COURT FILE NUMBER:	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ATB FINANCIAL
RESPONDENTS	ST. ALBERT LIMITED PARTNERSHIP by and through its general partner ST. ALBERT REAL ESTATE SYNDICATE GP LTD., ST. ALBERT REAL ESTATE SYNDICATE GP LTD., and JOHN TORODE
DOCUMENT:	**BENCH BRIEF OF THE APPLICANT (APPOINTMENT OF RECEIVER)**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. OVERVIEW

1. This Brief is submitted on behalf of ATB Financial (formerly Alberta Treasury Branches) ("**ATB**") in support of its application seeking to appoint BDO Canada Ltd. ("**BDO**") as Receiver and Manager of the property, assets, and undertakings of St. Albert Limited Partnership ("**St. Albert LP**") and St. Albert Real Estate Syndicate GP Ltd. ("**St. Albert GP**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***"), section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "***Judicature Act***"), and 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "***PPSA***").

2. For the reasons that follow, it is appropriate, just, and convenient in these circumstances to appoint BDO as Receiver over the Debtors and to grant a Sealing Order in respect of the Confidential Exhibit (defined below).

II. FACTUAL BACKGROUND

3. Capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Notice of Application and the Affidavit of Olena Olenchuk sworn on March 12, 2024 (the "**Olenchuk Affidavit**").

4. A detailed description of the background facts relevant to the Application are set out in the Olenchuk Affidavit and are adopted herein. In summary:

    a. ATB extended credit to the Borrower on certain terms and conditions, pursuant to an Commitment Letter, dated April 9, 2020 (the "**Commitment Letter**").[1]

    b. As security for all obligations owing by the Borrower to ATB, the Defendants entered into the following:

        i. a general security agreement dated April 20, 2020 from the Borrower to ATB (the "**Borrower GSA**");[2]

        ii. an unlimited continuing guarantee and postponement of claims, dated April 20, 2020, from St. Albert GP to ATB (the "**Corporate Guarantee**"), which was secured by:[3]

[1] Olenchuk Affidavit at para 11 and Exhibit D.
[2] Olenchuk Affidavit at para 13 and Exhibit E.
[3] Olenchuk Affidavit at para 15(a) and Exhibit F.

1. a general security agreement, dated April 20, 2020, from St. Albert GP to ATB (the "**GP GSA**");[4]

2. a collateral mortgage in the amount of $9,000,000 dated April 20, 2020 in favour of ATB in respect of the Lands (the "**Collateral Mortgage**");[5]

3. a general assignment of leases and rents, dated April 20, 2020, in favour of ATB in respect of the Lands (the "**GP Assignment**" and together with the Corporate Guarantee, the GP GSA, and the Collateral Mortgage, the "**GP Security**").[6]

iii. a continuing guarantee and postponement of claims, dated April 2020, from John Torode ("**Torode**") to ATB, guaranteeing up to the amount of $2,250,000 of the Borrower's obligations to ATB (the "**Torode Guarantee**").[7]

c. The Borrower GSA, the Torode Guarantee, and the GP Security are collectively referred to hereinafter as the "**Security**".

d. ATB has perfected its security interests created by the Security by way of registration at the Alberta Personal Property Registry and the Alberta Land Titles Office.[8]

e. The Borrower is in default of its obligations to ATB pursuant to the Commitment Letter and the Borrower GSA by, among other things, failing to maintain the Debt Service Coverage ratio and failing to make scheduled payments as required by the Commitment Letter (collectively, the "**Commitment Letter Defaults**").[9]

f. Notwithstanding the Commitment Letter Defaults, ATB was prepared to, and made several attempts with the Defendants, to propose a forbearance agreement to permit the Borrower time to attempt to take steps for the purpose of repaying the

[4] Olenchuk Affidavit at para 16(a) and Exhibit H.
[5] Olenchuk Affidavit at para 16(b) and Exhibit I.
[6] Olenchuk Affidavit at para 16(c) and Exhibit J.
[7] Olenchuk Affidavit at para 15(b) and Exhibit G.
[8] Olenchuk Affidavit at paras 18 to 20 and Exhibits K and L.
[9] Olenchuk Affidavit at paras 23 and 28.

Outstanding Indebtedness. However, the Defendants were not agreeable to a forbearance agreement on the terms proposed by ATB.[10]

g. On February 20, 2024, ATB issued a demand for payment of the indebtedness then owing to each of St. Albert LP, St. Albert GP, and Torode, along with a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA* (collectively, the "**Demands**").[11]

h. As of March 11, 2024, the Borrower is indebtedness to ATB in the amount of $7,737,946.67 in respect of the Commitment Letter (the "**Outstanding Indebtedness**").[12]

i. Notwithstanding the Demands, each of St. Albert LP, St. Albert GP, and Torode have failed, neglected, or otherwise refused to repay the Outstanding Indebtedness to ATB in breach of their respective obligations under the Commitment Letter and the Security, as the case may be. As a result, the Outstanding Indebtedness remains fully due and owing to ATB.[13]

III. ISSUES

5. The issues to be determined by the Court are as follows:

a. Whether the appointment of a Receiver is just and convenient in the circumstances?

b. Whether it is appropriate for the Court to grant a Sealing Order in respect of the Confidential Exhibit?

