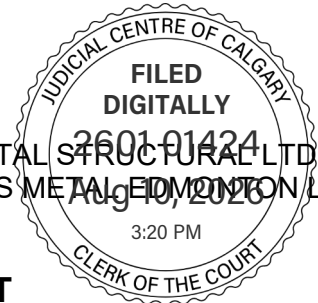


COURT FILE NUMBER	2601-14248
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ROYAL BANK OF CANADA
RESPONDENTS	JAY'S METAL PRODUCTS LTD., JAY'S METAL STRUCTURAL LTD., JAY'S METAL STEEL FRAMING LTD., JAY'S METAL EDMONTON LTD., JAGIT BAJWA, and RAJINDER SINGH
DOCUMENT	BRIEF OF LAW OF THE APPLICANT IN SUPPORT OF RECEIVERSHIP APPLICATION
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Burnet, Duckworth & Palmer LLP 2400, 525 – 8 th Avenue SW Calgary, AB T2P 1G1 Lawyers: David LeGeyt / Ryan Algar / Jessica MacKinnon Phone Number: (403) 260-0210 / 0126 / 0112 Fax Number: (403) 260-0332 Email Address: dlegeyt@bdplaw.com ralgar@bdplaw.com jmackinnon@bdplaw.com File No. 55398-117



**Hearing via Webex before the Honourable Justice G.S. Dunlop
on the Commercial List, on August 20, 2026, commencing at 11:00AM**

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I. INTRODUCTION

1. This is the Brief of Law of Royal Bank of Canada ("**RBC**" or the "**Lender**"), in support of its application (the "**Application**") to appoint BDO Canada Limited ("**BDO**") as the receiver and manager (BDO in such capacity, the "**Receiver**") of all of the current and future assets, undertakings and property (collectively, the "**Property**") of Jay's Metal Products Ltd., Jay's Metal Structural Ltd., Jay's Metal Steel Framing Ltd. and Jay's Metal Edmonton Ltd., (collectively, the "**Debtors**").¹

The Loans and Indebtedness

2. RBC extended credit facilities and related services (collectively, the "**Loans**") to the Borrowers pursuant to, among others:
 - (a) an RBC Credit Agreement dated August 26, 2024, between Jay's Metal Products as Borrower and RBC as lender;
 - (b) an RBC Credit Agreement dated November 4, 2024, between Jay's Structural, as borrower, and RBC, as lender; and
 - (c) an RBC Credit Facilities Letter dated October 11, 2023, between Jay's Steel Framing as borrower, and RBC as lender,
 (collectively, the "**Loan Agreements**").
3. Jay's Edmonton was also a Borrower at the time of Demands but has since repaid its only facility (a small visa facility) over the course of the Forbearance Period.
4. As at August 7, 2026, the Debtors were indebted to RBC for \$4,893,619.33 in respect of funds borrowed pursuant to the Loan Agreements, plus interest, costs and legal fees, which continue to accrue (the "**Indebtedness**").
5. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed thereto in Affidavit No. 1 of Marlene Starenky, sworn August 10, 2026 (the "**Starenky Affidavit**") the Lender's Statement of Claim or the Lender's Application, as applicable.

6. The Debtor is in default of its obligations to the Lender and the Lender is entitled to apply to this Honourable Court to appoint a receiver and manager.
7. BDO is qualified, prepared and has consented to act as Receiver.
8. As the Extended Forbearance Period has expired and Debtors are in default of their obligations to the Lender under the Loan Agreements, the Security, and the Forbearance Agreement (each as defined below) and has not repaid the Indebtedness, the Lender seeks to enter an order that was agreed to by the Debtors and to enforce its contractual right to appoint a Receiver. In addition, it is just and convenient to do so.

II. ISSUE

9. There are two related issues in this Application:
 - (a) should this Honourable Court appoint a receiver over the Property; and, if so
 - (b) should the Receiver have the power to assign the Debtors into bankruptcy?

III. THE LENDER'S POSITION

10. The appointment of a receiver over the Debtors is a contractual remedy that is available to the Lender pursuant to the Security (as defined below), and the Lender respectfully submits that it is just and convenient to appoint the Receiver in the present circumstances.
11. Further, should this Honourable Court appoint the Receiver as its officer, the Receiver would be best positioned to assign the Debtors into bankruptcy should the circumstances warrant.

