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COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	EDMONTON

Clerk's Stamp

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ALASKA - ALBERTA RAILWAY DEVELOPMENT CORPORATION

DOCUMENT **FACTUM OF THE BRIDGING RECEIVER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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FACTUM OF THE BRIDGING RECEIVER

(Application Returnable July 12, 2021)

PART I - OVERVIEW

1. PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as court-appointed receiver and manager of Bridging Finance Inc. ("**BFI**"), Bridging Income Fund LP (the "**Lender**"), and certain related entities and investment funds ("**Applicant**" or the "**Bridging Receiver**") seeks an Order (the "**Interim Receivership Order**") pursuant to section 47.1(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**"), among other things:

   (a) appointing MNP Ltd. ("**MNP**") as interim receiver (in such capacity, the "**Interim Receiver**"), without security, of all of the current and future assets, undertakings, and properties of Alaska-Alberta Railway Development Corporation ("**A2A**");

   (b) authorizing and empowering the Interim Receiver to seek, on behalf of A2A, a 45-day extension of the time for A2A to file a proposal within the A2A Proposal Proceeding (as defined below); and

   (c) such further and other relief as this Honourable Court may deem just.

2. The Court should grant the Interim Receivership Order for the following reasons:

   (a) the appointment of the Interim Receiver is necessary for the protection of A2A's estate, the interests of the Lender, and the interests of the other creditors and stakeholders of A2A generally, and therefore satisfies the test for such appointment set out in section 47.1(3) of the BIA;

   (b) based on the Bridging Receiver's investigations to date, it appears that over $128 million of the $145.8 million in loan advances under the A2A loan was advanced to Sean McCoshen or private numbered companies owned and controlled by him. The Bridging Receiver has been unable to obtain an accounting of the use of these funds despite repeated requests. The Bridging Receiver has significant concerns that these funds have not been utilized to fund the Railway Project and have instead been dissipated to the detriment of the Lender and the other stakeholders of A2A;

   (c) the financial situation of A2A and the location(s), quantum, and nature of its assets remains unclear to the Bridging Receiver and the Trustee in the A2A Proposal Proceeding. Outside of McCoshen, there is no party with the corporate authority to act on behalf of A2A. McCoshen has been unresponsive to requests for information from the Bridging Receiver

and has not been accessible to the Trustee. The parties currently charged with managing A2A do not appear to have comprehensive information regarding its assets; and

(d) given the significant concerns of the Bridging Receiver with respect to misuse of advances and dissipation of assets, the appointment of an Interim Receiver is necessary to locate, take possession of and safeguard A2A's assets to the benefit of the creditors and other stakeholders of A2A. It is critical that the assets of A2A be placed under the care and control of a court officer as soon as possible.

PART II - THE FACTS

3. The facts relevant to the relief sought by the Receiver are set out in the Affidavit of Graham Page sworn July 7, 2021 (the "**Page Affidavit**") and are summarized below. All capitalized terms not expressly defined herein are defined in the Page Affidavit.

Background

4. PwC was appointed as receiver and manager of Bridging pursuant to section 129 of the *Securities Act* (Ontario) R.S.O. 1990, c. S. 5, as amended (the "**Ontario Securities Act**") as a result of an ongoing investigation being conducted by the Ontario Securities Commission (the "**Commission**") into BFI and certain related individuals and entities (the "**Investigation**").[1]

5. As reflected in the endorsement of Justice Hainey issued in connection with the Appointment Order, the Ontario Court determined that, as required by section 129 of the Ontario Securities Act, the appointment of the Bridging Receiver was in the best interests of investors in the Bridging Funds and will further the due administration of Ontario Securities law.[2]

Overview of Bridging

6. BFI is an investment management firm and alternative lender based in Toronto, Ontario that promotes and manages various investment vehicles (the "**Bridging Funds**") that raise capital from investors for the purposes of making loans to corporate borrowers. Each of the Bridging Funds has appointed BFI as portfolio manager and as its agent to enter into loan agreements with

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[1] Affidavit of Graham Page sworn July 7, 2021 ("**Page Affidavit**") at paras 3-6.

[2] Page Affidavit at para 6.

Borrowers, take security on behalf of each Bridging Fund with respect to loans and collect loan payments from borrowers.[3]

Overview of A2A & A2A Loan

7. The largest outstanding loan in the Bridging loan portfolio is the non-revolving demand credit facility made available by the Lender (Bridging Income Fund LP) through BFI as agent to A2A (the "**A2A Loan**").[4]

8. A2A is a corporation incorporated under the laws of the province of Alberta. Sean McCoshen is listed as the sole director and voting shareholder of A2A. The purpose of A2A was to construct a railway line linking northern Alberta to ports in Alaska for the purposes of transporting oil products (the "**Railway Project**").[5]

9. According to the books and records of Bridging, as at June 8, 2021, the total amount owing by A2A to the Lender under the A2A Loan is $212,891,590, including capitalized interest, fees, and other costs (the "**A2A Indebtedness**").[6]

Security Held by Bridging

10. Pursuant to the A2A Loan Agreement, and as security for all of its obligations to the Lender, A2A granted to the Lender security over all of its present and after-acquired property pursuant to a General Security Agreement dated December 11, 2015.[7]

11. The A2A Indebtedness has been guaranteed by Sean McCoshen and 5321328 Manitoba Inc. ("**532 Manitoba**") (a company controlled by McCoshen), which guarantees are secured by separate general security agreements in favour of the Lender.[8]

12. In addition, pursuant to the Amending Agreement in connection with the A2A Loan dated February 23, 2021 (the "**Tenth Amendment**"), each of 7198362 Manitoba Ltd. ("**719 Manitoba**"), 12703131 Canada Ltd. ("**127 Canada**"), and Alaska-Alberta Railway Development Corporation US

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[3] Page Affidavit at para 7.

[4] Page Affidavit at paras 10 & 14.

[5] Page Affidavit at paras 11-13.

[6] Page Affidavit at para 15.

[7] Page Affidavit at para 18.

[8] Page Affidavit at para 21.

Inc. ("**A2A US**") were added as "Obligors" and guarantors under the A2A Loan Agreement. As security for their obligations as Obligors and guarantors under the A2A Loan Agreement, each of 719 Manitoba, 127 Canada and A2A US granted security to the Lenders upon all of its assets pursuant to the terms of the Tenth Amendment.[9]

13. Sean McCoshen is listed as the sole director and officer of each of 532 Manitoba, 719 Manitoba, 127 Canada, and A2A US.[10]

Receiver's Review of A2A Loan & Advances

14. As part of the Bridging Receivership Proceeding, the Bridging Receiver and its counsel are conducting an ongoing review of the A2A Loan and the corresponding flow of funds. Based on the Bridging Receiver's review, the Bridging Receiver has identified the following significant concerns in connection with the A2A Loan, among others:[11]

    (a) approximately $82.5 million was advanced under the A2A Loan to 7047747 Manitoba Ltd. ("**704 Manitoba**"), which is controlled by McCoshen and which is neither an obligor nor a guarantor under the A2A Loan. The Bridging Receiver has been unable to determine the commercial relationship between 704 Manitoba and A2A. According to the Commission's evidence in connection with the Investigation, 704 Manitoba transferred approximately $19.5 million to the personal chequing account of David Sharpe (the former Chief Executive Officer and UDP of BFI). 704 Manitoba was subsequently dissolved within two weeks of the Commission writing to BFI inquiring about its relationship with Sean McCoshen;

    (b) approximately $25.5 million was advanced under the A2A Loan to a personal bank account of Sean McCoshen in September 2020;

    (c) the Bridging Receiver has been advised that David Sharpe ordered individuals at Bridging to remove references to 704 Manitoba from certain Amending Agreements to the A2A Loan Agreement and delete approximately 34,200 emails based on pre-defined search terms that included, among others, "Sean McCoshen" and "7047747";

    (d) pursuant to the Tenth Amendment, Bridging advanced $20.6 million to 719 Manitoba under the A2A Loan and the Bridging Receiver understands that this advance was not received by A2A;

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[9] Page Affidavit at paras 23-25.

[10] Page Affidavit at para 25.

[11] Page Affidavit at para 26.

(e) the Bridging Receiver has requested certain information related to the A2A Loan from Sean McCoshen and his counsel. It was communicated to the Bridging Receiver that Mr. McCoshen is unavailable to respond to the Bridging Receiver's questions or discuss them due to medical reasons. As of the date of the within application, the Bridging Receiver has not received any information from A2A or McCoshen in response to the Bridging Receiver's request for information.

15. Based on the foregoing, the Bridging Receiver has significant concerns surrounding the use of $145.8 million advanced to A2A, McCoshen, and various entities controlled by McCoshen. The Bridging Receiver is particularly concerned with the value of the security held for the A2A Loan as the Railway Project is pre-construction and it is unclear whether any assets exist, other than A2A's intangible assets, which include the Presidential Permit.[12]

Demands, BIA Notices & NOI Filings

16. On June 8, 2021, the Bridging Receiver demanded payment of the A2A Indebtedness from each of A2A, Sean McCoshen, 532 Manitoba, 719 Manitoba, 127 Canada, and A2A US and delivered to each of A2A, Sean McCoshen, and 532 Manitoba a separate Notice of Intention to Enforce Security (collectively, the "**BIA Notices**") pursuant to section 244 of the BIA.[13]

17. On June 21, 2021, the Bridging Receiver learned that each of A2A, 719 Manitoba, and 127 Canada (collectively, the "**Debtors**") had commenced a proposal proceeding under Part III of the BIA by filing a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the BIA on June 18, 2021 (collectively, the "**Proposal Proceedings**"). MNP is the trustee appointed under the Proposal Proceedings (the "**Trustee**").[14]

18. Also on June 21, 2021, the Bridging Receiver learned that Sean McCoshen had commenced a proposal proceeding under Part III of the BIA by filing a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the BIA on June 18, 2021 (the "**McCoshen Proposal Proceeding**"). A. Farber & Partners Ltd. is the trustee appointed under the McCoshen Proposal Proceeding (the "**McCoshen Trustee**").[15]

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[12] Page Affidavit at para 27.