IV. LAW AND ARGUMENT

A. <u>The Appointment of a Receiver is Necessary</u>

6. ATB seeks the appointment of a Receiver pursuant to section 243(1) of the *BIA*, section 13(2) of the *Judicature Act* and section 65(7) of the *PPSA*.[14]

[10] Olenchuk Affidavit at para 25.
[11] Olenchuk Affidavit at paras 29 to 32 and Exhibits Q, R, and S.
[12] Olenchuk Affidavit at para 21.
[13] Olenchuk Affidavit at para 36.
[14] *BIA* at s. 243 at **TAB 1**; *Judicature Act* at s. 13(2) at **TAB 2**; *PPSA* at s. 65(7) at **TAB 3**.

7. This Court has the authority to grant a receivership order where it is "just and convenient to do so". [15]

8. In considering an application to appoint a receiver, Canadian courts have considered the following non-exhaustive list of factors:

   a. whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish 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;

   c. the nature of the property;

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

   e. the preservation or protection of the assets;

   f. the balance of convenience to the parties;

   g. the fact that the moving party has a right under its security to appoint a receiver;

   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. whether a court appointment of the receiver is necessary to enable the receiver to carry out its work 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 potential costs;

   o. the likelihood of maximizing the return on the property; and

[15] *Business Development Bank of Canada v 170 Willowdale Investments Corp*, 2023 ONSC 3230 [***170 Willowdale***] at para 49 at **TAB 4**.

p. the goal of facilitating the duties of the receiver.[16]

9. Where the security instrument provides the creditor with a right to appoint a receiver, the extraordinary nature of the relief sought is less essential to the inquiry.[17]

10. In addition to the reasons set out at paragraphs 37 to 45 of the Olenchuk Affidavit, it is appropriate just, and convenient that a Receiver be appointed over the assets, undertakings, and property of St. Albert LP and St. Albert GP for the following reasons:

a. St. Albert LP and St. Albert GP are in default of their respective obligations to ATB. In particular, the Debtors have failed, neglected or otherwise refused to pay the Outstanding Indebtedness, or any part thereof, and the full amount remains justly due and owing;

b. the risk to ATB is significant with the Outstanding Indebtedness exceeding $7 million;

c. St. Albert LP and St. Albert GP have had ample opportunity to attempt to refinance or repay the Outstanding Indebtedness to ATB. ATB does not believe that the principles of St. Albert LP and St. Albert GP are not able to agree on a course of action for those entities to deal with the amounts outstanding to ATB. Accordingly, ATB does not believe that providing additional time will result in ATB being repaid;[18]

d. ATB has significant concerns regarding its ability to be repaid in full from a forced sale of the Property and other assets of St. Albert LP and St. Albert GP;[19]

e. a receivership order would permit an orderly and cost effective liquidation of the Debtors' assets, permitting ATB and other secured creditors the best opportunity to realize on their respective collateral;[20]

f. the Security provides that, in the event of default, ATB is contractually entitled to, among other things, seek the appointment of a receiver over the Debtors; and[21]

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[16] *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co,* 2002 ABQB 430 at para 27 at **TAB 5**; see also *Lindsay Estate v Strategi Metals Corp*, 2010 ABQB 242 at para 32 at **TAB 6**, aff'd in 2010 ABCA 191 and *Schendel Management Ltd., Re,* 2019 ABQB 545 at paras 44 – 45 at **TAB 7**.
[17] *170 Willowdale* at para 50 to 51.
[18] Olenchuk Affidavit at para 37.
[19] Olenchuk Affidavit at paras 38 to 39.
[20] Olenchuk Affidavit at para 44.
[21] Olenchuk Affidavit at para 43.

g. BDO has consented to act as the Receiver over the Debtors.[22]

B. It is Appropriate to Grant a Sealing Order over the Confidential Affidavit

11. ATB requests a sealing order with respect to the Confidential Exhibit to the Olenchuk Affidavit (the "**Confidential Exhibit**").