IV. FACTUAL BACKGROUND

12. The facts in support of the Lender's Application are set forth in the Starenky Affidavit and summarized below.

A. The Guarantee and Security

13. Each of the Debtors have cross guaranteed the obligations of the others.
14. In support of their obligations under the Loan Agreements, each the Debtors granted, among other security, a general security agreement in favour of RBC.

B. Demand and Informal Forbearance

15. Certain of the Loans are payable on demand. Additionally, the Borrowers are in default of their obligations to RBC including, but not limited to, by reason of the following:
- (a) the failure to abide by reporting covenants as required by the Loan Agreements;
 - (b) the failure to pay amounts when due under the Loan Agreements;
 - (c) the failure to abide by general covenants as required by the Loan Agreements, including, without limitation, the granting of additional liens and security interests against the collateral without the consent of the Lender; and
 - (d) in the opinion of the Lender, there has been a material adverse change in the financial condition or operation of the Borrowers,
- (collectively, the "**Defaults**").
16. As a result of the Defaults, on or about November 17, 2025, the Lender delivered a demand letter to each of the Debtors and the Principals (the "**Demands**"), demanding full repayment of the applicable indebtedness owing to RBC, together with notices of its intention to enforce the applicable Security (each a "**244 Notice**") pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**").
17. Following the issuance of the Demands, the Debtors and RBC engaged in discussions to negotiate the conditions under which RBC would provide the Loan Parties with additional time to repay the Indebtedness.
18. Ultimately, on or about December 1, 2025, RBC and the Loan Parties entered into a forbearance agreement (the "**Initial Forbearance Agreement**", and as amended by the First Extension and the Second Extension (each as defined below), the "**Forbearance Agreement**") that, in addition to standard forbearance covenants, included, among others, the following material terms:
- (a) RBC would forbear from enforcing the Security until February 2, 2026 (the "**Forbearance Period**");

- (b) the Debtors agreed to pay a forbearance fee of either (i) \$5,000 if paid within 30 days of execution of the Forbearance Agreement; or (ii) \$15,000 payable upon the earlier of (A) expiry of the Forbearance Period or (B) a Refinancing (as defined therein) (the "**Initial Forbearance Fee**");
 - (c) the Debtors would repay the overdrawn amounts in respect of any overdrawn facility by January 30, 2026;
 - (d) the Principals agreed to provide a list of all real property owned by the Principals (the "**Principal Real Property List**");
 - (e) certain Loan Parties would provide additional cross-guarantees in support of the Debtors' Indebtedness;
 - (f) counsel to the Debtors executed a consent receivership order (the "**Consent Receivership Order**") to be held in trust by counsel to the Lender, Burnet, Duckworth & Palmer LLP ("**BD&P**") pursuant to the terms of the Forbearance Agreement; and
 - (g) counsel to the Debtors executed a consent judgment (the "**Consent Judgment Order**") to be held in trust by BD&P pursuant to the terms of the Forbearance Agreement.
19. Several Events of Default have occurred under the Forbearance Agreement.
20. Notwithstanding the various breaches of the Forbearance Agreement, on or about February 12, 2026, RBC and the Loan Parties entered into a forbearance extension agreement (the "**First Extension**") to provide the Borrowers with an opportunity to close on their proposed Refinancing. In addition to standard forbearance covenants, the Extension Agreement included the following material terms:
- (a) the Borrowers would pay an Extension Fee: (i) \$5,000 earned upon execution of the First Extension, and (ii) \$10,000 earned on April 3, 2026;
 - (b) RBC would continue to forbear from enforcing the Security for approximately an additional two months, until May 1, 2026; and
 - (c) the Loan Parties would deliver certain additional reporting to the Lender.

