and three corporations), supplied guarantees of partnership's debts to creditor — Creditor brought application that sought bankruptcy orders against bankruptcy-order targets — Application granted — Creditor pointed to multiple unpaid debts of principal 1 as of bankruptcy-application filing, and to apparent debts reflected in courthouse action searches, accordingly, it was found that creditor cleared "general ceasing" hurdle for principal 1 — It was found that reference to plural "liabilities" in "ceases to meet his liabilities" signalled that more than one unpaid debt was required, leaving aside single-creditor scenarios — Generally speaking, that would be sufficient to flip onus to debtor, to show that, despite "liabilities" going unpaid, payment failure did not represent "general" ceasing to pay liabilities — Especially with debtor better positioned to know score with its liabilities overall, and particularly in light of extensive case law on "single creditor" petitions or bankruptcy applications i.e., emphasizing distinction between one and more than one unpaid debts — Weighing creditor's substantial claim against apparently available assets (and tallying latter cumulatively), and with debtors providing nothing on that score, it was found that each of corporate guarantors had "ceased to meet its liabilities generally" as of November 2019, which was creditor's application date — For principal 1, creditor could rely on demands it made within six-month period, as well as "continuing demand" feature of judgment debt and for corporate guarantors, creditor can rely on "within period" demand — By these demands, combined with no payments in response, creditor satisfied "within six months" element.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Miscellaneous

Dental partnership, which was composed of three professional corporations, owed creditor millions of dollars — All of bankruptcy-order targets (principals of two of corporations and three corporations), supplied guarantees of partnership's debts to creditor — Creditor brought application that sought bankruptcy orders against bankruptcy-order targets — Application granted — Targets identified no compelling reason why bankruptcy orders for which creditor had satisfied statutory criteria should not be granted here — Targets asserted, but did not show, that interim receiver (IR) necessarily had same investigative and other powers as trustee in bankruptcy or that it could be given such powers — On other hand, IR, who should know, submitted that bankruptcy could be useful here — As for matters to be investigated, creditor pointed to various matters outlined in IR's reports, including those at paragraph 6.1 and difficulties encountered as detailed in paragraphs 6.2 and 6.3 of IR's eleventh report.

Table of Authorities

Cases considered by *M.J. Lema J.*:

ATB Financial v. Coredent Partnership (2020), 2020 ABQB 507, 2020 CarswellAlta 1555 (Alta. Q.B.) — referred to
Agrifoods International Cooperative Ltd. v. Welwood (1996), 42 C.B.R. (3d) 273, (sub nom. *Welwood (Bankrupt), Re)* 111 Man. R. (2d) 181, 1996 CarswellMan 329 (Man. Q.B.) — referred to
Andrews v. Andrews (1982), 26 R.F.L. (2d) 181, 1982 CarswellPEI 14 (P.E.I. S.C.) — considered
Asselford Martin Shopping Centers Ltd. v. Ross (1994), 28 C.B.R. (3d) 130, 1994 CarswellOnt 304 (Ont. Bktcy.) — considered
Bankruptcy of Stenan Construction Co., Re (1977), 1977 CarswellOnt 2747, 25 C.B.R. (N.S.) 7 (Ont. S.C.J.) — considered
Banque nationale de Paris (Canada) v. Opiola (1998), 1998 CarswellAlta 1076, (sub nom. *Banque Nationale de Paris (Canada) v. Opiola (Bankrupt))* 231 A.R. 398, 6 C.B.R. (4th) 184, 1998 ABQB 965 (Alta. Q.B.) — considered
Banque nationale de Paris (Canada) v. Opiola (2001), 2001 ABCA 25, 2001 CarswellAlta 71, 22 C.B.R. (4th) 47, 1 C.P.C. (5th) 228, 277 A.R. 80, 242 W.A.C. 80, [2001] 6 W.W.R. 95, 89 Alta. L.R. (3d) 6 (Alta. C.A.) — referred to
Bombardier Credit Ltd. v. Find (1998), 1998 CarswellOnt 685, 107 O.A.C. 127, 37 O.R. (3d) 641, 2 C.B.R. (4th) 1 (Ont. C.A.) — considered
Bombardier Credit Ltd. v. Find (1998), 231 N.R. 400 (note), 118 O.A.C. 199 (note), [1998] 2 S.C.R. vii (note) (S.C.C.) — referred to
Caisse populaire Desjardins Saint-Jean Baptiste de LaSalle c. 164375 Canada inc. (1999), [1999] R.R.A. 482, 1999 CarswellQue 1012 (C.A. Que.) — considered
Cappe, Re (1993), 18 C.B.R. (3d) 229, 1993 CarswellOnt 198 (Ont. Gen. Div. [Commercial List]) — considered
Cappe, Re (1994), 1994 CarswellOnt 2604 (Ont. C.A.) — referred to
Chartrand, Re (2009), 2009 CarswellOnt 8356, 69 C.B.R. (5th) 137 (Ont. S.C.J.) — referred to
Chartrand, Re (2010), 2010 ONCA 456, 2010 CarswellOnt 4044, 69 C.B.R. (5th) 143, (sub nom. *Chartrand (Bankrupt), Re)* 267 O.A.C. 91 (Ont. C.A.) — considered
Chauvco Resources International Ltd., Re (1999), 1999 CarswellAlta 61, (sub nom. *Chauvco Resources International Ltd. (Bankrupt), Re)* 239 A.R. 116, 9 C.B.R. (4th) 235, 1999 ABQB 56 (Alta. Q.B.) — followed
Chung, Re (2004), 2004 BCSC 1669, 2004 CarswellBC 3021, 7 C.B.R. (5th) 66 (B.C. S.C.) — considered
Corporate Cars Quebec Ltd. Partnership / Société en commandite Corporate Cars Quebec, Re (2008), 2008 CarswellQue 13188, 2008 QCCS 5178 (C.S. Que.) — considered
Diena, Re (2012), 2012 ONSC 5849, 2012 CarswellOnt 12936, 97 C.B.R. (5th) 312 (Ont. S.C.J. [Commercial List]) — considered
Ewanciw v. Lastiwka (2002), 2002 ABQB 605, 2002 CarswellAlta 2457 (Alta. Q.B.) — considered
Federal Business Development Bank v. Poznekoff (1982), [1983] 3 W.W.R. 1, 41 B.C.L.R. 273, 143 D.L.R. (3d) 370, 1982 CarswellBC 337 (B.C. C.A.) — considered
Forjay Management Ltd. v. 0981478 B.C. Ltd. (2018), 2018 BCSC 1409, 2018 CarswellBC 2216, 63 C.B.R. (6th) 86, 16 B.C.L.R. (6th) 128, [2019] 3 W.W.R. 753 (B.C. S.C.) — referred to
Fred Walls & Son Holdings Ltd., Re (1999), 1999 CarswellBC 1873, 13 C.B.R. (4th) 60, 16 B.C.T.C. 375 (B.C. S.C.) — considered
Fundy Supplies Ltd., Re (1971), 3 N.B.R. (2d) 723, 20 D.L.R. (3d) 615, 1971 CarswellNB 47 (N.B. C.A.) — considered
Gifford v. Gifford (1985), 44 R.F.L. (2d) 375, 1985 CarswellBC 513 (B.C. S.C.) — considered
Giusto, Re (1994), 25 C.B.R. (3d) 227, 1994 CarswellOnt 276 (Ont. Bktcy.) — considered
Harvey Estate v. 5505 Yukon Ltd. (2012), 2012 YKSC 69, 2012 CarswellYukon 129, 16 C.C.L.I. (5th) 292 (Y.T. S.C.) — considered
Henitiuk, Re (1984), 54 C.B.R. (N.S.) 203, 58 A.R. 394, 1984 CarswellAlta 264 (Alta. Q.B.) — considered
Home Hardware Stores Ltd. v. R Home Supply Centre Ltd. (2015), 2015 BCCA 500, 2015 CarswellBC 3466, 380 B.C.A.C. 91, 655 W.A.C. 91, 83 B.C.L.R. (5th) 36 (B.C. C.A.) — referred to
Hurzin v. Great West Life Assurance Co. (1988), 23 B.C.L.R. (2d) 252, 32 C.C.L.I. 107, 13 R.F.L. (3d) 172, 29 E.T.R. 51, 1988 CarswellBC 62 (B.C. S.C.) — considered
Ivany, Re (2012), 2012 ONSC 7058, 2012 CarswellOnt 15879, 97 C.B.R. (5th) 214 (Ont. S.C.J. [Commercial List]) — considered
Joyce, Re (1984), 51 C.B.R. (N.S.) 152, 1984 CarswellOnt 143 (Ont. Bktcy.) — considered

King Petroleum Ltd., Re (1973), 2 O.R. (2d) 192, 19 C.B.R. (N.S.) 16, 42 D.L.R. (3d) 332, 1973 CarswellOnt 90 (Ont. S.C.) — considered
Koska, Re (2000), 2000 CarswellAlta 1593, 22 C.B.R. (4th) 85, *(*sub nom. *Koska (Bankrupt), Re)* 285 A.R. 188, 2000 ABQB 953 (Alta. Q.B.) — considered
Krczizanowski v. Fieseler (2018), 2018 BCSC 1545, 2018 CarswellBC 2427 (B.C. S.C.) — considered
Kucera, Re (2014), 2014 BCSC 394, 2014 CarswellBC 627 (B.C. S.C.) — referred to
LaHave Equipment Ltd., Re (2007), 2007 NSSC 283, 2007 CarswellNS 423, 36 C.B.R. (5th) 75, *(*sub nom. *LaHave Equipment Ltd. (Bankrupt), Re)* 258 N.S.R. (2d) 238, *(*sub nom. *LaHave Equipment Ltd. (Bankrupt), Re)* 824 A.P.R. 238 (N.S. S.C.) — referred to
Lai, Re (2005), 2005 CarswellOnt 1998, 75 O.R. (3d) 451, 12 C.B.R. (5th) 245 (Ont. S.C.J.) — referred to
Lee, Re (1998), 1998 CarswellBC 1925, 5 C.B.R. (4th) 202 (B.C. S.C.) — referred to
Leppard v. Leppard (1991), 1991 CarswellBC 1998 (B.C. S.C.) — considered
Malmstrom v. Platt (2001), 2001 CarswellOnt 830, 24 C.B.R. (4th) 70, 198 D.L.R. (4th) 285, *(*sub nom. *Platt (Bankrupt) v. Malmstrom)* 142 O.A.C. 332, *(*sub nom. *Platt v. Malmstrom)* 53 O.R. (3d) 502 (Ont. C.A.) — considered
Mastronardi, Re (2000), 2000 CarswellOnt 4792, 21 C.B.R. (4th) 107, 195 D.L.R. (4th) 631, *(*sub nom. *Mastronardi (Bankrupt), Re)* 140 O.A.C. 392 (Ont. C.A.) — considered
Mitchicko Ltd., Re (1991), 5 C.B.R. (3d) 280, 92 Nfld. & P.E.I.R. 240, 287 A.P.R. 240, 1991 CarswellNfld 22 (Nfld. T.D.) — considered
Okoakih, Re (2013), 2013 ONSC 7492, 2013 CarswellOnt 17248, 7 C.B.R. (6th) 270 (Ont. S.C.J.) — considered
Olympia & York Developments Ltd., Re (1997), 45 C.B.R. (3d) 85, 143 D.L.R. (4th) 536, 1997 CarswellOnt 657, 27 O.T.C. 223 (Ont. Bktcy.) — considered
Omni-Stone Corp., Re (1991), 4 O.R. (3d) 636, 1991 CarswellOnt 698 (Ont. Bktcy.) — considered
Paterson v. Remedios (1999), 1999 CarswellSask 521, [1999] 11 W.W.R. 442, 1999 SKQB 6, 184 Sask. R. 287, 29 E.T.R. (2d) 279 (Sask. Q.B.) — referred to
RCL Operators Ltd., Re (1993), 136 N.B.R. (2d) 81, *(*sub nom. *Guarantee Co. of North America v. RCL Operators Ltd.)* 347 A.P.R. 81, 1993 CarswellNB 439 (N.B. Q.B.) — referred to
RCL Operators Ltd., Re (1994), 153 N.B.R. (2d) 93, *(*sub nom. *RCL Operators Ltd. (Bankrupt), Re)* 392 A.P.R. 93, 1994 CarswellNB 364 (N.B. C.A.) — referred to
Real Time Fibre Supply Ltd., Re (2007), 2007 BCSC 371, 2007 CarswellBC 580, 32 C.B.R. (5th) 57 (B.C. S.C.) — referred to
Servus Credit Union Ltd. v. Smith (2013), 2013 ABQB 415, 2013 CarswellAlta 1875, 567 A.R. 96 (Alta. Q.B.) — considered
Servus Credit Union Ltd. v. Smith (2012), 560 A.R. 83, 2013 ABQB 151, 2012 CarswellAlta 2465, 17 C.B.R. (6th) 21 (Alta. Q.B.) — considered
Smith, Re (1992), 13 C.B.R. (3d) 47, *(*sub nom. *Smith (Bankrupt), Re)* 80 Man. R. (2d) 216, 1992 CarswellMan 22 (Man. Q.B.) — considered
Solid Holdings Ltd., Re (2019), 2019 BCSC 126, 2019 CarswellBC 199 (B.C. S.C.) — considered
Stancroft Trust Ltd. v. Asiamerica Capital Ltd. (1992), 72 B.C.L.R. (2d) 353, *(*sub nom. *Stancroft Trust Ltd. v. Asiamerica Capital Ltd. (No. 2))* 19 B.C.A.C. 5, *(*sub nom. *Stancroft Trust Ltd. v. Asiamerica Capital Ltd. (No. 2))* 34 W.A.C. 5, 15 C.B.R. (3d) 175, 1992 CarswellBC 522 (B.C. C.A.) — considered
Steintron International Electronics Ltd., Re (1986), 7 B.C.L.R. (2d) 267, 62 C.B.R. (N.S.) 78, 1986 CarswellBC 477 (B.C. S.C.) — considered
Winant (Succession), Re (2011), 2011 QCCS 1190, 2011 CarswellQue 2586, 2011 CarswellQue 12282 (C.S. Que.) — considered
207053 Alberta Ltd., Re (1998), 1998 CarswellAlta 860, *(*sub nom. *207053 Alberta Ltd. (Bankrupt), Re)* 233 A.R. 313, 7 C.B.R. (4th) 32, 1998 ABQB 757 (Alta. Q.B.) — considered
307309 B.C. Ltd., Re (1991), 11 C.B.R. (3d) 187, 1991 CarswellBC 446 (B.C. S.C. [In Chambers]) — considered
0757376 B.C. Ltd., Re (2011), 2011 BCSC 1268, 2011 CarswellBC 2500 (B.C. S.C.) — referred to
805401 Ontario Ltd., Re (2001), 2001 CarswellOnt 735, 24 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

805401 Ontario Ltd., Re (2002), 2002 CarswellOnt 3116, 36 C.B.R. (4th) 164 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 42(1)(j) — considered

s. 43(1) — considered

s. 43(1)(a) — considered

s. 43(1)(b) — considered

s. 43(2) — considered

s. 43(7) — considered

s. 187(9) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 2(1) "secured creditor" — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 9(2) — considered

R. 69-76 — referred to

R. 70(1) — considered

R. 72 — considered

APPLICATION by creditor that sought bankruptcy orders against bankruptcy-order targets.

***M.J. Lema J.*:**

A. Introduction

1 A creditor owed approximately $6.6 million by a dental partnership composed of three professional corporations seeks bankruptcy orders against the principal of two of the corporations and also against the three corporations. All of the bankruptcy-order targets supplied guarantees of the partnership's debts to the creditor.

2 The targets resist on various grounds outlined below.

3 I find that bankruptcy orders are warranted against each of the targets.

B. Issues

4 The issues are:

1. whether Alberta Treasury Branches, the bankruptcy-orders applicant and a secured creditor of each of the targets, had to include its ss 43(2) [1] security valuations in its application documents (i.e. not just in the supporting affidavits);

2. whether ATB has "given an estimate of the value of [its] security" against each of the targets within the meaning of ss. 43(2);

3. if so, whether ATB has a net-of-secured-value (i.e. unsecured) claim against each target of at least one thousand dollars;

4. if so, whether each target committed an "act of bankruptcy" within the meaning of ss. 43(1). (ATB pointed to only one such act for each target: "ceas[ing] to meet [its] liabilities generally as they became due" within the meaning of para 42(1)(j));

5. if so, whether that act occurred "within the six months preceding the filing of the [bankruptcy] application" within the meaning of ss 43(1); and

6. assuming these bankruptcy-order requirements are met, whether "other . . . cause" exists to deny bankruptcy orders, per ss 43(7).

C. Analysis

1. Did ATB have to include its security valuations in the application documents?

5 The valuation requirement comes from ss. 43(2), which requires a secured-creditor applicant to either abandon or value its security, in the latter case showing an unsecured portion of its claim. ATB did not abandon its security, so the second branch (reproduced here) applies:

> If the applicant creditor . . . is a secured creditor, they shall in their application . . . give an estimate of the value of [its] security, and . . . they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

6 ATB did not provide an estimate of the value of its security in its original materials, sparking an objection by the targets and, in response, ATB's application to amend its materials to add security-value estimates. In 2020 ABQB 507 (Alta. Q.B.), I ruled that ATB's security-value omission was not fatal and that ATB could amend its materials, which it had done provisionally per an earlier order of ACJ Nielsen.

7 Now on the bankruptcy application, the targets challenge the sufficiency of ATB's amendments.

Impact of ss 43(2) reference to "in their application"

8 The targets first argue that, per these express words in ss 43(2) -- "they shall *in their application* . . . ", ATB must provide the security valuations in the body of its application materials, not only in its supporting affidavits. They did not cite any supporting authority.

9 I reject this argument. "Application" cannot be read so restrictively, particularly in light of Bankruptcy Rule 9(2): "Every document used in the filing of a bankruptcy application . . . must be . . . ." This suggests a "package" approach, with the formal application, the supporting affidavit, and any other supporting documents all embraced by the collective "application."

10 The same "package" sense comes from Rules 69–76, which specifically govern applications for bankruptcy orders. While Rule 70(1) distinguishes between the "application" and the "affidavit", the balance of these Rules use "application" in a collective sense. For example, Rule 70(1) discusses "service of the documents" (meaning the application and the affidavit), with Rule 72 requiring proof of service of the "bankruptcy application." I see no reason why an applicant would only have to prove service of the application itself i.e. not the affidavit as well. As I see it, Rule 72 (among others in this set) uses "application" collectively.

11 As well, the valuation information (like the other bankruptcy-order-supporting information) is required to be "verified by affidavit of the applicant", per ss. 43(3). Requiring the same information to be reproduced in the body of the application would add nothing meaningful.

