

CBA NATIONAL INSOLVENCY CONFERENCE

**2023 CROSS CANADA CASE LAW UPDATE
(SASKATCHEWAN AND MANITOBA)**

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Introduction and Summary of Cases

Throughout the paper, the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 will be referred to as the BIA and the *Companies Creditors Arrangement Act*, SC 1985, c C-36 will be referred to as the CCAA.

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Saskatchewan

Canadian Western Bank and Goshen Professional Care Inc., 2023 SKKB 162

This decision was the result of an application by Canadian Western Bank (“CWB”) to appoint a Receiver, or in the alternative an Interim Receiver, over Goshen Professional Care Home Inc. (“Goshen”). Goshen had previously, and continued to, operate a senior’s residence on the outskirts of Regina, Saskatchewan. Prior to October, 2022, Goshen housed approximately 70 residents. However, the Saskatchewan Health Authority, for reasons unknown, announced it would not renew Goshen’s license and Goshen lost a majority of its funding. This resulted in the Goshen’s residency being reduced to approximately 7 residents.

CWB considered that the non-renewal of the license amounted to a material change under the terms of the lending agreement and therefore, Goshen was in default under its loan and demand was made. In March, 2023 the primary mortgage matured with a balance owing of \$12,516,405.73 and CWB declined to renew the same.

Complicating matters was the fact that both before and after default, CWB attempted to obtain further financial information respecting Goshen and its plan to refinance the CWB debt. As part of this plan, CWB proposed Goshen retain MNP Ltd. to conduct a business review. While Goshen indicated it had a plan for the refinancing, no concrete details were ever provided. CWB brought the application to appoint a Receiver as a result.

In evidence before the Court, Goshen advised that it had a plan to obtain new financing in approximately two months, but no details were provided to support the same. Other material information such as the rent-roll, income and expense forecast and employee information was similarly deficient or not provided.

The Court noted that while the test for an Interim Receiver is whether it is “necessary” and thus differs from the “just and convenient” test, the factors to consider in both instances have significant overlap.¹

Ultimately, the Court had little difficulty in determining that Goshen had both defaulted under the loan agreement and was insolvent. The material question became whether a Receiver or Interim Receiver was appropriate. The Court noted that in many instances, the evidence supported both an Interim Receiver and Receiver. This included concerns over the lack of disclosure provided by Goshen and CWB’s contractual right to a receiver.²

¹ 2023 SKKB 162, para 44.

² 2023 SKKB 162, para 55-57.

However, ultimately, the Court declined to appoint a full Receivership. In doing so, the Court noted as follows:

1. The care home, the primary security for the loan, had significantly greater value as a going concern and there were concerns as to whether MNP Ltd. would be able to manage the operations as effectively as current management;
2. The overriding concern in this instance was the lack of disclosure on income, liabilities and business prospects. These concerns could be addressed via an Interim Receiver; and
3. Goshen, despite the scant evidence, had taken steps to find new refinancing by the end of August, which was a mere 30 days from when the Fiat was issued. There was no evidence the care home would deteriorate in the interim.³

Of interest is the first comment regarding the receiver's expertise in the personal care sector. While not determined in this proceeding, it begs the question as to what evidence (and from who) should be led when seeking to appoint a Receiver over a specialized business such as medical practice, care home or other professional institution.

In the Matter of the Receivership of Ritchie Industries Inc. and Duck Mountain Environmental Ltd., 2023 SKKB 152

The Debtors initially filed a notice of intention pursuant to section 50.4 of the *BIA*. This proceeding was terminated, resulting in a deemed bankruptcy. MNP Ltd. was appointed trustee. However, Affinity Credit Union 2013 applied to place the debtors into Receivership instead, with MNP Ltd. now assuming the role of Receiver. The application was granted and MNP Ltd. was appointed as Receiver.

At issue in the application was the approval of a sale and vesting order of a liquor store, liquor license and related chattels including liquor inventory (the "Business"). Complicating matters was that the liquor store purported to be operated by a partnership, Kamsack Liquor Store Limited Partnership (the "KSP"). KSP was comprised of two partners, Ritchie Industries Inc., a debtor in the proceedings, and GCO Investments Ltd., a non-insolvent party not subject to the Receivership Order.

Further complicating matters was the fact that KSP was not registered and the liquor license remained in the name of Ritchie Industries Inc. Ultimately, these issues were resolved as amongst the companies and Receiver, with the parties agreeing that KSP did not exist, any advances by GCO Investments Ltd. were to be treated as unsecured loans and the Business could be sold by MNP Ltd. The settlement further required that the Business would be sold to GCO Investments Ltd. to avoid litigation on the partnership issue. MNP Ltd. estimated the cost of the litigation to be in the hundreds of thousands of dollars given the complicated nature of the same.

³ 2023 SKKB 162, para 60-62.

As a further condition of settlement, MNP Ltd. agreed to sell the Business to GCO Investments Ltd. at a price in line with market value based on an appraisal conducted. However, no public sales process occurred. It was this sale that required Court approval.

In approving the sale, the Court noted that it must assess whether the Receiver acted properly in the sale. In citing the principals in *RBC and Soundair* (1991), 83 DLR (4th) 76 (Ont CA), the Court considered the following:

1. Did the Receiver make sufficient effort to get the best price and did it act improvidently;
2. The best interest of all parties;
3. The efficacy and integrity of the process by which the offers were obtained; and
4. Whether there was unfairness.⁴

Counsel for the principal of the debtors suggested that the Receiver had failed in all four fronts and the sale should not be approved.

Notwithstanding the objections, the Court approved the sale on the following basis:

1. In the context of a forced sale under a Court Ordered process, the value of goodwill should be reduced as this is not a sale of a going concern;⁵
2. A fair market value price does not necessarily equate to the best possible price or the suggested appraisal value;⁶
3. The interests of all stakeholders supports certainty in the matter. In a public sale, and absent settlement with GCO Investments Ltd., the Receiver could be subject to extensive litigation on the partnership dispute, paid for by the Debtor's estate;⁷
4. The settlement agreement may have been the only way to convey clear title;
5. Settling now, and obtaining cash to pay stakeholders, reduces the interest payable by the Estate and consequently, any debts owing by guarantors;⁸
6. The sale did not adversely affect other creditors; and⁹
7. The only other known potential buyer had been aware of the process for the sale of the Business and had not made an offer to purchase.¹⁰

Affinity Credit Union 2013 and F&L Concrete Services Ltd., KBG-RG-909-2023, unreported and appended

⁴ 2023 SKKB 152, at para 7.

⁵ 2023 SKKB 152, at para 12.

⁶ 2023 SKKB 152, at para 11.

⁷ 2023 SKKB 152, at para 13

⁸ 2023 SKKB 152, at para 14.

⁹ 2023 SKKB 152, at para 15.

¹⁰ 2023 SKKB 152, at para 17.

This was an application by Affinity Credit Union 2013 to appoint a Receiver over the Debtor. The Debtor had several loans and accounts with the Credit Union and, at the time of the application, was indebted to the Credit Union for an amount in excess of \$1,000,000. As was the normal course, the loan documents required timely reporting on the debtors finances, as well as provided the Credit Union with the right to appoint a Receiver.¹¹

A significant issue, and which the Court determined weighed heavily in favor of appointing the Receiver, was the lack of financial information provided to the Credit Union both prior to, and as part of, the application. Notably, the Court found:

1. As of April, 2023, the Debtor has not prepared either its 2021 or 2022 Financial Statements;¹²
2. The Debtor declined to obtain a Business Review, despite the request of the lender;¹³
3. Most notably and which weighed heavily in favour of granting the Order, the Debtor had a substantial increase in unpaid CRA remittances, many of which were subject to a deemed trust. The Debtor refused to advise as to the balance owing or any repayment plan such that the CRA obligations were an unknown;¹⁴
4. In accordance with the 2021 Financial Statements, there was a significant deterioration in the value of the assets of the Debtor;¹⁵ and
5. While the Credit Union may have had other rights of enforcement, given the significant unknowns with respect to the Canada Revenue Agency, and the difficulty with the Debtor, it was realistic to conclude that alternative enforcement methods were going to be difficult.¹⁶

While the consideration of whether to appoint a Receiver followed the traditional line of reasoning, the Debtor then argued that MNP Ltd. was precluded from acting as a Receiver due a conflict of interest. The Debtor argued that since MNP Ltd. had previously prepared financial statements for the Debtor, though had resigned from that role prior to the application, MNP Ltd. was precluded as acting as Receiver.

The Court determined this was not the case. The Court noted the established case law in the area established that this was not a conflict of interest and in fact, the balance of convenience suggested that having a party already familiar with the Debtor would lessen the cost and time to be expended in a Receivership. While not before the Court here, typically an engagement letter also specifically permits a financial institution such as MNP Ltd. to act as a Receiver even if they had been previously retained by the Debtor.¹⁷

¹¹ Paras 10, 11, 25 and 59.