[13] Page Affidavit at para 29.

[14] Page Affidavit at para 30.

[15] Page Affidavit at para 31.

19. Based upon the information provided to the Bridging Receiver by the Trustee and the McCoshen Trustee, the Lender is identified as the dominant creditor of the Debtors and Sean McCoshen. None of the Debtors will be able to make a viable proposal without the support of the Bridging Receiver.[16]

20. Since the Bridging Receiver learned of the Proposal Proceedings on June 21, 2021, the Bridging Receiver has engaged in various discussions with the Trustee and the McCoshen Trustee regarding the best path forward to protect the interests of the Lender.[17]

21. The Bridging Receiver is of the view that Sean McCoshen and any related party must not be permitted to remain in control of the property of A2A.[18]

22. The Bridging Receiver advised the Trustee and the McCoshen Trustee that it will not support any proposal filed by the Debtors nor any proceeding in which McCoshen or any related parties remain in possession or control of the business or property of the Debtors.[19]

Trustee's Material Adverse Change Report

23. As a result of the foregoing discussions, the Trustee issued a material adverse change report on July 7, 2021 in respect of each of the Debtors (collectively, the "**Material Adverse Change Reports**").[20]

24. Based on the Material Adverse Change Reports, the Bridging Receiver understands that the Trustee intends to: (i) bring an application to terminate the period in which 719 Manitoba and 127 Canada may make a proposal pursuant to section 50.4(11) of the BIA; and (ii) assuming the Bridging Receiver's application to appoint MNP as Interim Receiver in respect of A2A is successful, bring an application for an extension of the time in which A2A may make a proposal pursuant to section 50.4(9) of the BIA.[21]

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[16] Page Affidavit at paras 33-34.

[17] Page Affidavit at para 35.

[18] Page Affidavit at para 36.

[19] Page Affidavit at para 37.

[20] Page Affidavit at para 38.

[21] Page Affidavit at para 39.

Need for Interim Receiver

25. Given the Bridging Receiver's concerns with respect to the improper use of advances under the A2A Loan, it is critical that the assets of the Debtors be placed under the care and control of a court officer to protect the interests of the Lender and the other stakeholders of the Debtors.[22]

26. At this point, the Lender does not have sufficient information regarding the impact a bankruptcy of A2A may have upon the Presidential Permit and A2A's other assets, including the executory contracts to which A2A is a party. Accordingly, the Bridging Receiver seeks, as a term of the proposed order appointing the Interim Receiver, that the Interim Receiver be authorized and empowered to seek, on behalf of A2A, a 45-day extension of the time within which A2A may make a proposal within the Proposal Proceeding.[23]

27. Appointing the Interim Receiver while continuing the A2A Proposal Proceeding for a period of 45 days (and thus temporarily avoiding a bankruptcy of A2A) will ensure that the value of A2A's assets are preserved while the Interim Receiver takes possession of, and obtains further information regarding, A2A's assets, all with a view to determining if there is a benefit to the A2A Proposal Proceeding continuing.[24]

28. The Bridging Receiver does not have the same concern with respect to the impact of a bankruptcy on 719 Manitoba and 127 Canada. The Bridging Receiver is not aware of any ongoing business operations by either party and is not aware of either party holding any material assets. Accordingly, the Bridging Receiver supports the Trustee's application to terminate the period in which 719 Manitoba and 127 Canada may make a proposal pursuant to section 50.4(11) of the BIA, upon which 719 Manitoba and 127 Canada shall automatically be deemed bankrupt.[25]

PART III - THE ISSUE

29. The sole issue on this application is whether this Court should appoint MNP as Interim Receiver of A2A.

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[22] Page Affidavit at para 40.

[23] Page Affidavit at para 41.

[24] Page Affidavit at para 42.

[25] Page Affidavit at para 43.

PART IV - LAW & ANALYSIS

Jurisdiction to Appoint Interim Receiver

30. Section 47.1(1) of the BIA provides the Court with express jurisdiction to appoint the Interim Receiver:[26]

> **Appointment of interim receiver**
>
> 47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,
>
> (a) the trustee under the notice of intention or proposal;
>
> (b) another trustee; or
>
> (c) the trustee under the notice of intention or proposal and another trustee jointly.

31. Section 47(1.1) of BIA provides that the appointment of an interim receiver expires on the earliest of: (i) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed: (ii) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed; and (iii) court approval of the proposal.[27]

32. As noted by Justice Romaine of the Alberta Court of Queen's Bench in *Alberta Health Services v. Networc Health Inc.*, "sections 47 and 47.1 were added to the BIA in 1992 and were intended to give greater protection and flexibility to secured creditors during the period of time when they were in the process of enforcing their security. An interim receiver appointed under these sections may exercise broader powers."[28]

The Interim Receivership Order should be Granted

33. Pursuant to section 47.1(3) of the BIA, an interim receiver may be appointed only if it is shown to the Court to be necessary for the protection of:[29]

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[26] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [***BIA***], s. 47.1(1).

[27] *Ibid*, s. 47(1.1).

[28] *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373 at para 16 [**TAB 1**].

[29] *BIA*, s. 47.1(3).

(a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.

34. In *Royal Bank v. Canadian Print Music Distributors Inc.*, Justice Cumming of the Ontario Superior Court of Justice held that proof of fraud or misfeasance is not a prerequisite to appointing an interim receiver. Rather, it was sufficient in that case that the evidence established the need for an interim receivership to assure conservation of the debtor's assets, and therefore, protection of the interests of the secured creditor through its security.[30]

35. Similarly, the Alberta Court of Appeal in *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, recently rejected an argument that the appointment of an interim receiver requires proof by a preponderance of evidence of the existence of an actual and immediate danger of dissipation of assets, to the detriment of a secured creditor's security. That argument, the Court of Appeal held, necessitates reading a provision into the Act that, on a plain reading, does not exist.[31]

36. Although there is a conflicting line of case law that stands for the proposition that an application for the appointment of an interim receiver must satisfy an additional test, namely, that there must be evidence of an actual and immediate (and not merely suspected or feared) danger of dissipation of assets, this line of case law has been expressly rejected in both Ontario and Alberta.

37. This conflicting line of case law stems from *L.A.T. Macdonald Enterprises Ltd., Re*,[32] and *Royal Bank v. Zutphen Brothers Construction Ltd.*,[33] two decisions of Registrars from Ontario and Nova Scotia, respectively. It is notable that the decision of Registrar Ferron in *L.A.T.* (upon which the decision of Registrar Smith in *Zutphen Brothers* relies) pre-dates the enactment of section 47.1 and is therefore of little use in interpreting the statutory test set out therein.

38. As noted above, the Alberta Court of Appeal rejected this reasoning in *CWB Maxium*. Similarly, this line of case law was expressly rejected by Justice Ground of the Ontario Superior Court of

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[30] *Royal Bank v. Canadian Print Music Distributors Inc.*, [2006] OJ No 2492 at paras 16-18 [**TAB 2**].

[31] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2020 ABCA 118 at paras 12-17 [**TAB 3**].

[32] *L.A.T. Macdonald Enterprises Ltd., Re*, 42 CBR (NS) 17 at para 9 [**TAB 4**].

[33] *Royal Bank v. Zutphen Brothers Construction Ltd.*, [1993] NSJ No 640 at paras 20-23 [**TAB 5**].

Justice in *Bank of Nova Scotia v. D.G. Jewelry Inc.*[34] and Justice Campbell of the Ontario Superior Court of Justice in *Maxium Financial Services Inc. v. Corporate Cars Ltd. Partnership*.[35]

39. In the latter case, Justice Campbell held that while there must be more than mere suspicion or speculation concerning the assets of a company before an interim receiver is warranted, where the major secured creditors who have the most at risk have, with legitimate reason, lost confidence in the debtor, there does not have to be an actual immediate risk to assets. For the reasons set out herein, the Bridging Receiver (on behalf of the Lender, the senior secured creditor) has for legitimate reasons lost confidence in A2A and its sole director and officer, Sean McCoshen.

40. Whether a court will appoint an interim receiver under section 47.1(1) of the BIA is a matter of discretion, conditional upon the applicant satisfying the test set out in section 47.1(3).

41. The Bridging Receiver submits that the appointment of the Interim Receiver is necessary for the protection of A2A's estate, the interests of the Lender, and the interests of the other creditors and stakeholders of A2A generally, and therefore satisfies the legal test set out in section 47.1(3) of the BIA, for the following reasons:

    (a) the Lender advanced the principal amount of $145.8 million under the A2A Loan. The overwhelming majority of these advances were made to entities controlled by McCoshen or McCoshen personally, not A2A. It is unclear whether or to what extent these funds were actually received by A2A and/or used in connection with the Railway Project, particularly in light of the suspicious transactions, email deletions, and document modifications summarized above and in the Fourth Report;

    (b) based upon its ongoing review of the A2A Loan, the Bridging Receiver has significant concerns that the funds advanced under the A2A Loan have not been utilized to fund the Railway Project and have instead been dissipated to the detriment of the Lender and A2A's other stakeholders;

    (c) the financial situation of A2A and the location(s), quantum, and nature of its assets remains unclear to the Bridging Receiver and the Trustee. McCoshen has been unresponsive to requests for information from the Bridging Receiver dating back to May 27, 2021 on the basis of medical concerns notwithstanding that McCoshen subsequently directed three of

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[34] *Bank of Nova Scotia v. D.G. Jewelry Inc.*, [2002] OJ No 4000 at para 1 [**TAB 6**].