12 Finally, if "in their application" actually requires such duplication, the targets did not point to substantial, or any, injustice arising from the claimed shortcoming here. It is hard to see how any could arise, with the targets being fully informed valuations-wise via the affidavits. Here I invoke ss. 187(9) BIA:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court . . . is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

2. Did ATB give a sufficient estimate of the value of its security?

13 The targets assert that ATB has undercounted its security and, by definition, failed to value the omitted security. They argue that ATB effectively has only one debt claim, pursued against each of the targets via the guarantees. The consequence, they argue, is that, for the ss 43(2) analysis, ATB's various security, including the guarantees, must be aggregated and counted as security held by each target.

Targets misconstrue Fred Walls decision

14 Here the targets invoked *Fred Walls & Son Holdings Ltd., Re*.[2] However, that case is distinguishable. It featured simultaneous petitioning of the principal debtor and guarantors. Here, ATB is not petitioning the principal-debtor partnership, instead four of the guarantors.

15 Plus, that case does not stand for the proposition (asserted by the targets) that a creditor petitioning a guarantor must be treated as secured if it holds security against the principal debtor or others.

16 *Fred Walls* actually holds that the creditor can proceed between the principal debtor and guarantor as it sees fit, with a duty only to ensure that its petitioned-for claim (in that case against a guarantor) accounts for actual recoveries made by or earmarked for the creditor on other fronts.

17 It does not have to factor security on other fronts or yet-to-be-achieved or potential or even possible recoveries on such fronts: see *Chartrand, Re*[3] ("Payments made to reduce indebtedness . . . would ... be taken into consideration in determining the amount of the unsecured debt. Here, there were none."); *Bankruptcy of Stenan Construction Co., Re*[4] ("... the debenture [against a third-person's property] does not constitute the bank a secured creditor vis-à-vis the bankrupt. It is not security for a debt owing to the bank by the bankrupt ...."); *Cappe, Re*[5] (" ... I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt ... before proceeding with a petition ...." and "I am also unaware of any authority for the proposition that a petitioning unsecured creditor must value other assets which might be realized upon to satisfy the debt owing to him or her before proceeding with a petition ...."); *Asselford Martin Shopping Centers Ltd. v. Ross*[6] (" ... there is no security which the petitioner holds which would augment the estate of [the debtor] [i.e. if given up]. The petitioners' security is with other companies but is not related to the estate of [the debtor].")[7]; and Caisse populaire Desjardins Saint-Jean Baptiste de LaSalle c. 164375 Canada inc. [1999 CarswellQue 1012 (C.A. Que.)][8] (" . . . these third-party guarantees did not constitute security on the property of the debtor, and their existence could not affect the Caisse's entitlement to request a receiving order against its principal debtor.")

18 I find that *Fred Walls* does not cast any shadow on the bankruptcy applications here.

ATB able to pursue each guarantor for full amount of claim

19 Beyond this "somewhat separate silos" approach to the impact of recoveries on other fronts, the fundamental answer to the targets here is the existence of ATB's separate claims against each guarantor, in turn distinct from its claim against the primary-debtor partnership. McGuinness captures the point here:

> More than occasionally, the bankruptcy of the principal will be followed shortly afterwards by the bankruptcy of the surety. Where such a double bankruptcy occurs, the creditor can prove against the estate of each for the full amount owing to him in respect of the guaranteed obligation as of the date of the bankruptcy. The creditor is entitled to receive payment of any dividend payable out of either estate, provided he does not obtain more than complete recovery. [footnotes omitted][9]

20 This analysis extends to the separate claims that exist against co-guarantors, as here. While ATB would be barred from receiving more than 100 cents on the dollar across all fronts, it is entitled to pursue bankruptcy orders for the full amount owed by each guarantor. [10]

Impact of "secured creditor" definition

21 Further, for the purpose of ss 43(2), we count only security granted by a given target, not aggregated security, as asserted by the targets. Here the definition of "secured creditor" is critical:

> "secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor . . . . [balance of definition treated by all as inapplicable]

22 The targets paid little heed to this definition in their brief or in their submissions. ATB, on the other hand, emphasized the definition, using it as a filter to sift some of its security, acknowledged as counting under ss 43(2), from other elements of its security package, which it saw as not counting.

23 ATB is correct: ss 43(2) is built on the foundation of the "secured creditor" definition. Accordingly, the focus is on security "on or against [some or all of] the property *of the debtor*." [emphasis added]

24 ATB acknowledged that each of the corporate guarantors provided a general security agreement (GSA) to secure its guarantee obligations to ATB and that each GSA was properly included as "ss 43(2) security" for each of them.

25 In the case of Dr. Amarjit Singh Seerha (the principal of two of those corporate guarantors), ATB acknowledged holding three land mortgages in his property, securing three distinct debts to ATB, and that such security also counted.

26 ATB denied holding any additional security that counted for ss 43(2).

27 It admitted that the underlying indebtedness here (approximately $6.6 million) is that of the corporate partnership, which also granted ATB a general security agreement. It also acknowledged that the debts of each of the guarantors and of Seerha stem from their liability as guarantors of the $6.6 million debt. (In Seerha's case, his liability is (per his guarantee) limited to $5.4 million.)

28 But ATB is not seeking a bankruptcy order against the partnership, so the GSA from it does not enter into the ss 43(2) equation.

29 As well, in the case of a given target, guarantees given by other parties also do not count, as they do not create any kind of interest "on or against the property of" that target. For instance, focusing on Seerha as a bankruptcy-order target, ATB's guarantees from the three corporate guarantors, and even with those their liabilities anchored by GSAs against their respective assets, do not create an interest on or against Seerha's property. The guarantees are admittedly a potential means of recovery of the core $6.6 million debt, but because they have nothing to do with Seerha's property, they do not count as security for ss 43(2) purposes.

30 The same goes for all four guarantors: the guarantees of the other parties have no bearing on the "security" provided by a given target on its own property.

31 The targets returned often to the theme of the guarantees as "collective security", but they did not explain, nor could they, how other-party guarantees are security, per the "secured creditor" definition, for a given guarantor.

32 Accordingly, I reject their "collective security" argument.

Life insurance policies not security here (or not material security)

33 The same goes for their approach to assignments of life insurance obtained by ATB.

34 As part of its overall security package for loans to the partnership, ATB obtained, or at least asked for, assignments of certain life insurance policies held by the two principals (Seerha and Dr. Amandeep Lotey). [11]

35 On the record here, as it turned out ATB obtained assignments of two policies owned by Lotey. It also obtained an assignment of another policy, held by one of Seerha's professional corporations, on Seerha's life. (While requested, an assignment of any policies held by Seerha himself was not provided to ATB.)

36 The two Lotey policies have, or had, a combined face value of $6 million. The Seerha-related policy has, or had, a face value of $1.2 million.

37 From these facts, the targets mount arguments, first, that ATB holds additional security of $7.2 million and, second, that such security counts under ss 43(2).

38 I reject both arguments.

39 First, the evidence on the record shows that all three policies are, or were, term policies having no cash surrender value (CSV).

40 The "$5 million" Lotey policy, taken out in March 2016, is described (per a Manulife policy summary) as a "family term" policy ("05 Term-65"). Under "Values", the summary states "Amount of Insurance -- $5,000,000", "Gross Cash Value — 0.00", and "Payout Value — 0.00." The monthly premium amount is, or was, $480.01. Assuming that the policy is still in force and that all the monthly payments have been made, the total premiums to date would be approximately $26,000.

41 The "$1 million" Lotey policy, taken out in March 2015, is described (per a Canada Life "Term Insurance Summary") as a "Simply Preferred Term 10" policy. It makes no mention of a cash surrender, or any particular, value, other than "Face Amount -- $1,000,000." The monthly premium amount is, or was, $56.70. Assuming the policy is still in force and that all monthly payments have been made, total premiums to date would be approximately $4,000.

42 The "$1.2 million" Seerha-related policy, taken out in May 2007, is described (per an RBC Life Insurance Company summary) as a "Term 10" policy. It makes no mention of a cash surrender, or any particular, value, other than "Death Benefit -- $1,200,000." The annual premium amount is, or was, $1,728.40. Assuming policy still in force and all payments made, total premiums to date would be approximately $24,000.

43 ATB's evidence is that "[it] is not aware of whether the [Seerha-related policy] remains valid and subsisting, and to the best of ATB's knowledge [that policy] has no cash surrender value."

Case law treatment of term insurance policies (value or not)

44 In the absence of contrary evidence, term life-insurance policies are typically treated as having no particular monetized value. For example, see *Andrews v. Andrews* [12] :

> There are two life insurance policies, having a total face value of $165,000, payable to the plaintiff as beneficiary. Although no evidence was adduced on the point, I am assuming that these are term policies, since the statements filed indicate them as having no cash surrender value. As such, they would not be family assets properly speaking. . . .

45 See the similar approach in *Harvey Estate v. 5505 Yukon Ltd.* [13] :

> I would also note that the insurance in this case was term insurance, not whole life, as such there was not a cash surrender value at the time of death.

46 And in *Krczizanowski v. Fieseler* [14]:

> Policy 6415 is a term insurance policy owned by the respondent with a face value of $250,000 and on which the claimant was shown as the beneficiary by February 8, 2017. However, as a term policy it has no cash value. I do not ascribe it a value in the equalization calculation.

47 And *Hurzin v. Great West Life Assurance Co.* [15]:

> . . . As previously indicated, the benefit is term life insurance, with the deceased having only the right to designate a beneficiary. The deceased did not and could not use the benefit during his lifetime, since it had no cash surrender value, no capability for use as collateral, nor was there a right in the deceased to a return of premiums or any monetary benefits whatsoever during his lifetime. . . .

48 In *Gifford v. Gifford* [16], a pension death benefit, described as being akin to term life insurance, was accorded no value in a division of matrimonial property:

> . . . It appeared to Seaton J.A. in Rutherford v. Rutherford . . . that, where the current payments provide the life insurance and the scheme is comparable to term insurance, the wife is not entitled to include the death benefit in assessing the pension's value. . . . I do not include the value of the death benefit as calculated by the actuary in reaching the pension's value as the scheme here appears comparable to term insurance. [emphasis added]

Valuation of term insurance

49 In theory, term insurance can be valued, but in the absence of actuarial evidence (at minimum), valuation is impossible. Per Leppard v. Leppard [1991 CarswellBC 1998 (B.C. S.C.)] [17]:

> What compensation, if any, is to be given must depend on the value ascribed to the [term insurance] asset which has been disposed of prior to the triggering event. Although it is theoretically possible, with actuarial evidence, to arrive at a present value of a future benefit, payable on the death of another, no such evidence was presented in this case. . . .
>
> If Mrs. Leppard wishes to present evidence for the purpose of ascertaining the present value of the policy at the time the policy was cancelled by Mr. Leppard she may do so, but it appears to me that given the nature of the policy, including the fact that it was not a paid-up policy, that may not be a fruitful exercise.

No actuarial evidence here

50 The targets did not provide any actuarial, or other, evidence of the value of the term insurance policies.

Onus of proof — insurance policies

51 The targets argued that ATB bore the onus of proving the value, or lack of value, of the insurance policies and that it had failed to prove no, or immaterial, value. They argued the same thing in response to ATB's assertion that the Seerha-related policy may no longer be in effect: "ATB could have, and should have, checked with the insurer about that."

52 I disagree: ATB provided sufficient evidence to prove that, at least according to the insurer-provided summaries, all three policies were term policies, with no cash surrender value and, in any case, based on the premiums to date, would have no material CSV, at least nowhere remotely close to the asserted face values.

53 If the targets had or could have had information showing that, despite appearances, the policies, or any of them, actually had a cash surrender, or other material, value, they had the onus of providing that information. Same for whether the policies are still in force.

54 They did not do so, leaving ATB's as the only evidence on value i.e. lack of value.

55 I find that, assuming they are still in force, the policies are all term and, in any case, have no cash surrender or other value.

56 Even if we assume that all three policies had some kind of cash surrender value, the accumulated premiums, aggregating for all three policies, only amount to approximately $55,000. With two of the policies only in place for approximately five years, and even with the other since 2007, even if we factor in a healthy rate of return (e.g. 10 per cent), none of these policies would have a cash surrender value remotely approaching their face value or any value making a material difference here.

57 The targets' arguments about the insurance policies have accordingly fallen flat: with no material value, they make no difference in the security equation. However, I will continue the analysis to show how the targets' second argument here also fails.

Insurance policies largely not counting as "security" under ss 43(2)

58 As noted, the targets argued that the insurance policies count for ss 43(2).

59 They do not, or at least the two Lotey-related policies do not. Even if they had any value, those policies have nothing to do with Seerha's property or that of any of the corporate guarantors. If Lotey were a target here, [18] the assignments of his policies would or could, in theory, count as security in his property (subject to the potential "assignment not security" argument below). But he is not one of the targets.

60 That leaves the Seerha-related policy, which at least (from the targets' perspective) is security in the one corporate guarantor's property. But even this is not certain.

61 The uncertainty comes from the "mortgage, hypothec, pledge, charge or lien" wording in the "secured creditor" definition. Is an assignment of an insurance policy any such beast? Here I contrast the broader definition of "secured creditor" in the *Companies' Creditors Arrangement Act*, the *BIA*'s statutory sibling:

> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, **or any assignment, cession or transfer** of, all of any property of a debtor company as security for indebtedness . . . . [emphasis added]

62 The targets offered no arguments on how an assignment (here, of the Seerha-related policy to ATB) falls within the *BIA*'s narrower definition.

63 I make no finding here, factoring out the Seerha-related policy on the basis that, even if it secures ATB and thus counts for ss 43(2), it has zero, or no material, value.

Sufficiency of ATB's security valuation (Seerha)

64 With the guarantees and the insurance policies properly factored out of the ss 43(2) equation, I turn to whether ATB's valuations of its actual security were sufficient.

65 Starting with Seerha, they were. ATB valued its three mortgages for the three distinct debts advanced on the strength of them; the targets did not dispute those valuations.

66 The balance of ATB's claim against Seerha is not secured by those mortgages or any of them, which the targets also did not dispute.

67 Accordingly, Seerha-wise, ATB has passed the ss 43(2) test.

Sufficiency of ATB's security valuation (corporate guarantors)

68 For the corporate guarantors, the targets approached the valuation issue on an aggregate basis, mirroring what they understood to ATB's similar approach (targets' brief -- paras 59, 60, 73, and 83).

69 ATB valued the corporate guarantors' security, cumulatively, at $3.2 million. ATB largely relied here on reports of the interim receiver of the corporate guarantors. The IR in turn pointed largely to receivables reflected in one corporation's accounting.

70 At the application, the IR's counsel submitted that considerable uncertainty surrounds these receivables, calling the IR's estimate of their value "conservative." (I believe he meant "liberal", as in generous, given the reported uncertainty over their collectability.)

71 In any case, ATB was prepared to accept a valuation of $3.2 million for its GSA-anchored security in that corporation's assets, and effectively zero valuations for the two other corporate guarantors' security.

72 The targets effectively acknowledged these valuations of the GSA security granted by the target corporate guarantors.

73 I accept ATB's valuation of $3.2 million as an adequate (and probably overly generous) valuation of its security over the corporate guarantors' assets.

Conclusion on security valuation

74 ATB's estimates of the value of its security against each target are reasonable and, in any case, plainly meet the low bar of "not absurd or a sham." [19]

3. Is each of the targets indebted to ATB for at least $1,000?

75 Having accepted ATB's estimates of its security, I turn to whether, factoring in those estimates, plus other credits urged by the targets, ATB is owed at least $1,000 (unsecured) by each of them, per para 43(1)(a).

76 The parties differed over whether various recoveries [20] made by the IR and a receiver appointed over the partnership's assets should be counted.

77 Per the "somewhat separate silos" case law reviewed above, ATB has solid arguments for leaving some of these recoveries on the side.

78 However, I do not have to resolve the parties' differences here. Even if all these actual or estimated amounts, on every front, are factored in, at face value, as credits applicable to each of the targets, yielding an aggregate across-the-board credit of approximately $5.82 million, and leaving out only the already-determined-to-be-valueless insurance policies — in other words, assuming the targets' "global approach" arguments are correct, each of the targets would remain underwater by hundreds of thousands of dollars. ATB would still have unsecured claims against each of the corporate guarantors of approximately $794,000 and against Seerha of approximately $524,000.

79 ATB is clearly owed at least one thousand dollars by each of them.

4. Did the targets each "cease to meet its liabilities generally as they became due"?

80 The targets first argued that none of them had so ceased. In particular, they argued that ATB had not shown sufficient evidence of any such ceasing, that any such ceasing had occurred outside the six-month period preceding the filing of the application, that in any case the reach-back period should commence not on that filing date but on the date ATB's materials were ultimately filed in full i.e. only once the various supplementary affidavits were filed, that ATB had not shown the existence of other unpaid creditors (making this a "single-creditor application"), that no special circumstances warranting a bankruptcy

order applied in this single-creditor scenario, that ATB not made sufficient demands on the debtors for payment, and that the Seerha judgment did not constitute a "continuing demand" for payment.

81 ATB argued effectively the contra position on all of these points, with the exception of acknowledging single-creditor status vis-à-vis the corporate guarantors.

What "ceasing to meet liabilities generally" requires

82 What does a bankruptcy-order applicant have to show here? Some cases suggest at least two other unpaid debts.

83 In *Mastronardi, Re* [21] , the Ontario Court of Appeal held:

> . . . It was within [the bankruptcy judge's] discretion to issue a receiving order on the basis that "the existence of two other unpaid debts is . . . sufficient to establish the [ceasing to meet liabilities generally] act of bankruptcy": see *Re Joyce* (1984), 51 C.B.R. (N.S.) 152 (Ont. S.C.), and *Re Giusto* (1994), . . . , 25 C.B.R. (3d) 227 (Ont. Gen. Div.).

84 In Joyce, Re [1984 CarswellOnt 143 (Ont. Bktcy.)] (cited above), Saunders J. held;

> . . . A creditor contemplating a [ceasing generally] petition is not, in my opinion, required to make an exhaustive investigation of the affairs of the debtor prior to commencing bankruptcy proceedings. If the investigation reveals the **existence of other indebtedness, apparently unpaid**, the creditor need not go further**.** Where, as here, there is no evidence to contradict the allegation, the existence of two other unpaid debts is, in my opinion, sufficient to establish the act of bankruptcy. [emphasis added]

85 In Giusto, Re [1994 CarswellOnt 276 (Ont. Bktcy.)] (cited above), Haley J. held (at para 18):

> . . . In the matter before me the bank has put forward evidence that **other creditors were unpaid.** . . . Ordinarily the bankruptcy process will **not be invoked for the benefit of a single creditor** since the scheme of the Act is to provided for an orderly liquidation of assets for the benefit of creditors generally**. I am satisfied that there are other creditors here who would benefit and that is sufficient to take this petition out of the single-creditor category.** However, even if there were no other creditors I would consider that there are special circumstances here which would support the making of a receiving order. [emphasis added]

86 In *Servus Credit Union Ltd. v. Smith* [22] , Gates J. held

> If it is shown that the debtor has **failed to pay the debts due the applicant creditor and other creditors,** there is a presumption the debtor was not meeting its liabilities generally as they became due and the onus then shifts to the debtor to prove he is able to pay the debts (***Re Hayes*** (1979), 34 CBR (NS) 280 (BCSC); ***Re 484030 Ontario Ltd*** (1992), 1992 CanLII 7417 (ON SC), 12 CBR (3d) 302 (Ont Gen Div)).