¹² Para 16.

¹³ Para 19.

¹⁴ Paras 53-55.

¹⁵ Para 58.

¹⁶ Paras 60-61.

¹⁷ Paras 72-76, see also *620630 Saskatchewan Ltd. v PriceWaterhouse Coopers Inc.*, 2003 SKQB 175.

Given the above, the appointment of MNP Ltd. as Receiver was not only just and convenient, but also would save time and expense in comparison to appointing a third party unfamiliar with the Debtor.¹⁸

Rural Municipality of Eye Hill v The Ministry of Energy et al, 2023 SKKB 52

This application arose out of the Bow River Receivership and CCAA proceedings in Alberta. Bow River was placed in a Receivership in Saskatchewan following a failed CCAA proceeding. The Receivership was a liquidating receivership and the Minister of Energy and Resources in Saskatchewan (the “Minister”) brought an application to determine what should happen with the residual proceeds from an asset sale. It was the Minister and Receiver’s position that the funds should be paid to the Orphan Well Fund.

A competing application, brought by the Rural Municipality of Eye Hill, and supported by other Rural Municipalities (collectively the “RM”), sought to have the funds paid towards unpaid municipal property taxes. The RM’s relied on an Alberta Order issued in the now defunct CCAA proceedings to support this position.¹⁹

The Court determined that the surplus would be paid to the Orphan Well Fund. In doing so, the Court noted as follows:

1. The CCAA Orders did not apply to the Receivership proceedings. The CCAA Orders were granted in a different proceeding, in a different province and pursuant to other legislation. The template Receivership Order gave the Receiver a priority charge over all assets, including the proceeds²⁰;
2. Even if the CCAA Orders did apply, no amounts were paid during the CCAA proceedings to the RM before they were terminated. In fact, paragraph nine of the initial order in the CCAA proceedings actually provided for the Minister’s claim to take in priority to the RM’s.²¹ Furthermore, the RM had not advanced a claim for funds during the CCAA proceedings, but rather had laid in the weeds until now. This could not be permitted²²;
3. The Ministry’s claim is not a claim provable in bankruptcy. In applying the *Redwater* decision, the Court noted that in order for there to be a claim provable in bankruptcy, three things must be established:
 - a. There must be a debt or obligation to a creditor;
 - b. The debt must be incurred pre-bankruptcy; and
 - c. There must be a monetary value to be attached.

¹⁸ Para 78.

¹⁹ 2023 SKKB 52 at para 6.

²⁰ 2023 SKKB 52 at para 27.

²¹ 2023 SKKB 52 at para 29.

²² 2023 SKKB 52 at para 35.

As was confirmed in *Redwater* and repeated therein, a regulator in enforcing environmental obligations does not stand to benefit financially from the enforcement of environmental obligations.²³ Taking this one step further, it was not sufficiently certain all of the environmental work would be completed, such that a monetary value could be attached. The Minister led evidence that limited funds and the lack of service providers called into question whether the reclamation work would be completed, either in whole or in part²⁴; and

4. The RM's claims are limited to statutory liens under *The Municipalities Act*. Those liens take subject to Crown claims, including the Minister's claim.²⁵

Given all of the above, and in line with *Redwater* and *AbitibiBowater Inc.*, the claim of the Minister took priority and the Receiver was required to pay the surplus proceeds to the Minister.²⁶

Tron Construction & Mining Limited Partnership & Ton Construction & Mining Ltd. 2022 SKKB 203.

At issue in this application was the interplay between section 50.4 proposals under the BIA and provincial lien legislation. The debtor, collectively referred to as Tron, was a general contractor on various construction projects in Saskatchewan and Ontario with Bruce Power, owner of the projects. Bruce Power continued to retain holdbacks in relation to the projects in the collective amount of \$1,669,951. The balance of the construction contracts had been paid to Tron prior to the insolvency proceeding.²⁷

Bruce Power brought this application, in the context of the BIA proceeding to:

1. Allow Bruce Power to pay the holdback funds into court in full satisfaction of the lien obligations and claims;
2. Have the liens discharged against the construction property;
3. Dismiss and vacate the various lien actions; and
4. Create a claims procedure for the distribution of the holdback funds.²⁸

The application of Bruce Power was supported, in part, by the lien claimants. It was vigorously opposed by Tron and the Tron's lead secured creditor, First Nations Bank of Canada.²⁹

The Court, in part, granted the Order sought by Bruce Power. In support of this decision, the Court noted that by invoking the BIA, Tron prima facie accepted that the single proceeding model was

²³ 2023 SKKB 52 at para 51.

²⁴ 2023 SKKB 52 at para 61 and 62.

²⁵ 2023 SKKB 52 at para 68.

²⁶ 2023 SKKB 52 at para 69.

²⁷ 2022 SKKB 203 at para 7.

²⁸ 2022 SKKB 203 at para 8.

²⁹ 2022 SKKB 203 at para 10.

to be preferred, subject to compelling reasons to the contrary.³⁰ Tron tried, and failed, to make arguments to rebut the single proceeding model. Tron made two arguments, which were not accepted:

1. The lien claimants were a stranger to the proceedings. This was soundly rejected as they were debtors of Tron; and³¹
2. The claims procedure amounted to a collateral attack on the stay. The Court found, quite to the contrary, this promoted efficiency and what is intended by Division 1 proposal.³²

The Court was, however, receptive to Tron's submissions on cost. Tron suggested that the costs of a claims process could jeopardize its restructuring as the cost could be in excess of \$100,000. While the Court did not find the number compelling, it did agree that Bruce Power should cover some of the cost, similar to a security for costs application under the *Construction Act*, RSO 1990, c C30.³³

To that end, assuming Bruce Power agreed to the same, Bruce Power was required to fund the first \$35,000 of the claims process, plus 50% of all additional costs in the claims process. In addition, the terms of the claims process were not ordered, but rather the parties were invited to attempt to reach a consent order, failing which the Court would rehear the matter.³⁴

No further decisions were ever published on the issue as the parties were able to resolve the matter by agreement.

T&C Steel and T&C Reinforcing/Under the Sun Groweries Inc., 2022 SKKB 236

This was the second application for an extension of the stay, and time to file a proposal, pursuant to the Notice of Intention filed by the companies under section 50.4 of the BIA. T&C Steel and T&C Reinforcing had their matters consolidated in a previous proceeding, and a similar application for an extension was brought by the related party, Under the Sun Groweries Inc.³⁵

The Court noted that section 50.4(9) sets out a three part test for an extension as follows:

1. The applicants must be acting in good faith and with due diligence;
2. The applicants must be likely to make a viable proposal if the extensions are granted; and
3. There would be no material prejudice to the creditors.³⁶

³⁰ 2022 SKKB 203 at para 55.

³¹ 2022 SKKB 203 at para 58.

³² 2022 SKKB 203 at para 61.

³³ 2022 SKKB 203 at para 82.

³⁴ 2022 SKKB 203 at para 84 and 100.

³⁵ 2022 SKKB 236 at paras 1 and 2.

³⁶ 2022 SKKB 236 at para 5, section 50.4(9) of the BIA.

The only two creditors to appear on the matter were the Royal Bank of Canada, who took no position as the unaffected lead secured creditor, and the Canada Revenue Agency, who opposed on the basis a viable proposal could not be put forward.³⁷

The Court, in considering whether a viable proposal could be made, noted that the cash flows during the proposal process to date had not been met. The Court also put significant weight on the wording of the Trustee Reports as follows:

[18] In their Second Reports, Grant Thornton, in carefully limiting and curiously phrased statements, say that having reviewed the support provided by management for the probable assumptions and the preparation and presentation of the Second Cash Statements:

25. ... Based on the Proposal Trustee's review, nothing has come to its attention that causes it to believe that, in all material respects:

- (a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;
- (b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or
- (c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.

[19] The Proposal Trustee then end their Second Reports with the following conclusion:

28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these proceedings is in the best interests of the stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.
and recommend the Court approve the stay extensions sought.

Ultimately, the Court granted the extensions, noting the following:

1. The established case law notes that whether a viable proposal is likely to be made only means it "such as might well happen;"³⁸
2. The Court should take a broad approach to considering the interested parties, including that of the employees;

³⁷ 2022 SKKB 236 at para 11.

³⁸ 2022 SKKB 236 at para 21; *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833

3. The Trustee is an officer of the Court and their recommendations and conclusions must be viewed in that light; and
4. Where there is a possibility of a proposal, the creditors, not the Court, should be the ones who get to decide its viability as they are the primarily affected party.³⁹

Of note, a viable proposal in this matter was put forward, voted on by the creditors and approved.

