COURT FILE NUMBER	**Q.B.G 1705 of 2020**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE	**REGINA**
APPLICANT	**HER MAJESTY THE QUEEN, SASKATCHEWAN (AS REPRESENTED BY THE MINISTER OF ENERGY AND RESOURCES)**
RESPONDENT	**BOW RIVER ENERGY LTD.**

IN THE MATTER OF THE RECEIVERSHIP OF BOW RIVER ENERGY LTD.

BRIEF OF LAW ON BEHALF OF THE APPLICANT, HER MAJESTY THE QUEEN, SASKATCHEWAN (AS REPRESENTED BY THE MINISTER OF ENERGY AND RESOURCES)
(Receivership Order)

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BRIEF OF LAW ON BEHALF OF THE APPLICANT,

I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicant, Her Majesty the Queen, Saskatchewan (as Represented by the Minister of Energy and Resources) (the "**Ministry**"), in support of its application for an Order pursuant to section 65(1) of *The Queen's Bench Act, 1998*, SS 1998, c. Q-1.01 (the "**QBA**"), appointing BDO Canada Limited as receiver (the "**Receiver**"), without security, of certain of the assets, undertakings and properties of Bow River Energy Inc. (the "**Debtor**") acquired for or used in relation to the business carried on by the Debtor (the "**Property**").

2. The Ministry is seeking to enforce compliance with the end-of-life obligations of Bow River with respect to the licensed wells, facilities and pipeline segments of Bow River in Saskatchewan (the "**Licensed Assets**"), is acting in a bona fide regulatory capacity and does not stand to benefit financially. The Ministry's ultimate goal is to have the environmental and end-of-life obligations (collectively, the "**EOL Obligations**") of Bow River associated with the Licensed Assets satisfied or addressed by Bow River to the fullest extent possible.

3. Bow River has advised that it will cease operations effective October 29, 2020[1] and after that date will not have any directors or officers, employees or contractors, and no financial resources to provide care and control of the Licensed Assets. After October 29, 2020 there is no entity that will be in a position to have care and control of all of the Licensed Assets or that is capable of complying with the ongoing regulatory and legislative requirements associated with the Licensed Assets.

4. In accordance with the practice authorized by the Court of Queen's Bench for Saskatchewan of using template orders in Saskatchewan receivership proceedings, the Ministry has filed a redlined version of the Saskatchewan Template Receivership Order which identifies the manner in which the draft Receivership Order being requested varies from the template receivership order that has been approved by the Insolvency Panel of

[1] Affidavit of Brad Wagner, sworn on October 26, 2020, at para. 17.

the Court of Queen's Bench for Saskatchewan.

II. FACTS

5. The facts relied upon by Ministry in support of this application are those set out in the Affidavit of Brad Wagner sworn October 26, 2020 (the "**Wagner Affidavit**").

6. Unless otherwise defined herein, capitalized terms in this Brief of Law shall have the respective meanings ascribed to them in the Wagner Affidavit.

7. The Ministry further relies on all of the materials filed in support of this application which are referenced in the Notice of Application returnable on October 28, 2020.

III. ISSUES

8. The Ministry respectfully submits that this application raises the following issue for determination by this Honourable Court, namely: Is it just or convenient for the Court to grant an Order appointing a receiver of the Debtor upon the terms contained in the draft Receivership Order?

IV. ARGUMENT

9. The Ministry brings this receivership application pursuant to section 65(1) of the QBA, which provides that the Court, on application, may to appoint a receiver if it is "just or convenient to do so". The section reads as follows:

> **Interlocutory mandamus, injunction or appointment of receiver**
>
> 65(1) A judge may, on an interlocutory application, grant a mandamus or an injunction or appoint a receiver where it appears to the judge to be appropriate or convenient that the order should be made.
>
> (2) An order pursuant to subsection (1) may be made unconditionally or on any terms and conditions that the judge considers appropriate.
>
> [emphasis added]

10. Furthermore, Rule 6-41 of the new Rules sets out how a party can apply for appointment of a receiver manager:

How applications are made

> **6-41** Subject to the provisions of *The Queen's Bench Act*, the Court may make an interim orders for *mandamus*, an injunction, the appointment of a receiver or for the interim preservation of property on an application:
> (a) without notice; or
> (b) on any notice that the Court may direct.