12. Pursuant to Part 6, Division 4 of the Alberta *Rules of Court*, AR 124/2010, this Honourable Court has the discretionary authority to order that a document filed in a civil proceeding is confidential, may be sealed, and not form part of the public record of the proceedings.[23]

13. The Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, clarified the test for obtaining a sealing order as follows:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) Court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[24]

14. The Confidential Exhibit contains an appraisal of certain assets of the Debtors, which form the bulk of the Security, and which contains commercially sensitive information, including the value of the Property. This information in the hands of public could have a material and negative impact on efforts to maximize the realization of that Property in a receivership proceeding.

15. The proposed form of Sealing Order (attached as **Schedule "C"** to the Notice of Application) contemplates that the Sealing Order will remain in place only until the earlier of: (i) an Order of the Court in the within Action granting a sale approval and vesting order in respect of the Property; (ii) an Order of the Court discharging BDO as Receiver; (iii) a period of twelve months from the date of the Sealing Order; or (iv) further Order of the Court.

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[22] Olenchuk Affidavit at para 45 and Consent to Act of BDO Canada Limited, filed concurrently herewith.
[23] *Rules of Court*, AR 124/2010, Part 6, Division 4, at **TAB 8.**
[24] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 at **TAB 9**.

16. For that reason, the salutary effects of a sealing order outweigh any negative effects to the principles of court openness.

17. The proposed Sealing Order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information.

V. RELIEF SOUGHT

18. For the reasons described above, ATB seeks an Order from this Honourable Court appointing BDO as Receiver over the assets, undertakings, and property of St. Albert LP and St. Albert GP.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF MARCH, 2024.

MLT AIKINS LLP

Per: _____

Ryan Zahara/Molly McIntosh
Counsel for ATB Financial

LIST OF AUTHORITIES

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

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.

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

243(3)Definition of "receiver" — subsection 248(2)

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

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to October 26, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

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

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

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

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

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Statutes
Personal Property Security Act
Part 5 — Rights and Remedies on Default (ss. 55-65)

R.S.A. 2000, c. P-7, s. 65

s 65. Receiver

Currency

65.Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

65(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

65(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

65(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

65(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

65(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

65(7) On the application of any interested person, the Court may

(a) appoint a receiver;

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

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

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

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

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

65(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

65(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

Concordance References
Personal Property Security Act Concordance 84, Receiver, receiver and manager
Personal Property Security Act Concordance CABYCONCORD1, Table of Concordance

CITATION: Business Development Bank of Canada v. 170 Willowdale Investments Corp., 2023 ONSC 3230
COURT FILE NO.: CV-23-00699065-00CL
DATE: 20230525

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:	
BUSINESS DEVELOPMENT BANK OF CANADA Applicant	*Matilda Lici*, for the Applicant
– and –	
170 WILLOWDALE INVESTMENTS CORP. Respondent	*Raymond Zar*, Agent for the Respondent 170 Willowdale Investments Corp. *Brian N. Radnoff*, for 7291771 Alberta Inc.
	HEARD: May 23, 2023

ENDORSEMENT

OSBORNE, J.

1. The Applicant, Business Development Bank of Canada ("BDC") seeks the appointment of The Fuller Landau Group Inc. as receiver of all of the assets, properties and undertakings of the Debtor, 170 Willowdale Investments Corp. (the "Debtor"). Those assets include a property located at 170 Willowdale Ave., Toronto (the "Real Property"). The Debtor operates a small boutique hotel on the Real Property.

2. Following the hearing of the application on May 23, 2023, I granted the relief sought with reasons to follow. These are those reasons.

3. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

4. The Debtor was represented by Mr. Raymond Zar, the president, secretary and director of the Debtor, and himself a guarantor under the Credit Agreement referred to below.

5. No court reporter was available. The hearing commenced at 10:40 AM via Zoom and had been scheduled for 30 minutes. At 11:05 AM, and as explained further below, given that Mr. Zar requested additional time to make submissions and a brief opportunity (10 minutes) to gather his thoughts, which I granted, I stood down the continuation of this matter until 11:45 AM at which time the hearing resumed. As no court reporter was available, I requested that the Registrar record the hearing via Zoom. That recording has been preserved.

6. The Applicant relies on the affidavit of Dodie Ballesteros sworn May 5, 2023 and exhibits thereto. The Debtor did not file any responding materials.

The First Adjournment Request

7. At the outset of the hearing, Mr. Zar requested an adjournment of the application. BDC submitted that it should proceed.

8. Counsel for the second ranking creditor, 729171 Alberta Inc. ("171 Alberta"), opposed the request for an adjournment and supported the position of BDC.

9. Mr. Zar submitted, initially, that the Application should be adjourned for two reasons.

10. First, it was only a "first appearance and it never crossed [his] mind that any relief other than the imposition of a case management schedule would be granted at the hearing of the Application".

11. I do not accept this submission. The Application material is very clear that the Applicant sought the relief requested today.