In the Bankruptcy of Ritchie Peter Poitras, 2023 SKKB 161

This application before the Court, brought by Ms. Forester, was brought on the basis that the bankrupt had transferred a piece of real property to his mother for undervalue, contrary to section 96 of the BIA. Ms. Forester was an unsecured creditor in Mr. Poitras estate, by virtue of a judgment obtained against him in their family law proceedings. Due to the lack of funds in the estate, the Trustee did not bring the application, but consented to the application being brought by Ms. Forester.

As a preliminary issue, the recipient of the property, Ms. Fayant, suggested that Ms. Forester did not have standing as she did not have a claim ascertainable in bankruptcy. Ms. Fayant argued that the family judgment left the amount owing to Ms. Forester as a question.⁴⁰

The Court quickly dismissed this argument as follows:

1. The judgment for an equalization payment was separate and discrete from the other lingering family law issues, and thus was a provable claim; and
2. Further, this was a moot point as Ms. Forester had stepped into the shoes of the Trustee pursuant to section 38 of the BIA so her standing as a creditor was not relevant.⁴¹

The Court had little difficulty concluding that Ms. Fayant, as the debtor's mother, was a related person and therefore, Ms. Forester needed to prove the transfer was for undervalue and was intended to defeat Ms. Forester's claims.

The Court had little difficulty in concluding this was the case. In fact, the Court relied heavily on the Trial Judge's findings in the family law proceeding, who concluded that the value of the property was \$300,000 (not the less than \$150,000 that was paid) and the fact the debtor was actively trying to defeat his ex-spouse's claim to the rise in value in the land.⁴² The Court further noted that evidence filed by Ms. Fayant in the bankruptcy application flew in the face of all of the evidence in the family law proceeding. It was clear the debtor and his mom were leading self-serving evidence and thus, could not be accepted.⁴³

³⁹ 2022 SKKB 236 at para 21.

⁴⁰ 2023 SKKB 161 at para 13-14.

⁴¹ 2023 SKKB 161 at para 15.

⁴² 2023 SKKB 161 at para 24 and 35.

⁴³ 2023 SKKB 161 at pars 27 and 28.

The Court ultimately concluded that the transfer was for undervalue and Ms. Fayant was to make payment to the debtor's estate to account for the same. After adjusting for the debts owing by the debtor to his mother, as determined in the family law proceeding, Ms. Fayant was required to remit \$229,108.60 to the estate.⁴⁴

Manitoba

5379904 Manitoba Ltd. v Cythia Hallick and Shane Robillard, 2023 MBKB 63

This decision centers around the application of section 178(1) of the BIA and a whether judgment grounded in a claim of breach of fiduciary duty survives bankruptcy. In the present circumstances, Ms. Hallick, the bankrupt, stole lottery tickets from her employer resulting in a loss of \$425,000 to the numbered company, which operated a convenience store.

While a large portion of the analysis is not bankruptcy specific, but rather a factual analysis on whether the theft had actually occurred and how to quantify it, the analysis of the fiduciary duty owed and whether the debt survives bankruptcy are of note.⁴⁵

The Court noted that while typically a rank-and-file employee was not a fiduciary, and therefore the debt would not survive bankruptcy, certain factors merited the finding of a fiduciary relationship and a survival of the debt.⁴⁶

Since the bankrupt had the discretionary power to affect her employer's interest, namely the income or losses from lottery tickets, the employee was under an obligation not to violate that trust. The Court concluded that the employee owes a fiduciary duty to its employer not to opportunistically divest value from the employer to one's self.⁴⁷ While not a fiduciary in all capacities, in the context of the lottery theft, the employee was a fiduciary.

As a result of the above, the debt of just over \$425,000 survived bankruptcy.

RBC and Borne, 2023 MBKB 90

RBC sought to appoint a receiver over a farming operation run by a collection of individual farmers, operating as a partnership. At issue was not whether the Receiver should be appointed, but rather whether the Receivership should extend to include auction proceeds from a cattle sale that had already been completed. This was far and away the most substantial asset of the estate and RBC had advised it would abandon the application if the proceeds were not included.⁴⁸

⁴⁴ 2023 MBKB 63 at para 41.

⁴⁵ 2023 MBKB 63 at paras 28-39.

⁴⁶ 2023 MBKB 63 at paras 43 and 44.

⁴⁷ 2023 MBKB 63 at para 48; see also *Navrab Investments Inc. v Vaidyan*, 2012 ONSC 6844.

⁴⁸ 2023 MBKB 90 at para 1.

Pursuant to a separate court order, an auction company was hired to sell, and had compelled a sale of, the Debtor's cattle. The proceeds were then held in trust, to be dealt with in accordance with the sale process dictated by the Order. There were various parties making submissions at the proceeding:

1. FCC, BMO and a credit union (collectively the "Secured Parties") which were secured creditors of some or all of the individual farmers;
2. Three corporations who claimed to be the rightful owners of at least some of the cattle that were sold (the "Owner Parties"); and
3. Ste Rose & District Cattle Feeders Co-op Inc. and Township 20 Beef Breeders Co-operative Incorporated (the "Breeder Parties") who placed cattle with the Debtors pursuant to breeder agreements.

The Secured Parties supported RBC while the Owner Parties, Breeder Parties and Auctioneer were of the position the auction proceeds should not be subject to the Receivership.

There were two separate issues, being what are reasonable costs for the auction company and whether a Receiver should be appointed. The Court declined to appoint a Receiver and in doing so, noted:

1. The most substantial asset was the funds in trust, already held pursuant to a Mareva Order. There was no evidence it required management and the cost of a Receiver to care for the funds;⁴⁹
2. There was no risk, while the parties litigated the priority dispute, that the funds would be damaged. They were no longer an asset capable of spoliation or deterioration;⁵⁰
3. The Receiver will complicate the process to makes claims for the funds and in addition, the Receivership charge will unnecessarily prime the parties claiming the funds;⁵¹
4. While perhaps a lengthy process, the parties, by Consent Order, had previously agreed to an adjudication process with respect to the funds. While a single proceeding model is usually preferred, here it would not be expeditious, efficient or economical; and
5. While the Receiver could no doubt provide helpful assistance in tracing the various loans to determine what secured funds were used to purchase which cattle, given that the majority of the parties claimed an actual ownership interest in the cattle, the tracing of the loan proceeds was unlikely to prove helpful in determining the issues between the parties.⁵²

In this instance, the Court concluded it would not be just and convenient to appoint a Receiver where the vast majority of the estate was comprised of cash, already subject to an order and therefore, the assets of the estate were not subject to risk. While the one proceeding model is

⁴⁹ 2023 MBKB 90 at para 31.

⁵⁰ 2023 MBKB 90 at para 33.

⁵¹ 2023 MBKB 90 at para 34.

⁵² 2023 MBKB 90 at para 40.

usually preferred, in light of the additional cost, the balance of convenience did not tip in favour of Receivership appointment.

As a result of the above, the issue of costs became a moot point for the purposes of the application.

The Estate of Edward James Alexander Petz, a bankrupt, 2023 MBKB 20

Mr. Petz was an undischarged bankrupt at the time of his death. At the time of his passing, he had three adult children but no dependents. At issue was whether a deceased bankrupt, without dependents, retained the right to exemptions. The Court further canvassed whether the presence of dependents, in other instances, might change the matter.⁵³ There was \$564,850 in unsecured debt and \$42,500 in secured debt.

The estate was comprised of the following potentially exempt assets:

1. A teacher's pension in the amount of \$210,404.28.⁵⁴ There was no designated beneficiary for this pension;
2. An RRSP of \$17,063. The debtor's ex-wife was the designated beneficiary and received the same;⁵⁵
3. A non-registered investment held in trust for the debtor's son. These were not at issue;⁵⁶
4. A non-registered investment held for the debtor's daughter. This had been liquidated and was also not at issue;⁵⁷
5. Another investment, the status of which was unknown; and⁵⁸
6. Two life insurance policies payable to the debtor's children.⁵⁹

The decision, which is nearly 100 pages, provides a very helpful and complete summary of the law of exemptions in the various jurisdictions. Given the breadth of the decision, they will not be repeated in detail.

The Court, after reviewing all of the case law, synthesized, among others, the following principles:

1. There is no conclusive authority on whether the indivisibility of exempt property continues after a bankrupt has passed away prior to discharge;
2. The case law is not aimed at sheltering a deceased bankrupt's assets from creditors and that such a protection would undermine the bankruptcy process and the objectives of the personal bankruptcy provisions;

⁵³ 2023 MBKB 20 at paras 2 and 8.

⁵⁴ 2023 MBKB 20 at para 17(a).

⁵⁵ 2023 MBKB 20 at para 22(a).

⁵⁶ 2023 MBKB 20 at para 22(b).

⁵⁷ 2023 MBKB 20 at para 22(c).

⁵⁸ 2023 MBKB 20 at para 22(d).

⁵⁹ 2023 MBKB 20 at para 23.