87 I do not read these cases are necessarily imposing a two-other-debts minimum, instead as emphasizing the existence of at least *some other indebtedness*. I see no "magic" in the existence of at least two other unpaid debts, or any other natural or obvious dividing line above two unpaid debts -- why not at least three other debts, or four, or more?

88 In my view, the reference to the plural "liabilities" in "ceases to meet his liabilities" signals that *more than one* unpaid debt is required, leaving aside single-creditor scenarios. Generally speaking, that will be sufficient to flip the onus to the debtor, to show that, despite "liabilities" (i.e. two or more) going unpaid, the payment failure does not represent a "general" ceasing to pay liabilities. Especially with the debtor better positioned to know the score with its liabilities overall (versus the applicant-outsider), and particularly in light of the extensive case law on "single creditor" petitions or bankruptcy applications i.e. emphasizing the distinction between one and more than one unpaid debts.

89 Many cases feature this "at least one other debt" approach, which I find convincing.

90 In *Ewanciw v. Lastiwka* [23], Burrows J. found the existence of two judgment debts sufficient *prima facie* evidence of "general ceasing":

> The first alleged act of bankruptcy remains to be considered. Mr. Ewanciw alleges that Mr. Lastiwka has ceased to meet his liabilities generally as they become due. This is the act of bankruptcy described in s. 42(j) of the *BIA*.
>
> The evidence offered in support of this allegation is that **Mr. Lastiwka has not paid the two judgment debts** though they have been due and outstanding since November 2000. . . .
>
> . . . in my view the evidence presented is sufficient to shift the burden to Mr. Lastiwka to establish the contrary if he seeks to defend the petition on the basis that there is but one debt owed. **The evidence is also sufficient to shift to Mr. Lastikwa the burden of establishing that despite the act of bankruptcy he is able to pay his debts. He has filed no evidence.** He has not met those shifted burdens. The first alleged act of bankruptcy is established. [emphasis added]

91 Same in *Henitiuk, Re* [24], where Hope J. held:

> [7] I now deal specifically with the act of bankruptcy alleged as ceasing to meet his liabilities generally as they become due. At this point in my decision, I have found that the debtor has failed to meet his liability to the petitioner as it became due and he has failed to meet the payment of taxes to the municipal authority as they may have become due. **Those two items alone, in my opinion, would satisfy the word "generally" where it appears in that s. 24(1)(j)**. . . . [emphasis added]

92 And *Corporate Cars Quebec Ltd. Partnership / Société en commandite Corporate Cars Quebec, Re* [25], where Clement Gascon J. (as he then was) held:

> . . . **the evidence suggests that they owed money to more than merely one creditor.** In fact, there were likely at least three other creditors to whom the Debtors owed money at the time the Bank filed its applications.
>
> This easily supports the acts of bankruptcy relied upon by the Bank, i.e. that the Debtors have each failed to meet their liabilities generally as they become due. **The existence of two or more unpaid debts is sufficient to support this act of bankruptcy [**footnote 17 citing ***Mastronardi***]

93 And *Ivany, Re* [26], per D.M. Brown J.:

> The applicant has established that (i) within the six months prior to the filing of the application Ivany was **indebted both to the applicant and the CRA**, (ii) **both debts remained outstanding and unpaid on the date the application was filed**, and (iii) three months prior to the filing of the application the CRA had taken enforcement steps to collect Ivany's tax arrears. **This evidence, in my view, certainly establishes a *prima facie* case that within the six months prior to the filing of the application Ivany had failed to meet his liabilities generally as they became due**. [emphasis added]

94 And *Okoakih, Re* [27], per Newbould J.: "Thus there is *more than one* debt that the debtor has failed to meet." [emphasis added]

95 These cases (and others [28]) show that two unpaid debts are sufficient, at least to cast the onus over to the given target to show no "general ceasing."

"Ceasing to meet liabilities generally" (Seerha)

96 ATB points to multiple unpaid debts of Seerha as of the bankruptcy-application filing (November 29, 2019):

> • its outstanding judgment against Seerha, granted September 4, 2019, of $5.4 million, plus interest at prime plus 3 per cent, accruing since December 3, 2018, and costs;

• AJ Seerha PC's outstanding judgment (awarded to its interim receiver on its behalf) against Seerha for approximately $544,000, granted May 16, 2019;

• Seerha's liability under a June 19, 2029 contempt order to pay a fine of approximately $574,000 to the same corporation; [29] and

• Seerha's pre-application defaults under three different mortgages to ATB. [30]

97 ATB also points to apparent debts reflected in courthouse action searches.

98 In line with my two-debts-sufficient finding above, the two identified judgments ($5.4 million and approximately $544,000) are sufficient *prima facie* evidence of a "general ceasing to pay liabilities." (I treat Seerha's two debts — judgment and order -- to the one corporation as effectively one debt, given the noted overlay.)

99 If I am mistaken on two judgments being sufficient, the separate and distinct defaults under three different ATB mortgages clinch this point in ATB's favour.

100 ATB presented ample evidence to show a *prima-facie* "general ceasing" by Seerha. [31]

101 Despite that evidence and the resulting onus on him to show "no ceasing", Seerha presented no evidence disputing the state of any of these debts or that he had other debts that remained in good standing i.e. despite the identified defaults, he had not in fact "generally ceased to meet his liabilities."

102 Accordingly, I find that ATB cleared the "general ceasing" hurdle for Seerha.

"Ceasing to meet liabilities generally" (corporate guarantors)

103 For these debtors, ATB relied only on its guarantee claims, pointing to the $6.6 million claimed from each of the guarantors. It did not assert other indebtedness owing to it or to other creditors.

104 The guarantors argued that, as the only apparent creditor ATB must show special circumstances to obtain a bankruptcy order and that no such circumstances exist here.

105 A recent catalogue of the typical special circumstances is found in *Solid Holdings Ltd., Re* [32] :

> There is a presumption that a bankruptcy order is not available to a single petitioning creditor, however a debt to a single creditor can be sufficient to constitute an act of bankruptcy where there are "special circumstances": *Bankruptcy of Real Time Fibre Supply Ltd*, 2007 BCSC 371 . . . . In *Valente, Re* . . . [2004] O.J. No. 635 (C.A.) . . . , Justice Feldman set out the three categories of special circumstances which the law has recognized:
>
> a) *repeated demands for payment* have been made within the six-month period;
>
> b) the *debt is significantly large and there is fraud or suspicious circumstances* in the way the debtor has handled its assets which required that the processes of the bankruptcy of the Act be set in motion; and
>
> c) prior to the filing of the petition, the *debtor has admitted its inability to pay* creditors generally without identifying the creditors.

106 ATB relied primarily on the first branch, pointing to two demands made to each guarantor shorty before filing its bankruptcy application, as detailed in its application brief (paras 25-27).

107 The guarantors argue that the demands were made, at least in part, to the wrong persons and too close to the application date.

108 Before examining those arguments, I explore whether at least one of the traditional "special circumstances" must exist in a single-creditor scenario.

Traditional "special circumstances" not exhaustive

109 Some cases hold that one or more of the traditional "special circumstances" is not necessary for a bankruptcy order in every single-creditor scenario.

110 In *Banque nationale de Paris (Canada) v. Opiola* [33], featuring a petition anchored in a $2.7 million judgment against guarantors, W.E. Wilson J. so held:

> The real issues in this motion are whether or not a single creditor may petition successfully, and whether or not they must show some special circumstance beyond a failure to pay a liability when it falls due and is demanded. . . . There is clearly a debt extant, for more than $1000. If the objections are groundless, the Petition should be granted.
>
> In my opinion those objections do not stand in the way of this Receiving Order. [authorities omitted] **One act of bankruptcy is sufficient, there is [no] need to prove any special circumstances. The judgment, the *nulla bona*, and the demand will support the Petition**. It is not necessary to decide is there has been improper dealing with assets as well. [emphasis added]

111 The BC Court of Appeal held the same (in obiter, since another act of bankruptcy was found) in *Stancroft Trust Ltd. v. Asiamerica Capital Ltd.* [34]:

> Section 43(1) specifically contemplates that a petition may be brought by a single creditor. Where there is only one petitioning creditor . . . , the court has, no doubt, to be vigilant to ensure that the process is not being used for "collection" purposes--for instance, to compel payment of a debt where the debtor is solvent, or to prevent the debtor from defending itself against a disputed claim. **While a single petitioning creditor may obviously have difficulty in some cases in establishing that the debtor has ceased to meet debts generally under Section 42(1)(j), there is no special onus on petitioning creditor simply because it brings the petition alone.** . . . [emphasis added]

112 Same in *Fundy Supplies Ltd., Re* [35] (per Hughes JA):

> In my opinion there is nothing in the Act which prevents a single remaining creditor from presenting a petition for receiving order on the basis that the debtor ceased to meet a single liability when it became due. To so construe the Act would result in circumstances such as those of the present case where the debtor could use the proceeds of sale of the petitioning creditor's merchandise to meet all other creditors' demands and thereby deprive the petitioning creditor from the advantage of the Bankruptcy Act and frustrate the equitable distribution of the debtor's assets, which is the primary purpose of the Act. [authorities omitted]

113 Kroft J.'s helpfully reconciled the "special circumstances" case law in *Smith, Re* [36] here:

> . . . I am satisfied from my reading of the Bankruptcy Act (*supra*) and the authorities to which I have referred that there is nothing in law to preclude a single creditor from obtaining a receiving order. As with every application, however, the onus is on the petitioner to strictly prove the allegations contained in its petition which, in a case like this, requires that it prove that the debtor, within the six months preceding the date of the petition, ceased to meet his liabilities generally as they became due.

> In exercising its discretion, **a court must always consider all of the circumstances. Accordingly, the question is not so much whether the circumstances are "special", but whether, in light of all of the evidence, it can be said that the petitioner has discharged its onus**. [emphasis added]

114 In other words, the categories of "special circumstances" are not closed. If other circumstances, or the circumstances as a whole, show that the debtor has "ceased generally", that may be sufficient, at least to cast the onus over to the debtor, even absent one of the typical "special circumstances."

Large debt compared to apparent assets as special circumstance on its own

115 One example of such an additional circumstance is where the applicant creditor is literally the only creditor or its claim is so large, relatively speaking, as to render any other claims essentially immaterial, as in the cases below.

116 In *Winant (Succession), Re*[37], Alary J. so found:

> The courts have recognized that a bankruptcy order may be issued at the request of a sole unpaid creditor [authority omitted] **They have ruled that refusing a sole creditor this right would be tantamount to depriving it of the benefit of the provisions of the [*BIA*]** [authority omitted]
>
> There must, however, be special circumstances before the court [authority omitted]. **This would be the case, for example, if the claim represents a significant proportion of the debtor's assets** [authorities omitted]
>
> **In the present case, after payment of the debts in the inventory, the assets of the succession total $64,586.38. Computershare's alleged debt under the guarantee is about $3 million**. [Court concluded "sole creditor" not an obstacle] [emphasis added]

117 Same in *King Petroleum Ltd., Re*[38] (per Houlden J.):

> . . . in my view, the claims of the other creditors are really of no consequence. In effect there is only one creditor and there is no doubt that **the debtor has ceased to meet its liability to that creditor**. In my opinion, the [ceasing generally] act of bankruptcy . . . been proven. [emphasis added]

118 Same here, with ATB seeking approximately $6.6 million from each of the corporate guarantors, contrasted to the apparently available assets of each corporation as reflected in the interim receiver's reports through to the end of November 2019 (reports 1 to 11, inclusive). That comparison shows a massive anticipated shortfall for ATB.

119 Even crediting each of the corporate guarantors for all of the actual and potential recoveries out of those assets, as outlined in their security table (discussed above and factoring out the insurance policies as discussed earlier), a shortfall to ATB exists of almost $800,000 for each corporate guarantor. (Given that massive shortfall, I do not have to make any findings about whether each of the claimed credits is actually warranted and, if so, in favour of each target.)

120 Accordingly, even accepting the targets' "global approach" (i.e. with security being aggregated and all actual and potential recoveries being factored in for each guarantor), ATB still has towering unsecured claims against each of the corporate guarantors.

121 Further, none of the guarantors pointed to other liabilities with which they, or any of them, was current, let alone the existence of any other liabilities.

122 They did not even give evidence that they, or any of them, were carrying on business at the time of the application.

123 Weighing ATB's substantial claim against the apparently available assets (and tallying the latter cumulatively), and with the debtors -- obviously better placed than ATB to disclose the existence and status of any other liabilities -- providing

nothing on that score, I find that each of the corporate guarantors had "ceased to meet its liabilities generally" as of November 29, 2019 (ATB's application date).

"Multiple demands" special circumstance satisfied in any case

124 If I am wrong on the latter accounting-based approach, I find that ATB satisfied the first branch of the traditional "special circumstances" test (multiple demands for payment), accepting that ATB made the demands to the corporate guarantors outlined in paras 25 to 27 of its application brief and anchored in the associated affidavits.

125 The guarantors argued that some of the demands were off-target in being served on the debtor's counsel instead of the guarantors directly. They also argued that the demands came too late: approximately one week before the application was filed and another batch only two days before.

126 I reject both arguments: none of the guarantors gave evidence that the demands did not reach them on the dates indicated by ATB.

127 As well, they did not give any evidence that, if notice had been provided any earlier, anything would have changed, or even permitting that inference. All three were had been under interim receivership since December 2018, approximately one year before the bankruptcy application. In its eleven reports through to November 29, 2019 (the date of ATB's application), the IR had detailed its efforts to locate and realize on each of the corporate guarantor's assets. Nothing in those reports indicates that earlier demands would have made any difference here, in the sense of any or all of them being able to clear off ATB's guaranteed claim of approximately $6.6 million.

Conclusion on corporate guarantors "ceasing to meet liabilities generally"

128 In all the circumstances, and whether the traditional "special circumstances" test applies or not, ATB has shown that each of the corporate guarantors had "ceased . . . generally" by the time of its bankruptcy application, with none of them providing anything to the contrary.

5. Did the "ceasing generally" occur within six months preceding ATB's application?

129 The targets argue that that ATB placed the six-month yardsticks in the wrong spots and that, in any case, the "ceasing generally" occurred well before even the earliest plausible six-month period.

130 ATB argued that the six-month period necessarily runs back from the date of its bankruptcy applications (November 29, 2019) and that, with its judgments against Seerha treated as "continuous demands" and, in any case, payment demands made within that period for all the targets, any earlier "ceasing generally" was moved within, or at least made to run into, that period.

131 ATB is right, as explained below.

Where the six-month yardsticks should be placed

132 The targets' first argument is that the six-month period should be measured back from when ATB had a "complete" application together, whether in February 2020 (when it brought its application to amend on the ss 43(2) aspect) or even as late as September 2020, when my decision in 2020 ABQB 507 (Alta. Q.B.) confirmed that ATB had the right to amend, and had in fact amended, its application.

133 I reject this argument. The *BIA* is clear, in para 43(1)(b), that the six months are measured back from "the filing of the application."

134 ATB filed its application on November 29, 2020. The central question of the amendment proceedings resolved in my September decision was whether ATB was allowed to amend its application, versus having to start over, which would have meant a new application date.

135 The answer was that ATB could amend i.e. would continue with its original application.

136 The consequence is that November 29, 2019 remains the measure-back-from date.

Whether the "ceasing generally" occurred within preceding six months

137 The targets then argued that, even with that date, which would make the kick-off date May 29, 2019, ATB falls flat, with all of the key defaults here (i.e. all of the "ceasing . . . generally") occurring well before that, as early as December 2018.

138 I disagree.

139 The weight of Canadian case law on this point, exemplified by the ONCA decision in *Malmstrom v. Platt* [39], is that, even where the "ceasing . . . generally" begins before the six-month period, it is sufficient if demands are made within the period, as occurred here for Seerha and all three corporate guarantors.

140 The targets invoked *Federal Business Development Bank v. Poznekoff* [40] for its apparent finding that the "general ceasing" must start within the six-month period. However, that decision acknowledged a "demands within period" exception:

> While a debt may become due more than six months before the date of the petition, events which take place within that six-month period with respect to that debt may afford a basis for adjudging a debtor to be bankrupt. Such a qualification . . . was recognized in *Re Raitblat* . . . [1925] 2 DLR 1210 (ONSC). Fisher J. . . . said . . . :
>
> > In the present case there were demands within 6 months and numerous admissions by the debtor that he was unable to meet his liabilities, so that in this case it must be held there were continuing freshly occurring defaults within the 6 months. [decision affirmed [1925] 3 DLR 446 (ONCA)]

141 Same here. For Seerha, ATB can rely on the demands it made within the six-month period, as well as (if necessary) the "continuing demand" feature of a judgment debt. [41] For the corporate guarantors, ATB can rely on the "within period" demands. By these demands, combined with no payments in response, ATB satisfied the "within six months" element.

142 The targets cited other decisions which do not assist them. In 307309 B.C. Ltd., Re [1991 CarswellBC 446 (B.C. S.C. [In Chambers])] [42], no "within period" demand was made, hence the "stale debt" conclusion.

143 *Mitchicko Ltd., Re* [43] is out of step for not recognizing a "within period" demand or explaining why that demand was insufficient to move the "general ceasing" within the six-month period.

144 In *Koska, Re* [44], Bielby J. (as she then was) recognized the possibility of a within-period demand moving a "general ceasing" within the six-month period (see para 26, opening sentence). She did not have to decide the point, finding that at least one other act of bankruptcy (permitting execution to remain in place) had occurred, with a further demand making no difference to it.

145 The targets also invoked *Servus Credit Union Ltd. v. Smith*. [45] However, it is distinguishable as lacking the interim-receivership element here, which permitted a window into the general solvency of the corporate guarantors and, in turn, the conclusion that more or earlier demands would not likely have made any difference here. As for the Seerha dimension, *Smith* did not feature a judgment and thus the "continuing demand" aspect.

146 The targets fail in all these arguments.

147 I find that, in light of ATB's judgments against Seerha and, in any case, its payment demands to him before November 29, 2019, and in light of the same-timing payment demands to the targets, ATB proved that the "general ceasings" here were moved into, or at least continued into, the six-month period before that date.