12. The Notice of Application and the draft receivership order were served on Mr. Zar via email on May 5, 2023 and again in hard copy via personal service effected by process server three days later on May 8, 2023. The Notice of Application states on its face that the Application was returnable on May 23, 2023 at 10:30 AM.

13. The full Application Record was served on Mr. Zar on May 15, 2023. The electronic mail message under cover of which the Application Record was served clearly stated again the return date of May 23 at 10:30 AM.

14. Mr. Zar acknowledges receipt of these materials on these dates, but submitted that he requires additional time to respond to the Application. He submitted that, notwithstanding receipt of the Notice of Application and draft order on May 5, he did not receive the full Record until May 15, which is acknowledged by BDC. I observe, however, that the Record contains, in addition to the Notice of Application already delivered, only the affidavit of Dodie Ballesteros.

15. That affidavit contains nothing other than the facts clearly set out in the Notice of Application (although states them in properly sworn affidavit form), of which Mr. Zar was well aware in any event given his position as president, secretary and director of the Debtor and as guarantor. Even today, he does not deny any of the facts of the Credit Agreement (defined at para. 56), the defaults (including default of repayment), or the receipt of the

demand for repayment and notice pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") on April 6, 2023.

16. Mr. Zar was personally involved throughout the transactions at issue. He signed all of the loan documentation comprising the Credit Agreement documents. He was the directing mind of the Debtor when it committed a default and failed to make payments when due in September, 2022 and at all times since then. He received the demand for repayment and Notice of Intention to enforce Security discussed below.

17. Mr. Zar's first submission did not persuade me that an adjournment should be granted.

18. Second, Mr. Zar submitted that on May 11, 2023, he attempted to retain Fogler Rubinoff LLP as counsel to respond to this Application. However, that firm advised that it was in a position of conflict vis-à-vis the Applicant, with the result that on the same day, Mr. Zar requested that BDC waive the conflict and permit that law firm to act for the Debtor.

19. BDC declined to waive the conflict. Counsel for the Applicant confirmed in Court that this was conveyed to Mr. Zar the very same day, on May 11, 2023. Mr. Zar does not dispute that, but rather, maintains that the declining to waive the conflict on the part of the Applicant was unreasonable, unfair and done in bad faith and for tactical reasons.

20. I asked Mr. Zar repeatedly what, if any, steps he as directing mind of the Debtor Company had taken in the intervening period of approximately two weeks to retain other counsel. He stated to the Court that he had attempted to retain other counsel, but as of the date of hearing had not done so. He reiterated that it was unreasonable and unfair for BDC to decline to waive the conflict with his chosen firm and submitted that they ought to waive the conflict even now in order that he could seek to retain that firm.

21. I do not accept this submission. Mr. Zar had sufficient time to retain counsel to appear today on his behalf. But for the concerns of the Applicants, I might have granted the adjournment request. However, those concerns, which I will discuss below, in combination with Mr. Zar's conduct of this litigation to date, persuaded me that I should not grant the adjournment.

22. It is important to note that Mr. Zar did not challenge the underlying debt, the default in repayment or the fact that the loan documents provided for the appointment of a receiver in such circumstances, but submitted that it was not just or convenient to appoint a receiver today.

23. There is no evidence from or on behalf of the Debtor as to any substantive response to BDC to the demand for repayment delivered in April. There is no evidence of any effort or response, formal or even informal, to the Notice of Application served on May 5. The Debtor reached out to BDC only to request that it waive the conflict with respect to his chosen law firm. That itself was on May 11, and the response was given the same day.

24. I also observe that Mr. Zar made no submission that the Debtor (the entity he controls) was, even at the hearing of the Application, prepared to propose or entertain any forbearance terms or make any repayment, even if partial and/or late, with respect to the acknowledged indebtedness. Nor did he offer any submission to the effect that alternative or replacement

financing or investment was even on the horizon, let alone binding or available now, which might facilitate the repayment, in whole or in part, on any terms whatsoever, of the indebtedness owing to BDC.

25. In short, there was no suggestion or submission by Mr. Zar, even informally and in the absence of any properly filed evidence, to the effect that there was any prospect of additional funds to facilitate any repayment of the indebtedness on extended terms such as may have been agreed. On the contrary, he submitted that he intended to challenge any effort by BDC to enforce on its security every step of the way.

26. Both the Applicant and 171 Alberta submitted that they were concerned about the erosion of their respective security over the assets of the Debtor, had limited visibility into its operations or financial affairs, and given the events of default, maintained their position that a receiver should be appointed immediately.