[35] *Maxium Financial Services Inc. v. Corporate Cars Ltd. Partnership*, [2006] OJ No 4878 at paras 12-15 [**TAB 7**].

his companies to commence the Proposal Proceedings. Outside of McCoshen, there is no party with the corporate authority to act on behalf of A2A. McCoshen has not been accessible to the Trustee throughout the A2A Proposal Proceeding and the parties currently charged with management of A2A do not appear to have comprehensive information regarding its assets;

(d) the Bridging Receiver will not support any proposal filed by A2A nor any proceeding in which McCoshen or any related parties remain in possession or control of the business or property of A2A;

(e) given the significant concerns of the Bridging Receiver with respect to potential misuse of advances and dissipation of assets, the appointment of an Interim Receiver is necessary to identify, locate and safeguard A2A's assets and the interests of the creditors and other stakeholders of A2A. It is critical that the assets of A2A be placed under the care and control of a court officer as soon as possible; and

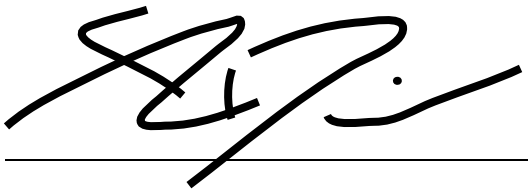
(f) a bankruptcy of A2A may negatively impact the value of its assets, including the Presidential Permit. Appointing the Interim Receiver while continuing the A2A Proposal Proceeding for a period of 45 days (and thus temporarily avoiding a bankruptcy of A2A) will ensure that the value of A2A's assets are preserved while the Interim Receiver takes possession of, and obtains further information regarding, A2A's assets, all with a view to determining if there is a benefit to the A2A Proposal Proceeding continuing.

PART V - RELIEF REQUESTED

42. For all of the foregoing reasons, the Bridging Receiver requests that this Honourable Court grant an Order substantially in the form of the draft Interim Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Edmonton, Alberta, this 9th day of July, 2021.

July 9, 2021



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Lawyers for the Bridging Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

Tab No.	**Case Law**
1	*Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373
2	*Royal Bank v. Canadian Print Music Distributors Inc.*, [2006] OJ No 2492
3	*CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2020 ABCA 118
4	*L.A.T. Macdonald Enterprises Ltd., Re*, 42 CBR (NS) 17
5	*Royal Bank v. Zutphen Brothers Construction Ltd.*, [1993] NSJ No 640
6	*Bank of Nova Scotia v. D.G. Jewelry Inc.*, [2002] OJ No 400
7	*Maxium Financial Services Inc. v. Corporate Cars Ltd. Partnership*, [2006] OJ No 4878

SCHEDULE "B"
RELEVANT STATUTES

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

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or

(c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment

(1.1) The appointment expires on the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) court approval of the proposal.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;

(b) take possession of all or part of the debtor's property mentioned in the order of the court;

(c) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(d) take conservatory measures; and

(e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.

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TAB 1

2010 ABQB 373
Alberta Court of Queen's Bench

Alberta Health Services v. Networc Health Inc.

2010 CarswellAlta 1017, 2010 ABQB 373, [2010] 11 W.W.R. 730, [2010] A.W.L.D. 4119, [2010] A.W.L.D. 4120, [2010] A.W.L.D. 4121, [2010] A.W.L.D. 4122, [2010] A.J. No. 627, 118 Alta. L.R. (5th) 118, 189 A.C.W.S. (3d) 939, 28 Alta. L.R. (5th) 118

Alberta Health Services (Applicant) and Networc Health Inc. (Respondent)

B.E. Romaine J.

Heard: May 3, 11, 2010
Judgment: June 1, 2010
Docket: Calgary BK01-094004

Counsel: Josef G.A, Krüger, Q.C., R.J. Daniel Gilborn, Rahim N. Punjani for Applicant, Alberta Health Services
C. Michael Smith, Smith Mack LaMarsh, Richard Dixon for Cambrian Group
David LeGeyt, David G. Loader for Respondent, Networc Health Inc.
Howard A. Gorman, Anne L. Kirker for Interim Receiver, PricewaterhouseCoopers
J. Alexander Kotkas, John Grieve for Healthcare Property Holdings Ltd.
Darren R. Bieganek for Clark Builders

Subject: Insolvency; Civil Practice and Procedure

APPLICATIONS by Alberta Health Services for appointment of interim receiver and continuation of receivership; COUNTER-APPLICATIONS by various interested parties.

***B.E. Romaine J.*:**

Introduction

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

Facts

2 Networc operates an accredited non-hospital surgical facility in Calgary under the name of the Health Resource Centre. In December, 2006, Networc and the Calgary Health Region (now Alberta Health Services) entered into an agreement whereby Networc would provide orthopaedic surgical services to the public in Alberta, the cost of which would be covered by Alberta Health. This agreement expires on March 31, 2012. Alberta Health submits that this arrangement was intended as an interim measure to assist it in dealing with capacity constraints until a new Alberta Health-owned surgical facility could be constructed. Currently, it is expected that this new facility will be operational in January, 2011. The agreement between Networc and Alberta Health limits the maximum annual number of procedures that can be performed at the Health Resource Centre, but Alberta Health has no obligation to fund any minimum number of procedures.

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

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

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

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

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

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

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

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

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

associated with its operating line of credit). The Cambrian Group subsequently agreed with Networc to discontinue its application to petition Networc into bankruptcy.

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

Analysis

Status of Alberta Health to Apply for Receivership

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

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

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

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

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

powers equivalent to those previously available to interim receivers under sections 47 and 47.1. It is noteworthy that these amendments did not affect section 46, either in terms of scope of powers or duration of appointment.

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

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

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

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

Initial Application

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

> a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case, the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and
>
> b) there is an immediate need for the protection of the debtor's estate.

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

23 Alberta Health deposed that there was an immediate need for the protection of Networc's estate. It submitted that if the bankruptcy threatened by the Cambian Group's application occurred, a trustee in bankruptcy would face huge obstacles to the continuance of Networc's operations, including exposure to liability, problems arising

from the fact that the agreement between Networc and Alberta Health was not assignable without the consent of Alberta Health and the Minister of Health and the dearth of potential assignees that could properly be designated and accredited to run the facility. If Networc had to cease operations, surgeries would be disrupted, highly-skilled employees would be left jobless and physicians would be left without facilities in which to operate. Alternatively, allowing Networc to operate under the supervision of an interim receiver would alleviate this disruption and would allow Networc to generate income for the benefit of creditors.

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

25 Alberta Health also indicated that it would agree to adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings and had removed any reference to that relief from its application for an interim receivership order. I was satisfied that Alberta Health had established the basis for an interim receivership order, particularly as the alleged prejudice to the Cambrian Group arising from a stay of its right to proceed with the bankruptcy proceedings was no longer a major issue. I was satisfied that the supplemental affidavit provided persuasive evidence that the bankruptcy application and the subsequent receivership application had created significant uncertainty and concern and a heightened risk of an interruption in medical services at the Networc facility. I was therefore satisfied that there were strong public interest reasons to appoint an interim receiver until the matter could be more thoroughly argued.

Applications on May 11, 2010

A. Status of Parties

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

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

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

28 The Cambrian Group, however, announced that it had agreed with Networc that it would withdraw its application to petition Networc into bankruptcy on the basis that neither party would be liable for costs, and

applied for an order of the court allowing such withdrawal. Counsel for the Cambrian Group suggested that it was satisfied by Networc's recent affidavit that Networc could not be said to have committed an act of insolvency. It is, of course, also clear that if no application for a bankruptcy order exists, an interim receivership under section 46 of the BIA may no longer be sustainable.

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

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

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

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

B. Continuation of the Receivership

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

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

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

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

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

37 Alberta Health's concern over the withdrawal and the necessity that this may require the receivership to continue under a different statutory provision relates to the complexity of insurance coverage now put in place

for the benefit of the Interim Receiver in recognition of its limited role under the section 46 receivership and the concern that a termination of a section 46 receivership and the commencement of a receivership authorized under section 47 or section 243 may create practical issues with respect to the possibility of two estates, or give rise to a perceived interruption in the stay of proceedings.

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

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

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

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

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

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

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

44 Counsel for the Cambrian Group submitted that the Court should not refuse it leave to withdraw its application for a receiving order since if the Court did so, it would be perceived by the public to be assisting Alberta Health in a manner not justified by law, suggesting that Alberta Health needed the bankruptcy proceedings to continue in order to justify its receivership application. As I have indicated in these reasons, that is a mischaracterization of the law and ignores the Cambrian Group's failure to satisfy the Court that its application should be withdrawn. These competing applications have raised public policy issues about the provision of health care services in Alberta by

private contractors, but those issues are not issues for this Court except to the extent that the public interest in uninterrupted health care services may validly affect the exercise of any discretion granted to the Court in the appointment of a receiver.