148 As for whether ATB should have made more, or earlier demands, with none of Seerha and the corporate guarantors having made any voluntary payments, and with the anticipated shortfalls here, it is hard to see any different pattern of demands would have made any difference to the "ceasing . . . generally" equation.

6. Are bankruptcy orders otherwise warranted here?

149 The targets argue that appointing a trustee in bankruptcy would "[add] no new methods of collection or investigation that could not be given . . . to the Interim Receiver", that "the Court can give to the [IR] any other powers that a Trustee might have that the [IR] does not currently have", that ATB is not pointed to any particular questionable transactions occurring with the *BIA*'s reach-back periods or any that the IR could not review, and that the *BIA* is not a collection tool.

150 In a nutshell, the targets argue that "there is no satisfactory evidence or indication of the need for Bankruptcy Orders or what good they would do."

151 I reject those arguments.

152 I start with a brief synopsis of the governing law and basic principles. From *Diena, Re*[46] (per D.M. Brown J.):

> Section 43(7) of the *BIA* provides as follows:
>
> > 43(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor is able to pay their debts, or that *for other sufficient cause no order ought to be made*, it shall dismiss the application. (emphasis added)
>
> Professor Roderick Wood, in *Bankruptcy &Insolvency Law*, summarized the jurisprudence in this area:
>
> > A court has the power to dismiss a bankruptcy application despite the fact that all necessary prerequisites and grounds alleged in the bankruptcy application have been proven. The Act provides little guidance on when this discretion is to be exercised since it merely permits the court to do so if there is "sufficient cause" . . .
> >
> > Courts will sometimes dismiss bankruptcy applications if it is clear that the proceedings would be no benefit to the creditors. This might be established if it can be shown that the debtor has no assets and has no prospect of acquiring any in the future . . .

153 Other key principles come from *Mastronardi* (cited earlier), where the ONCA held (at para 28):

> . . . if a petitioner can satisfy the requirements of the *BIA*, I see no reason for denying him access to the process and remedies of the Act because there may be other civil routes open to him. **The *BIA* is not a second-rate or fallback statute that can only be invoked if other avenues fail.** I agree with Ground J. who said in *Re Cappe* . . . :
>
> > **I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order**. In fact, the jurisprudence would seem to be to the contrary.

154 And *Ivany, Re* (cited above) (per D. M. Brown J. at para 33):

> . . . Although the bankruptcy process is meant to benefit the class of a debtor's creditors, not the civil interests of a single creditor, as I stated in *Re Diena*, another case involving an application by a judgment creditor, **"it is not surprising that [the] judgment creditor now seeks to invoke one of the legal mechanisms available to unsecured creditors; unpaid judgment creditors tend to do that".** [emphasis added]

155 And *Omni-Stone Corp., Re*[47], where Farley J. invoked Catzman J.:

> O objected that the bankruptcy petition was an abuse and that FC should be confined to a re-taking of the equipment and suing on the deficiency. . . . However, Catzman J. in Re Four Twenty-Seven, *supra*, said at p. 188 C.B.R.:
>
> > I also reject the debtors' submission based upon the alleged improper or ulterior motive of the petitioning creditor. **It is not an abuse of process or an improper purpose to commence a petition for the collection of a debt. It is not improper to petition to gain remedies not available outside of bankruptcy, including a thoroughgoing investigation of the bankrupt's affairs. Indeed, on the evidence, I consider this to be a prototypical case where the full arsenal of investigatory mechanisms and remedies available to a trustee in bankruptcy would be useful, appropriate and desirable.** [emphasis added]

156 And *Chung, Re*[48] (per Romilly J.):

> The onus is on the debtor to show sufficient cause why the order should not be granted. If the onus is not discharged, the receiving order will issue: . . .
>
> Ordinarily, **if all elements of a petition for a receiving order have been proved** and there is **no improper conduct** on the part of the petitioning creditor, **the court should, in the absence of exceptional circumstances, make the receiving order**: [authority omitted]
>
> If it is to the benefit of the parties that **an independent trustee investigate the affairs, then a receiving order should issue**: . . .
>
> It is **appropriate for a petitioning creditor to seek the mechanisms of the *Act* to obtain an investigation of the bankrupt's affairs** which may assist the creditor in recovering on its debt . . . . [authorities omitted] [emphasis added]

157 And finally *Steintron International Electronics Ltd., Re*[49] (per Cumming J.):

> . . . Mr. Ashcroft contends that sufficient cause for the dismissal of the petition lies in the fact that, as **he says, no useful purpose could be served by the appointment of a trustee as the receiver already in place has all the powers necessary to serve the interests of creditors**. [cited authorities omitted]
>
> I cannot accept Mr. Ashcroft's contentions in this regard. The [cited authorities] are each ones in which the affairs of the bankrupt were infinitely less complicated than are the affairs of Steintron, and **the powers of the receiver appointed by Southin J. are not nearly so complete and extensive as Mr. Ashcroft suggested they were**. As Mr. Lunny pointed out, the receiver appointed by Southin J. is a receiver by way of equitable execution. It has no power to compromise claims against the debtor nor to prosecute, with limited exceptions, claims on its behalf against others. **A trustee in bankruptcy, he says, could deal with the contingent claims which the receiver cannot, and the receiver is or may be without power adequately to protect the estate of the debtor against the claims of others. He argues, and I agree, that it is in the interest of all creditors that a trustee in bankruptcy be appointed in order that the liabilities of Steintron may be effectively determined and a distribution of its assets made among the creditors in an orderly manner.** [emphasis added]

Application of these principles here

158 The targets asserted, but did not show, that the IR necessarily has the same investigative and other powers as a trustee in bankruptcy or that it could be given such powers.

159 On the other hand, the IR, who should know, submitted that a bankruptcy could be useful here:

> The Interim Receiver is of the view that [bankruptcies] of the Professional Corps and Dr Seerha may assist with outstanding investigations as the trustee in bankruptcy will have certain powers of investigation available to it under the *Bankruptcy and Insolvency Act* which are not readily available to an Interim Receiver. The Interim Receiver notes ATB's proposed

trustee specializes in consumer bankruptcy and it is anticipated that the Interim Receiver will support the efforts of the bankruptcy Trustee. [50]

160 As for matters to be investigated, ATB points to various matters outlined in the IR's reports, including those at paragraph 6.1 and the difficulties encountered as detailed in paragraphs 6.2 and 6.3 of the IR's eleventh report.

161 I find that the targets have identified no compelling reason why bankruptcy orders for which ATB has satisfied the statutory criteria should not be granted here.

D. Conclusion

162 ATB cleared the ss 43(2) hurdle and is an eligible secured-creditor applicant for bankruptcy orders. It has proved unsecured debts to it by each target of at least one thousand dollars and also an act of bankruptcy by each of them, namely, ceasing to meet their liabilities generally. Finally, it proved that such ceasing continued into the six-month period preceding the date of its bankruptcy applications.

163 The targets did not show any sufficient cause why bankruptcy orders should not be issued.

164 Accordingly, I find that bankruptcy orders are warranted against each of the targets.

165 ATB is entitled to its costs of each application.

Application granted.

Footnotes

1 Unless otherwise indicated, all statutory references are to the *Bankruptcy and Insolvency Act*.

2 199913 C.B.R. (4th) 60(B.C. S.C.) (Meiklem J.)

3 2010 ONCA 456 (Ont. C.A.) at para 15

4 197725 C.B.R. (N.S.) 7 (Henry J.) at paras 8-9

5 (199318 C.B.R. (3d) 229 (Ground J.) all paragraphs under "Reasons" *affd* [1994] O.J. No. 3860 (Ont. C.A.)

6 199428 C.B.R. (3d) 130 (Chadwick J.) at para 25

7 See also, in a proof-of-claim context, the helpful judgment of Farley J. in Olympia & York Developments Ltd., Re199745 C.B.R. (3d) 85(Ont. Bktcy.) at paras 11-27.

8 1999 CanLII 13771, fourth-last paragraph

9 Kevin Patrick McGuinness, *The Law of Guarantee* (Second Edition — 1996), Carswell at p 384 (para 6.109)

10 Simultaneous bankruptcy petitions against the primary debtor and guarantor for the same indebtedness were noted without any adverse comment in *Bombardier Credit Ltd. v. Find* (1998), 37 O.R. (3d) 641 (Ont. C.A.) (CA, leave to appeal dismissed October 1, 1998 [1998231 N.R. 400 (note)(S.C.C.)], under the heading "A debt in the amount of one thousand dollars" ("It is not disputed that Find, by reason of the guarantee, is responsible for [the primary debtor's] indebtedness in the same amount.")

11 These and the other life-insurance-related details come from the Third Supplemental Affidavit of Rehman Mulji of ATB, sworn March 20, 2020.

12 198226 R.F.L. (2d) 181(P.E.I. S.C.) (McQuaid J.) at para 11

13 2012 YKSC 69 (Y.T. S.C.) at para 30

14 2018 BCSC 1545 (B.C. S.C.) (Branch J.) at para 63

15 198823 B.C.L.R. (2d) 252 (Prowse LJSC) at para 37

16 198544 R.F.L. (2d) 375 (Hutchison LJSC) at para 6

17 1991 CanLII 334 (Rowles J.) at seventh-last and fourth-last paragraphs. On the subject of an insured's imminent death changing the valuation of term insurance, see *Paterson v. Remedios*, 1999 SKQB 6 (Hunter J.) at paras 36-41.

18 And he is not, as he is already bankrupt.

19 See *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1409 (B.C. S.C.) (Fitzpatrick J.) at paras 55-58; *Home Hardware Stores Ltd. v. R Home Supply Centre Ltd.*, 2015 BCCA 500 (B.C. C.A.) at paras 28 and 34-37; *Kucera, Re*, 2014 BCSC 394 (B.C. S.C.) (Rogers J.) at paras 33-37; *LaHave Equipment Ltd., Re*, 2007 NSSC 283 (N.S. S.C.) (Reg. Cregan) at paras 49-55; and Chartrand, Re [2009 CarswellOnt 8356 (Ont. S.C.J.)], 2009 CanLII 74218 (Charbonneau J.) at para 16.

20 Summarized in the targets' "Table of Security Held by ATB Financial", tab 19 of its application brief.

21 (2000), 195 D.L.R. (4th) 631 (Ont. C.A.) at para 24

22 (2012), 2013 ABQB 151 (Alta. Q.B.) at paras 58-59

23 2002 ABQB 605 (Alta. Q.B.) at paras 16-19

24 ((1984), 58 A.R. 394 (Alta. Q.B.) at para 7

25 2008 QCCS 5178 (C.S. Que.) at paras 29 and 32

26 2012 ONSC 7058 (Ont. S.C.J. [Commercial List]) at para 21

27 2013 ONSC 7492 (Ont. S.C.J.) at para 21

28 See also these other two-unpaid-debts-sufficient decisions: *Real Time Fibre Supply Ltd., Re*, 2007 BCSC 371 (B.C. S.C.) (Chamberlist J.) at paras 41-43; *RCL Operators Ltd., Re* (1993), 136 N.B.R. (2d) 81 (N.B. Q.B.) (QB) (Jones J.) at para 63 *affd* (1994), 153 N.B.R. (2d) 93 (N.B. C.A.); and 805401 Ontario Ltd., Re200124 C.B.R. (4th) 158 (Jarvis J.) at para 10 *affd* 200236 C.B.R. (4th) 164(Ont. C.A.).

29 Per para 4 of that order, payments or other credits against the fine apply equally to the judgment, with Seerha's maximum exposure under the two liabilities being the indicated fine amount.

30 Details outlined in the ATB affidavit (Rehman Mulji) sworn November 29, 2019, Ex. M

31 Even if Seerha's only unpaid debt was the $5.4 million judgment, ATB would clear the "general ceasing" hurdle on the basis of its payment demands and the *Valente* factors being satisfied here, all as discussed at paras 14 and 15 of its application brief.

32 2019 BCSC 126 (B.C. S.C.) (Jackson J.) at para 15

33 1998 ABQB 965 (Alta. Q.B.) at para — appeal dismissed without consideration of this point: *Banque nationale de Paris (Canada) v. Opiola*, 2001 ABCA 25 (Alta. C.A.). A different view was outlined by Forsyth J. in *Chauvco Resources International Ltd., Re*, 1999 ABQB 56 (Alta. Q.B.) at para 26, followed by Gates J. in *Servus Credit Union Ltd. v. Smith*, 2013 ABQB 151 (Alta. Q.B.) at paras 71-73, and in *207053 Alberta Ltd., Re*, 1998 ABQB 757 (Alta. Q.B.) (Bielby J. as she then was) at paras 43-54.

34 199272 B.C.L.R. (2d) 353(B.C. C.A.) at para 12. Followed in Lee, Re19985 C.B.R. (4th) 202 (McEwan J.) at paras 11-12.

35 (1971), 3 N.B.R. (2d) 723 (N.B. C.A.)

36 (1992), 80 Man. R. (2d) 216 (Man. Q.B.) at paras 18-19, followed in *Agrifoods International Cooperative Ltd. v. Welwood* (1996), 111 Man. R. (2d) 181 (Man. Q.B.) (Oliphant ACJ) at para 25 (in obiter).

37 2011 QCCS 1190 (C.S. Que.) (Alary J.) at paras 54-58

38 (1973), 2 O.R. (2d) 192 (Ont. S.C.) at paras 12 and 13

39 (2001), 53 O.R. (3d) 502 (Ont. C.A.) at para 8

40 (1982), 143 D.L.R. (3d) 370 (B.C. C.A.) at para 11

41 Per *Malmstrom* at paras 18-20 and cases following it.

42 1991 CanLII 1824 (Lamperson J.)

43 (1991), 92 Nfld. & P.E.I.R. 240 (Halley J.)

44 2000 ABQB 953 (Alta. Q.B.) (Bielby J., as she then was) at paras 21-26

45 2013 ABQB 415 (Alta. Q.B.) (Gates J.)

46 2012 ONSC 5849 (Ont. S.C.J. [Commercial List]) (D.M. Brown J.) at paras 9-10

47 (1991), 4 O.R. (3d) 636 (Ont. Bktcy.) at fifth-last paragraph

48 2004 BCSC 1669 (B.C. S.C.) at paras 25-28. See also *0757376 B.C. Ltd., Re*, 2011 BCSC 1268 (B.C. S.C.) at paras 31-32 and *Lai, Re* (2005), 75 O.R. (3d) 451 (Ont. S.C.J.) (Ground J.) at para 15

49 19867 B.C.L.R. (2d) 267(B.C. S.C.) at paras 5 and 6

50 Eleventh Report of the Interim Receiver (November 29, 2019)

End of Document

Tab 11

2014 SCC 35, 2014 CSC 35
Supreme Court of Canada

Bombardier inc. c. Union Carbide Canada inc.

2014 CarswellQue 3600, 2014 CarswellQue 3601, 2014 SCC 35, 2014 CSC 35, [2014] 1 S.C.R. 800, [2014] S.C.J. No. 35, 239 A.C.W.S. (3d) 941, 373 D.L.R. (4th) 626, 457 N.R. 279, 55 C.P.C. (7th) 1

Union Carbide Canada Inc. and Dow Chemical Canada Inc. (now known as Dow Chemical Canada ULC), Appellants and Bombardier Inc., Bombardier Recreational Products Inc. and Allianz Global Risks US Insurance Company, Respondents and Attorney General of British Columbia and Arbitration Place Inc., Interveners

McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 11, 2013
Judgment: May 8, 2014
Docket: 35008

Counsel: Richard A. Hinse, Robert W. Mason, Dominique Vallières, for Appellants
Martin F. Sheehan, Stéphanie Lavallée, for Respondents
Jonathan Eades, Mark Witten, for Intervener, Attorney General of British Columbia
William C. McDowell, Kaitlyn Pentney, for Intervener, Arbitration Place INc.

Subject: Civil Practice and Procedure; Contracts; Evidence; International

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms
Contracts
IX Performance or breach
IX.9 Miscellaneous

Headnote

Contracts --- Performance or breach — Miscellaneous

Following consumer complaints concerning tanks supplied by D, B commenced action for damages against D — Parties agreed to private mediation, and standard mediation agreement containing confidentiality clause was signed — D submitted settlement offer, which was accepted by B — However, parties subsequently disagreed on scope of release — D failed to send discussed settlement amount and B filed motion for homologation of transaction in Superior Court — D brought motion to strike out allegations contained in six paragraphs of motion for homologation on ground that they referred to events that had taken place in course of mediation process, which violated confidentiality clause in mediation agreement — Trial judge granted motion to strike in part and B appealed — Court of Appeal held that when mediation has resulted in agreement, communications made in course of mediation process cease to be privileged and held that settlement privilege did not prevent party from producing evidence of confidential communications in order to prove existence of disputed settlement agreement — D appealed — Appeal dismissed — Nature of contract, circumstances in which it was formed and contract as whole revealed that parties did not intend to disregard usual rule that settlement privilege can be dispensed with in order to prove terms of settlement — There was no evidence that parties thought they were deviating from settlement privilege that usually applies to mediation when they signed agreement — Therefore, mediation contract did not preclude parties from producing evidence of communications made in course of mediation process in order to prove terms of settlement.

Civil practice and procedure --- Disposition without trial — Settlement — Enforcement of terms
Following consumer complaints concerning tanks supplied by D, B commenced action for damages against D — Parties agreed to private mediation, and standard mediation agreement containing confidentiality clause was signed — D submitted settlement offer, which was accepted by B — However, parties subsequently disagreed on scope of release — D failed to send discussed settlement amount and B filed motion for homologation of transaction in Superior Court — D brought motion to strike out allegations contained in six paragraphs of motion for homologation on ground that they referred to events that had taken place in course of mediation process, which violated confidentiality clause in mediation agreement — Trial judge granted motion to strike in part and B appealed — Court of Appeal held that when mediation has resulted in agreement, communications made in course of mediation process cease to be privileged and held that settlement privilege did not prevent party from producing evidence of confidential communications in order to prove existence of disputed settlement agreement — D appealed — Appeal dismissed — Nature of contract, circumstances in which it was formed and contract as whole revealed that parties did not intend to disregard usual rule that settlement privilege can be dispensed with in order to prove terms of settlement — There was no evidence that parties thought they were deviating from settlement privilege that usually applies to mediation when they signed agreement — Therefore, mediation contract did not preclude parties from producing evidence of communications made in course of mediation process in order to prove terms of settlement.
Contrats --- Exécution ou défaut d'exécution — Divers
À la suite de plaintes des consommateurs concernant les réservoirs fournis par D, B a intenté contre D une action en dommages-intérêts — Parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité — D a soumis une offre de règlement que B a acceptée — Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance — D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement — D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation de la clause de confidentialité contenue dans l'entente de médiation — Juge de première instance a accordé la requête en radiation en partie et B a interjeté appel — Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée — D a formé un pourvoi — Pourvoi rejeté — Nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement — Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement — Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.
Procédure civile --- Jugement rendu sans procès — Règlement — Enforcement of terms
À la suite de plaintes des consommateurs concernant les réservoirs fournis par D, B a intenté contre D une action en dommages-intérêts — Parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité — D a soumis une offre de règlement que B a acceptée — Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance — D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement — D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation de la clause de confidentialité contenue dans l'entente de médiation — Juge de première instance a accordé la requête en radiation en partie et B a interjeté appel — Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée — D a formé un pourvoi — Pourvoi rejeté — Nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement — Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement — Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.