27. For all of these reasons, I declined to adjourn the Application.

Merits of the Application and Mr. Zar's Renewed Request for an Adjournment

28. Counsel for BDC advised that it continued to rely on the facts as set out in the Application materials. I then asked Mr. Zar whether he wished to make any submissions in response to the Application and the relief sought, being the appointment of a receiver. He advised that he wished to do so, and requested a brief opportunity of ten minutes to gather his thoughts. I granted that, and the hearing was stood down for approximately 50 minutes.

29. As noted above, upon reconvening, I invited Mr. Zar to make submissions with respect to the appointment of a receiver.

30. Mr. Zar is a sophisticated businessperson, and an experienced litigant. When invited to make submissions on the merits of the motion, after his request for an adjournment had been denied, Mr. Zar continued to request an adjournment on various grounds, and made allegations of conflict of interest against each of the other counsel present and against the Court, and made allegations of bias and discrimination on the part of the Court. Mr. Zar advised that a higher court would review these matters. These requests and allegations were made on a continuing basis throughout the hearing.

31. Mr. Zar then renewed his request for an adjournment on the basis that he had, during the break, contacted potential new counsel via text message, and would be attempting to retain them. Mr. Zar and counsel for the Applicant disagreed on whether this new counsel had in fact previously been contacted about a potential retainer on this matter for the Debtor.

32. I advised that the adjournment request had already been denied for the reasons expressed above, and invited Mr. Zar to make any submissions as he wished with respect to the appointment of a receiver or the terms of any receivership.

Mr. Zar Alleges a First Reasonable Apprehension of Bias: Confidential Motion Record

33. Mr. Zar then submitted that I could not proceed to hear this matter either then or at any time, as a result of an apprehension of bias.

34. Mr. Zar submitted that since I had received and reviewed, earlier this year, a confidential motion record of counsel filed in support of a motion to remove themselves as counsel of record in another matter, I was in receipt of confidential information which operated to the prejudice of the Debtor in this matter. In the result, I could not be impartial and must recuse myself. He submitted that this was made clear by my endorsement in that other matter dated March 3, 2023.

35. The matter to which Mr. Zar refers is a different proceeding. On March 3, 2023, I heard a motion in another matter involving different parties: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.* (Ct. File No. CV-22-00674810-00CL). That motion, brought by counsel for the Debtor, sought an order removing them as counsel for the Debtor in that matter, 30 Roe Investments.

36. Counsel on that motion advised that they would be seeking similar orders removing themselves as counsel of record in four other proceedings pending in this Court in which they acted for corporate parties that were owned and/or controlled by the same individual who was the principal of 30 Roe Investments, Mr. Zar. One of those corporate parties was the Debtor, although in its capacity as a defendant in yet still another matter unrelated to this Application. (As noted above, this Application was not commenced until May 5, 2023 and was not pending at all on March 3, 2023).

37. I adjourned that motion to ensure that all responding parties had received proper notice. The motion was subsequently heard by Steele, J., who removed that law firm as lawyers of record, but as reflected in her Endorsement, such removal was without prejudice to the right of the receiver in that proceeding to oppose the law firm's removal as counsel in the Court of Appeal for Ontario in respect of appeals that were then pending from two sales orders made in that receivership proceeding.

38. That law firm then moved in the Court of Appeal to be removed as counsel of record on those pending appeals. By Endorsement dated March 20, 2023, Lauwers, J.A. dismissed the motion in what he described as the rare circumstances of that case: *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2023 ONCA 196, at para. 18.

39. In my view, the fact that I received a motion record by a law firm on a motion (ultimately heard by another judge) to be removed as counsel of record in a proceeding involving parties, none of which is a party to the current proceeding, and in respect of a corporate entity that is not a party to the current proceeding although apparently controlled by the same individual who controls the Debtor in this proceeding, does not disqualify me in the present circumstances from hearing any further step in this proceeding.

40. I advised Mr. Zar that I declined his request that I recuse myself on the basis of the alleged apprehension of bias and that he should proceed to make submissions, if he wished to do so, on the appointment of a receiver.

Mr. Zar Alleges a Second Reasonable Apprehension of Bias: Prejudgment

41. Mr. Zar then requested that I recuse myself from this matter on a second alleged basis for a reasonable apprehension of bias; namely, that I appeared to have already concluded that a receiver should be appointed without having given Mr. Zar an opportunity to be heard.

42. I explained to Mr. Zar that he had been given every opportunity to be heard, but that that opportunity was now, with the result that he should make such submissions as he wished. I declined to recuse myself on this second allegation of bias. I advised Mr. Zar, again, that he should restrict his submissions to the merits of the Application.

43. Mr. Zar then proceeded to make lengthy submissions, although they largely consisted of repeated requests for an adjournment.

44. I advised that in the circumstances, I was inclined to grant the relief sought and appoint a receiver, and invited Mr. Zar to make submissions if he wished as to the terms of the receivership as set out in the draft order with which he was served on May 5, 2023.