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

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

C. The Landlord

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

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

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

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

51 The Landlord relies on *North America Steamships Ltd., Re*, 2007 BCSC 267 (B.C. S.C.) in which the court considered the necessity of a trustee in bankruptcy affirming certain forward swap agreements between a bankrupt and creditors if the trustee wished to take the benefit of the agreements. The first thing of note is that this decision deals with a trustee in bankruptcy, not a receiver. The relevance of this is set out in paragraphs 11 and 18 of the decision, discussing the position of a trustee in bankruptcy with respect to the debtor's business. The decision also

deals with the special aspects of forward swap agreements: para. 15. It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination: Section 84.2 (7) (8) and (9) of the BIA. While the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract. In summary, this case does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor.

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

53 The Landlord also relies on an oral decision of Brenner, J. in *Pope & Talbot Ltd., Re* [2008 CarswellBC 1726 (B.C. S.C. [In Chambers])] dated May 20, 2008. This was a complex matter, primarily involving a filing under the CCAA, but certain properties of the debtor were also subject to a receivership order. This specific decision involved a contract for the supply of wood chips between a third-party sawmill owner, Canfor, and Pope & Talbot with respect to one of its mills under receivership. From the date of the initial order under the CCAA in November 2007 to April 25, 2008, Pope & Talbot paid monthly for the supply of wood chips. After that, it stopped paying, and on May 10, 2008 a receiver was appointed. At the time of the application, invoices for two months supply of wood chips were outstanding and Canfor submitted that it was suffering additional prejudice with respect to storage costs, space issues and contamination of stored stock. Brenner, J. considered the use of the CCAA in an insolvency that was clearly heading towards a liquidation and noted that Canfor was no longer being paid for goods supplied even though a receiver-manager was in place. He referred to *North America Steamships Ltd.*, and commenting that he was "balancing the equities as best as I can", gave the receiver until June 13, 2008 to decide whether to affirm the contract. In this case, the supplier was not being paid for the supply of materials, and the termination of the contract in question had been stayed, first by the CCAA order and then by the receivership order for seven months. Like *North America Steamships Ltd.*, this case was driven by its specific and complex facts.

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

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

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

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

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

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

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

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

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

Order accordingly.

Appendix A

Bankruptcy and Insolvency Act

46.(1) Appointment of interim receiver -

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

(2) Powers of interim receiver -

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

Judicature Act

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

End of Document

TAB 2

2006 CarswellOnt 3780
Ontario Superior Court of Justice

Royal Bank v. Canadian Print Music Distributors Inc.

2006 CarswellOnt 3780, [2006] O.J. No. 2492, 23 C.B.R. (5th) 42

Royal Bank of Canada (Applicant) and Canadian Print Music Distributors Inc., Digital Moon Music + Video Inc., Cantur Trans. Inc., Just Service Express Ltd., Pak-Express Inc., ID Merchandising Group Inc., Millwork by Amati Inc., 1569175 Ontario Limited c.o.b. ID Flooring & Finishing and Secure Distribution Services Inc.

Cumming J.

Heard: June 14, 15, 2006
Oral reasons: June 15, 2006
Written reasons: June 21, 2006
Docket: 06-CL-6487

Counsel: Steven Graff, Sam Babe for Applicant, Royal Bank of Canada
Robert Tanner for Respondent

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

APPLICATION by creditor bank for appointment of receiver in bankruptcy.

***Cumming J.*:**

The Application

1 The Applicant, the Royal bank of Canada (the "Bank"), applies for an Order appointing Grant Thornton Limited ("GTL") as interim receiver, and receiver and manager, under s. 47 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am. ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as am., to protect the Bank's interests, among others, in the Respondents.

2 The nine related Respondents ("Debtors") are each indebted for significant amounts to the Applicant to a total of some $6.5 million pursuant to Credit Facility Agreements, payable on demand, secured by General Security Agreements ("GSAs"). As well, each of the Debtors has given a guarantee to the Bank in respect of the indebtedness of some of the other Debtors. The indebtedness through such guarantees is also secured by the GSAs.

3 There is common ground that the requisite demands for repayment of the loans and under the guarantees have been made, and that Notices of Intention to Enforce Security, pursuant to s. 244(1) of the *BIA*, were issued to each Respondent, the specified notice periods have expired, and that there has not been repayment of any of the loans.

4 There is also common ground that negotiations took place in May between the Bank with the Respondents' former counsel, and certain parties related to the Respondents, in respect of the Bank's concerns, toward a formal forbearance agreement being

executed, but the copy circulated by the Bank's counsel for execution by June 9, 2006, was not executed by the Respondents or their related parties.

5 Mr. Art Goodine, manager in the Special loans and Advisory Services Group of the Bank, has provided a 16 page affidavit in support of the Application.

6 Mr. Goodine states that the Bank began to have concerns about the sufficiency of its security about April 25, 2006 when the Bank's Corporate Investigation Services ("CIS") was alerted to a number of irregular banking transactions involving the Respondents. These transactions involved a series of returned cheques issued between the companies and related parties, deposited to accounts of the companies at the Bank and drawn on accounts of related parties at the Bank of Nova Scotia. As a result of these returned items, most of the Respondents' accounts with the Bank were in overdraft positions in excess of their authorized limits.

7 Mr. Goodine says that the resulting examination evidenced that since the middle of April, 2006, the majority of transactions in both quantity and dollar value in most of the Respondents' bank accounts has involved cheques drawn on or payable to related parties. Funds were transferred between companies and related parties operating in different industries, without any obvious business relationship. There were a number of instances of funds being deposited to an account from one company on one day, followed by a payment back to that same company on the following day. Other than payments from related parties, most of the companies did not have a significant external source of funds. Once the Bank placed constraints upon the Respondents' accounts and began to return cheques, the overall combined overdraft position of the Respondents' accounts increased significantly.

8 As a result of the Bank's findings, the Bank retained Price WaterhouseCoopers Inc. ("PWC") to investigate the Respondents' financial positions and prepare a report for the Bank. PWC attended at the Respondents' premises between May 2 and 23, 2006.

9 PWC found that there extensive accounts receivable past due more than 90 days, and considerable accounts payable and accounts receivable were due from related parties. PWC also found that the margin availability calculations provided by management had been considerably overstated.

10 PWC made preliminary conclusions, including: the enterprise has grown in a haphazard fashion into a number of largely unrelated businesses, some of which are not customers of the Bank, there is an unusually high level of intercompany transactions, and the internal financial reporting capacity is "very weak". PWC says it was unable "to obtain sufficient verifiable information to confirm whether" the businesses were profitable at present.

11 PWC also says that its personnel were met outside the Respondents' building on May 23, 2006 and told by Mr. Mahmood Hemani, a principal of the Respondents, that it was felt PWC should no longer continue its investigation.

12 Mr. Goodine says there is some suggestion from the company records that some of the companies are being used to sustain others in meeting payrolls. Mr. Goodine also states that "When the Bank has communicated to the Companies that there are insufficient funds in the Company Bank accounts to cover payroll, the companies have purported to cut down the payroll list".

Disposition

13 Section 47 (3) of the *BIA* provides for the appointment of an interim receiver under s. 47 (1) only if it is shown to the Court to be necessary for the protection of the debtor's estate or the interests of the creditor who sent the notice under s. 244 (1). In my view, the Bank's evidence establishes by a preponderance of evidence that an interim receivership is necessary for both the protection of the debtor's estate and for protection of the interests of the Bank.

14 The Bank has met the onus of establishing a strong *prima facie* case of bankruptcy inasmuch as the respondents cannot meet their liabilities as they fall due. The evidence in support of the Application establishes on a balance of probabilities that the Bank will likely succeed in obtaining an order for a permanent receivership on the return of the Application.

15 The Bank has proven the need for immediate protection of the Debtors' estates. The evidence shows there is a significant danger that assets may disappear and the estates may be adversely affected in the absence of protection through an interim receiver.

16 Counsel for the Respondents submits that the Bank has not proven that there is actual misfeasance and wrongdoing such that assets are being misappropriated or dissipated. The Respondents assert that proof of such misfeasance is a prerequisite to appointing an interim receiver. I disagree.

17 Because the possible explanations underlying the financial records of the Respondents are unknown, or at least uncertain, at this point in time, it cannot be said with any certainty that wrongdoing on the part of the Respondents has been established. Nor does the Bank so assert.

18 However, in my view, and I so find, the Bank's evidence has established with certainty on a balance of probabilities the need for an immediate interim receivership to assure conservation of the Respondents' assets, and hence, protection of the interests of the Bank through its security.

19 For the reasons given, I granted on June 15, 2006, the Application for an interim receiver to be appointed under s. 47(1) of the *BIA*, with these written reasons to follow. The Application for a permanent receivership is adjourned to July 5, 2006. I shall remain seized of the matter.

Application granted.

TAB 3

2020 ABCA 118
Alberta Court of Appeal

CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.

2020 CarswellAlta 513, 2020 ABCA 118, [2020] A.W.L.D. 1277, 316 A.C.W.S. (3d) 607

2026998 Alberta Ltd, Grandin Prescription Centre Ltd, 517751 Alberta Ltd, 1396987 Alberta Ltd, and 1396966 Alberta Ltd (Applicants) and CWB Maxium Financial Inc (Respondent) and MNP Ltd, in its Capacity as the Court-Appointed Interim Receiver of 2026998 Alberta Ltd, Grandin Prescription Centre Ltd, 517751 Alberta Ltd, 1396987 Alberta Ltd and 1396966 Alberta Ltd (Respondents) and Harold Douglas Loder (Not a Party to the Appeal)

Dawn Pentelechuk J.A.

Heard: March 18, 2020
Judgment: March 20, 2020
Docket: Edmonton Appeal 2003-0053-AC

Counsel: J. Schmidt, for Applicants
T.M. Warner, S. Norris, for Respondent, CWB Maxium Financial Inc.
R.F.T. Quinlan, Z. Soprovich, for Respondent, MNP Ltd. in its capacity as Court-Appointed Receiver

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by debtor for leave to appeal appointment of interim receiver.