D manufactured and distributed gas tanks for personal watercraft while B manufactured and distributed personal watercraft. A dispute arose over the fitness of the gas tanks as a result of consumer complaints. B claimed that the tanks supplied by D were unfit for the use for which they had been intended and commenced an action for damages against D in Montreal, in the Quebec Superior Court. The parties agreed to private mediation, and a standard mediation agreement containing a confidentiality clause was signed. D submitted a settlement offer, which was accepted by B. However, the parties subsequently disagreed on the scope of the release. D considered this to be a global settlement involving any gas tank models, and B replied that the settlement was for the Montreal litigation only. D failed to send the discussed settlement amount and B then filed a motion for homologation of the transaction in the Superior Court. D brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process, which violated the confidentiality clause in the mediation agreement. The trial judge granted D's motion to strike in part, ordering that four of the six allegations be struck because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. B appealed.

The Court of Appeal held that when mediation has resulted in an agreement, communications made in the course of the mediation process cease to be privileged and held that settlement privilege did not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement. Accordingly, the Court of Appeal allowed the appeal, and D appealed.

Held: The appeal was dismissed.

Per Wagner J. (McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. However, a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Both the common law privilege and this exception to it form part of the civil law of Quebec.

On the other hand, a confidentiality clause is a binding agreement. It should be noted that the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. To produce such a result, its terms must be clear.

Here, the nature of the contract, the circumstances in which it was formed and the contract as a whole revealed that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement. The mediation agreement was a standard form contract provided by the mediator, and neither party amended it or added any provisions relating to confidentiality. There was no evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement. Therefore, the mediation contract did not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement.

D fabriquait et distribuait des réservoirs à carburant pour motomarines tandis que B fabriquait et distribuait des motomarines. Des plaintes des consommateurs étaient à l'origine d'un différend au sujet du caractère approprié des réservoirs. B affirmait que des réservoirs fournis par D étaient impropres à l'usage auquel ils étaient destinés et a intenté contre D une action en dommages-intérêts devant la Cour supérieure du Québec à Montréal. Les parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité. D a soumis une offre de règlement que B a acceptée. Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance. D considérait que le montant offert visait un règlement global relativement à tous les modèles de réservoirs à carburant et B a répliqué que le règlement visait uniquement la poursuite engagée à Montréal. D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement. D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation de la clause de confidentialité contenue dans l'entente de médiation. La juge de première instance a accordé la requête en radiation en partie et a ordonné que quatre des six allégations soient radiées parce qu'elles portaient sur les discussions et communications échangées dans le cadre de la médiation. B a interjeté appel.

La Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée. Aussi, la Cour d'appel a accueilli l'appel, et D a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Wagner, J. (McLachlin, J.C.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : En common law, le privilège relatif aux règlements est une règle de preuve qui protège les communications échangées entre des parties qui tentent de régler un différend. Toutefois, une communication qui a conduit à un règlement cesse d'être privilégiée si sa divulgation est nécessaire pour prouver l'existence ou la portée du règlement. Ce privilège de la common law et son exception font partie du droit civil du Québec.

D'un autre côté, une clause de confidentialité est une entente exécutoire. Il est important de noter que le simple fait de signer une entente de médiation assortie d'une clause de confidentialité n'écarte pas automatiquement le privilège et ses exceptions. Pour arriver à un tel résultat, la clause doit l'exprimer clairement.

En l'espèce, la nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement. L'entente de médiation consistait en un contrat type fourni par le médiateur et ni l'une ni l'autre des parties ne l'a modifié ni n'y a ajouté des dispositions concernant la confidentialité. Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement. Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.

Table of Authorities

Cases considered by *Wagner J.*:

Archambault c. Canada (Agence du Revenu) (2013), 365 D.L.R. (4th) 535, 2013 SCC 65, 2013 CarswellQue 11299, 2013 CarswellQue 11300, (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5174 (Eng.), (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5175 (Fr.), (sub nom. *Agebce du Revenu du Québec v. Services Environnementaux AES inc.)* 453 N.R. 119, (sub nom. *Quebec (Agence du revenu) v. Services Environnementaux AES inc.)* [2013] 3 S.C.R. 838 (S.C.C.) — followed

Bloom Films 1998 inc. c. Christal Films productions inc. (2011), 2011 QCCA 1171, 2011 CarswellQue 6389 (C.A. Que.) — referred to

Bombardier inc. c. Union Carbide Canada inc. (2012), 2012 CarswellQue 72, 2012 QCCS 22 (C.S. Que.) — referred to

Bombardier inc. c. Union Carbide Canada inc. (2012), 2012 QCCA 1300, 2012 CarswellQue 7252 (C.A. Que.) — referred to

Coopérative des consommateurs de Ste-Foy c. Sobeys Québec inc. (2005), 2005 CarswellQue 11045, [2006] R.D.I. 12, 2005 QCCA 1172, [2006] R.J.Q. 100 (C.A. Que.) — followed

Ferlatte v. Ventes Rudolph Inc. (1999), 1999 CarswellQue 2751 (C.S. Que.) — considered

Globe & Mail c. Canada (Procureur général) (2010), (sub nom. *Globe & Mail v. Canada (Attorney General))* 220 C.R.R. (2d) 339, [2010] 2 S.C.R. 592, 2010 SCC 41, 2010 CarswellQue 10258, 2010 CarswellQue 10259, (sub nom. *CTVglobemedia Publishing Inc. v. Canada (Attorney General))* 407 N.R. 202, (sub nom. *Globe & Mail v. Canada (Procureur général))* 325 D.L.R. (4th) 193, 78 C.R. (6th) 205, 94 C.P.C. (6th) 1 (S.C.C.) — considered

Kosko c. Bijimine (2006), 2006 CarswellQue 4944, 2006 QCCA 671, 2006 CarswellQue 14225 (C.A. Que.) — considered

Luger c. Empire, Cie d'assurance-vie (1991), 1991 CarswellQue 1852 (C.S. Que.) — considered

R. v. Fosty (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285 (S.C.C.) — considered

Sable Offshore Energy Inc. v. Ameron International Corp. (2013), 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 2013 SCC 37, 2013 CarswellNS 428, 2013 CarswellNS 429, 359 D.L.R. (4th) 381, [2013] 2 S.C.R. 623, 446 N.R. 35, 1052 A.P.R. 1, 332 N.B.R. (2d) 1 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Slavutych v. Baker (1975), [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224, 1975 CarswellAlta 39, 1975 CarswellAlta 145F, [1976] 1 S.C.R. 254, *(*sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587 (S.C.C.) — considered

Stewart v. Stewart (2008), 2008 CarswellAlta 2212, 2008 ABQB 348 (Alta. Q.B.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 1414 — considered

art. 1425 — considered

art. 1426 — considered

art. 1427 — considered

art. 1431 — considered

Code de procédure civile, L.R.Q., c. C-25

en général — referred to

art. 151.16 [ad. 2002, c. 7, art. 19] — considered

art. 151.21 [ad. 2002, c. 7, art. 19] — considered

Commercial Mediation Act, S.N.S. 2005, c. 36

Generally — referred to

Commercial Mediaton Act, 2010, S.O. 1989, c. 16, Sched. 3

Generally — referred to

Treaties considered:

UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 I.L.M. 1302

Article 9 — considered

Authorities considered:

Baudouin, Jean-Louis and Pierre-Gabriel Jobin, *Les obligations*, 7th ed., by Pierre-Gabriel Jobin and Nathalie Vézina (Cowansville, Que.: Yvon Blais, 2013)

Boulle, Laurence and Kathleen J. Kelly, *Mediation: Principles, Process, Practice* (Markham, Ont.: Butterworths, 1998)

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2009)

Glaholt, Duncan W. and Markus Rotterdam, *The Law of ADR in Canada: An Introductory Guide* (Markham, Ont.: LexisNexis, 2011)

Grammond, Sébastien, Anne-Françoise Debruche and Yan Campagnolo, *Quebec Contract Law* (Montreal: Wilson & Lafleur, 2011)

Lluelles, Didier and Benoît Moore, *Droit des obligations*, 2nd ed. (Montreal: Thémis, 2012)

Royer, Jean-Claude and Sophie Lavallée, *La preuve civile*, 4th ed. (Cowansville, Que.: Yvon Blais, 2008)

Silver, Michael P., *Mediation and Negotiation: Representing Your Clients* (Markham, Ont.: Butterworths, 2001)

Thibault, Joëlle, *Les procédures de règlement amiable des litiges au Canada* (Montreal: Wilson & Lafleur, 2000)

United Nations, Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, 2002* (New York: United Nations, 2004)

Words and phrases considered:

confidentiality

Confidentiality is often described as one of the factors that induce parties to opt for mediation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), at para. 197), and as one of the benefits of mediation (M. P. Silver, *Mediation and Negotiation: Representing Your Clients* (2001), at p. 82).

confidentiality clause

[A confidentiality clause] is a binding agreement.

mediation

Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as "a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute" (p. 10).

settlement privilege

Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation.

Termes et locutions cités:

Confidentialité

[La confidentialité] est (...) souvent considérée comme l'un des facteurs qui incitent les gens à recourir à la médiation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), par. 197) et l'un de ses avantages (M. P. Silver, *Mediation and Negotiation : Representing Your Clients* (2001), p. 82).

clause de confidentialité

[Une clause de confidentialité] est une entente exécutoire (...).

médiation

Dans *The Law of ADR in Canada : An Introductory Guide* (2011), D. W. Glaholt et M. Rotterdam définissent la médiation comme suit : [TRADUCTION] « un processus de collaboration strictement confidentiel dans le cadre duquel les parties concluent un contrat avec une personne neutre, en l'occurrence un médiateur, qui les aidera à régler leur différend » (p. 10).

privilège relatif aux règlements

En common law, le privilège relatif aux règlements est une règle de preuve qui protège les communications échangées entre des parties qui tentent de régler un différend. Parfois appelé la règle des communications faites « sous toutes réserves », le privilège permet aux parties de prendre part à des négociations en vue d'un règlement sans crainte que les renseignements qu'elles divulguent soient utilisés à leur détriment dans un litige ultérieur.

APPEAL by supplier from decision allowing manufacturer to allege information pertaining to out-of-court settlement in its pleadings.

POURVOI formé par un fournisseur à l'encontre d'une décision permettant à un fabricant d'alléguer des renseignements concernant une transaction dans des procédures écrites.

Wagner J. **(McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring):**

I. Introduction

1 This Court recently confirmed the vital importance of the role played by settlement privilege in promoting the settlement of disputes and improving access to justice: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.). Settlement privilege is a common law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it. This privilege is not the only tool available to parties, however, as parties like the appellants and the respondents in the case at bar often sign mediation agreements that provide for the confidentiality of communications made in the course of the mediation process.

2 This case concerns the interaction between these two protections: confidentiality of communications provided for in a private mediation contract, and the common law settlement privilege. More specifically, it relates to a common law exception to settlement privilege that applies where a party seeks to prove the existence or the scope of a settlement. At issue is whether a mediation contract with an absolute confidentiality clause displaces the common law settlement privilege, including this exception, thereby foreclosing parties from proving the terms of a settlement.

3 Ironically, both the appellants and the respondents argue that the Court's answer could negatively affect the development of mediation in Canada, either by undermining its confidential nature or by frustrating its main objectives. I disagree. I reach this decision bearing in mind the overriding benefit to the public of promoting the out-of-court settlement of disputes regardless of the legal means employed to reach a given settlement. For the reasons that follow, I find that parties are at liberty to sign mediation contracts under which the protection of confidentiality is different from the common law protection. This enables parties to secure the safeguards they deem important and fosters the free and frank negotiation of settlements, thereby serving the same purpose as settlement privilege: the promotion of settlements. However, I reject the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically the exceptions to that privilege that exist at common law. The exceptions to settlement privilege have been developed for public policy reasons, and they exist to further the overall purpose of the privilege. A mediation contract will not deprive parties of the ability to prove the terms of a settlement by producing evidence of communications made in the mediation context unless a court finds, applying the appropriate rules of contractual interpretation, that that is the intended effect of the agreement.

4 Because this dispute arose in Quebec, Quebec contract law applies. I find that although it was open to the parties to contract out of the exception to settlement privilege, they did not do so. They therefore retain their right to produce evidence of communications made in the mediation context in order to prove the terms of their settlement. I would affirm the Court of Appeal's decision, albeit for different reasons.

II. Facts

5 The parties are entangled in a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. The appellants, Dow Chemical Canada Inc. and Union Carbide Canada Inc., now known as Dow Chemical Canada ULC ("Dow Chemical"), manufacture and distribute gas tanks for personal watercraft. The respondent Bombardier Inc. manufactured and distributed Sea-Doo personal watercraft before selling its recreational products division to the respondent Bombardier Recreational Products Inc. (jointly, "Bombardier"). A dispute arose over the fitness of the gas tanks as a result of consumer complaints.

6 This appeal results from an allegation by Bombardier that two gas tank models supplied by Dow Chemical were unfit for the use for which they had been intended. More specifically, Bombardier alleged that the material used and recommended by Dow Chemical for the gas tanks had been cracking and that this had in some cases caused explosions as a result of which owners

and users of the watercraft had suffered property damage and bodily injury. Bombardier recalled the watercraft equipped with the gas tanks in question in 1997, 1998 and 2003, and it has been sued by a number of consumers.

7 In March 2000, Bombardier Inc. commenced an action against Union Carbide Canada Inc. in the Quebec Superior Court (file No. 500-05-056325-002) for $9,980,612.07 in damages. Dow Chemical Canada Inc. was subsequently added as a defendant, as a result of its merger with Union Carbide. They filed their defence to the action on May 6, 2003. On May 29, 2007, Bombardier Inc. amended the declaration to add Bombardier Recreational Products Inc., which had since acquired its recreational products division, and Allianz Global Risks US Insurance Company as co-plaintiffs (Allianz is also a respondent to this appeal). In this amended declaration, the amount of the claim was raised to $30,019,505, and an additional claim for $1,786,445.23 was made on behalf of Allianz. Finally, on or about July 31, 2008, Dow Chemical filed an amended defence.

8 Bombardier claimed three separate amounts: (1) $15,153,394 for the cost of the safety recall campaigns; (2) $13,474,142 for the cost of settlements with and lawsuits by consumers for damage and injuries caused by the gas tanks; and (3) $1,391,969 for other costs incurred by Bombardier.

9 After signing a joint list of admissions on the value of the claims, the parties agreed to private mediation to be conducted in Montréal by lawyer Max Mendelsohn. On April 26, 2011, before the mediation commenced, a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process:

> 2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:
>
> (a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;
>
> (b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;
>
> (c) The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding.

10 The agreement also contained a clause regarding the mediator's role:

> 4. The Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute.

11 At the mediation session on April 27, 2011, Dow Chemical submitted a settlement offer for $7 million. Counsel for Bombardier asked Dow Chemical to keep this offer open for 30 days, as he had to ask his client for instructions, and Dow Chemical agreed to do so. On May 17, 2011, before the 30 days expired, counsel indicated to Dow Chemical that Bombardier was accepting the offer:

> My clients, BRP, Bombardier and Allianz have given me instructions to accept Dow Chemical's offer to settle the above-mentioned case for an amount of CAN$ 7 million in capital, interest and costs.
>
> I would ask that you request a check from your client to the order of Fasken Martineau in trust at your earliest convenience or have the amount wired to our trust account using the following coordinates.
>
> . . . . .
>
> In the meantime, I will prepare a draft release that I will forward to you very shortly. Of course, Fasken Martineau will undertake to hold the sums until the release documents have been signed and returned to Lavery.

12 Two days later, on May 19, 2011, counsel for Dow Chemical emailed counsel for Bombardier, stating that his client considered this to be a global settlement amount. Dow Chemical thus wanted Bombardier to sign a release absolving it of

liability in any future litigation not only in Quebec and with respect to the two gas tank models at issue, but anywhere in the world and involving any gas tank models:

> It is my client's expectation that this settlement will put an end to all present and future litigation arising out of any fuel tanks supplied to Bombardier, BRP et al by Wedco, Union Carbide and Dow Chemicals et al. My client realizes that it may be conceivably named as a co-defendant with your client in matters arising out of one of the fuel tanks delivered, but expects that the settlement document will be clear so that neither party would institute a warranty or third party proceedings against the other. It is my client's feeling that litigation with respect to fuel tanks supplied by Wedco, Union Carbide, Dow Chemicals et al has been going on long enough and has proven to be very expensive for both parties and it wants to put an end to the dispute once and for all.

13 After a short follow-up email from Dow Chemical's counsel on June 1, 2011, counsel for Bombardier replied, on June 6, 2011, that the settlement amount was for the Montréal litigation only. His email also detailed further courses of action:

> As you well know, the object of the discussions at the mediation and the offer that Dow presented at that time never encompassed the type of release referred to in your e-mail of May 19th. The numbers exchanged were always based on the claim before the Superior court of the district of Montreal and the third party claims covered by that action. These were limited to existing claims at the time the admissions were made and no other....
>
> I therefore enclose a release that reflects the scope of your offer and our binding acceptance. For the purpose of buying the peace, BRP has agreed to extend the release to any exi[s]ting or potential claims involving 109 and 183 tanks manufactured by Wedco regardless of whether or not they existed at the time the admissions were made. However, they will not go so far as to settle existing or potential claims for fuel tanks that are not the object of the Montreal litigation.
>
> It appears to me we now have 3 choices:
>
> > 1) Dow significantly increases its offer to cover the release it now wants;
> >
> > 2) We settle the Montreal action and attempt to settle the other existing and potential claims you now want to settle (with or without the assistance of a mediator). If you wish to go this latter route I suggest Dow obtain settlement authority before we engage in the process to avoid a take it or leave position as occurred last time around.
> >
> > 3) Dow refuses to settle and BRP will either a) continue the suit or b) decide to file an homologation action.
>
> [Emphasis in original.]