3. The rights of a bankrupt, and whether an exemption is crystallized at the date of the assignment, ought to be considered in the eyes of the objectives of the BIA;
4. The legislative exemption provisions are operational throughout the administration of the estate;
5. It would be impractical for property that is exempt to never be capable of losing its non-divisible status; and
6. There is no definitive principle that states that property retains its exempt character in bankruptcy, even if the individuals who need the exemption are no longer living.⁶⁰

In light of the above, the Court determined the “two steps, one estate” approach should apply, meaning that all of the debtor’s assets would pass to the Trustee (step one) and that at the end of the bankruptcy, the exemptions are determined (step two). Therefore, whether the property was exempt was dependent on the type of property. Further, exemptions could be lost in the event the bankrupt died prior to discharge⁶¹

In considering the policy objectives of the proceedings, the Court noted that the rehabilitation of the debtor is no longer an objective, rather the primary goal is to satisfy creditor claims.⁶²

Ultimately the Court concluded that the pension was not exempt and was to vest in the Trustee. In concluding the matter, the Court noted:

1. The pension vested with the trustee on the date of filing;
2. Even if it was exempt then, the two steps one estate approach allowed the exemption matter to be revisited post-death;
3. Exemptions are personal to the bankrupt where there is no beneficiary and lost upon death;
4. Exemptions in the bankruptcy legislation are for individuals and not estates; and
5. The pension legislation, while it states that it is protected from a creditor, does not specify this continues where the teacher is an undischarged bankrupt without a beneficiary and deceased.⁶³

The Estate of Dwight Charles Logeot, 2022 MBKB 214

This application was brought by the Trustee with respect to an alleged preferential payment, or payment for under value, made by the bankrupt. At issue was whether various building materials purchased by the bankrupt, in the collective amount of \$93,846.73, which were used on real property owned by his parents, were subject to recovery as a preferential payment pursuant to section 95 of the *BIA*.⁶⁴ The bankrupt, and his parents, suggested that the real property was

⁶⁰ 2023 MBKB 20 at para 186.

⁶¹ 2023 MBKB 20 at paras 187, 188.

⁶² 2023 MBKB 20 at para 224.

⁶³ 2023 MBKB 20 at para 242.

⁶⁴ 2022 MBKB 214 at para 31.

leased by the bankrupt pursuant to succession planning and therefore, not subject to recovery in the bankruptcy.

The trustee took the position that if they were payments under the lease, they amounted to a fraudulent preference. Alternatively, if the lease was not valid, the Trustee took the position the payments were to be considered capital improvements on the parents' property, they would constitute a transfer for under value contrary to section 96 of the *BIA*.⁶⁵

Complicating matters was an allegation by the Trustee that the lease was not valid and enforceable.

Fraudulent Preference

In short, the Trustee's position was as follows:

1. The payments made under the lease were made after the Bankrupt had defaulted on multiple loans. Furthermore, a corporation the Bankrupt was a 50% shareholder in, had already filed an NOI. He was therefore, insolvent;⁶⁶
2. His parent's were clearly non-arm's length parties; and
3. The payments were made within 12 months of the assignment.

The Debtor and his parents took various positions such as:

1. The supplies were purchased in the normal course of business;
2. There was no intent to prefer creditors; and
3. In some instances, it was a corporation who paid for the supplies.

The Court was quick to point out that intent is not a defense when the preference is amongst related parties. Therefore, the three-part test as put forward by the Trustee was satisfied and the debtor's parents were obligated to account for the same.⁶⁷

Payment for Under Value

While no longer at issue, given a fraudulent preference had been determined, it was noted that pursuant to section 96 of the *BIA*, that a transfer for undervalue could have also been found. The Court noted that with the 2009 amendments to the *BIA*, where there has been a provision of services or products for undervalue, amongst non-arm's length parties, the Trustee does not need to demonstrate intent to defeat the creditors.⁶⁸

⁶⁵ 2022 MBKB 214 at para 44.

⁶⁶ 2022 MBKB 214 at para 51-53.

⁶⁷ 2022 MBKB 214 at para 72.

⁶⁸ 2022 MBKB 214 at para 121.

In this instance, the Debtor had purchased supplies for his parents, but had not received adequate consideration for the same. The use of the farm was not adequate consideration and even if a fraudulent preference had not occurred, a transfer for undervalue had.⁶⁹

Other Issues

Finally, the debtor's parents attempted to reduce the payment of \$93,000 by half, alleging the parents and the debtor were in an equal partnership. This was quickly set aside by the Court in noting:

1. There was no partnership agreement;
2. The partnership was not registered;
3. The bankrupt's only GST number was registered in his sole name;
4. No documentation was disclosed to support a partnership at the time of filing; and
5. No lease or other document refers to the partnership.⁷⁰

Therefore, the parents were required to remit \$93,846.73 to the Trustee.⁷¹

White Oak Commercial Finance LLC v Nygard Holdings (USA) Limited et al, 2023 MBCA 83

This appeal arose from an order consolidating nine separate estates placed in Receivership. The Receiver was also granted leave to apply for bankruptcy orders with respect to two of the estates, being Nygard Properties Ltd. and Nygard Enterprises Ltd. (the "Nygard Corporations").⁷²

The proceedings arose from a lengthy receivership, with the receiver initially being appointed in March, 2020. The Receiver was appointed over various corporations operated by Peter Nygard, including the Nygard Corporations, and arose as a result of approximately \$36,000,000 in secured debt owing by the debtors, plus considerable unsecured debt. Notably, the Nygard Corporations were only guarantors of the debts, not borrowers.

Only three of the debtors, including Nygard Properties Ltd., had meaningful assets to realize against. Nygard Properties Ltd.'s assets were realized in the amount of \$28,579,000, with an additional \$62,748,000 realized from the remaining debtors.⁷³

The Receiver brought an application to consolidate all of the estates given the significant overlap in the debts, costs and expenses of the Receivership. The Nygard Corporations submitted that this would be inappropriate as they were solvent and would be seriously prejudice if the Nygard Corporations realized value was distributed across nine estates. It further argued that, since it

⁶⁹ 2022 MBKB 214 at para 131.

⁷⁰ 2022 MBKB 214 at para 141-149.

⁷¹ 2022 MBKB 214 at para 155.

⁷² 2023 MBCA 73 at pars 1-3.

⁷³ 2023 MCBA 73 at para 12.

had paid on the guarantees it had granted in favor of the other debtors, the Nygard Corporations stood as secured creditors to collect in the Receivership⁷⁴.

In quoting from the *Redstone*⁷⁵ decision, the Court noted that numerous factors should be applied in determining whether to order a consolidation:

1. Are the elements of the consolidation present, such as the intertwining of corporate functions and other commonalities across the group. Included in this, the Court should consider the following:
 - a. Difficulty in segregating assets;
 - b. Presence of consolidated financial statements;
 - c. Profitability of consolidation at a single location;
 - d. Co-mingling of assets and business functions;
 - e. Unity of interests in ownership;
 - f. Existence of inter-corporate loan guarantees; and
 - g. Transfer of assets without observing corporate formalities.
2. Do the benefits of the consolidation outweigh the prejudice to the creditors. Where a consolidation order is refused, it is often the case that one group of creditors would be materially prejudiced by the order; and
3. Is the consolidation fair and reasonable?⁷⁶

The Court further noted that a consolidation order is highly discretionary and should not be interfered with on appeal unless there is an error of law, material misapprehension of the evidence or the decision is so clearly wrong as to amount to an injustice.⁷⁷

The Court noted that the initial submission by the Nygard Corporations, that they were solvent, was incorrect. The initial Receivership Order was premised on a finding of insolvency. Furthermore, substantive consolidation of solvent and insolvent corporations may be ordered to prevent corporations from insulating their assets from creditors with corporate shells.⁷⁸

The Court also noted that the prejudice to the Nygard Corporations, related parties and debtors in the receivership proceeding, is different than the prejudice that would be suffered by arm's length third party creditors. Therefore, the Nygard Corporations could not rely on *Redstone* in attempting to argue the prejudice to a creditor, namely themselves, prevented a consolidation order from being granted.⁷⁹

Ultimately, the appeal was dismissed in full and the consolidation orders remained in place. With respect to the bankruptcy order, this matter was dismissed without substantive analysis.

⁷⁴ 2023 MBCA 73 at paras 14 and 15.

⁷⁵ *Redstone Investment Corporation*, 2016 ONSC 4453

⁷⁶ 2023 MNCA 73 and paras 26, 27 and 30.

⁷⁷ 2023 MBCA 73 at para 24.

⁷⁸ 2023 MBCA 73 at para 43.

⁷⁹ 2023 MBCA at paras 48-50.

KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 195**

Date: **2023 08 17**
Docket: KBG-RG-00909-2023
Judicial Centre: Regina

BETWEEN:

AFFINITY CREDIT UNION 2013

APPLICANT

- and -

F & L CONCRETE SERVICES LTD.

