COURT FILE NUMBER	1701- 05131
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	PRIVATE EQUITY OAK LP by its General Partner PE12PXPE (OAK) GP LTD.
RESPONDENTS	OAK POINT ENERGY LTD., KEMEX LTD., KEMEX TECHNOLOGIES LTD. and 1NSITE TECHNOLOGIES LTD.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Guy P. Martel/David M. Price** gmartel@stikeman.com / dprice@stikeman.com Tel: (514) 397-3163 / (403) 266-9093 Fax: (403) 266-9034 Lawyers for the Applicant, Private Equity Oak LP File No.: 125561-1003

CLERK OF THE COURT
FILED
APR 12 2017
JUDICIAL CENTRE OF CALGARY

COMMERCIAL LIST APPLICATION

APRIL 13, 2017 AT 12:00 PM

PART I - INTRODUCTION

1. This Brief is submitted by the Applicant, Private Equity Oak LP, acting through its General Partner, PE12PXPE (Oak) GP Ltd. ("**PEO**"), in support of the issuance by this Court of an order pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") (the "**Receivership Order**"), appointing Alvarez & Marsal Canada Inc. ("**A&M**") as receiver to all assets, property and undertakings (collectively, the "**Assets**") of the Respondents, Oak Point Energy Ltd. (the "**Borrower**"), Kemex Ltd., Kemex Technologies Ltd. and 1nSite Technologies Ltd. (the "**Guarantors**", and collectively with the Borrower, the "**Debtors**").

2. All capitalized terms used but not defined in this brief shall have the meanings given to them in the Affidavit of Kate Malcolm sworn April 11, 2017 (the "**Malcolm Affidavit**").

PART II - FACTS

3. The Debtors are insolvent corporations that have ceased their operations. All of their directors resigned on or before April 11, 2017.

Malcolm Affidavit, para 39.

A. PEO's Debt and Security

4. On December 23, 2013, a *Debenture* was issued by the Borrower in favor of the Holder (the "**Debenture**"). Under the terms of the Debenture, the Holder agreed to provide the Borrower with a 15.0% senior secured redeemable convertible debenture in the principal amount of twenty million dollars ($20,000,000) due December 23, 2015 (the "**Initial Maturity Date**") all on the terms set out in the Debenture.

Malcolm Affidavit, paras 4 and 17.

5. On or about May 23, 2014, the Debenture was amended and restated in order to, *inter alia*, increase the principal amount to twenty-two million dollars ($22,000,000) and on or about July 4, 2014, the Debenture was amended and restated in order to, *inter alia*, increase the principal amount to twenty-five million dollars ($25,000,000).

Malcolm Affidavit, paras 5 and 18.

6. On or about September 28, 2015, a *Third Amended and Restated Debenture* was entered into between the Holder and the Borrower (The "**Third Amended and Restated Debenture**"). The Third Amended and Restated Debenture provides, *inter alia*, for an extension of the Initial Maturity Date to December 31, 2016 (the "**Maturity Date**").

Malcolm Affidavit, paras 5 and 19.

7. As security for the payment of all amounts owed to the Holder under the Third Amended and Restated Debenture and all other present and future indebtedness, fees, expenses and other liabilities due by the Borrower to the Holder (collectively, the "**Obligations**"), the Borrower mortgaged and charged and granted to and in favour of the Holder a continuing first priority security interest in and to all of its present and after-acquired property, assets and undertaking (the "**Borrower Security**") including:

a) all of the Borrower's right, title, estate and interest in and to the oil sands leases described in Exhibit "D" to the Third Amended and Restated Debenture and all extensions, renewals, replacements or amendments thereto; and

b) all of the Borrower's patents, trademarks, copyrights, industrial designs software, firmware, trade secrets, know-how, show-how, concepts, information and other intellectual and industrial property included the intellectual property rights described in Exhibit "D" to the Third Amended and Restated Debenture.

Malcolm Affidavit, para 21.