***Dawn Pentelechuk J.A.*:**

1 The applicants, collectively referred to as "Grandin", apply for permission to appeal the decision of a commercial duty judge to order the appointment of an interim receiver. Grandin also applies, if necessary, for a stay of proceedings.

2 The parties agree that permission to appeal is required under s 193(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. The parties disagree on whether, pursuant to s 195 of the *BIA*, an automatic stay is triggered should permission to appeal be granted.

3 On March 2, 2020, a commercial duty judge granted an order appointing MNP Ltd (MNP) as interim receiver under s 47 of the *BIA*. The test is outlined in s 47(3):

> An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

4 CWB Maxium Financial Ltd (CWB Maxium) is a secured creditor of Grandin which operates a pharmacy in St Albert. CWB Maxium's application for appointment of an interim receiver was triggered by it being served with Requirements to Pay (RTPs) by Canada Revenue Agency (CRA) for Grandin's unpaid source deductions that exceeded $350,000.

5 The application was made on short notice to Grandin, who opposed the application.

6 In short oral reasons, the commercial duty judge alluded to the test under s 47 of the *BIA* and noted the evidence from both sides was "somewhat deficient." Nonetheless, he was satisfied there was a debt owing to CWB Maxium and a default by Grandin, and that the operation of the pharmacy was in jeopardy. He was satisfied there were significant concerns regarding CWB Maxium's security and that an appointment of an interim receiver was necessary to protect its interest. The commercial duty judge noted that CWB Maxium was prepared to fund the interim receiver up to $250,000 in order to allow Grandin to continue to operate as a going concern and to meet its financial obligations.

7 The commercial duty judge found the evidence of Grandin's president did not sufficiently address how the debtor's estate could be protected in the absence of the appointment of an interim receiver. In doing so, he expressly stated he was not reversing the onus onto Grandin.

8 Grandin seeks permission to appeal on the following questions:

a) whether the commercial duty judge applied the wrong legal test in determining whether an interim receiver ought to be appointed;

b) whether the commercial duty judge erred in failing to find that CWB Maxium had breached its good faith obligations under the *BIA*;

c) whether the commercial duty judge made a palpable and overriding error in determining that CWB Maxium had made an effective demand for payment from Grandin; and

d) whether the commercial duty judge erred by failing to find that CWB Maxium was estopped and precluded by its own conduct from seeking the appointment of an interim receiver.

9 The test for permission to appeal under s 193(e) of the *BIA* is well known. The factors are:

a) whether the point on the proposed appeal is of significance to the bankruptcy practice;

b) whether the point on the proposed appeal is of significance to the underlying action itself;

c) whether the proposed appeal is *prima facie* meritorious or, on the other hand, frivolous;

d) whether the proposed appeal will unduly hinder the progress of the action itself; and

e) whether the judgment from which an appeal is proposed to be taken appears contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there is no remedy: *Smith v. Pricewaterhousecoopers Inc.*, 2013 ABCA 288 (Alta. C.A.) at para 11.

10 The second, third and fourth proposed grounds of appeal were not strenuously pursued in the application before me. Grandin's brief of law and argument before the commercial duty judge raises these arguments. While the commercial duty judge's reasons do not expressly address these arguments, I am satisfied he considered them

in the context of the overarching issue before him: whether the appointment of an interim receiver was necessary for the protection of Grandin's estate *or* the interests of CWB Maxium.

11 In any event, the second, third and fourth proposed grounds of appeal do not, in my view, meet the test for permission to appeal.

12 The heart of Grandin's argument is that the commercial duty judge applied the wrong test in determining whether the appointment of an interim receiver was necessary. Grandin argues that the appointment of an interim receiver requires proof by a preponderance of evidence that an actual and immediate danger of dissipation of Grandin's assets, to the detriment of CWB Maxium's security, exists. Grandin relies on*Royal Bank v. Canadian Print Music Distributors Inc.*, 2006 CanLII 21048, (2006), 23 C.B.R. (5th) 42 (Ont. S.C.J.) [*Royal Bank v Canadian Print Music*]; *Trez Capital Corp. v. UC Investments Inc.*, 2013 NSSC 381 (N.S. S.C.) [*Trez Capital*]; and *Royal Bank v. Zutphen Brothers Construction Ltd.* (1993), 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) [*Royal Bank v Zutphen Brothers*] in support of this proposition.

13 A reading of these cases does not support the proposition suggested by Grandin and at least one decision expressly rejects this proposition: see *Bank of Nova Scotia v. D.G. Jewelry Inc.*, 2002 CanLII 12477, (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) at para 1.

14 In *Royal Bank v Zutphen Brothers*, the Bank argued there was an immediate danger of dissipation of the company assets. This alleged risk of dissipation grounded the Bank's application for the appointment of an interim receiver. The company had already retained a trustee in bankruptcy to assist in preparation of a plan of reorganization. The court concluded there was insufficient evidence to establish a risk of dissipation of assets and denied the application for the appointment of an interim receiver.

15 In *Royal Bank v Canadian Print Music*, the appointment of an interim receiver was ordered. The court concluded that the Bank had met the onus of establishing a strong *prima facie* case of bankruptcy in as much as the respondents could not meet their liabilities as they became due. The court simply noted that the evidence showed "a significant danger that assets may disappear." The court did not expand the test beyond the wording of s 47(3) of the *BIA*.

16 In *Trez Capital* , the issue considered was whether or not the notice under s 244 of the *BIA* had been properly served. Whether the applicant had met the test under s 47(3) of the *BIA* was considered in the alternative. While the dicta in *Royal Bank v Zutphen Brothers* is referenced, the court in *Trez Capital* articulates the test for the appointment of an interim receiver in para 57:

> The burden under s 47.1(3) of the *BIA* is on the applicants to show that the appointment is necessary to either protect the respondents' estate or to protect the interests of one or more creditors, or of creditors generally.

Trez Capital does not stand for the proposition that evidence of dissipation of assets is necessary for the appointment of an interim receiver.

17 Grandin's argument necessitates reading a provision into s 47(3) that, on plain reading, does not exist.

18 The commercial duty judge's decision is entitled to deference. He identified the correct test. While noting that the evidence was somewhat deficient on both sides, it is an indisputable fact that CRA had served TRPs under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), for unpaid source deductions in excess of $350,000, and in doing so, created a super-priority to CRA ahead of CWB Maxium's position as a secured creditor. While the president of Grandin deposed that various options existed to secure alternate financing, the evidence was not compelling. The affidavit affirmed March 12, 2020 was silent on this issue.

19 Grandin's value is as a going concern. The business requires both a licensed pharmacist and continued service from its main supplier. The placement of an interim receiver facilitated that. Funds have been lent by CWB Maxium to allow the interim receiver to meet Grandin's liabilities and to facilitate continued operation of the business.

20 More to the point, even if permission to appeal is granted, the issue would be moot by the time any appeal was heard by this Court. The interim receivership order terminates 30 days after the date of the order (March 2, 2020).

21 Section 195 of the *BIA* states that "all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of." In other words, the stay of proceedings imposed under s 195 of the *BIA* is limited to a stay of all proceedings *under the order appealed from*: *Canada (Attorney General) v. Moss*, 2001 MBCA 166 (Man. C.A. [In Chambers]) at para 4. The stay would not preclude an application for the appointment of a permanent receiver.

22 In the alternative, Grandin argues the common law test for a stay is met: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) , 1994 CanLII 117. I disagree. Grandin has not satisfied me it will suffer irreparable harm if the stay is refused, and the balance of convenience clearly favours CWB Maxium.

23 The application for permission to appeal and for a stay of proceedings is dismissed.

Application dismissed.

End of Document

TAB 4

1982 CarswellOnt 167
Ontario Supreme Court, In Bankruptcy

L.A.T. Macdonald Enterprises Ltd., Re

1982 CarswellOnt 167, 42 C.B.R. (N.S.) 17

Re L.A.T. MacDONALD ENTERPRISES LIMITED

Ferron, Registrar

Judgment: June 4, 1982
Docket: No. 31-202306-T

Counsel: *P.F.M. Jones*, for petitioner, Royal Bank of Canada.
H.R. Poultney, Q.C., for respondent.

Subject: Corporate and Commercial; Insolvency

Application for order rescinding and setting aside interim receiving order.

***Ferron*, Registrar (orally):**

1 This is an application brought by L.A.T. MacDonald Enterprises Limited, to which I will refer hereinafter as MacDonald, the respondent in a petition in bankruptcy, for an order rescinding and setting aside an order which I made on 7th April 1982 appointing Thorne Riddell Incorporated as interim receiver of the property of MacDonald.

2 The inference which is meant to be drawn from para. 15 of the affidavit of William G. Truax is that the circumstances described in paras. 13 and 14 make the appointment of an interim receiver imperative and urgent in order to prevent the immediate dissipation of the assets of the respondent.

3 It appears from the material filed that Q-P Office Buildings Limited is the trustee of, inter alia, the property at 434 Queen Street in the city of Ottawa and that Dwyer Hill Holdings Limited and MacDonald each have 50 per cent interest in that trust.

4 In or about April 1981 Q-P entered into an agreement under which the building at 434 Queen Street was sold. The purchase price was $4,000,000 of which $3,000,000 was paid on closing and the balance made payable by two installments secured by a vendor's lien.