21. In late March, the Debtors advised that a Refinancing would occur in the next few weeks and requested payout statements in respect of the Indebtedness.
22. In early May, the Debtors advised that their proposed refinancing had fallen through and requested a further extension of the Forbearance Period in order to pursue alternative financing.
23. On or about May 19, 2026, RBC and the Loan Parties entered into a second forbearance extension agreement (the "**Second Extension**"), which included, among others, the following key terms:
 - (a) the Borrowers would make certain payments towards the overdrafts on accounts held by the Borrowers;
 - (b) the Borrowers would pay an extension fee of \$5,000, earned upon execution of the Second Extension;
 - (c) the Debtors would provide executed financing proposals for a Refinancing by no later than June 5, 2026;
 - (d) the Debtors would provide a binding commitment letter in respect of a Refinancing by no later than June 25, 2026; and
 - (e) RBC would refrain from enforcing the Security for an additional two and a half months until July 15, 2026 (the "**Extended Forbearance Period**").
24. On or about June 3, 2026, the Borrowers provided RBC with two term sheets (each, a "**Term Sheet**" and collectively, the "**Term Sheets**") in respect of a Refinancing: one from Essex Lease Financial Corporation ("**Essex**") in respect of the leasing portion of the facilities and one from Sallyport Commercial Financing for the remainder of the Refinancing. The Essex term sheet was addressed to Jay's Holding Corp. ("**Jay's Holdco**"), with the Debtors listed as Guarantors.
25. The Extended Forbearance Period expired on July 15, 2026 and to date, the Indebtedness has not been repaid.
26. The Debtors have promised that a refinancing is imminent on several occasions.

27. Most recently, the Debtors have proposed a financing by Essex whereby Jay's Steel Framing will sell certain equipment (currently subject to RBC's Security), to Essex, which will then be leased to Jay's Holdco.
28. RBC is not willing to consent to the proposed Essex financing structure for several reasons including, but not limited to:
- (a) certain of the equipment contemplated by the Essex Lease Agreements provided includes collateral financed by RBC;
 - (b) to the best of RBC's knowledge, Jay's Holdco is not the owner of any of the RBC financed equipment;
 - (c) the leased equipment contemplated to be sold pursuant to the Lease Agreements is currently subject to:
 - (i) PMSI registrations made by RBC; and
 - (ii) RBC's ALPAAP security,and as a result, the full value of the equipment (i.e. any equity remaining after the payout of the respective lease facility) is subject to RBC's first position ALPAAP registration;
 - (iii) Jay's Holdco is not part of the existing security structure, and as a result RBC is concerned about the transfer of assets from any of the Debtor entities to Jay's Holdco or otherwise outside of its Security; and
 - (iv) Essex has requested that RBC discharge its ALPAAP registration as part of this financing.
29. Certain of the equipment financed by RBC is reflected in a PPR search in respect of Jay's Holdco, with Essex listed as a secured creditor.
30. As a result, RBC is extremely concerned about the potential dissipation of assets to Jay's Holdco.

31. RBC is also extremely concerned by the Debtors' most recent financial reporting, for among others, the following reasons:
- (a) it reflects significant intercompany indebtedness, and amounts owing from Jay's Holdco to the Debtors;
 - (b) it casts doubt on the solvency on the Debtors; and
 - (c) the financial statements illustrate that the Debtors have significant indebtedness other than to RBC, which was incurred without RBC's knowledge or consent (in contravention of the Loan Agreements).²
32. The Lender believes its collateral is at risk unless a receiver is immediately appointed.³

V. LAW AND ARGUMENT

A. The Lender is Entitled to Appoint a Receiver

33. The Lender satisfied the procedural prerequisite to seeking the appointment of the Receiver in November 2025 when it served the 244 Notices on the Debtors.
34. Each of section 243 of the *BIA*,⁴ section 13(2) of the *Judicature Act*,⁵ and section 65(7)(a) of the *PPSA*⁶ vest this Honourable Court with the authority to appoint a Receiver where it is just and convenient to do so.
35. The Lender respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property, because it is just, convenient and otherwise appropriate in the circumstances and would be in accordance with the contractual terms agreed upon by the Lender and the Debtors under the Security.

² Details of RBC's concerns are set forth at paras 56-63 of the Starenky Affidavit.

³ *Ibid* at para 42.

⁴ *Bankruptcy and Insolvency Act*, [RSC c B-3](#) (the "**BIA**") at [s 243](#).