8. On or about September 28, 2015, the Guarantors executed a *Guarantee and Security Agreement* (the "**Guarantee Agreement**") pursuant to which they agreed to irrevocably and unconditionally guarantee to the Holder the punctual, complete and irrevocable payment when due, and at all times thereafter, of all of the Borrower's obligations under the Third Amended and Restated Debenture. As continuing security for the payment of all of its obligations under the Guarantee Agreement, each Guarantor granted to the Holder a security interest over, and assigned, mortgaged, charged, hypothecated and pledged all of its property, assets, effects and undertaking, whether owned or after

acquired including without limitation, accounts, general intangibles, goods (including inventory, equipment and fixtures), chattel paper, investment property, documents of title, instruments, money, cash and cash equivalents, trade-mark, copyrights, patents, license and other intellectual property or intangibles (the "**Guarantor Security**" and, together with the Borrower Security, the "**Security**").

Malcolm Affidavit, paras 7 and 22.

9. As of the date hereof, the Borrower is in default under Section 9.1(b) of the Third Amended and Restated Debenture as a result of its failure to pay the amounts owed under the Third Amended and Restated Debenture on the Maturity Date. Accordingly the Debenture has matured and all amounts outstanding thereunder are now past due and payable in full.

Malcolm Affidavit, para 29.

10. An event of default under the Third Amended and Restated Debenture entitles PEO to, among other things, enforce its rights under the Third Amended and Restated Debenture and the Guarantee Agreement including, without limitation, the right to seize any and all collateral, use the Security and appoint a receiver.

Malcolm Affidavit, para 40.

11. On January 26, 2017, given the Borrower's inability to pay its liabilities as they became due, PEO, through its counsel, issued and delivered to the Borrower the following notices (collectively, the "**Notices**"):

a) a demand for repayment of the Obligations in which the Borrower and the Guarantors were advised that an event of default had occurred and was continuing without cure under the Third Amended and Restated Debenture and Guarantee Agreement; and

b) a Notice of Intention to Enforce Security pursuant to Section 244 of the BIA, in which the Borrower and the Guarantors were formally advised that, as a result of the continuing event of default under the Third Amended and Restated

Debenture, the Holder intended to enforce its rights pursuant to the Third Amended and Restated Debenture, the Guarantee Agreement and the Security (collectively with any and all agreements, documents and instruments at any time executed or delivered in connection with or related to the Third Amended and Restated Debenture and the Guarantee Agreement, the "**Loan Documents**").

Malcolm Affidavit, para 27.

12. The 10-day notice period referred to in the Notice of Intention to Enforce Security issued by the Holder has passed and the indebtedness owing by the Borrower remains outstanding. As of March 31, 2017, the Debtors were indebted to PEO for an amount of $32,364,420.10 plus any applicable fees (the "**Indebtedness**").

Malcolm Affidavit, para 29.

13. PEO is the only secured creditor of the Debtors, and has security registered over all of their Assets.

Malcolm Affidavit, para 25.

14. Following the issuance of the Notices, representatives of PEO the Borrower and Guarantors have had numerous discussions with a view to reaching an agreement whereby the Holder would forbear form exercising its rights, remedies and recourses for a certain period of time in order to allow the Borrower and the Guarantors to retain a financial advisor to conduct a sale and investment solicitation process in respect of the Assets. For reasons stated in the Malcom Affidavit, on or about April 5, 2017, counsel for PEO advised counsel for the Debtors that in light of the circumstances, the Holder had lost faith or trust in the Borrower and Guarantors and their representatives, including management of the Borrower and its board of directors. PEO requested that a receiver be appointed. This request was reiterated during a meeting between representatives of all parties held on April 6, 2017. This effectively put an end to pending discussions in connection with a possible forbearance agreement.

Malcolm Affidavit, paras 31-34.

15. Following these discussions, on April 7, 2017, the Debtors advised PEO, through counsel, that the Debtors would not oppose an application for the appointment of a receiver by PEO.