5 In a note to a financial statement of Q-P dated 1st October 1981 and reflecting the financial position of the company as of 31st May 1980, it is recorded that MacDonald had assigned its interest in Q-P to Naepen Investments Incorporated, effective 31st December 1979. Naepen is a company whose sole officer is L.A.T. MacDonald who is also a principal of L.A.T. MacDonald Enterprises Limited, the respondent to the petition in bankruptcy.

6 On or about 15th March 1982 Naepen purported to assign all of its interest in the vendor's lien, to which I have referred, to Radcliff Realties Company Limited. Presumably that interest is the same interest referred to in the note to the financial statement, but this is by no means clear since no one seems to have any information aside from pure speculation as to the method or form by which MacDonald's interest in Q-P was transferred to Naepen.

7 Miss Pepall in argument stated that there appeared to be no consideration for the transfer to Naepen but since there was no evidence at all of that transaction, other than the note to the financial statement, that conclusion appears to be conjectural only. It is suggested that because the petitioning creditor has no knowledge of a written assignment of interest by MacDonald to Naepen and since there is nothing to that effect registered on title that the same was done surreptitiously and with fraudulent

intent. Counsel for the respondent, MacDonald, points out, quite rightly in my opinion, that MacDonald's interest in Q-P was that of a shareholder and that the assignment of that interest need not either be public or the subject registration. In any event, from these facts and from the conclusions from the lack of information, the petitioning creditor suggests that MacDonald is attempting "to dissipate all assets of Enterprise, such that its creditors are unable to realize on any assets".

8 The conclusion is, in my opinion, based on a premise which may or may not be factual and, in any event, it does not follow that the transfer of one asset puts all assets out of the reach of creditors.

9 Further, the conclusion urged by the petitioning creditor is speculative and based on events which, for the purpose of the application for an interim receiver, are so far in the past that no note of urgency can be nor should have been assigned to those events. The danger of dissipation must be actual and immediate and not one based solely on suspicion. The transactions, from what we know of them, become the more innocuous when one understands that Radcliff in fact had a claim for commission against Q-P which Naepen recognized and for the payment of which the assignment was made by Naepen. Moreover, the assignment by MacDonald to Naepen of its interest appears to be one, if not expected, at least contemplated by the petitioning creditor. The letter of 10th October 1979, sent by counsel for the Royal Bank to MacDonald, confirms an arrangement between the bank and MacDonald whereby all properties without equity would be transferred to other companies "not presently indebted to the Royal Bank". Both the interest of MacDonald and the status of Naepen vis-à-vis the bank fall into that category and description and regardless of whether MacDonald carried out all the collateral terms of that agreement (and it was in the power of the bank to compel compliance) the transfer to Q-P was at least contemplated and indeed urged by the petitioning creditor.

10 It seems to me that the bank's complaint is not so much that the assignment took place but that it took place without consultation of a kind not spelled out in the undated undertaking, but which the bank expected. It is quite conceivable that the bank had knowledge of that assignment or at least the means of acquiring that information, but was not consulted in the terms which it contemplated at the time the undertaking was given. The transfer took place prior to 31st December 1979 and I suspect that, since the financial statement dated 1st October 1981 is part of the bank's material, the bank knew of the assignment long before it launched the motion for the interim receiving order, but chose to do nothing about the assignment. Indeed, in para. 10 of the Truax affidavit the deponent states that the financial statement was given to the bank by Linquist, Holmes and Company as long ago as 27th January 1982. He does not state, and in my opinion could have stated, when in fact the bank first came into possession of that knowledge.

11 It seems to me moreover that the production of the letter of 10th October 1979, to which I have already referred, is crucial and should have been part of the bank's material. I accept absolutely the reason for its non-production advanced by Mr. Jones and reflected in para. 5 of the affidavit of Truax dated 5th May 1982. But that letter, read in conjunction with the financial statement produced, at least offers a credible explanation and view of the assignment of which Truax complains in para. 13 of his affidavit, which is most germane to the application for the interim receiving order. The basis of the order and the atmosphere of immediacy created by the two affidavits of William G. Truax dated 7th April 1982 is removed when one considers both documents and the circumstances of the intimate course of dealings between the bank and MacDonald.

12 The application for the interim receiving order was made on 7th April 1982. The supplementary affidavit of Truax, which accompanied the application, alleges a meeting to be held on the following day at which MacDonald and Morld, a principal of Dwyer Hill, would effectively divert the balance of the purchase price of the Q-P building sale into the hands of Radcliff to the detriment of creditors. The inference left by that affidavit was that documents would be signed, registration effected and money turned over, unless, of course, an interim receiver were appointed to be on hand to receive any money before it left the possession of MacDonald.

13 It is clear that not only did such a meeting not take place but that none was contemplated and on that basis alone and more particularly since Trainor J. has now removed the danger, if it in fact existed, of dissipation of such funds, the interim receiving order should be set aside.

14 It is said in *Re Imperial Broadloom Co.* (1978), 22 O.R. (2d) 129, 29 C.B.R. (N.S.) 113, 92 D.L.R. (3d) 390 (H.C.), to which both parties have referred, that it is necessary for the applicant to demonstrate a prima facie case of success on the

petition. The evidence must show that on the balance of probabilities the petitioning creditor will succeed. In the case of this petition another element is present. Counsel for the respondent has filed material consisting of a writ of summons and pleadings in an action commenced by the petitioning creditor in the ordinary civil courts against the respondent for substantially the same indebtedness. That material was not available to the court on 7th April 1982. The bankruptcy court could conceivably, on the hearing of the petition, as it has done on similar cases, merely stay the petition until the indebtedness of MacDonald is established in the civil court in which the petitioner originally elected to proceed. One cannot say, accordingly, that a prima facie case under those circumstances has been made out.

15 Moreover, the indebtedness is clearly in dispute and vigorously defended, not only on the petition but in the civil action to which I have referred. For these reasons, in my opinion, the order of 7th April 1982 cannot stand and the same is rescinded and set aside and the application is allowed.

Brief discussion.

16 Accordingly, the order should contain a provision that any documents obtained by the interim receiver from MacDonald in the course of its receivership should be forthwith returned to MacDonald. Costs in the cause.

Interim receiving order rescinded.

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: CWB Maxium Financial Inc. v. 2026998 Alberta Ltd. | 2020 ABCA 118, 2020 CarswellAlta 513 | (Alta. C.A., Mar 20, 2020)

1993 CarswellNS 22
Nova Scotia Supreme Court

Royal Bank v. Zutphen Brothers Construction Ltd.

1993 CarswellNS 22, [1993] N.S.J. No. 640, 17 C.B.R. (3d) 314

ROYAL BANK OF CANADA v. ZUTPHEN BROTHERS CONSTRUCTION LIMITED

Registrar Smith

Heard: February 22, 1993
Judgment: February 25, 1993
Docket: Doc. S.H. 93-44893

Counsel: *David G. Coles* , for applicant, Royal Bank of Canada.
Richard N. Rafuse, Q.C. , and *John D. MacIsaac, Q.C.* , for respondent, Zutphen Brothers Construction Limited.
J. Craig McCrea , for trustee, Coopers & Lybrand Limited.

Subject: Corporate and Commercial; Insolvency

Application for appointment of interim receiver.

Registrar *Smith* :

1 This is an application to the Court by the Royal Bank of Canada (the Bank), for an Order pursuant to s. 47 of the *Bankruptcy and Insolvency Act* , 1993, (the Act), appointing an interim receiver of all the property of Zutphen Brothers Construction Limited, a body Corporate, (the Zutphen Company).

2 The application stands opposed by the Zutphen Company and Coopers & Lybrand Limited, Trustee under a proposal to be filed by the Zutphen Company, on the grounds that, *inter alia* , the facts do not support the appointment of an interim receiver for the protection of the Zutphen Company estate; that there is no actual and immediate danger of the dissipation of the assets; and that the appointment of an interim receiver would, in effect, usurp the Zutphen Company's rights to proceed with the proposal under the provisions of the Act.

3 The Bank takes the position that their security over the Zutphen Company's assets, consisting of two floating charge debentures, and a general assignment of book debts is indeed threatened, and that there is an immediate danger of a dissipation of the Company assets, and that the appointment of an interim receiver would effect the required protection.

4 The Zutphen Company has engaged in heavy construction work in the Cape Breton area, for the past 30 years or so. It owns construction equipment consisting in part of large bulldozers, backhoes and trucks. It presently has a contract with the Nova Scotia Power Corporation, commonly called the "Ashe Contract", and the cost of completion of that contract is approximately $98,200.00. The Zutphen Company states that it "owns construction equipment having equity between $1,500,000.00 and $2,000,000.00", and that this equity is covered by the debentures held by the Bank.

5 The evidence in support of the Bank's application, and that in opposition thereto, is contained in affidavits duly sworn, with the deponents present in Court for the purpose of examination and cross-examination.

6 Karen M. Cramm, F.C.A., is a licensed Trustee in Bankruptcy, a Chartered Accountant, and a Senior Vice-President of Deloitte & Touche Inc., a national accounting firm. She has been a licensed Trustee in Bankruptcy for approximately 15 years. By letter dated February 16, 1993, the Bank empowered by the terms of its debenture security, appointed Deloitte & Touche Inc. Receiver and Manager of the assets of the Zutphen Company following a default by that Company under the terms of loans granted by the Bank. The Receiver and Manager was appointed with all powers and authority "to take possession of the property and assets charged thereunder and to take all necessary steps to protect and realize on that property and assets". On that same date, Mrs. Cramm attended the offices of the Zutphen Company located at Mabou, Cape Breton, was denied access to the premises, and later in the afternoon returned to their office and met with John Van Zutphen, the President, and Neil MacIsaac the Accountant of the Company respectively. Mrs. Cramm said that she was advised that the Zutphen Company was (1.) insolvent, (2.) had no ongoing work except for the completion of the "Ashe Contract", (3.) had outstanding accounts receivable in the approximate amount of $500,000.00, (4.) had opened a new bank account with a local credit union, and had deposited $20,000.00 in that account, and (5.) did not expect any monies to be paid under the "Ashe Contract" until priorities between the Bank and mechanic's lien claimants were resolved. In an affidavit filed by John Van Zutphen, (1.), (4.) and (5.) were denied.