14 On June 14, 2011, counsel for Bombardier sent counsel for Dow Chemical a demand letter for payment of the $7 million settlement amount. Counsel for Dow Chemical replied on June 16, 2011, reiterating their position on the release sought by their client:

> Your clients were fully aware of the nature of the release that our clients required and at no time suggested that they would provide a narrower release. If your clients are not prepared to grant the release that we have outlined to you, then no payment will be forthcoming and any proceedings will be contested.
>
> I remind you of the confidentiality provisions of the mediation agreement signed by yourself on your own behalf and on behalf of your clients on April 26, 2011. Any attempt to violate the confidentiality of what transpired in the mediation will be met with the appropriate proceedings.

15 Counsel for Bombardier replied to that letter on June 29, 2011, stating that they would proceed by filing a motion if they did not receive the payment:

> We understand that your client is no longer willing to abide by the agreement that was reached in the above-mentioned matter.

As such, unless Dow Chemical revisits its position, BRP will have no other choice but to file the attached Motion.

We have considered the arguments raised in your letter with regard to the confidentiality of discussions that may have taken place during the mediation. However, these are without merit.

First of all, as you know, there is an exception to confidentiality when settlement discussions have led to a transaction.

Moreover, the contract between the parties is not applicable in this case as Dow Chemical agreed to keep its offer open for consideration after the mediation and the acceptance of BRP was sent outside of the mediation forum.

16 In a further letter dated July 6, 2011, counsel for Dow Chemical argued that neither the correspondence from Bombardier nor the draft motion had addressed the issue of the consideration to be provided by Bombardier in return for the sum to be paid by Dow Chemical. Counsel for Dow Chemical reiterated that in their client's opinion, there was "no agreement and no transaction".

17 Dow Chemical did not send the discussed settlement amount, and Bombardier then filed a motion for homologation of the transaction on July 8, 2011, in the Superior Court, District of Montréal. The motion detailed the history of the dispute between the parties and referred to both the mediation and the subsequent settlement discussions.

18 Dow Chemical brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process, which was in violation of the confidentiality clause in the mediation agreement. The paragraphs at issue were the following:

[TRANSLATION]

17. The Joint List of Admissions was the sole basis for discussion by the Parties at the mediation session of April 27, 2011;

18. All the discussions in the course of the mediation related exclusively to the Covered Claims and the other costs claimed in the Re-amended Action R-4. No claims concerning tanks other than tanks 275 500 109 and 275 500 183 were ever discussed;

19. Moreover, the mediation related exclusively to the existing dispute between the parties as described in the Pleadings, as can be seen from a copy of the mediation contract signed by the Parties on April 26, 2011 that is attached hereto as Exhibit **R-8**;

20. The mediation was terminated unsuccessfully on April 27, 2011 when Dow Chemical submitted to BRP and Allianz an offer to settle the Re-amended Action for $7,000,000 in capital, interest and costs, but indicated to BRP and to the mediator that it had no authority to increase this offer;

21. Yves St-Arnaud, in-house counsel for BRP, asked Dow Chemical to keep this offer open for thirty (30) days and promised to get back to them shortly. Dow Chemical acceded to this request;

22. On May 17, 2011, that is, twenty (20) days after the end of the mediation, counsel for BRP and for Allianz advised counsel for Dow Chemical that the applicants accepted the settlement offer for $7,000,000 in capital, interest and costs in full and final settlement of the claims made in the case bearing court file No. 500-05-056325-002 (the "**Transaction**"), as can be seen from a copy of an email attached hereto as Exhibit **R-9**;

19 In oral argument in this Court, counsel for Dow Chemical stated that no settlement had been reached between the parties. This is not completely accurate. The record of communications between the parties shows that there was a settlement offer and that it was accepted, but that the parties subsequently disagreed on the scope of the release. In short, Bombardier's view is that the settlement is limited to the ongoing Montréal litigation, and seeks to admit evidence from the mediation session to enable it to prove this. Dow Chemical disagrees on the scope of the settlement, viewing it as a global settlement, and argues

that the evidence from the mediation session on which Bombardier seeks to rely in its motion for homologation is inadmissible by virtue of the confidentiality agreement.

III. Judicial History

A. Quebec Superior Court, 2012 QCCS 22 (C.S. Que.) (CanLII) (Corriveau J.)

20 Corriveau J. based her analysis on art. 151.16 of the *Code of Civil Procedure*, CQLR, c. C-25 ("*CCP*"), as well as on art. 151.21, which provides that anything said or written during a settlement conference is confidential. She cited cases from the Quebec Court of Appeal which confirmed the confidential nature of mediation or settlement conferences, and reasoned that those cases applied regardless of whether the mediation was conducted by a judge or, as in the instant case, by a lawyer. She held that in light of the confidentiality clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *CCP*.

21 On this basis, Corriveau J. granted the appellants' motion to strike in part, ordering that four of the six allegations (paras. 17, 18, 20 and 21) be struck from the respondents' motion for homologation because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. She denied Dow Chemical's request to strike para. 22 from the motion for homologation, as it referred to the settlement offer itself, which had been kept open after the mediation session. Having struck the four paragraphs in question, Corriveau J. explained that Bombardier could continue to rely on the remainder of the motion for homologation relating to the claim, the mediation contract and the discussions that followed the mediation. Bombardier applied to the Quebec Court of Appeal for leave to appeal, which was granted on March 16, 2012.

B. Quebec Court of Appeal, 2012 QCCA 1300 (C.A. Que.) (CanLII) (Thibault, Rochette and Morissette JJ.A.)

22 Thibault J.A., writing for a unanimous court, allowed the appeal and, contrary to the motion judge, found that the rules of the *CCP* with respect to confidentiality do not apply to extrajudicial mediation proceedings. Given the absence of legislation in this regard, two factors must be considered to determine whether mediation proceedings presided over by someone other than a judge are confidential: (1) the mediation contract agreed to by the parties, and (2) the common law settlement privilege as recognized in Quebec law. In the Court of Appeal's view, the language of the contract ("Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding") indicated that what was said in the course of the mediation session was subject to an obligation of confidentiality, and this obligation applied to some of the facts Bombardier sought to rely upon.

23 The Court of Appeal then restated the general rule that settlement negotiations are confidential, even in the absence of a legislated rule of procedure. It cited *Globe & Mail c. Canada (Procureur général)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.), to reiterate that the purpose of settlement privilege is to enable parties to have frank discussions about a possible settlement without worrying that what they disclose in the course of the negotiations will be used against them in litigation. The court noted that settlement privilege is based on public policy considerations, as it is preferable, in the interests of the proper administration of justice, that parties try to resolve their own disputes before resorting to litigation.

24 Where mediation has resulted in an agreement, the Court of Appeal observed, communications made in the course of the mediation process cease to be privileged. It supported this comment by quoting various authors, from both civil law and common law backgrounds (at paras. 35-38), as well as two decisions of the Quebec Superior Court, including *Ferlatte v. Ventes Rudolph Inc.*, [1999] Q.J. No. 2735 (C.S. Que.), in which that court had commented as follows, at para. 12:

> Unchallenged judicial authority in Quebec, the common law provinces and in England holds that privilege protects communications between opposing counsel aimed at settling a dispute. Therefore offers of settlement cannot be introduced in evidence unless they are accepted. In that case they are admissible, not as proof that the offerors admit responsibility for the offerees' claims, but that they choose to end their conflict by settling on the terms of the offers. Such communications benefit from the protection of privilege on the policy ground that without it, disputing parties would be reluctant to attempt settlement negotiations, fearing their initiatives will come back to haunt them at trial if they fail.

[Emphasis added.]

25 Thibault J.A. argued that, if a dispute arises regarding the existence or the terms of a transaction, the obligation of confidentiality of communications made in the course of the mediation process is no longer necessary given that the underlying purpose of confidentiality — to further the achievement of a settlement — is no longer relevant. If an agreement was not in fact reached, on the other hand, such communications cannot of course be admitted in evidence for any other purpose.

26 The Court of Appeal held that settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. It considered three cases cited by Dow Chemical in support of the proposition that the confidentiality of discussions and communications from an extrajudicial mediation process is absolute where the mediation agreement contains a confidentiality clause, but it noted that those cases did not call into question the application of the exception to settlement privilege that enables a party to produce evidence of such discussions and communications in order to prove the existence or the scope of a settlement agreement. Reversing the motion judge's ruling, the Court of Appeal held that the allegations at issue should not be struck from the motion for homologation. It left it to the judge hearing that motion to consider whether the impugned paragraphs were relevant to the identification of the terms of the agreement, in which case the exception to the common law settlement privilege would apply.

IV. Analysis

27 In my view, there are two questions to answer in this appeal. The first is whether a confidentiality clause in a private mediation contract can override the exception to the common law settlement privilege that enables parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement. The second question, which arises only if the answer to the first is yes, is whether the confidentiality clause at issue in the case at bar displaces that exception. If it does, the information referred to in the impugned paragraphs cannot be disclosed. If it does not, that information may be disclosed if it meets the criteria of the exception.

28 The appellants argue that a court must give effect to a confidentiality clause in a mediation agreement to which both parties have freely consented, and that there are no public policy reasons to nullify the clause. The respondents counter that a standard form confidentiality clause cannot displace the exception to the common law settlement privilege and that, even if it could do so, the clause at issue in this case, if correctly interpreted, does not preclude the application of that exception.

29 I see value in the submissions of both the appellants and the respondents. On the first question, I agree with the appellants that a court must give effect to a confidentiality clause to which both parties have agreed, and that it is open to the parties to contract out of common law rules, including the exception to settlement privilege. Parties may desire that the protection of confidential information disclosed in the mediation process be broader than that afforded by the common law privilege, and disregarding this desire would undermine one of the main features that encourage parties to opt for this oft-used form of alternative dispute resolution. On the second question, however, I agree with the respondents that, on the facts of this case, overriding the common law exception was not what the parties intended when they signed their mediation agreement, which means that the parties *can* produce communications from the mediation process to prove the terms of their settlement.

A. Does a Confidentiality Clause Supersede the Exception to the Common Law Doctrine of Settlement Privilege?

30 This case requires a review both of the common law settlement privilege in the mediation context and of the use of confidentiality clauses in mediation agreements. In my view, it will be helpful to consider each of these distinct concepts — including their application in Quebec — in turn, before discussing how they overlap.

(1) Settlement Privilege

31 Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations

without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

32 Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose. As Abella J. wrote in *Sable Offshore*, at para. 12, "[s]ettlement privilege promotes settlements." She explained this as follows, at para. 13:

> Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:
>
> > ... parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
>
> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

33 There have been other occasions on which this Court discussed the importance of encouraging parties to settle their own disputes. For example, LeBel J., writing for the Court in *Globe & Mail* cited *Kosko c. Bijimine*, 2006 QCCA 671 (C.A. Que.) (CanLII), a case in which the Quebec Court of Appeal had commented as follows, at paras. 49-50:

> The protection of confidentiality of these "settlement discussions" is the most concrete manifestation in the law of evidence of the importance that the courts assign to the settlement of disputes by the parties themselves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.
>
> The courts and commentators have unanimously recognized that, first, settlement talks would be impossible or at least ineffective without this protection and, second, that it is in the public interest and a matter of public order for the parties to a dispute to hold such discussions.
>
> (See also *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 41 B.L.R. 22, at p. 28.)

34 Settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality, and parties do not have to use the words "without prejudice" to invoke the privilege: "What matters instead is the intent of the parties to settle the action .... Any negotiations undertaken with this purpose are inadmissible" (*Sable Offshore*, at para. 14). Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: *Sable Offshore*, at paras. 15-18. As with other class privileges, there are exceptions to settlement privilege:

> To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

(*Sable Offshore*, at para. 19)

35 The exception to settlement privilege at issue in the case at bar is the rule that protected communications may be disclosed in order to prove the existence or scope of a settlement. This exception is explained by Bryant, Lederman and Fuerst:

> If the negotiations are successful and result in a consensual agreement, then the communications may be tendered in proof of the settlement where the existence or interpretation of the agreement is itself in issue. Such communications form the offer and acceptance of a binding contract, and thus may be given in evidence to establish the existence of a settlement agreement. [para. 14.340]

The rule is simple, and it is consistent with the goal of promoting settlements. A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement. Far from outweighing the policy in favour of promoting settlements (*Sable Offshore*, at para. 30), the reason for the disclosure — to prove the terms of a settlement — tends to further it. The rule makes sense because it serves the same purpose as the privilege itself: to promote settlements.

36 In *Globe & Mail*, this Court confirmed that the common law settlement privilege applies in Quebec. As the Court of Appeal demonstrated in its reasons in the instant case, the exception for the purpose of proving the terms of a settlement also clearly applies in Quebec. The Court of Appeal cited a number of Quebec authors and cases on this point, and I find it helpful to reiterate how J.-C. Royer and S. Lavallée explain the application of the exception:

> [TRANSLATION] **1137** — *Limits of this privilege* — This rule for the exclusion of evidence is grounded in a desire to promote the out-of-court settlement of disputes. The privileged nature of the communication is accordingly limited to facts related to the negotiation of a settlement. Thus, an expert's report is privileged if it is transmitted with a communication made for the purpose of settling a dispute. Moreover, a litigant cannot object to evidence of a fact that is independent of and separate from a settlement offer. Such an objection will be dismissed *a fortiori* if the fact is contrary to public order or to public morals, or if it is likely to cause serious injury to the recipient of the communication. Thus, a threat made by a debtor in a settlement offer, or a statement by a debtor that he or she cannot pay his or her creditors, would not be privileged. A communication ceases to be privileged if it resulted in a transaction that one of the parties wishes to prove. The existence of negotiations between the parties and of settlement offers can also be proven in order to prove certain relevant facts needed to resolve a question with respect to prescription, to prove fraudulent acts or to explain and justify a delay in pursuing litigation.
>
> [Emphasis added.]
>
> (*La preuve civile* (4th ed. 2008))

37 Although this rule has not been codified in Quebec, it is discussed in the academic literature on the law of evidence and forms part of the civil law of Quebec. The Court of Appeal cited two cases in which the Superior Court has applied the exception: *Ferlatte* and *Luger c. Empire, Cie d'assurance-vie*, [1991] J.Q. No. 2635 (C.S. Que.). In Quebec law, as at common law, settlement privilege is an evidentiary rule that relates to the admissibility of evidence of communications. It does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.

(2) Confidentiality in the Mediation Context

38 Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as "a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute" (p. 10). It is unsurprising that confidentiality is mentioned in the very definition of mediation. Confidentiality is often described as one of the factors that induce parties to opt for mediation (J. Thibault, *Les procédures de règlement amiable*

des litiges au Canada (2000), at para. 197), and as one of the benefits of mediation (M. P. Silver, *Mediation and Negotiation: Representing Your Clients* (2001), at p. 82).

39 A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement, which means that their communications are protected by the common law settlement privilege (Bryant, Lederman and Fuerst, at para. 14.348; see also L. Boulle and K. J. Kelly, *Mediation: Principles, Process, Practice* (1998), at pp. 301-4). But mediation is also a "creature of contract" (Glaholt and Rotterdam, at p. 13), which means that parties can tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract.

40 As both the appellants and the intervener Arbitration Place Inc. mention, the reasons why parties might want to protect information exchanged in the mediation process are not limited to litigation strategy. Owen V. Gray states the following in this regard in "Protecting the Confidentiality of Communications in Mediation" (1998), 36 *Osgoode Hall L.J.* 667:

> When [the parties] have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts.... Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives.
>
> [Emphasis added; p. 671.]

Incentives for choosing confidential mediation include both "a disinclination to 'air one's dirty laundry' in the neighborhood" and legitimate concerns such as the protection of trade secrets (L. R. Freedman and M. L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 *Ohio St. J. Disp. Resol.* 37, at p. 38).

41 It is therefore no surprise that mediation contracts often contain strongly worded confidentiality clauses that place limits on the disclosure of communications exchanged in the course of the mediation process. Such clauses have been upheld by courts, though not in a context in which the parties were trying to prove the existence of a settlement. In *Bloom Films 1998 inc. c. Christal Films productions inc.*, 2011 QCCA 1171 (C.A. Que.) (CanLII), the Quebec Court of Appeal upheld a confidentiality clause in a case in which a party was seeking to introduce evidence arising out of the mediation process. The clause in question specifically prohibited the use of such evidence for any purpose other than homologation or judicial review. And in *Stewart v. Stewart*, 2008 ABQB 348 (Alta. Q.B.) (CanLII), another case involving a confidentiality clause with respect to communications made in the course of a mediation process, albeit in a family law context, the Alberta Court of Queen's Bench refused to admit evidence arising out of that process.

42 Although the confidentiality provided for in a clause of a mediation contract may be broader, and set out in greater detail, than the common law settlement privilege, several authors caution that such a clause nevertheless does not represent a "watertight" approach to confidentiality and that a court may refuse to enforce it after balancing competing interests, such as the role of confidentiality in encouraging settlement, and evidentiary requirements in litigation (see Boulle and Kelly, at pp. 309 and 312-13; F. Crosbie, "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests" (1995), 2 *C.D.R.J.* 51, at p. 70; K. L. Brown, "Confidentiality in Mediation: Status and Implications", [1991] *J. Disp. Resol.* 307; E. D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 *Ohio St. J. Disp. Resol.* 1, at pp. 19-22; Freedman and Prigoff, at p. 41).

43 The intervener Arbitration Place suggests that the four-part Wigmore test, sometimes used by common law courts to determine whether evidence of communications is admissible, be applied to balance the competing interests. The four parts of the test are:

> (i) The communications must originate in a confidence that they will not be disclosed.

> (ii) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (iii) The relationship must be one which, in the opinion of the community ought to be "sedulously fostered."
>
> (iv) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

(I.F., at para. 4, citing *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.), at p. 260.)

This Court applied this test in *Slavutych* to determine whether a confidential document signed by the appellant at the request of the university authorities should remain privileged in dismissal proceedings subsequently taken against the appellant. The Court also applied it in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) [hereinafter *Gruenke*], to determine whether religious communications should remain privileged in a criminal context.

44 The intervener Attorney General of British Columbia, on the other hand, suggests that the plain meaning of an unambiguous confidentiality agreement should prevail, barring extreme circumstances. As for the respondents, they say that courts should look beyond the plain meaning to account for the wishes of the parties. I agree with these approaches. In principle, there is relatively little that can displace the intent of the parties once it is clearly established. Only the fourth step of the Wigmore test — the balancing of interests — is potentially relevant in this case. In my view, the first three steps of the Wigmore test are redundant where parties have not only opted for a confidential dispute resolution process, but have also signed a confidentiality agreement.

(3) Can a Confidentiality Clause in a Mediation Agreement Displace the Exception to Settlement Privilege That Applies Where a Party Seeks to Prove the Terms of a Settlement?