Malcolm Affidavit, para 35.

PART III - ISSUES

16. The issue on this application is whether it is just and reasonable under the circumstances for this Court to appoint A&M as Receiver over the Assets pursuant to section 243 of the BIA and section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "**JA**").

PART IV - THE LAW

A. The Technical Requirements for the Appointment of a Receiver are Met

17. PEO is a secured creditor of the Debtors and is thus entitled to bring an application under section 243 of the BIA.

18. The Borrower is in breach of its obligations under the Debenture. As a result, the Borrower has defaulted under the Debenture. In accordance with the Debenture, the occurrence of an event of default under the Debenture grants PEO the right to seek the appointment of a receiver in respect of the Borrower.

Malcolm Affidavit, para 40.

19. In accordance with the Guarantee Agreement, the occurrence of an event of default under the Debenture and the failure of the Guarantors to pay the amounts owed PEO by the Borrower grants PEO the right to seek the appointment of a receiver in respect of the Guarantors.

20. As required by subsection 243(1.1) of the BIA, the Notices were sent to the Debtors on January 26, 2017.

Malcolm Affidavit, para 27.

21. In accordance with subsection 243(4) of the BIA, A&M is qualified to act as Receiver of the Debtors and has consented to being appointed.

Malcolm Affidavit, para 43.

22. Section 243(5) of the BIA requires that a receivership application be made to the court having jurisdiction in the "locality of the debtor". Section 243(5) states:

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

23. The term "locality of the debtor" is defined in section 2(1) of the BIA as follows:

> **"locality of a debtor"** means the principal place
>
> (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
>
> (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
>
> (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated[.]

24. Each of the Debtors has its registered office situated in Calgary, Alberta. Accordingly, the Debtor's locality is Calgary, Alberta, and this application is properly brought before this Court.

Malcolm Affidavit, para 13.

B. The Appointment of a Receiver is Just and Convenient

25. The purpose of a receivership is to enhance and facilitate the preservation and realization of a debtor's assets for the benefit of all its creditors, including its secured creditors.

Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd, (1995), 23 OR (3d) 781, 32 CBR (3d) 303 at para 18 (Ont Gen Div [Commercial List]) (**TAB 1**).

26. Section 13 of the JA permits the appointment of a receiver where it is "just and convenient".

27. In addition, subsection 243(1) of the BIA provides that on application by a secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court considers advisable over that property and over the insolvent person's business where it is "just and convenient" to do so:

> 243. (1) Court may appoint receiver – Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> c) take any other action that the court considers advisable.
>
> BIA, s 243(1) (**TAB 2**).

28. Although the BIA does not provide any factors to determine under what circumstances the appointment of a receiver would be "just or convenient", the jurisprudence highlights several factors which may guide a judge in determining whether or not the appointment of a receiver is warranted under the circumstances.

29. In *Bank of Nova Scotia v Freure Village on Clair Creek*, Blair J. (as he then was) set out that, in deciding whether the appointment of a receiver was just or convenient, the court "must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto," which includes the rights of the secured creditor under its security.

Bank of Nova Scotia v Freure Village on Clair Creek, 1996 CarswellOnt 2328 (Gen Div – Comm List) at para 11 [Freure Village] (**TAB 3**).

30. In the matter of *Kasten Energy*, the Alberta Court of Queen's Bench, citing *Bennett on Receivership*, listed numerous factors which have been taken under consideration by other Courts in the determination of whether it is appropriate to appoint a receiver:

> Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 (CanLII) at para 27, 316 AR 128 [*Paragon Capital*] citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130 to include:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Kasten Energy Inc v Shamrock Oil & Gas Ltd, 2013 ABQB 63 at para 13 [*Kasten Energy*] **(TAB 4)**.