RESPONDENT

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released September 20, 2023. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

Ryan Pederson
Grant Schmidt
M. Kim Anderson and Travis K. Kusch

for the applicant
for the respondent
for MNP Ltd.

JUDGMENT
August 17, 2023

BERGBUSCH J.

Introduction

[1] Affinity Credit Union 2013 [ACU] applied for an order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA], s 65(1) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01(repealed by *The King's Bench Act*, SS 2023, c 28 [KBA]), and s. 64(8) of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [PPSA], appointing MNP Ltd. [MNP] the receiver-manager of the property, assets, and undertakings [Property] of F & L Concrete Services Ltd. [F & L]. Given the recent enactment of the KBA, I have considered the order sought by ACU under the applicable

provisions of that statute. ACU submits that F & L is insolvent and that the appointment of a receiver is just and convenient.

[2] F & L opposed the receivership order, contending that the application should be adjourned until F & L's financial statements for the years ending March 31, 2022 and March 31, 2023, can be prepared, so that F & L can seek replacement financing. Alternately, F & L requested that the application be dismissed, arguing that it is not insolvent, that ACU is misusing the *BIA* to circumvent *The Queen's Bench Rules*, and that a receivership would destroy its business. F & L also alleges that MNP is in a conflict of interest because it prepared the financial statements of F & L for the year ended March 31, 2021, and had been engaged by F & L to prepare the financial statements for F & L's two subsequent fiscal years.

[3] ACU commenced this proceeding by originating application returnable on April 26, 2023. On April 25, F & L served and filed a responding affidavit sworn by its president, Norman Fichter. By consent of the parties, the application was adjourned to May 25, 2023. In accordance with *The Queen's Bench Rules*, ACU served two response affidavits on F & L's counsel on May 18, 2023. On May 24, 2023, F & L served and filed two additional affidavits, as well as an appraisal dated April 5, 2023, which opines that the market value of F & L's business premises is \$1,970,000. Despite the late filing of F & L's materials, I exercised my discretion to admit them for consideration on this application.

[4] Based upon the evidence filed by the parties, I have determined that F & L is insolvent within the meaning of the *BIA*. Further, I have determined that it is just and convenient to appoint a receiver, taking into account the relevant factors identified in the case law. I have also determined that MNP should be appointed the receiver of the Property of F & L. F & L has not demonstrated that MNP is in a conflict of interest

that would preclude its appointment.

[5] I provided a summary of my decision to the parties on August 3, 2023, explaining that my reasons in full would follow.

Background

[6] F & L is a concrete, aggregate, and gravel supplier and it also operates an equipment rental business [Business] in the Estevan, Saskatchewan area. F & L owns a property in Estevan from which it conducts its business [Business Land], as well as two rental properties in Estevan [Rental Lands]. Depending upon the season, F & L employs approximately 35 full- and part-time workers.

[7] ACU has provided banking services to F & L for approximately 30 years. During that period, ACU has made numerous loans to F & L, including the following:

- (a) A revolving line of credit [LOC], with a limit of \$400,000, used by F & L to operate its business;
- (b) A revolving capital loan [Loan #1], with a limit of \$500,000, used by F & L to purchase equipment for use in its business; and
- (c) A loan in the original amount of \$1,192,400 [Loan #12], to be used for working capital.

[Demand Loans]

[8] ACU also provided a term loan in the original amount of \$93,741.41 to finance F & L's purchase of a 2019 Dodge truck. This loan is not in default and is not relevant to this decision.

[9] The LOC is subject to a revolving line of credit agreement [LOC Agreement] dated August 11, 2015, and is secured by a mortgage dated July 27, 2015, in the amount of \$400,000 registered against title to the Rental Lands. Loan #1 is subject to a revolving capital loan agreement dated August 11, 2015, and a general security agreement dated November 24, 2016, granting ACU a security interest in all of F & L's present and after-acquired property. Finally, Loan #12 is secured by a demand mortgage dated June 21, 2016, in the amount of \$1,192,400 registered against title to the Business Land.

[10] The LOC and Loan #1 are payable on demand, with interest at ACU's prime rate of interest plus 2% per annum. In addition, F & L is obligated to pay monthly instalments of \$9,405 on Loan #1, reduced to \$4,705 if the outstanding balance is \$250,000 or less. Loan #12 is also payable on demand, with interest at 4.20% per annum. F & L was required to make monthly payments of \$6,405 from July 31, 2016 to June 30, 2019, when the full balance of principal and interest became due. It appears that F & L continued to make monthly payments on Loan #12 after June 20, 2019. According to ACU, the last payment received from F & L in respect of Loan #12 was \$8,021.12 on March 23, 2023.

[11] F & L has certain obligations to report financial information to ACU:

(a) Paragraph 17 of the LOC Agreement states:

17. FINANCIAL REPORTS

The Borrower shall provide the Credit Union with financial reports showing, among other things, the value of inventory owner [sic] and accounts receivable outstanding. The financial reports shall be provided at such times in such manner as the Credit Union may request. Unless the Credit Union shall otherwise advise in writing, the financial reports shall be provided annually. The Borrower agrees to provide

such further financial or other reports or information as the Credit Union may require from time to time.

- (b) The revolving capital loan agreement for Loan #1 contains the following clause:

Financial Reports. The Member shall provide the Credit Union with a financial report showing, among other things, the value of inventory owned, accounts receivable outstanding and a listing of current equipment. The financial reports shall be provided at such times in such manner as the Credit Union may request. Unless the Credit Union shall otherwise advise in writing, the financial report shall be provided annually. The Member agrees to provide such further financial or other reports or information as the Credit Union may require from time to time.

[12] Under para. 8 of the mortgage agreement related to the Business Land, F & L is also required to maintain property insurance for the building on the property to the full extent of its insurable value.

[13] F & L provides monthly borrowing limit certificates (also referred to as “margin certificates”) to ACU so that ACU can determine the credit to advance under the LOC. The borrowing limit is reduced by potential preferred claims, which are those payables that rank in priority to ACU’s security. These include amounts owing for wages, employee deductions, workers compensation, sales tax, income tax, and overdue rent.

[14] ACU filed affidavits sworn by Christine Bunch, loan rehabilitation officer for ACU, and Judy du Chalard, director, loan rehabilitation and recovery for ACU, both of whom had extensive dealings with F & L.

[15] Ms. Bunch has had responsibility for the F & L loan accounts since May 2021. She averred that F & L has been delinquent in meeting its payment obligations

under one or more of the Demand Loans, causing ACU to send delinquency notices seven times between March 31, 2021 and June 8, 2022. She also outlined her efforts to obtain copies of financial information from F & L, including its financial statements. ACU received F & L's financial statement for the year ending March 31, 2020 on March 10, 2022. In response to Ms. Bunch's inquiry about the 2021 and 2022 financial statements, Kurt Schmidt, F & L's controller, replied on March 10, 2022 that changes were being made to those financial statements and he hoped to have the 2021 financial statement completed in a few weeks and the 2022 financial statement completed by May 15, 2022.

[16] Between April and October 2022, Ms. Bunch followed up numerous times with Mr. Schmidt regarding the status of the financial statements and two instances when F & L's chequing account was in overdraft. She also communicated directly with a representative of MNP (F & L's external accountants), who advised on May 31, 2022, that he had not received information to prepare F & L's financial statements. On June 7, 2022, MNP advised that it "did not even have sufficient information to start preparing [F & L's] 2021 financial statements and that MNP did not have any information for 2022." (Christine Bunch affidavit sworn April 11, 2023 at para. 15).

[17] At ACU's request, a conference call took place between Ms. Bunch, Ms. du Chalard, and Mr. Schmidt on October 7, 2022. Norman Fichter did not participate despite Ms. Bunch having advised F & L that his participation was imperative. Mr. Schmidt advised that F & L's 2021 financial statement would not be completed until November 2022, which was unacceptable to ACU. Ms. Bunch asked whether ACU would permit MNP to conduct a review of F & L's business [Business Review] and warned that ACU would end its banking relationship with F & L if F & L refused.

[18] After this conference call, MNP provided information to F & L regarding the Business Review process, including the estimated cost, and sent F & L an engagement letter. Ms. Bunch advised Mr. Schmidt that ACU expected F & L to decide on the Business Review by November 1, 2022. ACU continued to press F & L regarding the engagement letter and the Business Review. Ms. Bunch advised that MNP did not require F & L's financial statements to be completed before embarking on the Business Review. Ms. Bunch next told Mr. Schmidt that ACU needed F & L to decide on the Business Review by December 23, 2022.