7 In paragraph 9 of her affidavit, Mrs. Cramm had stated that, "... I am of the opinion that the costs of preparing and presenting a proposal as contemplated by Zutphen Brothers Construction Limited could be in excess of $200,000.00 including legal fees". On examination by Mr. Rafuse, Mrs. Cramm admitted that this figure was "just an estimate, in the case of a large company (costs) could be in excess of $200,000.00. Mrs. Cramm expressed her opinion that to allow the Zutphen Company to continue to operate and "to receive monies paid by its debtors, and to dispose of its equipment, and to apply those monies to its ongoing operations, and the costs of the proposal as contemplated herein would materially prejudice the position of the secured creditor, the Royal Bank of Canada."

8 Marcus A. Wide is a Chartered Accountant, and Senior Vice-President of Coopers & Lybrand Limited, Trustee under the proposal to be filed by the Zutphen Company. After having conferred with Donald A. Leet, C.A. of Doane Raymond Management Consultants, advisors to the Zutphen Company, and after reviewing the information supplied, Mr. Wide stated in his affidavit, "it appeared to me that a proposal under the Act would be more beneficial to all of the creditors of (the Zutphen Company) than a forced realization pursuant to the security of the Royal Bank of Canada or some other secured creditor". Notice of Intention to file a proposal by the Zutphen Company was filed on February 15, 1993, late in the day on that date, failing an attempt by Counsel for the Bank, and the Zutphen Company to reach an agreement whereby it would become unnecessary to file the said Notice of Intention. On February 15, 1993, Mr. Wide commenced carrying out his duties as Trustee pursuant to the provisions of the *Bankruptcy and Insolvency Act* , by engaging the services of Ritchie Brothers Auctioneers to appraise and propose a liquidation of the heavy equipment of the Zutphen Company; verifying the status of various accounts receivable; and instructing two members of the administrative staff of Coopers & Lybrand Limited to conduct an inventory, and review financial information on the Zutphen Company premises at Mabou.

9 Mr. Wide observed that there was very little activity at the Zutphen Company premises, that there was only a skeletal staff of 5 persons at their office engaged in recovering money on contracts already performed. In Mr. Wide's opinion the additional cost of the appointment of an interim receiver would dilute whatever assets are already available for the creditors. He further stated that "there is nothing untoward going on with the company assets".

10 Donald A. Leet is a Chartered Accountant, a licensed Trustee in Bankruptcy, a certified Management Consultant, and a partner of Doane Raymond Management Consultants of Halifax. Mr. Leet was engaged to assist the Zutphen Company in preparing a plan of reorganization to respond to the Bank's concern about the financial situation of the Company. Mr. Leet attempted to secure financing from another financial institution without success. It was Mr. Leet's observation, during the period of his engagement, that the principals of the Zutphen Company acted in a responsible, honest, and cooperative manner when dealing with the Bank. They acted responsibly in not drawing down all of the Bank funds, which would have been permitted, based on "margin credit calculations" at the time.

11 In Mr. Leet's opinion having a Trustee and interim receiver would result in a duplication of work with greater costs involved and less money available for the creditors. On paper, the Zutphen Company's assets are more valuable than their indebtedness. In Mr. Leet's words, "its a cash flow problem", and he does not perceive any greater danger of dissipation of assets having a Trustee in place, as compared to having an interim receiver.

12 John Van Zutphen of Port Hood, Cape Breton, is President of the Zutphen Company. He has been involved in the construction business for 30 years. He stated that his company fully intends to complete the "Ashe Contract", and that Mrs. Cramm's calculation re costs are wrong. He testified that his company recently sold two trucks, "within the past two weeks", for a sale price of $250,000.00, and after playing the encumbrances, "$200,000.00 goes to the Royal Bank". He stated that the Zutphen Company owns 100 pieces of construction equipment. Mr. Van Zutphen admitted to depositing $20,000.00 in a second bank account, and writing a substantial cheque on that account, to release a truck from a weigh scale in order to "allow us to continue to operate", and to be "able to do our business". He denied that the said second bank account was inactive or dormant.

Decision

13 While there was argument relating to whether or not the application should have been made under s. 47 or s. 47.1, I am satisfied that sufficient notice was given under s. 244(1) to bring the application under s. 47 of the Act. S. 244(1) provides that the secured creditor who intends to enforce a security, in this case the Bank's floating charge debentures, must send a notice of intention to the insolvent person, and shall not enforce the security until the expiry of 10 days after sending that notice.

14 I find, on the evidence, that the required notice was given to the Zutphen Company, and that the security was not enforced prior to the expiry of the 10 days after sending the notice within the meaning of s. 244(1). Therefore, the application before the Court was properly brought under s. 47 of the Act.

15 It was submitted by Mr. McCrea for Coopers & Lybrand Ltd., that the new legislation under the Act is aimed at the rehabilitation of insolvent companies rather than bankruptcy. The purpose is similar to that of the *Companies' Creditors Arrangement Act* (the C.C.A.A.), the object of which is to keep a company going despite its insolvency. Furthermore, the Trustee, Coopers & Lybrand Ltd., is charged with the duty of monitoring the Company's business and financial affairs until a proposal is filed. With this monitoring on the part of the Trustee, Mr. McCrea submits that it is highly unlikely that dissipation of assets and cash will occur to any significant degree.

16 Mr. Rafuse on behalf of the Zutphen Company submitted that the only evidence in support of the Bank's application is the evidence of Mrs. Karen Cramm, and that her evidence is "tainted with understandings and suppositions", not hard facts. He submitted that the intent of the Zutphen Company was to act properly and to comply with its duties and responsibilities under the Act, and to grant the Order sought would be to go outside the purpose and intent of the new legislation. Mr. Rafuse further submitted that there are realizable assets over and beyond what is owing to the Bank, that the Zutphen Company was spending money wisely, and finally that the appointment of Deloitte & Touche Inc. as interim receiver could create a conflict situation.

17 Mr. Coles for the Bank, on the other hand, submits that the evidence points not to rehabilitation but to liquidation. He urged that s. 47 contemplates the appointment of an interim receiver in just these circumstances. He points to the "dormant" bank account of the Zutphen Company, and the deposit of $20,000.00 made therein. This was the Bank's money, he says, and the "fear" talked about is that the Zutphen Company may elect to make choices that the Bank would not make. Finally, Mr. Coles pointed out that the Act contemplates both the appointment of a Trustee, and an interim receiver.

18 The exact wording of the section in question is relevant:

> 47.(1) Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(*a*) take possession of all or part of the debtor's property mentioned in the appointment;

(*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(*c*) take such other action as the court considers advisable.

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(*a*)the debtor's estate; or

(*b*)the interests of the creditor who sent the notice under subsection 244(1).

19 As indicated earlier, I am satisfied that the prescribed notice has been sent in compliance with s. 244(1) of the Act. S. 47(3)(*b*) is extremely important and places the onus on the applicant to establish, by a preponderance of evidence, that the appointment of an interim receiver is necessary for the protection of "the interests of the creditor who sent the notice under subsection 244(1)".

20 It is well established law, that in order to support an application for the appointment of an interim receiver, the danger of dissipation of assets must be actual and immediate and not one based on suspicion and speculation.

21 *Re L.A.T. MacDonald Enterprises Ltd.* (1982), 42 C.B.R. (N.S.) 17 (Ont. S.C.) was an application brought by the MacDonald company for an Order rescinding and setting aside an Order appointing Thorne Riddell Inc. as an interim receiver of the property of the company. It was submitted that the appointment of an interim receiver was imperative and urgent in order to prevent the immediate dissipation of the assets of the respondent. It was alleged that the MacDonald company was attempting to dissipate all assets belonging to Enterprise, such that its creditors were unable to realize on any assets.

22 Master Ferron, Registrar, stated in part in his decision [at pp. 19 and 21],

> The danger of dissipation must be actual and immediate and not one based solely on suspicion.
>
> . . . . .
>
> In my opinion, the order ... cannot stand and the same is rescinded and set aside and the application is allowed [with costs].

23 Has the Bank proven by a preponderance of evidence that there is an actual and immediate danger of dissipation of the Zutphen Company assets to the detriment of the Bank's security?

24 The applicant's case rests almost entirely on the evidence of Mrs. Cramm, who when examined on her affidavit evidence, prefaced many of her answers with "I understand ...", which connotes a position of indefiniteness respecting the actual and immediate danger of the dissipation of the Zutphen Company assets. Notwithstanding the evidence concerning the deposit of $20,000.00 to the "other" bank account, John Van Zutphen, in his evidence, gave an explanation that appears to me to be plausible in the circumstances. As well, there is the evidence of the net proceeds from the sale of two trucks amounting to $200,000.00, which will go to the Bank in partial satisfaction of their claim.

25 Moreover, Coopers & Lybrand Ltd., as a Trustee, is located on the Zutphen Company premises, and their activities are directed by Marcus Wide, a recognized expert in bankruptcy work who "had acted before in similar situations", and who functions also as an Officer of the Court. As well, he is working on a proposal, which if accepted by the creditors, will enable the Zutphen Company to continue operations for the benefit of the creditors.