45 The common law settlement privilege and confidentiality in the mediation context are often conflated. They do have a common purpose: facilitating out-of-court settlements. But as we saw above, confidentiality clauses in mediation agreements can also have different purposes. In most cases involving such clauses, the status of the common law settlement privilege will not arise, because the two protections generally serve the same purpose, namely to foster negotiations by encouraging parties to be honest and forthright in reaching a settlement without fear that the information they disclose will be used against them at a later date. However, as I mentioned above, settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

46 The differences between these protections may be muddled in a case like this one in which both of them could apply, but to different parts of the sequence of events. The parties met for the mediation session on April 27, 2011, the day after they had signed an agreement with a confidentiality clause. The clause in question applied to discussions that took place in the course of the mediation session and prohibited the disclosure of information about those discussions at any time in the future. A settlement offer was made at the mediation session, was kept open for 30 days after that date, and was discussed by the parties' lawyers after the session. Any additional information that came up in the course of these subsequent discussions falls outside the protection of the confidentiality clause — however, since it formed part of negotiations aimed at reaching a settlement, it is protected by settlement privilege. As regards the timing of the communications, the scope of settlement privilege is broader, because it is not limited to the duration of the mediation session.

47 On the other hand, there are recognized exceptions to settlement privilege at common law that limit the scope of its protection, but such exceptions may be lacking in the case of a confidentiality clause. The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception, thereby preventing parties from producing evidence of communications made in the mediation process in order to prove the terms of a settlement.

48 There is indeed a delicate balance to be struck. The concerns articulated by commentators about the uncertainty of confidentiality clauses in mediation contracts are legitimate. Boulle and Kelly accurately identify the most important of these concerns:

> The principle of sanctity of contract supports the maintenance of confidentiality where the parties have committed themselves to it. If, however, the confidentiality is too wide, it will sterilise too much evidence and seriously undermine the trial process. If the confidentiality is too narrow, it will discourage parties from entering mediation and from using their best endeavours to settle once there. A balance is required between supporting mediation, on one hand, and not freezing litigation or upholding illegality, on the other. [pp. 312-13]

49 In my view, the inquiry in each case will begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. I have discussed reasons why parties might desire greater confidentiality protection, and allowing parties to freely contract for such protection furthers the valuable public purpose of promoting settlement. As Professor Green states,

> if a written confidentiality agreement exists, the parties are in a stronger position to argue that the court should exercise its discretion to grant a protective order assuring confidentiality because protecting the confidentiality of mediation statements furthers the expressed intentions of the parties as well as the public policy of encouraging extra-judicial settlements. [p. 22]

50 But contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement is a different matter. As I mentioned above, a failure to apply this common law exception could frustrate the broader purpose of promoting settlements in that it might prevent parties from enforcing the terms of settlements they have negotiated. Thus, whereas contracting for broader protection than is afforded by the common law settlement privilege may further the overall purpose of that privilege in most circumstances, contracting out of the exceptions to the privilege might undermine that purpose. This may be what was behind the Court of Appeal's decision, as it largely favoured the exception to settlement privilege over the confidentiality clause.

51 In my respectful opinion, the Court of Appeal did not devote adequate attention in its analysis to freedom of contract. It is open to contracting parties to create their own rules with respect to confidentiality that entirely displace the common law settlement privilege. This furthers both freedom of contract and the likelihood of settlement, two important public purposes. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. As I mentioned above, these protections do not have the same scope. For instance, settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. It cannot be argued that parties who agree to confidentiality in respect of a mediation session thereby deprive themselves of the application of settlement privilege after the conclusion of the mediation session. The protection afforded by the privilege does not evaporate the moment the parties contract for confidentiality with respect to the mediation process, unless that is the contract's intended effect.

52 I would note that there has been some international agreement on this approach to confidentiality in the mediation context. Jurisdictions in 14 countries with both common law and civil law systems, including Ontario (S.O. 2010, c. 16) and Nova Scotia (S.N.S. 2005, c. 36), have adopted the United Nations Commission on International Trade Law's Model Law on International Commercial Conciliation. Article 9 of the Model Law states:

> Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.
>
> [Emphasis added.]

(*UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (2004), at p. 5)

53 This article, with which my approach is consistent, recognizes the need for confidentiality in the settlement context, but also provides that parties may enter into their own agreements in this regard. Furthermore, it indicates widespread acceptance in both common law and civil law jurisdictions that an exception to settlement privilege applies where a party seeks to prove the existence or the terms of a settlement.

54 Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear. It cannot be presumed that parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace an exception to settlement privilege that serves the same purpose of promoting a settlement. Parties are free to do this, but they must do so clearly. To avoid a dispute over the terms of a settlement, they may also choose to stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing. This practice is specifically contemplated in art. 1414 of the *Civil Code of Québec*, which provides that "[w]here a particular or solemn form is required as a necessary condition of formation of a contract, it shall be observed". Such a stipulation would underscore the binding nature of any agreement reached in the course of the mediation process.

55 I wish to emphasize that my analysis concerns one exception to the common law settlement privilege — the one that applies where a party seeks to prove the terms of a settlement. I have not discussed other exceptions, such as the one with respect to fraudulent or unlawful communications, as they are not at issue in this case. Nor will I consider whether the mediator could be compelled to testify in a situation such as this one. The evidence before this Court is limited to the impugned paragraphs of the motion for homologation, so I will not address the appropriate legal threshold for permitting or compelling direct testimony by the mediator. I will leave that question for another day.

56 In my opinion, the information the respondents seek to disclose with the impugned paragraphs of their motion for homologation is protected by the confidentiality clause, and not solely by settlement privilege. It was open to the parties to displace settlement privilege, including the exceptions to it. The question is whether they did so.

57 The mediation contract was signed and performed in Quebec. It must be interpreted in accordance with the *Civil Code of Québec* and with the law of obligations.

B. Does This Mediation Contract Permit the Parties to Use Confidential Information in Order to Prove the Terms of a Settlement?

58 I have concluded that it is generally open to parties, in the mediation context, to contract for confidentiality that exceeds that of the common law settlement privilege; in particular, parties may contract out of the exception to that privilege that enables a party to disclose confidential information in order to prove the terms of a settlement. I will now inquire into whether that is what the parties did in this case. What is the effect of the mediation contract at issue here?

59 In Quebec, contractual interpretation is centered on the intention of the parties. As J.-L. Baudouin and P.-G. Jobin explain, where the parties disagree about the scope of a contract clause, the judge must determine what the parties originally intended, at the time of formation of the contract (*Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at pp. 488-89). This rule of contractual interpretation is codified in a number of provisions of the *Civil Code of Québec*:

> **1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> **1427.** Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

> **1431.** The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

60 The Quebec Court of Appeal explained this interpretive approach in *Coopérative des consommateurs de Ste-Foy c. Sobeys Québec inc.*, 2005 QCCA 1172, [2006] R.J.Q. 100 (C.A. Que.):

> [TRANSLATION] To establish the true will of the parties, and their common intention within the meaning of article 1425 C.C.Q., it is of course necessary to consider the actual words of the contract, but it is also necessary, as required by article 1426 C.C.Q., to consider the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage.
>
> Deciphering the parties' intention is of course a delicate exercise, especially where that intention conflicts with the intention expressed in a writing that is by all appearances clear. Moreover, it can happen, which does not make things easier, that a review of the contract itself, of its context, of the circumstances in which it was formed, of the subsequent conduct of the parties, and so on, shows that there was no real common intention. Pineau and Gaudet [*Théorie des obligations* (4th ed. (2001)), at pp. 401-02] explain this as follows:
>
> > ... Moreover, the principle stated in article 1425 C.C.Q. presupposes that there is always a common intention to "find". But that is not always the case. Of course, for there to be a contract, there must be a minimal common intention, but it is very possible that the parties, although they had a genuine common intention regarding the essential elements of the contract, also agreed on certain incidental clauses that each of them, in his or her heart of hearts, interpreted differently. In such a case, it is of course impossible to rely on the common intention of the parties, as there is none. All that can then be done is to adopt the interpretation that can most readily be reconciled with the rest of the contract and with the circumstances in which it was concluded. [paras. 59-60]

61 This approach was also confirmed by this Court in *Archambault c. Canada (Agence du Revenu)*, 2013 SCC 65, [2013] 3 S.C.R. 838 (S.C.C.): "... the determination of the common intention, or will, of the parties represents a true exercise of interpretation" (para. 48; see also D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at paras. 1587-90; S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2011), at paras. 297-301).

62 On its face, the mediation contract at issue in the case at bar shows a common intention on the part of the parties to be bound by confidentiality in respect of anything that might transpire in the course of the mediation. But the question to be answered is more specific and concerns an incidental aspect of the contract, for which the common intention of the parties is not immediately clear: Was the confidentiality clause intended to exceed the protection of the common law settlement privilege and, more specifically, to displace the exception to that privilege that applies where a party seeks to prove the existence or the scope of a settlement? I find that a review of the nature of the contract, of the circumstances in which it was formed and of the contract as a whole reveals that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement.

63 The nature of the contract is that of a mediation agreement signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute that was the subject of an action in the Quebec Superior Court. The word "settlement" appears twice in the mediation agreement, the first time in a clause relating to the mediator that reads "[t]he Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute", and the second time in the mediator's concluding words: "I look forward to working with you, and hope that the Mediation will give rise to a settlement of the dispute."

64 The nature of the contract must be considered together with the circumstances in which it was formed. Neither of the parties drafted the mediation contract or the confidentiality clause. It was a standard form contract provided by the mediator, who sent it to both parties to sign on the eve of the mediation. Neither party amended the standard mediation agreement or added any provisions relating to confidentiality when they signed it. There is no evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement.

65 It is my opinion that the parties entered into this mediation process with the intention of settling their dispute and that they had no reason to assume that they were signing away their ability to prove a settlement if necessary. There is no evidence that they had any expectation for this mediation other than that it might help them settle the dispute. Lluelles and Moore write that, [TRANSLATION] "[i]f the spirit pervading a contract is considered to be the best guide in this regard (art. 1425) ..., the common intention of the parties can sometimes be self-evident, and a question of logic" (para. 1589). Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical.

66 I therefore find that the mediation contract does not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement. However, I would note that this exception is a narrow one. Parties may produce such evidence only insofar as it is necessary in order to prove the terms of the settlement. The judge who hears the motion for homologation will consider the impugned paragraphs of the motion individually to determine whether each of them is necessary for that purpose. If either party would prefer that potentially sensitive information tendered in support of those paragraphs not be made available to the public, an application can be made to the motion judge for a confidentiality order and to consider the evidence *in camera*, as long as the parties meet the test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.). Not all cases will meet that test, which requires parties to show

> (a) [that] such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) [that] the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

(*Sierra Club*, at para. 53)

In camera hearings such as this should be reserved for cases in which there is a genuine dispute about the scope of the confidentiality agreement.

67 I find that it is open to parties, in agreeing to confidentiality for a mediation process, to go so far as to limit their ability to prove the terms of any settlement. When any such limit is placed on the usual rule in this regard, however, it must be clear, on applying the principles of contractual interpretation of the relevant jurisdiction, that that is what the parties intended. In this case, the principles of Quebec contract law applied because the agreement at issue was entered into in Quebec. Had the law of another jurisdiction applied, the question whether the parties intended to renounce the common law exception to settlement privilege that applies where a party seeks to prove the terms of a settlement would have been decided in accordance with the principles applicable in that jurisdiction.

68 Although I find that the Court of Appeal failed to conduct the necessary contractual interpretation exercise before applying the exception to the common law settlement privilege that enables parties to prove the terms of a settlement, I nevertheless uphold the result it reached. The parties did not renounce the common law rule, which also applies in Quebec, that communications made in the course of negotiations can be used to prove the terms of a settlement.

V. Conclusion

69 For the foregoing reasons, the appeal is dismissed with costs throughout.

Appeal dismissed.

Pourvoi rejeté.

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Tab 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Waldmann v. Kuo | 2022 BCSC 329, 2022 CarswellBC 541 | (B.C. S.C., Mar 3, 2022)

2013 SCC 37
Supreme Court of Canada

Sable Offshore Energy Inc. v. Ameron International Corp.

2013 CarswellNS 428, 2013 CarswellNS 429, 2013 SCC 37, [2013] 2 S.C.R. 623,
[2013] S.C.J. No. 37, 1052 A.P.R. 1, 228 A.C.W.S. (3d) 78, 22 C.L.R. (4th) 1, 332
N.B.R. (2d) 1, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 446 N.R. 35, J.E. 2013-1134

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation, ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project, Appellants and Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc., Respondents

McLachlin C.J.C., LeBel, Abella, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 25, 2013
Judgment: June 21, 2013
Docket: 34678

Proceedings: reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.); reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2010), 299 N.S.R. (2d) 216, 947 A.P.R. 216, 2010 CarswellNS 907, 2010 NSSC 473 (N.S. S.C.)

Counsel: Robert Belliveau, Q.C., Kevin Gibson, for Appellants
John P. Merrick, Q.C., Darlene Jamieson, Q.C., for Respondents, Ameron International Corporation and Ameron B.V.
Terrence L.S. Teed, Q.C., Ronald J. Savoy, for Respondents, Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

Subject: Civil Practice and Procedure; Evidence
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.e Miscellaneous
Evidence
XIV Privilege
XIV.9 Miscellaneous
Headnote
Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous
Privilege with respect to amount of settlement — Plaintiffs were involved in litigation with multiple defendants — Plaintiffs reached settlement with some defendants ("settling defendants") — Plaintiffs and settling defendants executed Pierringer agreement — Remaining defendants brought unsuccessful application for disclosure of quantum of settlement under R. 20 of Civil Procedure Rules (1972) — Chambers judge held quantum met relevancy threshold for disclosure under R. 20, but not

until after trial — Chambers judge held disadvantage to remaining defendants of not knowing quantum did not outweigh benefit of encouraging settlement in future multi-party litigation — Chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings — Non-settling defendants successfully appealed timing of disclosure of settlement amount — Plaintiffs appealed — Appeal allowed — It was not clear how knowledge of settlement amounts materially affected ability of non-settling defendants to know and present case — Defendants remained fully aware of claims they must defend themselves against and of overall amount that plaintiffs was seeking — It was true that knowing settlement amounts might allow defendants to revise estimate of how much they want to invest in case, but this did not rise to sufficient level of importance to displace public interest in promoting settlements.

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous

Privilege with respect to amount of settlement — Plaintiffs were involved in litigation with multiple defendants — Plaintiffs reached settlement with some defendants ("settling defendants") — Plaintiffs and settling defendants executed Pierringer agreement — Remaining defendants brought unsuccessful application for disclosure of quantum of settlement under R. 20 of Civil Procedure Rules (1972) — Chambers judge held quantum met relevancy threshold for disclosure under R. 20, but not until after trial — Chambers judge held disadvantage to remaining defendants of not knowing quantum did not outweigh benefit of encouraging settlement in future multi-party litigation — Chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings — Non-settling defendants successfully appealed timing of disclosure of settlement amount — Plaintiffs appealed — Appeal allowed — It was not clear how knowledge of settlement amounts materially affected ability of non-settling defendants to know and present case — Defendants remained fully aware of claims they must defend themselves against and of overall amount that plaintiffs was seeking — It was true that knowing settlement amounts might allow defendants to revise estimate of how much they want to invest in case, but this did not rise to sufficient level of importance to displace public interest in promoting settlements.

Procédure civile --- Jugement rendu sans procès — Règlement — Divers

Secret concernant le montant d'une transaction — Demandeurs étaient engagés dans un litige avec de nombreuses défenderesses — Demandeurs ont conclu une transaction avec certaines d'entre elles (les « défenderesses parties à la transaction ») — Demandeurs et les défenderesses parties à la transaction ont exécuté des ententes de type Pierringer — Autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès — Juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès — Juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties — Juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser des frais — Défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation du montant de la transaction, avec succès — Demandeurs ont formé un pourvoi — Pourvoi accueilli — Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments — Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs — Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Divers

Secret concernant le montant d'une transaction — Demandeurs étaient engagés dans un litige avec de nombreuses défenderesses — Demandeurs ont conclu une transaction avec certaines d'entre elles (les « défenderesses parties à la transaction ») — Demandeurs et les défenderesses parties à la transaction ont exécuté des ententes de type Pierringer — Autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès — Juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès — Juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties — Juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser

des frais — Défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation du montant de la transaction, avec succès — Demandeurs ont formé un pourvoi — Pourvoi accueilli — Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments — Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs — Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

The plaintiffs were involved in litigation with multiple defendants. The plaintiffs reached settlement with some defendants. The remaining defendants brought an unsuccessful application for disclosure of the quantum of settlement under R. 20 of Civil Procedure Rules (1972).

The chambers judge held that the quantum met the relevancy threshold for disclosure under R. 20, but not until after the trial. The chambers judge held that the disadvantage to the remaining defendants of not knowing quantum did not outweigh the benefit of encouraging settlement in future multi-party litigation. The chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings.

The non-settling defendants successfully appealed the timing of disclosure of the settlement amount.

The plaintiffs appealed.

Held: The appeal was allowed.

Per Abella J. (McLachlin C.J.C., LeBel, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): It was not clear how knowledge of the settlement amounts materially affected the ability of the non-settling defendants to know and present their case. The defendants remained fully aware of the claims they must defend themselves against and of the overall amount that the plaintiffs were seeking.

It was true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they wanted to invest in the case, but this did not rise to a sufficient level of importance to displace the public interest in promoting settlements.

Les demandeurs étaient engagés dans un litige avec de nombreuses défenderesses. Les demandeurs ont conclu une transaction avec certaines d'entre elles. Les autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès.

Le juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès. Le juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties. Le juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser des frais.

Les défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation du montant de la transaction, avec succès.

Les demandeurs ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Abella, J. (McLachlin, J.C.C., LeBel, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments. Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs.

Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

Table of Authorities

Cases considered by *Abella J.*:

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), [2001] 6 W.W.R. 628, 2001 CarswellAlta 575, 2001 ABCA 110, 281 A.R. 185, 248 W.A.C. 185, 4 C.P.C. (5th) 20, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13 (Alta. C.A.) — referred to

Bioriginal Food & Science Corp. v. Gerspacher (2012), 2012 SKQB 469, 2012 CarswellSask 823 (Sask. Q.B.) — considered
Brown v. Cape Breton (Regional Municipality) (2011), 2011 NSCA 32, 2011 CarswellNS 186, 331 D.L.R. (4th) 307, 955 A.P.R. 84, 302 N.S.R. (2d) 84 (N.S. C.A.) — followed
Cutts v. Head (1984), [1984] 1 All E.R. 597, [1984] 2 W.L.R. 349, [1984] Ch. 290 (Eng. C.A.) — considered
Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada (2005), 249 D.L.R. (4th) 416, 40 B.C.L.R. (4th) 245, [2005] 7 W.W.R. 1, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 207 B.C.A.C. 54, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 341 W.A.C. 54, 2005 BCCA 4, 2005 CarswellBC 5, 17 C.C.L.I. (4th) 180, 5 C.P.C. (6th) 278 (B.C. C.A.) — referred to
Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright (1997), 12 C.P.C. (4th) 94, 1997 CarswellMan 388, (sub nom. *Hudson Bay Mining & Smelting Co. v. Wright)* 120 Man. R. (2d) 214, [1997] 10 W.W.R. 622 (Man. Q.B.) — referred to
Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), (sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — considered
Middelkamp v. Fraser Valley Real Estate Board (1992), 1992 CarswellBC 267, 71 B.C.L.R. (2d) 276, 10 C.P.C. (3d) 109, 96 D.L.R. (4th) 227, 17 B.C.A.C. 134, 29 W.A.C. 134, 45 C.P.R. (3d) 213 (B.C. C.A.) — considered
Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — considered
Rush & Tompkins Ltd. v. Greater London Council (1988), [1988] 3 All E.R. 737, 104 N.R. 392, [1989] A.C. 1280, [1988] 3 W.L.R. 939 (U.K. H.L.) — considered
Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered
Underwood v. Cox (1912), 26 O.L.R. 303, 4 D.L.R. 66, 21 O.W.R. 757, 1912 CarswellOnt 200 (Ont. Div. Ct.) — referred to
Unilever Plc v. Procter & Gamble Co. (1999), [2000] 1 W.L.R. 2436, [2001] 1 All E.R. 783 (Eng. C.A.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

Rules considered:

Civil Procedure Rules (1972), N.S. Civ. Pro. Rules

R. 20.02 — considered

R. 20.06 — considered

Authorities considered:

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2009)

Knapp, Peter B., "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1

Vaver, David, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85

APPEAL by plaintiffs from decision reported at *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), which granted non-settling defendants' appeal of timing of disclosure of settlement amount.

POURVOI formé par les demandeurs à l'encontre d'une décision publiée à *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), ayant accueilli l'appel des défenderesses non parties à une transaction à l'encontre du moment choisi pour la divulgation du montant de la transaction.

***Abella J.*:**

1 The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

2 The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

3 Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

Background

4 Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.

5 In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.

6 Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

7 As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.

8 Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.

9 These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.

10 Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Analysis

11 Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.):

> [T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [p. 230]

This observation was cited with approval in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (U.K. H.L.), at p. 740).

13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597 (Eng. C.A.), at p. 605:

> [P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

14 *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

15 Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

> In such circumstances it would, I think, place a serious fetter on negotiations ... if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

16 *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (B.C. C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges

being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

> ... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

17 As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84 (N.S. C.A.), is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

> Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself.... *The distinction ... is arbitrary*. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it*.
>
> [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

> ... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable.
>
> [Emphasis added; para. 14. 341.]

18 Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185 (Alta. C.A.), at para. 40, citing *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1997), 120 Man. R. (2d) 214 (Man. Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54 (B.C. C.A.), at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever Plc v. Procter & Gamble Co.* (1999), [2001] 1 All E.R. 783 (Eng. C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Ont. Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

20 The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

21 The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value — and complexity — of trying to settle multi-party litigation as follows:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.
>
> "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1, at p. 5.

22 Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

> On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

23 In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

24 Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

25 The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

26 As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

27 It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to

revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.

28 The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

29 Someone has to go first, and encouraging that first settlement in multiparty litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in *Bioriginal Food & Science Corp. v. Gerspacher*, 2012 SKQB 469 (Sask. Q.B.):

> ... imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns ... [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in *Brown* as follows:

> Some courts have argued that it is necessary to go further and disclose the settlement amount itself.... They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. ... If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

30 A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure *outweighs* the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.

31 I would therefore allow the appeal with costs throughout.

Appeal allowed.

Pourvoi accueilli.

End of Document

Tab 13

2020 ABCA 195
Alberta Court of Appeal

Phoa v. Ley

2020 CarswellAlta 894, 2020 ABCA 195, [2020] A.W.L.D. 2743,
321 A.C.W.S. (3d) 480, 60 C.P.C. (8th) 437, 9 Alta. L.R. (7th) 1

Eugene Phoa as the personal representative of the Estate of Evelyn Siew Chiang Phoa, deceased, also known as Lauw Siew Chiang, Eugene Phoa, and Eugene Phoa, as the personal representative of the Estate of William Phoa, deceased (Appellant / Plaintiff) and Oei Liang Ley also known as Oey Liang Ley also known as Ridwan Kasenda, Alin Kasenda, Oei Liang Hien also known as Oey Liang Hien also known as Salman Kasenda, Joshua Huang Thien En, Wellington Phoa, John Phoa, and Angeline Teh also known as Angeline Phoa (Respondents / Defendants)

Peter Martin, Jo'Anne Strekaf, Jolaine Antonio JJ.A.

Heard: May 4, 2020
Judgment: May 11, 2020
Docket: Calgary Appeal 2001-0009-AC

Counsel: W.J. Kenny, Q.C., A.S. Funk, for Appellant
M.L. Teetaert, for Respondents, Oei Liang Ley, Alin Kasenda
M. Vesely, for Respondents, Oei Liang Hien, Joshua Huang Thien En
Wellington Phoa, Respondent, for himself
John Phoa, Respondent, for himself
Angeline Teh, Respondent, for herself

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence
Related Abridgment Classifications
Evidence
XIV Privilege
XIV.4 Settlement privilege [communications without prejudice]
Headnote
Evidence --- Privilege — Settlement privilege [communications without prejudice]
Dispute arose out of alleged trust created in Singapore prior to 1976 between plaintiff and brother-in-law, both of whom were deceased — Trust involved shares in private corporation incorporated in Singapore — Plaintiff moved from Singapore to Alberta — Plaintiff's personal representative brought action in Alberta on behalf of plaintiff's estate against brother-in-law's children alleging breach of trust, breach of fiduciary duty, conversion and fraud — Defendants brought application to challenge jurisdiction to bring action in Alberta on basis of forum non conveniens — Defendants successfully brought application to strike plaintiff's affidavits in opposition to application — Plaintiff appealed — Appeal dismissed — Chambers judge did not wrongly infer that parties' dispute predated challenged documents — Chambers judge made no error in applying test for settlement privilege — It would not be appropriate to parse challenged documents in manner suggested by plaintiffs as this was not case where settlement privilege might not apply to all attachments to document covered by settlement privilege.
Table of Authorities
Cases considered:
Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd. (2013), 2013 ABCA 10, 2013 CarswellAlta 76, 542 A.R. 83, 566 W.A.C. 83, 358 D.L.R. (4th) 628, [2013] 8 W.W.R. 71, 81 Alta. L.R. (5th) 84, 43 C.P.C. (7th) 145 (Alta. C.A.) — followed

Costello v. Calgary (City) (1997), 1997 CarswellAlta 758, 62 L.C.R. 161, 152 D.L.R. (4th) 453, [1998] 1 W.W.R. 222, 13 R.P.R. (3d) 145, 209 A.R. 1, 160 W.A.C. 1, 53 Alta. L.R. (3d) 15, 41 M.P.L.R. (2d) 155, 38 C.C.L.T. (2d) 101, 1997 ABCA 281 (Alta. C.A.) — followed

Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada (2005), 2005 BCCA 4, 2005 CarswellBC 5, 17 C.C.L.I. (4th) 180, 5 C.P.C. (6th) 278, 249 D.L.R. (4th) 416, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 207 B.C.A.C. 54, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 341 W.A.C. 54, 40 B.C.L.R. (4th) 245, [2005] 7 W.W.R. 1, 5 C.P.C. (4th) 278 (B.C. C.A.) — considered

Guccione v. Bell (2004), 2004 ABQB 729, 2004 CarswellAlta 1282, 15 C.P.C. (6th) 321 (Alta. Q.B.) — distinguished

Hansraj v. Ao (2002), 2002 ABQB 385, 2002 CarswellAlta 627, [2002] 8 W.W.R. 725, 4 Alta. L.R. (4th) 124, 314 A.R. 262 (Alta. Q.B.) — distinguished

Hansraj v. Ao (2004), 2004 ABCA 223, 2004 CarswellAlta 849, 354 A.R. 91, 329 W.A.C. 91, 34 Alta. L.R. (4th) 199, [2005] 4 W.W.R. 669 (Alta. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 1 S.C.R. 401, 29 C.C.L.T. (3d) 1, 2005 CSC 25 (S.C.C.) — followed

Sable Offshore Energy Inc. v. Ameron International Corp. (2013), 2013 SCC 37, 2013 CarswellNS 428, 2013 CarswellNS 429, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 446 N.R. 35, 1052 A.P.R. 1, 332 N.B.R. (2d) 1, [2013] 2 S.C.R. 623 (S.C.C.) — considered

Sorochan v. Bouchier (2015), 2015 ABCA 212, 2015 CarswellAlta 1116, 602 A.R. 148, 647 W.A.C. 148 (Alta. C.A.) — referred to

APPEAL by plaintiff from judgment granting defendants' application to strike affidavits in opposition to application challenging jurisdiction.

***Per curiam*:**

Introduction

1 The issue on this appeal is whether a chambers judge erred in striking portions of an affidavit on the basis of settlement privilege. We are satisfied that he did not.

Background

2 The dispute arises out of an alleged trust created in Singapore prior to 1976 between Evelyn Phoa and her brother-in-law, Wireo Kasendra, both of whom are deceased. The trust involved the shares in a private corporation incorporated in Singapore. Evelyn moved from Singapore to Alberta in 1976 and died in 1981. Her personal representative (Eugene Phoa) commenced an action in Alberta in March 2018 on behalf of her estate and heirs (appellants) against Wireo's children and members of their families (respondents) alleging breach of trust, breach of fiduciary duty, conversion and fraud with respect to the shares in the alleged trust.

3 The respondents applied to challenge the jurisdiction to bring the action in Alberta, on the bases that there is no real and substantial connection between Alberta and the allegations in the Statement of Claim, or that Alberta should decline jurisdiction on the basis of *forum non conveniens*.

4 Eugene swore an affidavit on behalf of the appellants in opposition to that application, in which he referred to communications between certain of the parties. He attached a letter dated September 25, 2003 addressed to him from the respondent Ridwan Kasenda, his response dated October 14, 2003, and some email correspondence.

5 The respondents applied to strike those portions of Eugene's affidavit on the basis that they are subject to settlement privilege and inadmissible. A chambers judge granted the application, striking paragraphs 9 through 12 of the affidavit and the associated exhibits (Challenged Documents).

6 On appeal, the appellants submit that the chambers judge erred in striking the Challenged Documents as he drew improper inferences, did not properly apply the test for settlement privilege when assessing whether the Challenged Documents qualify, failed to recognize that the Challenged Documents qualify as exceptions to settlement privilege, and failed to admit the non-privileged portions of the Challenged Documents.

Standard of Review

7 Questions of law are reviewed for correctness. Questions of fact, and mixed fact and law, are reviewed for palpable and overriding error, except where the wrong legal test was incorrectly applied or the legal test was applied incorrectly, which is reviewable on the correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para 8.

Analysis

Did the chambers judge draw improper inferences from the evidence?

8 The appellants submit that the chambers judge wrongly inferred that the parties' dispute predated the Challenged Documents. They argue that was not the only inference that could be drawn having regard to all the evidence, and that an inference can only be drawn where the evidence supports no other reasonable conclusion, citing *Sorochan v. Bouchier*, 2015 ABCA 212 (Alta. C.A.) at para 37.

9 That proposition is inconsistent with the direction provided by the Supreme Court of Canada in *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at para 74:

> Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own.

10 We are satisfied that the inference drawn by the chamber judge was reasonable and did not constitute a palpable and overriding error.

Did the chambers judge fail to properly apply the test for settlement privilege?

11 Settlement privilege prevents communications being admissible where: (1) there is a litigious dispute in existence or within contemplation; (2) the communication is made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail; and (3) the purpose of the communication is an attempt to effect a settlement: *Costello v. Calgary (City)*, 1997 ABCA 281 (Alta. C.A.) at para 60.

12 The rationale underlying settlement privilege was explained in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 (Alta. C.A.) at para 21:

> Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.

13 The appellants submit that the chambers judge failed to adequately consider whether the Challenged Documents, and in particular the September 25, 2003 letter, contain an element of compromise.

14 In *Bellatrix*, while some documents were found to be subject to settlement privilege, other documents did not qualify as they were "simply statements of . . . position and provide no hint of compromise, a critical hallmark to any settlement discussion" (para 35).

15 The chambers judge was mindful of the test for settlement privilege as he stated:

> To be protected from disclosure by reason of settlement privilege, each part of a three-part test must be satisfied by the party asserting that privilege: first, that at the time of the communication a litigious dispute existed or was in contemplation; second, the communication must be made with the express or implied intention that it would not be disclosed, that is the communication would not be disclosed in the event negotiations failed; and third, the purpose of the communication must be to attempt settlement.

16 He considered the documents in context and concluded that the September 25, 2003 letter and the response were "written in an effort to settle the dispute". He made similar findings with respect to the other documents, describing them as "clearly an attempt to resolve a dispute" and containing "settlement offers and positions."

17 We are satisfied that the chambers judge made no error in applying the test for settlement privilege.

Are the Challenged Documents admissible because they fall within the exceptions to settlement privilege?

18 There are exceptions to the privilege when "a competing public interest outweighs the public interest in encouraging settlement": *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (S.C.C.) at para 19, citing *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (B.C. C.A.) at para 20.

19 The "generally recognized exceptions" to settlement privilege were identified in *Bellatrix* at para 29:

> (a) to prevent double recovery: *Dos Santos (Committee of) v Sun Life Assurance Co of Canada*, 2005 BCCA 4, 207 BCAC 54;
>
> (b) where the communications are unlawful, containing for example, threats or fraud;
>
> (c) to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement: *Comrie v Comrie*, 2001 SKCA 33, 203 Sask R 164;
>
> (d) it is possible that the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the Rules of Court, but also with respect to informal offers: *Mahe v Boulianne*, 2010 ABCA 74 at paras 8-10, 21 Alta LR (5th) 277; *Calderbank v Calderbank*, [1975] 3 All ER 333 (CA).

20 The appellants submit that the Challenged Documents are admissible under the fraud exception. The chambers judge rejected this argument; he found the appellants' claim was not that "the communications themselves constitute a fraud or are an essential part of a larger fraud" but that "the existence of settlement offers can be proven in order to prove fraudulent acts". He found that did not fall within the exception, saying: "Taken to its logical extreme, it seems to me the plaintiffs' position would mean one need only allege fraud and any privilege attaching to without prejudice settlement communications would fall away. That cannot be." The chambers judge went on to note that it is "not enough to outweigh the public interest in encouraging settlements to say the records speak of settling a claim of fraud." We agree.

21 The exception applies to the communication itself — "where the communications are unlawful, containing for example, threats or fraud" (*Bellatrix* at para 29(b)).

22 The appellants also submit a further exception exists when privileged documents are sought to be used on a preliminary application that does not involve adjudication of the merits of the underlying action. The chambers judge rejected this argument, stating it was not enough to "demonstrate only the chambers judge will consider the alleged privileged communications." A similar conclusion was reached in *Bellatrix*, where privileged documents were not permitted to be used to respond to a limitations defence on a chambers application as "there [were] no exceptional circumstances to justify doing so" (para 39).

23 The cases relied upon by the appellants (*Hansraj v. Ao*, 2002 ABQB 385 (Alta. Q.B.) at para 21, rev'd on other grounds [2004 CarswellAlta 849 (Alta. C.A.)]; *Guccione v. Bell*, 2004 ABQB 729 (Alta. Q.B.) at para 9) are distinguishable. Both involved applications to dismiss an action for want of prosecution where the *existence* of the settlement negotiations was used to explain the delay; their content was immaterial. As Slatter J (as he then was) noted in *Hansraj* at para 21:

> . . . For example, if an application is brought to strike proceedings for want of prosecution, it is possible to explain the delay by indicating that negotiations have been underway. However, in these circumstances it will seldom be necessary or permissible to actually attach the without prejudice correspondence to an affidavit; it will be sufficient to merely refer to the discussions and perhaps note the dates of the correspondence back and forth.

24 The exceptions to settlement privilege are to be construed narrowly. The appellants have not demonstrated that the chambers judge erred in failing to find that the Challenged Documents should have been admitted.

Did the chambers judge err in refusing to admit non-privileged portions of the Challenged Documents?

25 This issue is raised for the first time on appeal, so it was not addressed by the chambers judge.

26 The appellants submit that portions of the Challenged Documents are not subject to settlement privilege and that the chambers judge should have parsed the documents into privileged and non-privileged portions and admitted the non-privileged portions. In particular, they submit that an attachment to the September 25, 2003 letter, being a document dated February 15, 1981, should not be viewed as covered by settlement privilege.

27 While "it may be that even if part of a communication is covered by the privilege another part, such as a separate enclosure might not be" (*Bellatrix* at para 30), this does not require a court to parse a single document (in the absence of a special reason) to dissect statements that might not independently qualify as privileged. Doing so would undercut the privilege. As was noted in *Bellatrix* at paras 27-28:

> It is to be remembered that the rationale for the privilege is not limited to the notion that it would be unfair to subsequently prejudice one of the parties by admitting any admissions made during settlement negotiations. The rule is also intended to allow parties to freely and openly discuss the potential for a settlement, and while doing so, the parties should not have to carefully monitor the content of their discussions. As noted by Lord Walker in *Unilever plc v The Procter & Gamble Co* (1999), [2001] 1 All ER 783 at para 35, [2000] 1 WLR 2436 (CA):
>
> > the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.
>
> In other words, the rule's protection is not meant to be limited to the prejudice that an admission may have at trial specifically, but on the potential impairment on settlement discussions as an important element of the litigation process generally. Accordingly, for the rule to operate properly, not only must the ambit of the settlement privilege be broad, but the exceptions to the exclusionary rule must be narrowly construed and only be given effect where another policy objective can be shown to outweigh any impact that may arise to the settlement objective.

28 In our view, it would not be appropriate to parse the Challenged Documents in the manner suggested by the appellants for the reasons outlined above. While we recognize that there may well be cases where settlement privilege might not apply to all

attachments to a document covered by settlement privilege, that is not this case. The copy of the February 15, 1981 document that was attached to the September 25, 2003 letter exhibited to Eugene's affidavit was clearly provided as part of the overall communication, made with a view to settlement. Settlement privilege attaches to that copy of the document for the purposes of this application. Our findings address only the issue at hand, not whether other copies of the attached document might be otherwise admissible in this litigation or in other proceedings.

Conclusion

29 The appeal is dismissed.

Appeal dismissed.