[19] Ms. Bunch spoke to Norman Fichter directly about the Business Review on January 10, 2023, explaining that the review was necessary for ACU to continue its business relationship with F & L. Mr. Fichter was sceptical of MNP's estimate that the fees for the Business Review would be \$10,000 to \$15,000, believing that the fees would more likely be \$40,000. On January 12, 2023, Mr. Fichter told Ms. Bunch that the Business Review was a "waste of money," that he thought all ACU needed was the 2022 financial statement, and that it was not F & L's year-end yet. Ms. Bunch responded that ACU had not received F & L's financial statements for its previous two fiscal years.

[20] Ms. du Chalard also communicated with Mr. Schmidt on several occasions about F & L's failure to provide its financial statements and ACU's lack of confidence in F & L's financial strength. On December 22, 2022, Ms. du Chalard told Mr. Schmidt that ACU needed an updated margining statement, the 2021 financial statement, and F & L's agreement to the Business Review. Ms. du Chalard advised that ACU wanted to renew Loan #12 and the associated mortgage for a one-year term, with a 7% interest rate. On January 4, 2023, Ms. du Chalard followed up with Mr. Schmidt, advising him that ACU had not received financial statements for nearly three years and ACU would terminate its business relationship with F & L unless F & L agreed to the

Business Review by January 6, 2023.

[21] Ms. du Chalard determined on January 15, 2023 that Loan #12 should be extended for one year in order to fix the interest rate at 7% per annum. As a result, ACU sent to F & L an extension agreement for Loan #12, which was accepted by F & L on February 2, 2023.

[22] When ACU offered to extend Loan #12, ACU did not plan to demand immediate repayment of the Demand Loans. Rather, ACU intended to communicate that it was going to end its banking relationship with F & L and it would call in the Demand Loans if F & L did not refinance them by a specified date. However, on January 25, 2023, after reviewing ACU's recent correspondence with F & L, Ms. Bunch determined that ACU should call in the loans immediately because of F & L's long-term lack of co-operation with its lender.

[23] ACU finally received F & L's financial statement for the year ended March 31, 2021 [2021 Financial Statement] on January 27, 2023. It revealed that F & L had been in precarious financial condition during the effective period of the report. Most significantly:

- (a) Working capital was negative \$172,554;
- (b) F & L recorded a loss of \$633,465, which would have been significantly higher but for government assistance of \$461,177;
- (c) Retained earnings were in a deficit position; and
- (d) Government remittances payable increased from \$74,500 at the end of the previous fiscal year to \$584,489.

[24] After comparing the 2021 Financial Statement to the margining certificates F & L had provided to ACU for March 31, 2021 to April 30, 2021, ACU concluded that F & L's equity had been overstated by more than \$2.7 million. As result, ACU suspected that more recent margining certificates provided by F & L were not reliable.

[25] Through counsel, ACU demanded payment of the Demand Loans on February 2, 2023 [Demand Letter] and gave notice that it was terminating the LOC Agreement and the revolving capital loan agreement and closing F & L's chequing accounts. At that date, the amounts owing on each of the Demand Loans were as follows:

- (a) LOC: \$261,253.12;
- (b) Loan #1: \$163,303.08; and
- (c) Loan #12: \$1,041,873.59.

[26] On February 17, 2023, ACU served F & L with a notice of intention to enforce security pursuant to s. 244 of the *BIA*. The total indebtedness secured by ACU's security was \$1,627,440.38 as at February 15, 2023.

[27] On March 1, 2023, ACU received notice of cancellation of insurance for the shop located on the Business Land. The policy naming ACU as first loss payee expired on February 24, 2023. As noted above, under the mortgage F & L was required to maintain insurance on the property.

[28] On April 24, 2023 (the day before the original hearing date of ACU's receivership application), F & L paid to ACU proceeds of sale from three items of

equipment. ACU applied those proceeds to pay out Loan #1 and to reduce the balance owing on the LOC.

[29] Norman Fichter admitted that, during the COVID-19 pandemic, F & L fell into arrears on payment of employee source deductions. He said that “Revenue Canada is working with the company to pay current deductions and slowly pay off arrears.” (Norman Fichter affidavit sworn on April 24, 2023 at para. 7). F & L’s controller, Mr. Schmidt, attested that Canada Revenue Agency [CRA] “has been paid current deductions and has been patient with clearing arrears from the pandemic.” (Kurt Schmidt affidavit sworn on May 24, 2023 at para. 7). None of the affidavits filed on behalf of F & L provided details of any agreement with CRA whereby CRA had agreed not to enforce, or to delay enforcing, F & L’s obligation to pay source deductions.

[30] Mr. Fichter’s evidence on April 24, 2023 was that the financial statement for the year ending March 31, 2022 was very near completion by MNP. He asserted that F & L has assets that far exceed its liabilities, citing an appraisal of the Business Lands and a list of one-year old equipment showing a gross value of \$11,500,000. He also averred that F & L was selling surplus equipment to pay down the Demand Loans.

[31] In his affidavit, Mr. Schmidt stated that F & L had been working in 2022 and 2023 to improve its cash flow. F & L’s large customers are oil companies, their subcontractors, and rural municipalities, and according to Mr. Schmidt they are all slow to pay their accounts. However, he claimed that they are now doing more work, which has improved F & L’s cash flow. He indicated that he could not arrange for alternate financing until MNP had completed the company’s 2022 and 2023 financial statements. He also filed in evidence property assessments of the Rental Lands, showing appraised values for assessment purposes of \$111,200 and \$127,000.

[32] Chris Fichter, the general manager, secretary-treasurer and a director of F & L, stated that F & L has been able to operate without a line of credit through improved collection of accounts receivable, the co-operation of creditors, and some shareholders' loans. He described problems with F & L's bookkeeper and its former accountants, which forced F & L to engage MNP to prepare its 2020 and 2021 financial statements. He also explained that F & L had sold some surplus equipment, using the proceeds to pay off Loan #1 and to make regular mortgage and loan payments to ACU. As at May 22, 2023, the balances F & L owed to ACU on the Demand Loans were as follows:

- (a) LOC: \$334,063.88;
- (b) Loan # 1: Nil; and
- (c) Loan #12: \$1,033,976.44.

[33] Contrary to Norman Fichter's earlier evidence that the 2022 financial statement was "very near to completion by MNP Ltd." (Norman Fichter affidavit at para. 29), Chris Fichter stated that MNP had informed him they were too busy to work on this report until after June 20, 2023. Mr. Fichter asserted that F & L's work-in-progress, accounts receivable, and cash flow were adequate to operate F & L's business until the 2022 and 2023 financial statements have been completed and replacement financing can be arranged. He also attached to his affidavit two lists, purporting to be F & L's equipment, with estimated values totalling \$3,545,700 and \$6,511,625. These lists are difficult to reconcile with the notes to F & L's 2021 Financial Statement, which list the net book value of F & L's equipment at \$502,377 and the net book value of equipment under capital lease at \$2,180,907.

Issues

[34] The issue to be determined is whether the court should appoint a receiver-manager pursuant to s. 243 of the *BIA*, s. 10-15 of the *KBA*, and/or s. 64(8) of the *PPSA*, or whether the court should adjourn or dismiss ACU’s application, as F & L requests.

[35] In the event that the court decides the appointment of a receiver-manager is warranted, the court must also determine whether MNP is in a conflict of interest that precludes its appointment.

Applicable Law

[36] ACU relies upon s. 243 of the *BIA*, which reads:

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. ...

[37] On the application of a secured creditor pursuant to s. 243 of the *BIA*, the court may appoint a receiver over all of the property of an insolvent person or a bankrupt and may, *inter alia*, authorize the receiver to “take any other action that the court considers advisable.” This phrase has been interpreted as giving the court the power to do what “justice dictates” and “practicality demands”: see discussion in *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA

508 at paras 48 – 58, 435 DLR (4th) 416.

[38] ACU is a secured creditor of F & L. F & L has not made an assignment in bankruptcy and no bankruptcy order has been made against F & L. Accordingly, the court cannot make an order under s. 243 of the *BIA* in this proceeding unless F & L is an “insolvent person,” defined at s. 2 of the *BIA* as follows:

2 In this Act ...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[39] If this statutory test is met, the court must decide whether it is just and convenient to appoint a receiver. This is a discretionary decision. The non-exhaustive factors to be considered on such an application were summarized in *Lemare Lake Logging Ltd. v 3L Cattle Company Ltd.*, 2014 SKCA 35 at paras 98-100, 371 DLR (4th) 663 [*Lemare Lake Logging*] (rev’d on constitutional grounds 2015 SCC 53, [2015] 3 SCR 419):

[98] The case law relating to the appointment of receivers has identified a broad range of considerations that can bear on the issue of whether an appointment is appropriate. A number of decisions refer to the list of factors found in the second edition of *Bennett on Receiverships* [*Bennet on Receiverships*, 2nd ed (Toronto: Carswell, 1999)], *supra* at pp. 130-132. These include matters such as:

- Whether irreparable harm might result if the order is not made;
- The risk to the security holder taking into consideration the size of the debtor's equity in the collateral;
- The nature of the property or collateral;
- The need to protect or safeguard the debtor's assets while litigation takes place;
- The need to prevent waste of the debtor's assets;
- The balance of convenience as between the parties;
- The fact that the creditor has a right to appoint a receiver under the loan agreement in question;
- The conduct of the parties;
- The impact of the order on the parties;
- The cost of the receivership to the parties;
- The likelihood of maximizing return to the parties.

