

COURT FILE NUMBER 2301 – 13922
~~25-2958981~~

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT CONNECT FIRST CREDIT UNION LTD.

RESPONDENTS OGEN HOLDINGS LTD., OGEN LTD., EDWARDS CONCRETE INC. and MORRISON HOMES CALGARY LTD.

DOCUMENT **BRIEF OF LAW OF THE APPLICANT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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**Hearing via Webex before the Honourable Justice D.R. Mah
on the Commercial List, on November 3, 2023, commencing at 10:00 AM**

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I. INTRODUCTION

1. This is the brief of Connect First Credit Union Ltd. ("**CFCU**", or the "**Lender**"), in support of its application (the "**Application**") to appoint Alvarez & Marsal Canada Inc. ("**A&M**") as the receiver and manager (the "**Receiver**") of all of the current and future assets, undertakings and property (collectively, the "**Property**") of OGEN Holdings Ltd. ("**OHL**") and OGEN Ltd. ("**OL**" and together with OHL, the "**Borrowers**" and each a "**Borrower**").
2. Capitalized terms not otherwise defined herein have the meaning set forth in Affidavit No.1 of Kunle Popoola, sworn October 24, 2023 (the "**Popoola Affidavit**") in support of the Application.
3. The Lender extended the Loans to the Borrowers pursuant to the terms of the Loan Agreements.
4. In support of the Borrowers' obligations under the Loan Agreements, the Borrowers granted Security in favour of the Lender, including but not limited to GSAs and the OHL Mortgage over the Lands, the principal amount of which was ultimately increased to \$23,511,235.
5. As at October 20, 2023, the Indebtedness owing by the Borrowers to the Lender was nearly \$22,000,000, plus interest and costs, which, which continue to accrue.
6. As further support for the Borrowers' obligations under the Loan Agreements, and in addition to each of the Borrowers granting unlimited Guarantees with respect to the obligations of the other Borrower in favour of the Lender, the Guarantors granted Guarantees and the Guarantor Security in favour of the Lender, including Guarantees in the principal amount of \$7,000,000 and \$500,000 for the Indebtedness owing by OHL and OL, respectively.
7. The terms of the Security include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.
8. A&M is qualified, prepared and has consented to act as Receiver.
9. The Borrowers are in default of their obligations to the Lender under the Loan Agreements and the Security, the Lender seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

II. ISSUE

10. There is one issue in this application, namely: should this Honourable Court appoint a receiver over the Property?

III. THE LENDER'S POSITION

11. The appointment of a receiver over the Borrowers is a contractual remedy that is available to the Lender and the Lender respectfully submits that it is just and convenient to appoint a Receiver of the Property in the present circumstances.

IV. FACTUAL BACKGROUND

12. The facts in support of the Lender's application are set forth in the Popoola Affidavit.
13. The Borrowers are corporation incorporated pursuant to the laws of Alberta, with their registered offices located in Calgary.
14. As set forth in greater detail in the Popoola Affidavit, on June 26, 2023, each of the Borrowers filed a Notice of Intention pursuant to section 50.4(1) of the BIA. It is CFCU's current expectation that the Borrowers' creditors will not vote in favour of the Proposal at the Creditors' Meeting. If that occurs, the Borrowers will be deemed to have made an assignment into bankruptcy prior to the Application and then CFCU as a secured creditor of the Borrowers will no longer be subject to the Stay.

V. LAW AND ARGUMENT**A. The Lender is entitled to appoint a receiver**

15. The Lender satisfied the procedural prerequisite to seeking the appointment of the Receiver when it served the 244 Notice on the Borrowers. Further, in the event that the Borrowers become bankrupt in advance of the Application, the issuance of the 244 Notices by the Lender will no longer be a prerequisite to the enforcement of the Borrower Security.