Mr. Zar Alleges a Third Reasonable Apprehension of Bias: My Former Law Firm

45. Mr. Zar then submitted that I could not hear the matter for yet another new reason. He submitted that my decision to appoint a receiver was improper on the basis of a reasonable apprehension of bias resulting from an alleged conflict of interest, in that, he submitted (for the first time, not having raised the issue previously) another partner at my former firm was apparently engaged in litigation to which he, or at least companies he controlled, were parties. As a result, he submitted, I was in a position of conflict, and could not hear any matter to which Mr. Zar, or any company he controlled, was a party.

46. I advised I had no knowledge of any such matter and rejected this submission also, and invited Mr. Zar, yet again, to make submissions on the terms of the draft order if he wished to do so.

Mr. Zar Alleges that the Proposed Receiver had a Conflict of Interest

47. Mr. Zar then submitted that the proposed receiver, The Fuller Landau Group Inc., was not an appropriate candidate to act as receiver as a result of an alleged conflict of interest of that firm. When asked to explain or identify this alleged conflict, Mr. Zar declined to do so, stating that the nature and circumstances of the conflict were privileged. This alleged conflict had not been raised with counsel for the Applicant earlier.

48. There is no basis upon which I can conclude that the proposed receiver has any disqualifying conflict of interest.

It is Appropriate to Appoint a Receiver

49. The test for the appointment of a receiver pursuant to s. 243 of the *BIA* or s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 is not in dispute. Is it just or convenient to do so?

50. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on Clair Creek*, (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div), at para. 11.

51. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

52. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953, 78 C.B.R. (6th) 299, at paras. 43-44.

53. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007, 74 C.B.R. (5th) 300, at paras. 24, 28-29.

54. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case? I am satisfied that in the circumstances of this case, it is.

55. The background to the Application is straightforward.

56. The Debtor entered into loan and credit facilities with BDC according to the terms of a letter of offer dated November 19, 2018, as amended ("the Credit Agreement").

57. Pursuant to the terms of the Credit Agreement, the Debtor provided security to BDC including a general security agreement ("GSA") dated November 30, 2018, a collateral charge/mortgage in the amount of $3,558,000 registered on title to the Real Property on November 30, 2018, and a general assignment of rents.

58. BDC is the first position creditor of the Debtor in that it is the first ranking registered secured creditor under the *Personal Property Security Act*, R.S.O. 1990, c.P.10 over the property of the Debtor, and the charge on the Real Property is a first charge.

59. The second ranking creditor of the Debtor, 171 Alberta, was represented in Court today and supports the relief sought and the appointment of a receiver.

60. The Credit Agreement provides that the indebtedness is repayable on demand upon the occurrence of an Event of Default (as defined in the Credit Agreement). It also provides for the appointment of a receiver pursuant to section 15.1 of the GSA.

61. Events of Default have occurred, including the failure by the Debtor to pay, when due, principal, interest and fees.

62. BDC issued a formal written demand on the Debtor for repayment by letter dated April 6, 2023. Together with that demand, BDC delivered a Notice of Intention to Enforce Security pursuant to s. 244 of the *BIA*.

63. As of April 6, 2023, BDC was owed by the Debtor the amount of $3,629,460.06, exclusive of legal fees, disbursements and interest which continued (and continue today) to accrue.

64. Since April 6, 2023, the Debtor has not repaid any indebtedness. The evidence of BDC is to the effect that the Debtor has further refused to engage in any meaningful dialogue with BDC for the purpose of entering into any arrangements as may have been agreed for the full repayment of the amounts owing.

65. Indeed, the Debtor has failed to make the scheduled payments since September 23, 2022 (Ballesteros affidavit, para. 16). In my view, the Applicant has not sought the appointment of a Receiver hastily or without giving the Debtor any opportunity to cure the default or even to seek an agreement with respect to extensions or possible forbearance terms.

66. Rather, the Debtor has been in default, in respect of repayment of amounts as and when due, for some eight months or the better part of one year, during which the Applicant has not sought to precipitously appoint a receiver, although it had the contractual right to do so last September.

67. There is no evidence before me of any effort on the part of the Debtor to remedy the default or seek revised terms. As noted, there has been no repayment of indebtedness, in whole or in part at all, since last September. The Applicant has continued to be patient.

68. The formal demand for repayment, and Notice of Intention to Enforce, were delivered 1.5 months ago. Since that time, the Debtor has failed or refused to acknowledge that correspondence, repay the indebtedness, or enter into any arrangements acceptable to BDC (Ballesteros affidavit, para. 19).

69. Nor has the Debtor taken any steps whatsoever with respect to its indebtedness, the default and the demand since it was served with the Notice of Application seeking the appointment of a receiver, expressly returnable on the date of this hearing, together with the draft order, on May 5, 2023.