See, for example: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* 2009 BCSC 1527, 60 C.B.R. (5th) 142 at para. 25.

[99] The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

[100] These sorts of factors will inform judicial reasoning on an application such as the one brought by Lemare Lake in this case but, of course, the bottom-line issue remains the one specified in s. 243(1) of the *BIA*: Is the appointment of a receiver “just or convenient”?

See also *Affinity Credit Union 2013 v The Lighthouse Supported Living Inc.*, 2023 SKKB 82 at para 13.

[40] The applicant does not need to show irreparable harm if it is entitled, under its contract with the respondent, to appoint a receiver: see *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228 at para 19, 50 CBR (6th) 220 [*Vortex Drilling*]. Court appointment of a receiver is not considered extraordinary equitable relief if the debtor assented to the creditor’s right to appoint a receiver upon default: *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 at para 42. However, even when the security agreement grants to the creditor the right to appoint a private receiver, the creditor must still establish that court appointment of a receiver is just and convenient: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238 at paras 50-51.

[41] As ACU has the contractual right to appoint a receiver, the extraordinary and intrusive nature of a receivership order weighs less heavily, but court appointment of a receiver must nonetheless be a “just and convenient” remedy for the purpose of protecting and preserving the insolvent person’s assets.

[42] ACU relies on additional statutory authority in support of the requested orders. Section 10-15 of the *KBA* authorizes a judge to appoint a receiver on an interlocutory application if it appears “appropriate or convenient”. Section 64(8) of the *PPSA* also empowers the court to appoint a receiver on the application of an interested person. As I have decided that a court-appointed receiver is warranted under s. 243 of the *BIA*, I will not address these alternate bases for a receiver.

Analysis

Is F & L insolvent?

[43] As required by s. 243 of the *BIA*, I will first address whether F & L is an “insolvent person.”

[44] ACU’s counsel sent the Demand Letter on February 2, 2023. As a result of ACU’s demand, F & L was obligated to repay immediately the total balances then due and owing under the Demand Loans, which totalled \$1,466,429.79. F & L has not disputed that ACU was entitled to demand repayment of the Demand Loans, nor do I see any basis on which it could.

[45] Since the date of the Demand Letter, F & L has sold some equipment in order to repay in full Loan #1 (which had a balance of \$163,303.08) and has made payments to reduce the amounts owing under Loan #12. Despite these efforts, as of May 22, 2023, the balance due under the LOC had risen to \$334,063.88, while \$1,033,976.44 was still owing on Loan #12. Looking only at F & L’s debt to ACU, the evidence demonstrates that F & L was unable to meet its obligations as they became due.

[46] Looking at F & L’s finances from a broader perspective, it is apparent that F & L had ceased paying its current obligations in the ordinary course of business as they generally came due. The most glaring example is unpaid government remittances, which stood at \$584,489 at March 31, 2021, the most recent year for which financial statements are available. F & L’s affiants all admitted that, as at May 25, 2023, F & L was not current on employee source deductions. F & L is in the best position to provide more current information if F & L’s financial position has materially improved but it has not done so. F & L’s principals also acknowledged that F & L was managing

its finances in the absence of an operating loan by relying, in part, on the indulgence of other creditors. While, again, F & L’s evidence was short on specifics on this point, I infer that F & L was not making timely payment to other creditors in the ordinary course of business.

[47] Given F & L’s large debt due and owing to ACU and its substantial unpaid government remittances, I conclude that F & L is an “insolvent person” within the meaning of the *BIA*.

Is the appointment of a receiver just and convenient?

[48] With that precondition satisfied, the court must determine whether this is an appropriate circumstance to appoint a receiver pursuant to s. 243 of the *BIA*. ACU bears the burden of satisfying the court that such appointment would be just and convenient.

[49] I will now consider and weigh the factors outlined by the court in *Lemare Lake Logging* at para 98 and in *Vortex Drilling* at para 19, some of which were addressed specifically by ACU in its submission. Where I do not comment on a specific factor listed in those decisions, I concluded that the factor was not relevant or neutral in the present circumstances.

Irreparable Harm and Risk to the Security Holder

[50] These factors can be considered together. As discussed above, ACU was not required to show irreparable harm given its contractual right to appoint a receiver. ACU acknowledged that it was not clear whether it would suffer irreparable harm if the court declined to appoint a receiver because the value of F & L’s assets was not known. However, ACU submitted that the test is whether irreparable harm “might” result if a

receiver were not appointed, relying upon *Vortex Drilling*.

[51] ACU pointed to the large increase in F & L's unpaid government remittances between 2020 and 2021 and raised the concern that those debts might have risen further since March 2021. F & L admitted that it continues to have outstanding unpaid government remittances but has not disclosed the current amount due or any explanation of how it intends to become current.

[52] ACU argued that government claims for unpaid statutory remittances would have priority over ACU's security. Depending upon the amounts due, this could result in a portion of the Demand Loans becoming unsecured. Moreover, payments made by F & L to ACU since the Demand Letter was sent were likely subject to a deemed trust in favour of the Receiver General of Canada, exposing ACU to liability. In support of this submission, ACU referred to *First Vancouver Finance v M.N.R.*, 2002 SCC 49, [2002] 2 SCR 720 at paras 40-42 [*First Vancouver Finance*], and *Canada (Deputy Attorney General) v Schwab Construction Ltd.*, 2002 SKCA 6, [2002] 4 WWR 628 [*Schwab Construction*].

[53] In *First Vancouver Finance*, the Supreme Court reviewed the scheme in ss. 227(4) and 227(4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] determining that the deemed trust created in those provisions operates in a manner similar to a floating charge over the assets of a tax debtor. The trust has priority over secured interests from the time that source deductions are made and remains in existence so long as the default continues. Since the trust is similar to a floating charge, it does not attach to particular assets and the debtor is free to dispose of property in the ordinary course. When this occurs, the proceeds of such disposition are then subject to the trust.

[54] ACU asserts that F & L’s use of the proceeds of equipment sales to pay down the Demand Loans places ACU at risk as the recipient of funds subject to the deemed trust in favour of the Minister of National Revenue. While *First Vancouver Finance* does not address this point specifically, ACU’s concern is well-founded. In *Canada (Attorney General) v National Bank of Canada*, 2004 FCA 92, 3 CBR (5th) 1, the Federal Court of Appeal noted that s. 227(4) of the *ITA* and s. 86(2) of the *Employment Insurance Act*, SC 1996, c 23 [*EIA*] both stipulate that every person who deducts or withholds any amount under those Acts is deemed to hold the amount in trust for the Crown. Subsection 227(4.1) of the *ITA* and s. 86(2.1) of the *EIA* provide that, where the amount is not paid, the “trust extends as well to the property of the person, including property held by a secured creditor which, absent such secured interest, would be that of the person, and stipulate that the Receiver General ‘shall be paid’ in priority out of the proceeds of such property”: *Canada (Attorney General) v National Bank of Canada* at para 5. The proceeds of sale of property over which a secured creditor asserts a security interest are also subject to the deemed trust and must be paid to the Receiver General in priority to the creditor’s security interest: at para 30. Further, s. 222 of the *ITA* and s. 86(1) of the *EIA* impose liability on secured creditors to pay the Receiver General the proceeds from the property subject to the trust: at paras 37 and 40. See also *Innovation Credit Union v Keshe Holdings Inc.*, 2023 SKKB 113.

[55] The 2021 Financial Statements refer to “government remittances payable” in the amount of \$584,489. ACU is concerned that this amount comprises unpaid source deductions subject to the deemed trust provisions of the *ITA* and the *EIA*. The current balance payable to the Receiver General is unknown. However, there is a meaningful risk that ACU’s security is impaired in the circumstances. Further, ACU is

also exposed to liability to the Receiver General for the amounts that it has received from F & L and applied against the Demand Loans. In principle this liability extends to all amounts ACU has been paid by F & L since F & L defaulted on its statutory obligation to remit source deductions.

[56] ACU cited *Schwab Construction* for the proposition that equipment leased to F & L is not property subject to the Crown's deemed trust under the *ITA*. To the extent that equipment F & L has listed in its affidavit evidence is in fact leased rather than owned by F & L, the equipment would not be available to satisfy any claims by the Crown. The 2021 Financial Statement shows the net book value of equipment under capital lease as \$2,180,907.

[57] The factors of irreparable harm and risk to the security-holder weighed heavily in favour of the receivership order.