31. Where the enumerated rights of the secured creditor under the credit agreement include the right to seek the appointment of a receiver, the burden on the applicant seeking the relief is relaxed. As stated by Morawetz J., as he then was, in *Elleway*:

> ...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.

Elleway Acquisitions Ltd v Cruise Professionals Ltd., 2013 ONSC 6866 at para 27 [*Elleway*] **(TAB 5)**.

32. Where a creditor is entitled under its agreement with the debtor to seek the appointment of a receiver, a court will consider in its discretion whether, on an examination of the surrounding circumstances, it is in the interests of all concerned to have the receiver appointed by the court.

Freure Village at para 13 **(TAB 3)**.

33. In *Business Development Bank of Canada v 2197333 Ontario Inc*, the Court found that where the security agreement provides for the appointment of a receiver, such relief cannot be seen to be extraordinary in nature. Where the debtor has been in default for a considerable period of time, the debt is not in dispute and the debtor has not been operating, the Court will appoint a receiver.

Business Development Bank of Canada v 2197333 Ontario Inc, 2012 ONSC 965 at para 21 **(TAB 6)**.

34. In the case at hand, the following circumstances warrant the need for the immediate appointment of A&M as receiver:

a) the Debtors are in continuing default of their obligations under the Third Amended Restated Debenture and the Guarantee Agreement and are unable to meet their obligations as they generally become due;

b) the Third Amended Restated Debenture and the Guarantee Agreement each provide that PEO is entitled to apply to a court for the appointment of a receiver in the event of a defaults by the Debtors under the Third Amended Restated Debenture or the Guarantee Agreement;

c) the Debtors have ceased their operations and their directors have resigned;

d) the only remaining employee, the Debtor's President and Chief Executive Officer, has indicated his intention to resign effective once a receiver has been appointed or an alternative arrangement has been agreed upon;

e) the Borrower and the Guarantors have extremely limited liquidity and cannot continue to preserve and protect the Assets, including meeting their payment of rent, fees for patent rights, and storage fees for critical core samples;

f) the Borrower and/or Guarantors currently share rental space with Nauticol Energy Limited ("**Nauticol**"), which is in the process of leaving the premises. However, the Holder has recently become aware that Nauticol's employees have access to and control over the computer systems and files of the Borrower and Guarantors;

g) the appointment of a receiver is the most convenient and efficient way for PEO, the only secured creditor of the Debtors, to recover a portion of the debt owing to it; and

h) the appointment of a receiver to manage the assets of the Debtors is the most likely way to maximize the return for all of the Debtors' creditors.

Malcolm Affidavit, paras 30, 34-42.

35. The Debtors advised PEO, through counsel, that the Debtors would not oppose an application for the appointment of a receiver by PEO.

Malcolm Affidavit, para 35.

36. A&M is qualified and has agreed to act and has consented to being appointed as receiver to the assets of Fogo and exercise any and all of the proposed powers provided for in the draft receivership order.

Malcolm Affidavit, para 43.

37. In light of the above, the circumstances at hand clearly make it just and convenient to immediately appoint A&M as receiver to the assets of the Debtors.

PART V - CONCLUSION

38. For the reasons set forth above, PEO respectfully submits that it is just and convenient that the Receivership Order be granted.

Respectfully submitted in Calgary this twelfth day of April, 2017,

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TABLE OF AUTHORITIES

1. *Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd*, 1995 CarswellOnt 374 (Ont Gen Div [Commercial List]) (extract).

2. *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s. 243.

3. *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Gen Div – Comm List) (extract).

4. *Kasten Energy Inc v Shamrock Oil & Gas Ltd*, 2013 ABQB 63 (extract).

5. *Elleway Acquisitions Ltd v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (extract).

6. *Business Development Bank of Canada v 2197333 Ontario Inc*, 2012 ONSC 965 (extract).

TAB 1

1995 CarswellOnt 374
Ontario Court of Justice (General Division), Commercial List

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.