16. Each of section 243 of the *BIA*, section 13(2) of the *Judicature Act* and section 65(7)(a) of the *PPSA* vest this Honourable Court with the authority to appoint a Receiver where it is just and convenient to do so.¹
17. The Lender respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property, because it is just, convenient and otherwise appropriate in the circumstances and would be in accordance with the contractual terms agreed upon by the Lender and the Borrowers under the Security.

B. Considerations when Appointing a Receiver

18. Traditionally, when considering an application to appoint a receiver, Courts have used the same test used to determine if an interlocutory injunction is appropriate,² but have loosened the test in cases where "the dictates of fairness are so overwhelming".³ In *Murphy*, Justice Veit confirmed that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Test are not met.⁴
19. The requirement to meet the Injunction Test is less relevant where a secured creditor is simply seeking to enforce its contractual rights.⁵
20. There are a number of factors that are considered by a Court in appointing a receiver. In *Schendel*,⁶ this Court affirmed the non-exhaustive list of factors listed in *Bennett on Receiverships* and referenced by Justice Romaine in *Paragon* (the "**Paragon Factors**").⁷

The Lender is not required to meet the Injunction Test

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

The security documentation in the present case authorizes the appointment of a Receiver... Thus, even if I accept the argument that the [Applicant] has not been able to demonstrate irreparable harm, that itself would not be determinative of whether

¹ *BIA* at s. 243 [Authorities, Tab 1]; *Judicature Act*, RSA 2000 c J-2, as amended (the "*Judicature Act*") at s. 13(2) [Authorities, Tab 2]; *Personal Property Security Act*, RSA 2000 c P-7 ("*PPSA*") at s. 65(7)(a) [Authorities, Tab 3].

² The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**")² *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paras 83-85 [Authorities, Tab 4].

³ *Murphy v Cahill*, 2013 ABQB 335 ("*Murphy*") at para 8 [Authorities, Tab 5].

⁴ *Murphy* at para 62 [Authorities, Tab 5].

⁵ *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("*Paragon*") at para 28 [Authorities, Tab 6].

⁶ *Re Schendel Management Ltd.*, 2019 ABQB 545 ("*Schendel*") at para 44 [Authorities, Tab 7].

⁷ *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("*Lindsey*") at para 32 [Authorities, Tab 8]. *Paragon* at para 27 [Authorities, Tab 6]. Among the *Paragon* Factors are two of the three elements of the Injunction Test, with the "serious issue to be tried" question omitted. The five factors from *Lindsey* are also captured in the *Paragon* Factors.

or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed.⁸

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

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.⁹

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

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.¹⁰

24. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, effectively reversing the onus as to whether or not a receiver should be appointed. The Court confirmed that, where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.¹¹

25. Having regard for the *Paragon* Factors and the Security, the Lender respectfully submits that it is just and convenient to appoint A&M as Receiver over the Property for, among others, the following reasons:

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

⁸ *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* ("**Kasten**") 2013 ABQB 63 at para 21 [**Authorities, Tab 9**].

⁹ *Paragon* at para 28 [**Authorities, Tab 6**].

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

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

- (d) the Borrowers have committed numerous defaults under the Security and the Loan Agreements;
 - (e) it is probable that, by the time the Application is heard, the Borrowers will be bankrupt and it is in the best interest of the Borrowers' stakeholders to have the Receiver appointed; and
 - (f) there are no compelling commercial or other reasons to not appoint A&M as receiver.
26. The Lender respectfully submits that it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over the Borrowers' business and to maximize recovery for stakeholders.

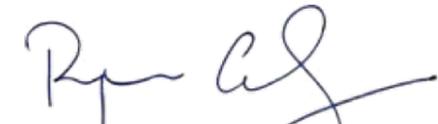
VI. CONCLUSION

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF OCTOBER, 2023

BURNET, DUCKWORTH & PALMER LLP

Per:



David LeGeyt / Ryan Algar
Solicitors for Connect First Credit
Union Ltd.

TABLE OF AUTHORITIES

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