70. Instead, the Debtor has effectively ignored its contractual obligations and this proceeding until the hearing of this motion, at which time Mr. Zar appeared and requested an adjournment. When that was denied, he made various and repeated and in my view unwarranted, attacks on the Applicant, on counsel for the Applicant and on counsel for 171 Alberta, and this Court, all by way of his submission as to why I ought not to exercise my discretion to conclude that it was just or convenient to appoint a receiver.

71. Mr. Zar then submitted again that the Applicant was acting in bad faith and that my decision to deny his request for an adjournment and hear the Application on the merits was "ridiculous and disgraceful".

72. There is no basis upon which I can conclude that the Application has been brought in bad faith. It was brought in the circumstances described above following nonpayment of

amounts due and the complete failure or refusal of the Debtor to substantively engage with the Applicant.

73. The statements of Mr. Zar at the conclusion of the hearing, after I confirmed to the parties that I was granting the order sought, are illustrative of the repeated attacks and allegations made. Mr. Zar stated that this Court was "ramming it through because [a partner at my former law firm] had accidentally sent him confidential information and [that partner] wants some insurance" (a bald allegation not further explained), and that the Court "clearly had a personal vendetta against [him]". Mr Zar then threatened, in response to my direction that he focus on the merits of the Application, that: "if [the Court] interrupts me one more time, I will submit a complaint to [the Chief Justice]".

74. Mr. Zar submitted, and more than once during his submissions, that he had a medical condition as a result of which he was requesting additional time to make his submissions and formulate his thoughts. I reminded him that I had adjourned the matter earlier in the day when he requested 10 minutes to gather his thoughts and was given approximately 50 minutes, and I had allowed him to make submissions for approximately two hours thereafter.

75. In my view, all of the allegations represented continuing attempts simply to delay the appointment of a receiver notwithstanding that the Debtor had contractually agreed to that appointment in the event of default which occurred almost a year ago.

76. I observe that the various arguments, allegations and procedural issues that Mr. Zar raised are very similar to those he raised during the hearing of the appeal by the Court of Appeal for Ontario referred to above and on which Mr. Zar placed reliance in this Application: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.,* 2023 ONCA 219.

77. In the Reasons for Decision of the Court of Appeal, the Court noted that Mr. Zar appeared in his capacity as guarantor of the responding party's debt, although the substance of his submission certainly conveyed a response by the debtor corporation to the Receiver's motion (para. 23).

78. At paragraphs 14 – 23 of the Reasons for Decision, the Court of Appeal addressed various procedural issues raised by Mr. Zar during the appeal. Those included:

    a. a request for a 24 hour adjournment; issues resulting from the fact that Mr. Zar orally changed his instructions to counsel in open Court;

    b. the accommodation offered by the Court to permit Mr. Zar to file with the Court registrar a draft Debtor's factum that he was holding in his hands and the granting of a 30 minute adjournment to allow him to do so, only to be advised upon resuming that Mr. Zar had not filed a factum for the panel's consideration or provided copies to the other parties; and

    c. the fact that instead of filing the factum, upon the resumption of the hearing Mr. Zar requested that Brown J.A. recuse himself because some familial relationship created a conflict of interest, although when questioned, Mr. Zar was not prepared to name the person who allegedly had some familial relationship with Brown J.A.,

as a result of all of which the panel called upon the moving party receiver's counsel to make submissions on the motion. Then, when the panel called upon Mr. Zar to make responding submissions, he advised that a medical condition of his was making it difficult for him to formulate submissions. The panel offered, and Mr. Zar accepted, a 10 minute recess to allow him to collect his thoughts. Upon reconvening, argument proceeded.

79. The delay tactics employed there were nearly identical to those employed on this Application.

80. In the present case, the Applicant, fully supported by the second ranking secured creditor, seeks the appointment of a receiver not only on the basis of the clear and continuing repayment default, but in the absence of any effort on the part of the Debtor or its principal to make any repayment of any amounts whatsoever, or effectively, to take any step to meaningfully engage as a reasonable sophisticated commercial party, (as the Debtor here clearly is), and respond to its contractual obligations or to this proceeding.

81. While a receiver may be appointed where it is just *or* convenient to do so, in my view the circumstances of this case are such that it is both just *and* convenient. There is no basis upon which I can conclude that the circumstances will be materially different if a receiver were not appointed today and the matter were put over for a short period of time.

82. Accordingly, and having considered all of the circumstances and the relevant factors, including the rights of the affected parties, it is my view that the interests of all parties will best be protected, in a transparent and fair manner, by the appointment of a receiver who will act in a neutral and impartial way, under the supervision of the Court.