1995 CarswellOnt 374, [1995] O.J. No. 1482, 23 O.R. (3d) 781,
28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, 55 A.C.W.S. (3d) 953

HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation v. COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR.

COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR. v. HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation, DONALD BABB, JOHN CALDERWOOD, JOHN EDMONDS, ARNOLD GEORGIAN, GARFIELD WOODS, ROY J. PARKIN and MICHAEL GREEN

R.A. Blair J.

Judgment: May 30, 1995
Docket: Docs. B117/92 and 92-CQ-20023

Counsel: *Rob B. Thibodeau*, for receiver Deloitte & Touche Inc.
Lee A. Pinelli, for Corporation of the town of Flamborough.
John M. Hovland, for Hamilton Wentworth Credit Union Limited, in liquidation.

Subject: Corporate and Commercial; Insolvency; Public; Civil Practice and Procedure; Tax — Miscellaneous; Municipal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.a General principles

Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iii Costs

Municipal law

XXI Tax collection and enforcement
XXI.7 Remedies available to municipality
XXI.7.e Priorities
XXI.7.e.iii Miscellaneous

Municipal law

XXII Tax sales
XXII.1 Nature and scope of legislation

Headnote

Municipal law — Tax collection and enforcement — Remedies — Municipality — Priorities — Miscellaneous priorities

Municipal law — Tax sales — Nature and scope of legislation

Receivers — Costs and remuneration — Priorities — Municipality's claim for taxes having priority over receiver's claim for fees and disbursements by virtue of s. 382 of Municipal Act and Municipal Tax Sales Act — Municipal Act, R.S.O. 1990, c. M.45, s. 382 — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

Receivers — Order appointing receiver — Court having jurisdiction to add leave requirement in receivership order but not having jurisdiction to interfere with or abridge scheme set out in Municipal Tax Sales Act as part of process of granting leave — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

The plaintiff was appointed receiver and manager of the assets and property of a debtor company. The only asset of the debtor consisted of a trailer park, which it was operating as an illegal non-conforming use. The estimated market value of the property was $500,000; however, total municipal tax arrears exceeded $559,000. The municipality took the position that it was entitled and obliged to pursue its remedies of sale to collect tax arrears under the *Municipal Tax Sales Act* (Ont.). The receiver argued that the municipality was barred from taking such steps by virtue of a "no proceedings without leave" provision in the receivership order appointing it as receiver and manager. The receiver also argued that it was entitled to payment of its fees and disbursements for preserving the property in priority to the payment of the municipality's taxes and it brought a motion for such a declaration. The municipality brought a cross-motion for leave to exercise its tax sale rights and remedies under the *Municipal Tax Sales Act*.

Held:

The motion was dismissed and the cross-motion was allowed.

A court has jurisdiction to make a receivership order that any party must first obtain leave before commencing any proceedings in respect of the assets of the debtor. The municipality was not, however, to be denied leave in seeking to pursue a statutorily prescribed remedy. The court had no jurisdiction to impose terms of sale different from those set out in the *Municipal Tax Sales Act* as part of the process of granting leave. The Act sets out a complete statutory code respecting the sale of lands for the recovery of municipal tax arrears and for the disposition of the proceeds from such sales. The court had no authority to interfere with or impose a different scheme.

There was no discretion, in view of the provisions of the *Municipal Tax Sales Act* and s. 382 of the *Municipal Act* (Ont.), for a receiver's claim for fees and disbursements to have priority over a municipality's claim for taxes.

A receiver and manager is an officer of the court. That position does not provide it with carte blanche to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. Although a court-appointed receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain. There must be an air of commercial reality to its efforts.

Table of Authorities

Cases considered:

that the court has no jurisdiction to abridge or abrogate the statutory rights of a municipality under the *Municipal Tax Sales Act*, supra, or the *Municipal Act*, R.S.O. 1990, c. M.45, s. 382.