⁵ *Judicature Act*, [RSA 2000 c J-2](#), as amended (the "**Judicature Act**") at [s 13\(2\)](#).

⁶ *Personal Property Security Act*, [RSA 2000 c P-7](#) ("**PPSA**") at [s 65\(7\)\(a\)](#).

Considerations When Appointing a Receiver

36. Historically, when considering an application to appoint a receiver, Courts relied on the injunction test.⁷ However, more recently, in considering whether it is just and convenient to appoint a receiver, Alberta courts often cite and consider a non-exhaustive set of factors, as described in *Bennett on Receiverships* when deciding whether or not to appoint a receiver, including:⁸

- (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 securityholder 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; and

⁷ The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**") *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paras 83-85.

⁸ *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 ("**Paragon**") at para 27.

- (q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.⁹

Considerations Where Receivership Is a Remedy Authorized by Security Documentation

37. A secured creditor is entitled to elect the means by which its security will be enforced, subject to the Court granting any relief sought by such creditor.¹⁰ Furthermore, where a security agreement between a debtor and a secured creditor grants the secured creditor the right to appoint a receiver, the burden of proof on the secured creditor is relaxed, as the Court is simply giving effect to a term of the contractual relationship agreed to by both parties.¹¹
38. Alberta courts have also held that, where a secured Lender's security documentation expressly provides for the appointment of a receiver, the extraordinary nature of the remedy is less central to the analysis, and that the Court may place less emphasis on proving irreparable harm and focus instead on whether a receivership is an appropriate and proportionate enforcement mechanism.¹²
39. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, essentially reversing the onus as to whether or not a receiver should be appointed. The Court confirmed that, where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.¹³
40. Courts have also confirmed that a loss of confidence in the debtor and management arising from a pattern of default and/or other difficulties is a factor that supports the appointment of a receiver.¹⁴

⁹ See also, *Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, [2025 ABKB 11](#) ("**Smiling Simba**"); *Servus Credit Union Ltd v Proform Management Inc*, [2020 ABQB 316](#) ("**Proform**"); *ATB Financial v Mayfield Investments Ltd*, [2024 ABKB 635](#) ("**Mayfield**") at para [65](#).

¹⁰ *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, [2024 BCSC 47](#) at para [95](#).

¹¹ *Textron Financial Canada Ltd v Chetwynd Motels Ltd.*, [2010 BCSC 477](#) at paras [60](#) and [75](#); *Maple Trade Finance Inc v CY Oriental Holdings Ltd.*, [2009 BCSC 1527](#), at para [26](#).

¹² *Paragon* at para [28](#); *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, [2021 ABQB 137](#) at para [211](#).

¹³ *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc*, [2012 BCSC 437](#) ("**Can-Pacific Farms**") at para [14](#).

¹⁴ See for examples: *KingSett Mortgage Corporation v 30 Roe Investments Corp*, 2022 ONSC 2777, leave to appeal ref'd 2022 ONCA 479 ("**30 Roe Investments**") at paras [32-35](#) and *Mayfield* at para [60](#).

41. In this case, the Debtors have defaulted on the terms of the security and the Forbearance Agreement. Further, the Lender has lost confidence in management of the Debtors.
42. It has been nearly 9 months since the Lender issued the Demands. The Lender has been extremely patient with the Debtors to date, and despite the Loan Parties' promises to refinance, these promises have not materialized. However, this patience has expired and the Lender is no longer prepared to refrain from enforcing its security.
43. The Lender also understands that the Debtors are in arrears in respect amounts owing to CRA, and the PPR searches in respect of the Debtors reflect various secured creditors across the Jay's Metal Group. The Receiver would be best positioned to liquidate the assets of the Debtors to satisfy the various amounts owing to several creditors.
44. The Lender respectfully submits that it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over the Debtors' business and to maximize recovery for stakeholders.