26 In my view, and in all the circumstances of the case, the applicant Bank has failed to discharge the burden of showing to the Court that an appointment of an interim receiver is necessary for the protection of the interests of the Bank, as it is required to do pursuant to s. 47(3)(*b*) of the Act.

27 Therefore, the application is dismissed with costs to the Respondent, and Coopers and Lybrand Ltd., which I fix at $400.00 each for a total of $800.00.

Application dismissed.

TAB 6

2002 CarswellOnt 3443
Ontario Superior Court of Justice

Bank of Nova Scotia v. D.G. Jewelry Inc.

2002 CarswellOnt 3443, [2002] O.J. No. 4000, [2002] O.T.C. 762, 117 A.C.W.S. (3d) 245, 38 C.B.R. (4th) 7

The Bank of Nova Scotia, Applicant and D.G. Jewelery Inc. et al, Respondents

Ground J.

Heard: October 9, 2002
Judgment: October 9, 2002
Oral reasons: October 9, 2002
Written reasons: October 15, 2002
Docket: 02-CL-4707

Subject: Insolvency

APPLICATION by creditor for appointment of interim receiver pursuant to s. 47(1) of *Bankruptcy and Insolvency Act*.

Ground J. **(orally):**

1 I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assests. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers Construction Ltd.*[1993 CarswellNS 22 (N.S. S.C.)] is not, in my view, the law of Ontario.

2 I accept the submission of Mr. MacNaughton that the objection based on the Notice of Application, not seeking an interlocutory order for the appointment of a Receiver is formalistic and could easily be remedied by amending the Notice of Application to seek some declaratory or other relief to create a lis as between the parties.

3 On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court-appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed. I believe that test is met in the case at bar. It appears that the role of the Receiver, in this case, will be to develop and carry out a reorganization or restructuring of the various companies and to bring a plan to this court for approval. This will permit all stakeholders to have an input into the structure and detail of such a plan. This is particularly important where there appears to be at least some possibility of some return to subsequent secured creditors, unsecured creditors or even shareholders. In addition, I am of the view that a court-appointed Receiver will be able to deal more effectively with the assets of D.G. Jewelry and its affiliates in the United States and, if necessary, to bring proceedings under the U.S. Bankruptcy Code than would a private Receiver.

4 With respect to KPMG being appointed as court-appointed Receiver, it is obvious that KPMG is well qualified to perform this function and, in view of its experience with and familiarity with the company, is the logical person to be appointed. Although I have some concerns about the same firm or related firms fulfilling various roles in CCAA/insolvency proceedings, the company in this case has consented to the appointment by the bank of KPMG as a private Receiver and it would seem illogical for the company now to object to KPMG being appointed a court-appointed Receiver with clear obligations to act in the interests of all stakeholders and the obligation to report regularly to this court and obtain the court's approval of its activities.

5 An order will issue, pursuant to Section 47(1) of the *Bankruptcy and Insolvency Act* and Section 101 of the *Courts of Justice Act* appointing KPMG Inc. as Interim Receiver of D.G. Jewelry Inc. I will ask counsel to submit and approve the form of order to me or arrange for a 9:30 a.m. appointment to settle the formal order. The appointment is effective October 9, 2002.

Application granted.

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TAB 7

2006 CarswellOnt 7735
Ontario Superior Court of Justice

Maxium Financial Services Inc. v. Corporate Cars Ltd. Partnership

2006 CarswellOnt 7735, [2006] O.J. No. 4878, 153 A.C.W.S. (3d) 781, 29 C.B.R. (5th) 110

IN THE MATTER OF the PROPOSAL OF CORPORATE CARS LIMITED PARTNERSHIP and TRACEMOUNT/GLOJACK LEASING LTD.

AND IN THE MATTER OF APPLICATION under s. 67 of the Personal Property Security Act, R.S.O., 1990, c. P-10, s. 47 of The Bankruptcy And Insolvency Act, R.S.C. 1985, c. B-3 and s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

MAXIUM FINANCIAL SERVICES INC. (Applicant) and CORPORATE CARS LIMITED PARTNERSHIP and TRACEMOUNT/GLOJACK LEASING LTD. (Respondent)

C. Campbell J.

Heard: November 9, 2006
Judgment: November 21, 2006
Docket: 31-452767, 31-452788, 06-CL-6724

Counsel: Steven J. Weisz, Michael P. McGraw for Applicants
Joseph G. Speranzini, Michael J. Valente for Canadian Imperial Bank of Commerce
Craig Hill for Bank of Nova Scotia
Pamela Huff for Securcor / Sun Life Assurance Company of Canada
Sanj Mitra for KPMG
Christopher Besant, Frank Spizziri for Respondent, Corporate Cars
Ronald Reim for Segal & Partners Inc.

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

MOTION by senior secured creditor for appointment of interim receiver.

***C. Campbell J.*:**

1 This is a motion brought by Canadian Imperial Bank of Commerce ("CIBC"), supported by the Bank of Nova Scotia ("BNS"), the senior secured creditors of Corporate Cars Limited Partnership ("Corporate Cars"), for the appointment of an interim receiver under s. 47.1(1) of the *Bankruptcy And Insolvency Act*, R.S.C. 1985 (the "BIA").

2 Corporate Cars opposes the appointment on the grounds that since it has now filed a proposal, there is an onus on those seeking the appointment to demonstrate that it is necessary for the protection of the applying creditors.

3 The proceedings before the Court commenced as a motion brought on behalf of Maxium Financial Services Inc. ("Maxium") pursuant to s. 69 of the BIA to lift the stay of proceedings that then existed on the basis that the stay of proceedings did not apply to it. Maxium also opposed the extension of the stay then sought by Corporate Cars.

4 Relief similar to that of Maxium was sought by Securcor, a creditor in similar but not exactly the same position.

5 Between the time of commencing of the Maxium and Securcor motions, two things happened: (1) Corporate Cars filed a proposal under the BIA; and (2) CIBC brought its motion for the appointment of an interim receiver.

6 When this matter was first addressed, Corporate Cars sought an adjournment to enable it to put in response material. The matter was adjourned to the next day to permit the filing of material by Corporate Cars, which was done.

7 The position on behalf of the Company can be succinctly put. The Company asserts that it has since August developed two proposals each of which would allow for the orderly disposition of the Company's portfolio of car leases, which would permit payment sufficient to discharge the debt to the Banks and permit Maxium and Securcor to in effect operate their own portfolios and leave equity to the owners of somewhere between $3 and $5 million.

8 Corporate Cars complains that the Banks have not provided information to it to suggest that the two proposals are not reasonable.

9 The position of the creditors is quite straightforward. They have lost confidence in the Company. They do not support either of the proposals. The Banks' position arises from certain events that were revealed in August and September.

10 Funds received from payments made on leases were not held in trust, as the terms of the arrangements with the creditors provided for. The Company does not dispute these past events and asserts that currently it is operating within the strictures of its various contracts. Indeed, the Company agrees with the relief sought by both Maxium and Securcor to protect the entitlement they have to certain aspects of the revenue stream.

11 None of the Company's suggested steps has satisfied the two major secured creditor Banks, as their debt is due even though some payments have been made on account.

12 The position of the Company is that the Banks have not only not met the test of establishing that there has been a dissipation of assets, but cannot meet the additional test that "the damages of dissipation of assets must be actual and immediate and not one based on suspicion and speculation."

13 The latter quote originated in a decision from Nova Scotia where Registrar Smith used that language in *Royal Bank v. Zutphen Brothers Construction Ltd.*, [1993] N.S.J. No. 640 (N.S. S.C.) in the context of a section 244 Notice.

14 Ground J. in *Bank of Nova Scotia v. D.G. Jewelry Inc.*, [2002] O.J. No. 4000 (Ont. S.C.J.) rejected the above test on the basis that it was not the law of Ontario. In *Atsana Semiconductor Corp., Re* (Ont. S.C.J.), Aitkin J. accepted the Nova Scotia test but does not appear to have been referred to the statement of Ground J. in *D.G. Jewelry*.

15 I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major secured creditors who have the most at risk have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets.

16 Both Banks do not believe the assumptions that underlie the Company's proposals are realistic. Added to that is the recent history of sales out of trust, loss of vehicles and questionable accounting. In that sense there is a realistic risk of asset dissipation if a Receiver is not appointed.

17 The only objection that the Company can muster in response is that the appointment of an interim receiver will add to the expense and undermine any proposal that would see a significant return to the equity holders. It suggests that the monitoring that has been and would continue to be available to the Banks should be sufficient.

18 The suggestion that the appointment be postponed for 20 days to allow all the creditors to vote does not make sense in the present context. The position of the Banks is such that without their agreement, the current proposals are doomed. It is the Company and not the Banks that will have to come up with a proposal (if there is one) that is acceptable to all creditors.

19 I have been referred to s. 50(12) of the BIA, which provides as follows:

(12) Court may declare proposal as deemed refused by creditors — The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

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

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

20 While it is not necessary for these motions to deem the proposal of the Company refused, that is the practical effect of the Banks' position.

21 In my view, the appointment of an interim receiver will not impair the Company bringing forth a proposal (if one is to be made) that may have a chance of success.

22 If there are circumstances for which it is appropriate to modify the terms of the model receivership order to accommodate legitimate needs, the matter may be returned on short notice.

23 The motion for appointment of an interim receiver is granted, as is the relief sought by both Maxium and Securcor. In the circumstances I trust that it will not be necessary to deal with the costs of the motions.

Motion granted.

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