16 The issue is not free from difficulty. In general, however, "[w]here any third party has rights paramount to the receiver and manager, such third party must seek leave of the court before initiating or continuing proceedings already taken": Frank Bennett, *Receiverships* (Scarborough, Ont.: Carswell, 1985), at p. 19.

17 I have concluded — whatever may be the effect of other arguments relating to property tax arrears and the operation of the statutory tax sales scheme — that the court has jurisdiction to make an order such as that contained in paragraph 5 above which encompasses steps taken by a municipality pursuant to such a scheme.

18 The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors: *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.), at p. 88; *Re Winmil Holidays Co.* (1984), 10 D.L.R. (4th) 572 (B.C. C.A.), at pp. 579-580. The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with whatever happens to the property that comes under its administration. See Bennett, supra, at pp. 110-111.

19 All of the assets, property, and undertaking of the debtor come under its administration. They remain the property, assets, and undertaking of the debtor, notwithstanding the receivership, until otherwise disposed of. They do not vest in the receiver and manager, and they do not become the property of the municipality simply because the legislation creates a statutory lien. The municipality remains the claimant of a statutory lien or charge, by virtue of s. 382 of the *Municipal Act*. The assets remain under the aegis of the court's administration. An order requiring that leave be obtained before steps are taken that will affect the assets under that administration is therefore, in my view, within the jurisdiction of the court, by virtue of its inherent jurisdiction and by virtue of its statutory jurisdiction respecting the appointment of receivers "where it appears to a judge of the court to be just and convenient to do so": the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

20 Mr. Pinelli submitted that I should read the wording of paragraph 5 of the order narrowly, and hold that it is not broad enough in its language to catch steps taken by a municipality respecting tax arrears. The words "other proceedings" have to be read in context, the argument goes, and should be read together with the words they accompany, such as "action," "courts," and "tribunals" in paragraph 5, and "suits," "administrative hearings," "cases," and "actions in law" in paragraph 4 of the order. The legal principle for this concept is referred to as the ejusdem generis rule. I have little difficulty in concluding, however, that the purpose of paragraph 5 of the receivership order is to preserve the integrity of the court's role as supervisor over the realization and preservation of the assets which have fallen within its administration, and that its language should be read broadly with that objective in mind.

21 I recognize that in other cases, such as *Re Great West Life Assurance Co.*, [1927] 3 W.W.R. 302 (Man. K.B.), the words "other proceeding" have been interpreted to exclude extra-judicial matters, such as foreclosure of mortgages in the land titles or registry offices. In that case Dysart J. concluded that the language "action or other proceeding" did not encompass such steps. He was of the view that "other proceeding" must mean "some process or step in a matter to be brought before, or pending in, this Court" (p. 303). It is clear from the wording of paragraph 5 of the May 5, 1992, receivership order that it is intended to be broader than the more restrictive "action or other proceeding" because it provides that "no action or other proceedings (whether through the courts, tribunals, *or otherwise*) shall be taken *in respect of* the Assets" [emphasis added] without leave. To my mind, this language is ample to catch "a process or step in a matter" which is taken "otherwise" than through the courts or an administrative tribunal, "in respect of" the sale of the Courtcliffe Park assets for tax arrears.

The Test for Leave, and Its Parameters

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to April 1, 2017

Last amended on February 26, 2015

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to April 1, 2017. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of April 1, 2017 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 1 avril 2017. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 1 avril 2017 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

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

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

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

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

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

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

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

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

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

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

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

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

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

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

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

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

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

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

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

TAB 3

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote
Receivers — Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked

TAB 4

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.a General principles

Natural resources

III Oil and gas
III.5 Oil and gas leases
III.5.h Transfer of title

Headnote

Debtors and creditors — Receivers — Appointment — General principles

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Natural resources — Oil and gas — Oil and gas leases — Transfer of title

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By

Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Table of Authorities

Cases considered by *Donald Lee J.*:

Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc. (1992), 2 Alta. L.R. (3d) 168, 127 A.R. 155, 20 W.A.C. 155, [1992] 4 W.W.R. 499, 1992 CarswellAlta 53, 1992 ABCA 93 (Alta. C.A.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — considered

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88, 2010 ABQB 242 (Alta. Q.B.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 495 W.A.C. 262, 487 A.R. 262, 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.) — referred to

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

Philip's Manufacturing Ltd., Re (1992), 69 B.C.L.R. (2d) 44, 92 D.L.R. (4th) 161, [1992] 5 W.W.R. 549, 12 C.B.R. (3d) 149, (sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.*) 15 B.C.A.C. 247, (sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.*) 27 W.A.C. 247, 1992 CarswellBC 490 (B.C. C.A.) — referred to

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Saulnier (Receiver of) v. Saulnier (2008), (sub nom. *Saulnier (Bankrupt), Re*) 271 N.S.R. (2d) 1, 48 C.B.R. (5th) 159, (sub nom. *Saulnier v. Royal Bank of Canada*) [2008] 3 S.C.R. 166, (sub nom. *Saulnier (Bankrupt), Re*) 867 A.P.R. 1, 13 P.P.S.A.C. (3d) 117, (sub nom. *Royal Bank of Canada v. Saulnier*) 298 D.L.R. (4th) 193, 2008 SCC 58, 2008 CarswellNS 569, 2008 CarswellNS 570, (sub nom. *Saulnier (Bankrupt), Re*) 381 N.R. 1, 50 B.L.R. (4th) 1 (S.C.C.) — considered

Stout & Co. LLP v. Chez Outdoors Ltd. (2009), 2009 ABQB 444, 2009 CarswellAlta 1158, 15 P.P.S.A.C. (3d) 224, 478 A.R. 316, 56 C.B.R. (5th) 250, 9 Alta. L.R. (5th) 366, [2009] 10 W.W.R. 474 (Alta. Q.B.) — considered

Statutes considered:

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

7 As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

8 On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division I Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

9 At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

10 On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58 which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

11 The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

12 The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

> 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.

Parties' Positions and Analysis

13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

Kasten's Submissions

14 The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

15 Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

17 The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc.*, 1992 ABCA 93 (Alta. C.A.); at para 10, [1992] 4 W.W.R. 499 (Alta. C.A.). Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles:

TAB 5

2013 ONSC 6866
Ontario Superior Court of Justice [Commercial List]

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.

2013 CarswellOnt 16639, 2013 ONSC 6866, 235 A.C.W.S. (3d) 683

Elleway Acquisitions Limited, Applicant and The Cruise Professionals Limited, 4358376 Canada Inc. (Operating as Itravel2000.com) and 7500106 Canada Inc., Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: November 4, 2013
Docket: CV-13-10320-00CL

Counsel: Jay Swartz, Natalie Renner, for Applicant
John N. Birch, for Respondents
David Bish, Lee Cassey, for Grant Thornton, Proposed Receiver

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

Headnote

Bankruptcy and insolvency

Civil practice and procedure

Debtors and creditors

Table of Authorities

Cases considered by *Morawetz J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to

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

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

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

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

20 If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

21 The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

22 The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

23 This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

24 Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

25 Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

26 In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]) at para. 10

27 Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]) at paras. 50 and 75; *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (Ont. S.C.J. [Commercial List]) at para. 18; *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, [2011] O.J. No. 671 (Ont. S.C.J.) at para. 27. I accept this submission.

28 Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village*, *supra*, at paras. 10-12; *Canada Tire*, *supra*, at para. 18; *Carnival National Leasing*, *supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15.

TAB 6

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

IV Receivers
IV.1 Appointment

Debtors and creditors

VII Receivers
VII.2 Jurisdiction of court to appoint

Headnote
Bankruptcy and insolvency — Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors — Receivers — Jurisdiction of court to appoint

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

(a) the credit agreement is in default;

(b) the indebtedness is not in dispute;

(c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and

(d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

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

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