B. The Receiver Ought to Have the Authority to Assign the Debtors into Bankruptcy

45. RBC's proposed form of Receivership Order would empower the Receiver to assign the Debtors into bankruptcy.

The Court Has the Authority To Grant The Power Sought

46. Alberta's Template Receivership Order (the "**Template**") does not explicitly grant a receiver the authority to assign a debtor into bankruptcy. However, the explanatory notes to the Template (the "**Explanatory Notes**") provide that:

There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention.¹⁵

¹⁵ Alberta Template Receivership Order Explanatory Notes, January 2019 at 4.

47. *Gustin*, a recent decision of the Ontario Superior Court, addresses this very issue.¹⁶ In determining that a Receiver had the authority to assign a debtor into bankruptcy, Justice Rady stated:

...the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion...¹⁷

48. The Court in *Gustin* referenced, among others, its prior decisions *Sun Squeeze*¹⁸ and *Owen Sound*.¹⁹

49. In *Sun Squeeze*, Justice Farley concluded that he "...did not see that there is any dispute that this Court has the power to authorize the Court-appointed Receiver and Manager to either file an assignment in bankruptcy or consent to the Petition" and that:

Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed [Receiver and Manager] or liquidator to put a debtor company into bankruptcy.²⁰

50. Similarly, in *Owen Sound*, Justice Brown, in concluding that a receiver-manager had the authority to wind-up a debtor company, confirmed that "[i]t is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order".²¹

51. In *Sun Squeeze*, Justice Farley cited the following from the Manitoba Court of Appeal's decision in *Brandon Packers*:

Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

In this case the Court directed its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt: but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the

¹⁶ *RBC v Gustin*, [2019 ONSC 5370](#) ("*Gustin*").

¹⁷ *Gustin* at [para 15](#).

¹⁸ *Royal Bank v Sun Squeeze Juices Inc*, [1994] OJ No 567 ("*Sun Squeeze*") (not available on CanLII); aff'd *Royal Bank v Sun Squeeze Juices Inc*, [28 CBR \(3d\) 201](#).

¹⁹ *Bank of Montreal v Owen Sound Golf & Country Club Ltd*, [2012 ONSC 557](#) ("*Owen Sound*").

²⁰ *Sun Squeeze* at paras 6 and 10.

²¹ *Owen Sound* at [para 7](#).

jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".²²

52. In *Bresea Resources*, the Alberta Court of Appeal set aside an order which directed the interim receiver-manager to assign the debtor company into bankruptcy because the debtor was not actually insolvent.²³ However, the Court expressly endorsed *Sun Squeeze*, holding that, in the appropriate circumstances, the Court has authority to direct that a receiver-manager assign a company into bankruptcy:

Where a company is insolvent within the meaning of the [BIA], and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy.²⁴ [emphasis added]

53. The Debtors have failed to pay their obligations in the ordinary course of business and have ceased to meet their liabilities each as they generally become due. Upon review of the aforementioned authorities, the Template and the Explanatory Notes, it is clear that this Court has the authority to authorize and empower the Receiver to assign the Debtors into bankruptcy.
54. Accordingly, it is RBC's respectful submission that should this Honourable Court appoint the Receiver as its officer, the Receiver would be best positioned to assign the Debtors into bankruptcy should the circumstances warrant.
55. In particular, a bankruptcy would provide additional powers to investigate potential preferences and/or transfers at under value, and to recover assets that may have been dissipated.
56. If the proposed form of Receivership Order is granted, paragraph 3 of the Receivership Order would provide expansive power and authority to act in respect of the Debtors. If a bankruptcy assignment is warranted, the addition of this provision saves the added costs of a secured creditor bringing an additional application for its unsecured deficiency.

²² *Re Brandon Packers Ltd*, [1962] [33 DLR \(2d\) 503](#), ("**Brandon Packers**") at [paras 52-53](#), leave to appeal to SCC refused.

²³ *Chow v Bresea Resources Ltd*, [1997] [75 ACWS \(3d\) 1006](#) ("**Bresea Resources**") at [para 13](#).

²⁴ *Bresea Resources* at [para 13](#).