Apprehended waste of assets

[58] Apart from assets under capital lease, the 2021 Financial Statement shows a decline in the net book value of F & L's assets from \$3,174,125 in 2020 to \$2,741,371 in 2021. F & L suffered a significant loss for the year ended March 31, 2021, despite receiving \$461,177 in government assistance, and F & L's retained earnings were - \$94,177 (*i.e.*, in deficit). F & L has been selling some equipment in order to make payments to ACU and to finance continuing operations, but which equipment is being sold and what remains is unexplained. This factor favours granting the receivership order.

Creditor's right to appoint a receiver under the loan documentation

[59] In its agreements with ACU, F & L consented to the appointment of a

receiver in the event of a default. F & L has not repaid the Demand Loans in full, complied with its financial reporting obligations to ACU despite repeated requests for such information, or maintained property insurance on the building located on the Business Land as required. F & L is in default and accordingly ACU is entitled under their agreements to appoint a receiver. This factor favours a court appointment as well.

Expectation of difficulty of enforcement of security-holder's rights

[60] ACU expressed the concern that it would have difficulty enforcing its rights in the absence of a court-appointed receiver. ACU refers to its frustrated efforts to obtain current and accurate financial information from F & L, F & L's refusal to cooperate with the Business Review, and the failure of F & L's principals to meet with ACU representatives to discuss F & L's financial circumstances.

[61] The evidence demonstrates that F & L has not cooperated with ACU's reasonable efforts to obtain clarity on F & L's financial position and has failed to provide requested financial information on a timely basis or at all, including financial statements for the last two fiscal years, in breach of its contractual obligations. F & L has also rebuffed requests to meet with ACU and the proposed Business Review. This factor also supports court-appointment of a receiver.

Whether court appointment is necessary to enable a receiver to carry out its duties

[62] F & L's recent history of lack of cooperation with ACU also suggests that a court order was required in the present circumstances.

Balance of convenience and effect of the order on the parties

[63] F & L argued that appointment of a receiver would destroy its business.

The evidence shows that F & L is already in precarious financial circumstances. MNP is an experienced trustee and has undertaken such assignments on many occasions. A receiver-manager may bring a fresh perspective to the business's viability as a going concern. If F & L's fortunes are not dire, as its principals claim in their affidavits, this should become apparent to the receiver.

[64] A court-appointed receiver will have authority to communicate directly with F & L's creditors, including the Receiver General, so that ACU has an accurate understanding of F & L's financial circumstances.

[65] Undoubtedly the imposition of a receiver on the business affairs of F & L will be disruptive to its day-to-day operations. This must be weighed against ACU's demonstrated need to achieve transparency into the true state of F & L's finances, especially in light of the fact that less intrusive measures, such as a Business Review, were rebuffed by F & L. Overall, this factor is neutral to my conclusion regarding the appointment of a receiver.

Conduct of the parties

[66] ACU refers again to F & L's failure to provide financial information despite ACU's many requests. In addition, ACU notes the significant discrepancies between the 2021 Financial Statement and the margining certificates received for March and April 2021, which cast doubt on the reliability of subsequent margining certificates provided by F & L. ACU says that it has lost confidence in F & L's management.

[67] In contrast, ACU submits that it showed patience toward F & L throughout its efforts to obtain financial disclosure and only turned to the court after those efforts had failed.

[68] Having regard for all of the evidence on this point, I am persuaded that the parties' conduct also favours appointment of a receiver.

Cost to the parties

[69] The receivership order provides for \$250,000 in additional borrowing to fund the receivership. While this is a significant sum, it is not disproportionate given the nature of the Business.

Conclusion

[70] Based upon my review of the relevant factors, and looking at the circumstances holistically, I am persuaded that the appointment of a receiver pursuant to s. 243 of the *BIA* is just and convenient. I have also considered whether alternate remedies are also available to ACU, such as the right to commence foreclosure proceedings or to enforce its security under the *PPSA*. However, ACU would have to initiate multiple proceedings in order to enforce its rights. More importantly, those alternate remedies would not clarify what amounts F & L owes to the Crown and what arrangements may be in place regarding enforcement of F & L's statutory obligations. ACU is entitled to understand whether F & L's property is subject to deemed trusts in favour of the Crown and whether ACU is also at risk of liability.

[71] It follows from my conclusion that appointment of a receiver is just and convenient that I did not accept F & L's position that the application should be adjourned until F & L's financial statements for 2022 and 2023 can be completed. F & L provided ACU repeated assurances that its financial statements were nearing completion, which proved not to be the case. The financial statements for the fiscal years ended March 31, 2022 and March 31, 2023 are now long overdue. An adjournment to an uncertain date so that F & L could have its financial statements

prepared, in the hope that they would show an improved financial position, was not appropriate.

Is MNP precluded from acting as receiver?

[72] In support of its application, ACU filed MNP's written consent to act as a court-appointed receiver of the assets and undertakings of F & L.

[73] During the hearing, F & L's counsel argued that MNP is in a conflict of interest and is precluded from acting as a court-appointed receiver in this case. F & L referred to the facts that MNP had prepared F & L's 2021 Financial Statements and F & L had been communicating with MNP about preparing its financial statements for the years ending March 31, 2022 and March 31, 2023. The terms of MNP's engagement by F & L were not in evidence.

[74] In the circumstances, I granted leave to MNP to file an affidavit to respond to this issue. MNP's counsel subsequently advised the court by letter that, pursuant to its professional obligations and code of conduct, MNP was not permitted to file affidavit evidence with respect to its involvement with F & L. Thereafter, counsel for F & L informed the court that MNP had declined the engagement to complete F & L's 2022 and 2023 financial statements. F & L did not indicate whether its objection to MNP's appointment was withdrawn in light of this development, so I have proceeded on the basis that this remains a live issue.

[75] In argument, counsel for MNP referred to the decisions in *Wabush Hotel Limited v Business Development Bank of Canada*, 2017 NLCA 35 at paras 10-13, 48 CBR (6th) 181 [*Wabush*] and in *620630 Saskatchewan Ltd. v PriceWaterhouse Coopers Inc.*, 2003 SKQB 175, 235 Sask R 239 [*620630 Sask*]. In the former case, PriceWaterhouse Coopers [PWC] had assisted the debtor in its unsuccessful financial

restructuring efforts while, in the latter, PWC had acted as a monitor to assess and report on loans made to a third party. In both cases, the question was whether PWC’s prior engagement created a conflict with its subsequent appointment as receiver. A distinguishing feature of both cases from the present situation is that PWC’s engagement letters expressly provided that it would not be conflicted out from other mandates, including appointments by court order. As noted, MNP’s engagement letter is not before the court.

[76] However, in *620630 Sask* at para 4, Registrar Herauf (as he then was) reasoned that PWC could have been appointed receiver in that case even without the acknowledgement in its engagement letter:

[4] I mention the point relating to PWC as both a “monitor” and receiver to show that it was specifically recognized that there would be no conflict if PWC was appointed receiver. In fact, even without the acknowledgement in the engagement letter, it would appear logical and cost effective to ensure that the monitor would be the receiver if that eventuality occurred. This would avoid the potential for duplication and increased fees by the appointment of an entity that had not already become familiar with the debtor companies through the previous work carried out as a monitor.

[Emphasis added]

[77] After citing this passage with approval in *Wabush*, Harrington J.A. added that the evidence did not show any negative effects related to the alleged conflict; for example, the evidence did not show that PWC contributed to the debtor’s default.

[78] The evidence in the present instance does not establish that MNP is in a conflict of interest preventing it from acting as a court-appointed receiver. Moreover, having prepared the 2021 Financial Statement, MNP will have some familiarity with F & L’s business, saving time and expense compared to what would be necessary if another trustee were appointed.

Conclusion

[79] For the foregoing reasons I appointed MNP the receiver-manager of the Property of F & L Concrete Services Ltd. by granting the order in the form of the draft proposed receivership order filed on behalf of ACU.

J.
P.T. BERGBUSCH

KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 195**

Date: **2023 09 20**
Docket: KBG-RG-00909-2023
Judicial Centre: Regina

BETWEEN:

AFFINITY CREDIT UNION 2013

APPLICANT

- and -

F & L CONCRETE SERVICES LTD.

RESPONDENT

Counsel:

Ryan Pederson
Grant Schmidt
M. Kim Anderson and Travis K. Kusch

for the applicant
for the respondent
for MNP Ltd.

(September 20, 2023)
CORRIGENDUM to JUDGMENT
of (August 17, 2023)

BERGBUSCH J.

[80] The first sentence in paragraph 27 should read as follows:

On March 1, 2023, ACU received notice of cancellation of insurance for the shop located on the Business Land.

[81] The last sentence in paragraph 58 should read as follows:

This factor favours granting the receivership order.



J.
P.T. BERGBUSCH