83. The terms of the proposed receivership are consistent with the Model Order of the Commercial List. The obligations, as well as the permitted activities, of the proposed receiver are clearly set out and in my view are appropriate in this matter.

84. As I specifically highlighted to Mr. Zar, paragraph 33 of the proposed order contains the usual "comeback" provision, providing that any interested party may apply to the Court at any time to vary or amend the order on seven days' notice.

85. I observe in addition that there is of course nothing preventing the parties from having discussions with a view to reaching a consensual resolution of this matter, in whole or in part, at any time.

86. For all of the above reasons, I granted the receivership order.

Osborne J.

May 25, 2023

CITATION: Business Development Bank of Canada v. 170 Willowdale Investments Corp., 2023 ONSC 3230
COURT FILE NO.: CV-23-00699065-00CL
DATE: 20230525

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

– and –

170 WILLOWDALE INVESTMENTS CORP.

Respondent

ENDORSEMENT

Osborne J.

Released: May 25, 2023

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

Date: 20020429
Action No. 0101 05444

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

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

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

Defendants

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

APPEARANCES:

Judy D. Burke
for the Plaintiff

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

INTRODUCTION

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

SUMMARY

[2] The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

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

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

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

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

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

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

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

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

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

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

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

ANALYSIS

Should the *ex parte* receivership order have been granted?

[12] Rule 387 of the ***Alberta Rules of Court*** provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: ***Metropolitan Life Insurance Company v. Hover***, 1999, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

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

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

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

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

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

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

[19] The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex*

parte order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

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

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

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

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

[23] Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

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

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

Should the *ex parte* order now be set aside?

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

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

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

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

[30] The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

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

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

Should the order be stayed?

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

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

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

[34] On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to

indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

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

[36] The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

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

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

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

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

_____

J.C.Q.B.A.

Court of Queen's Bench of Alberta

Citation: Lindsey Estate v. Strategic Metals Corp., 2010 ABQB 242

Date: 20100409
Docket: 0801 08351
Registry: Calgary

Between:

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

Reasons for Judgment
of the
Honourable Mr. Justice G.C. Hawco

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.

[8] In paragraph 20 and 21of 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.

Heard on the 14th day of December, 2009.
Dated at the City of Calgary, Alberta this 9th day of April, 2010.

G.C. Hawco
J.C.Q.B.A.

Appearances:

Frank R. Dearlove
Michael D. Mysak
Bennett Jones LLP
for the Applicants

Kenneth J. Warren, Q.C.
Tanya A. Fizzell
Gowlings Lafleur Henderson LLP
for the 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., and Merendon de Ecuador S.A.

Victor C. "Dick" Olson
Christopher Archer
Olson & Company
for the Respondent, Arbour Energy Inc.

Richard Glenn
Richard Glenn Law Office
for the Respondent, Milowe Brost

Court of Queen's Bench of Alberta

Citation: Schendel Management Ltd, 2019 ABQB 545

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

In the Matter of

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

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

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

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

A. Introduction

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

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

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***[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]

[1] 2005 NBQB 394 at paras 36-43

[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 ***Re Marine Drive Properties Ltd***[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;

[2] 2009 BCSC 145 at paras 31 and 32

- 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, ***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

[3] 2018 ONSC 4669 at paras 13-15
[4] 2015 BCSC 596 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)

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 ***Prudential Transportation Ltd v West Coast Logistics Ltd***[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*

[7] Affidavit of Alex Corbett filed April 4, 2019, paras 31-41
[8] 2017 BCSC 1970
[9] 1998 NSCA 42
[10] 2002 ABCA 239

> *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.

Andover Mining Corp (Re) **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

[11] 2010 ONSC 2987 at paras 33 and 36

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

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

Conclusion on "proposal deemed refused" application

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

E. Appointment of receiver

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

Test for appointing a receiver

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

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

Arguments

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

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

[14] 2013 ABQB 335 at para 71

- [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).

Heard on the 16th day of July, 2019.
Dated at the City of Edmonton, Alberta this 19th day of July, 2019.

M. J. Lema
J.C.Q.B.A.

Appearances:

Pantelis Kyriakakis and Walker MacLeod
McCarthy Tetrault LLP, Calgary
for the Applicant ATB

Jim Schmidt and Katherine J. Fisher
Bennett Jones LLP, Edmonton
for the Debtor Companies

Dana M. Nowak, MLT Aikins LLP, Edmonton
for the Proposal Trustee

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 126/2023

VOLUME ONE

Published January, 2024

Division 4
Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

6.31 An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

6.32 When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

6.33 A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Persons having standing at application

6.35 The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

6.36 Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate
Appellants

and

Kevin Donovan and Toronto Star Newspapers Ltd.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 108)

Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Indexed as: Sherman Estate *v.* Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General*), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and