VI. CONCLUSION

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF AUGUST, 2026

BURNET, DUCKWORTH & PALMER LLP



Per: _____

Ryan Algar / Jessica MacKinnon
Solicitors for Royal Bank of Canada

LIST OF AUTHORITIES

TAB	DOCUMENT
1.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3.
2.	<i>Judicature Act</i> , RSA 2000, c J-2.
3.	<i>Personal Property Security Act</i> , RSA 2000 c P-7.
4.	<i>Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co</i> , 2002 ABQB 430.
5.	<i>Bank of Nova Scotia v Smiling Simba Learning Academy Inc</i> , 2025 ABKB 11.
6.	<i>Servus Credit Union Ltd v Proform Management Inc</i> , 2020 ABQB 316.
7.	<i>ATB Financial v Mayfield Investments Ltd</i> , 2024 ABKB 635.
8.	<i>Bank of Montreal v Haro-Thurlow Street Project Limited Partnership</i> , 2024 BCSC 47.
9.	<i>Textron Financial Canada Ltd v Chetwynd Motels Ltd.</i> , 2010 BCSC 477.
10.	<i>Maple Trade Finance Inc v CY Oriental Holdings Ltd.</i> , 2009 BCSC 1527.
11.	<i>Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc</i> , 2012 BCSC 437.
12.	<i>RBC v Gustin</i> , 2019 ONSC 5370.
13.	<i>Royal Bank v Sun Squeeze Juices Inc</i> , [1994] OJ No 567 aff'd 28 CBR (3d). (not available on CanLII)
14.	<i>Bank of Montreal v Owen Sound Golf & Country Club Ltd</i> , 2012 ONSC 557.
15.	Alberta Template Receivership Order Explanatory Notes, January 2019.
16.	<i>Re Brandon Packers Ltd</i> , 33 DLR (2d) 503.
17.	<i>Chow v Bresea Resources Ltd</i> , 75 ACWS (3d) 1006.

1994 CarswellOnt 266

Ontario Court of Justice (General Division — Commercial List)

Royal Bank v. Sun Squeeze Juices Inc.

1994 CarswellOnt 266, [1994] O.J. No. 567, 24 C.B.R. (3d) 302, 46 A.C.W.S. (3d) 821

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.

Farley J.

Heard: February 28, 1994

Judgment: March 16, 1994

Docket: Doc. B253/93

Counsel: *J.A. Carfagnini* and *R. Chadwick*, for Coopers & Lybrand Ltd., court-appointed receiver and manager.*Paul G. Macdonald*, for plaintiff.*Edward M. Morgan*, for defendants.*Ronald M. Moldaver, Q.C.*, for Josef Blum, majority shareholder of defendants.

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

Related Abridgment Classifications**Bankruptcy and insolvency**

V Bankruptcy and receiving orders

Debtors and creditors

VII Receivers

VII.2 Jurisdiction of court to appoint

Headnote**Bankruptcy --- Receiving order — Effect of receiving order****Receivers --- Jurisdiction of court to appoint**

Receiving orders — Effect — Court having jurisdiction to require receiver-manager to consent to receiving order pursuant to petition — Appropriate for court to require consent where bankruptcy best position for debtor and for trustee to resolve certain issues — No interested party to be prejudiced by receiving order.

The bank issued a petition for a receiving order against the defendant company, naming a proposed trustee. The company filed a Notice Disputing the Petition. The court appointed a receiver-manager, which reported that the company's operations were no longer feasible. The receiver-manager was authorized by the court to realize upon the company's assets.

The issue before the court was whether it should authorize the receiver-manager to consent to the receiving order.

Held:

The receiver-manager was directed to consent to a receiving order pursuant to the petition.

The evidence showed that the company was indebted to the bank and that it had not, within the six months preceding the petition, met its liabilities generally as they became due. Several actions had been commenced against the company. The receiver-manager saw little benefit to incurring further costs to defend the actions given the bank's priority position and the fact that it would suffer a significant shortfall on its loans. It was appropriate in the circumstances to direct the receiver-manager to consent to the receiving order. Bankruptcy would allow the trustee to resolve the allegations of fraudulent preferences to the company's majority shareholder, and to investigate suspicious circumstances surrounding a secret bank account. Further, since the company was merely an insolvent shell, its assets having been sold and its operations having been discontinued, no interested party would be prejudiced by a receiving order.

Table of Authorities**Cases considered:**

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), affirmed (1989), 65 Alta. L.R. (2d) 374 (C.A.) — referred to

Brandon Packers Ltd., Re (1962), 3 C.B.R. (N.S.) 326, 33 D.L.R. (2d) 503 (Man. C.A.), leave to appeal to S.C.C. refused [1962] S.C.C. ix — referred to

Can Corp Financial Services Ltd., Re (1991), 4 C.B.R. (3d) 99 (Ont. Bkcty.) — referred to

Chinavision Canada Corp. v. Ling (January 12, 1994), Doc. B285/92, Farley J. (Ont. Gen. Div. [Commercial List]) — referred to

Everex Systems Inc. v. Pride Computer Distribution Ltd. (1988), 68 C.B.R. (N.S.) 24 (B.C. S.C.) — considered

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — referred to

Goodis-Wolf Inc., Re (1990), 80 C.B.R. (N.S.) 146 (Ont. Bkcty.) — considered

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) — referred to

Western Hemlock Products Ltd., Re (1961), 2 C.B.R. (N.S.) 207, 35 W.W.R. 184, 27 D.L.R. (2d) 457 (B.C. S.C.) — referred to

Statutes considered:

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

s. 38

Company Act, R.S.B.C. 1979, c. 59 —

s. 110

s. 111

Petition for receiving order.

Farley J.:

1 The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

2 On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately \$16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court authorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

3 Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately \$1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

4 Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

5 Actions have been commenced and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the \$75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: *Re Can Corp Financial Services Ltd.* (1991), 4 C.B.R. (3d) 99 (Ont. Bkcty.) at p. 107.

6 As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: *First Treasury Financial Inc. v. Congo Petroleum Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p. 240; *Re Brandon Packers Ltd.* (1962), 33 D.L.R. (2d) 503 (Man. C.A.), at pp. 510-511 and 513, leave to appeal to S.C.C. refused [1962] S.C.C. ix; *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) at p. 165; *Chinavision Canada Corp. v. Ling* (Ont. Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in *Brandon* at p. 511:

The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the *Companies Act*). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded ...

7 As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed. (London: Sweet & Maxwell, 1989), at p. 219; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (C.A.); *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at p. 111.

8 Freedman J.A. in *Brandon*, *supra*, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C. S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the *Company Act*, R.S.B.C. 1979, c. 59.

9 As Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* 3rd ed., Vol.1, (Toronto: Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-2-49 where it is said [at D\$12]:

(a) Conflict Between Assignment and Petition

There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: *Re Lalonde* (1924), 4 C.B.R. 416 (Ont. S.C.); *Re Lakeshore Golf & Country Club* (1933), 19 C.B.R. 127 (C.S. Que.); *Re Slavonia SS Agencies* (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is that bankruptcy proceedings are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: *Re Croteau & Clark Ltd.* (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. (413 (S.C.)).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in *Chinavision*, *supra*, at p. 4 as well.

10 Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See *Prairie Palace*, *supra*, at p. 65; *Re Western Hemlock Products Ltd.* (1961), 2 C.B.R. (N.S.) 207 (B.C. S.C.) at p. 210; *Chinavision*, *supra*, at pp. 4-5. Guy J.A. in *Brandon*, *supra*, said at p. 513:

Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

11 Thus this matter boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in *Kerr*, *Hat* and *Nova*, *supra*. The question of "need" for a bankruptcy was canvassed in *Prairie Palace*, *supra*, at p. 165 and *Chinavision*, *supra*, at pp. 4-5.

12 Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited *Re Goodis-Wolf Inc.* (1990), 80 C.B.R. (N.S.) 146 (Ont. Bkcty.) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-155 that:

The existence of a prior civil action has not always resulted in the court staying or dismissing a petition: see, for example, Re Hutchens (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and *Re H.M. Simpson Ltd.* (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, (sub nom. *Jenkins Transfer Ltd. v. H.M. Simpson Ltd.*) 246 A.P.R. 307 (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory

to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider, on balance, that it is preferable that the litigation be allowed to take its course.

13 [emphasis added]

14 That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the \$75 million claim against the Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

15 In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to [s. 38 of the BIA](#). There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

Receiver-manager directed to consent to receiving order.