11. The test for when a receiver manager will be appointed pursuant to section 65 of the QBA was explained by Klebuc J.(as he then was) in *Pelican Lake First Nation v. Bill*, 2003 SKQB 566, 244 Sask. R. 182. In that decision, Klebuc J. confirmed that a receiver manager will be appointed when a judge considers it "just or convenient" to do so:

> [14] Section 65 of *The Queen's Bench Act*, *supra*, provides that a judge of this Court may, on an interlocutory application, appoint a receiver where it appear to the judge that such an order is appropriate or convenient. The section also empowers the Court to impose terms and conditions as part of a receivership order.
>
> ...
>
> [19] At pp. 3 and 4, *Bennett on Receiverships* summarized the method for obtaining a court-appointed receiver and the purpose for such a receiver in these words:
>
> > . . . Under section 101 of the Courts of Justice Act, a court may appoint a receiver or a receiver and manager where it appears to the judge that it is "just or convenient" to do so . . . . The most common use of this section is by a security holder who seeks the assistance of the court for the purpose of enforcing the rights under a security instrument against the debtor's assets. It is also used in many different situations whether at common law or in equity . . . .
> >
> > In addition, the court may appoint a receiver pursuant to the power granted by another statute or by way of equitable execution following a judgment against the debtor. Lastly, the court may appoint a receiver where it is necessary to preserve specific property from some danger during the course of a lawsuit between the parties. This situation does not arise as frequently as the others. Such a receiver is seldom given the power to sell the property except in the ordinary course of business. In this case, the receiver is a custodian of the property pending disposition of the action. The plaintiff usually claims some proprietary interest in the property.
>
> At p. 134, *Bennett on Receiverships* enumerates circumstances in which a court will appoint a receiver, or a receiver and manager, namely:

> (1) any partnership dispute in order to protect assets that may be in the possession and control of one of the partners;
>
> (2) by an execution creditor for the appointment of an equitable receiver in aid of execution;
>
> (3) by shareholders of a corporation which is mismanaged; or in a shareholders' dispute where there is a "hopeless deadlock";
>
> . . .
>
> (7) by a party to an action where it is necessary to preserve and protect the property that is in dispute pending a declaration or a judgment.

The phrase "just or convenient" is often referred to in receivership applications. In *Receiverships*, Bennett at p. 91 articulates the essential requirements of such phrase:

> In determining whether it is "just or convenient" that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others.
>
> [emphasis added]

12. In the last paragraph referenced above, Klebuc J. relied on Bennett's identification of factors to determine if a circumstance was just or convenient to warrant appointment of a receiver manager. These factors include whether irreparable harm might occur if no order is made.

13. Section 65 of *The Queen's Bench Act, 1998* is similar to section 13(2) of *The Judicature Act*, RSA 2000, cJ-2 which reads as follows:

> 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 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.

14. In determining whether to grant relief pursuant to section 13(2) of the *Judicature Act*, the Alberta Court of Queen's has adopted the same test used for granting interlocutory

injunctive relief. The "tripartite test" for interlocutory injunctive relief was outlined by the Supreme Court of Canada decision in *RJR - MacDonald Inc. v. Canada (Attorney General),* 1994 SCC 117, [1994] 1 SCR 311 which was cited in *MTM Commercial Trust v. Statesman Riverside Quays Ltd.*, 2010 ABQB 647 ("***MTM Commercial***") as follows:[2]

a. a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

b. it must be determined that the moving party would suffer "irreparable harm" if the motion is refused; and

c. an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience".

Serious Issue to be Tried

15. As outlined in *MTM Commercial*, in determining whether there is a serious issue to be tried, the Court will look at "the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial".[3]

16. The Ministry, has established a strong prima facie case that Bow River is not able to exercise care and control of its Licensed Assets after October 29, 2020.

17. The Ministry has significant concerns regarding what will happen in respect of the Licensed Assets (especially those that are continuing to produce) of Bow River once it ceases operations, no longer has care and control of the Licensed Assets, and no longer has the protection of the *CCAA* proceedings.

18. The Ministry submits that there is no practical or legal basis for which to deny the Receivership Application as a result of all of these significant issues.

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[2] *MTM Commercial Trust v. Statesman Riverside Quays Ltd.,* 2010 ABQB 647 ("***MTM Commercial***"), at para. 12

[3] *MTM Commercial*, at para. 52.

Irreparable Harm Test

19. When reviewing this factor, the Ministry would have to show that failure to grant the Receivership Order would "give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured".[4]

20. It is submitted that failure to appoint a Receiver could have significant environmental risks if the Licensed Assets of Bow River are not properly transferred to a entity who has proper funding to continue operations or, alternatively, shut in, seal and lock assets in the proper manner in accordance with Bow River's regulatory obligations. Additionally, if there is no stay of proceedings continued after expiry of the *CCAA* proceedings there are also concerns that other creditors will take steps to commence enforcement proceedings or terminate leases or other agreements associated with the Licenses Assets. The harm cannot be quantified in monetary terms that could be paid by Bow River.

Balance of Convenience Test

21. This factor requires the Court to assess which of the parties would suffer greater harm from the granting or refusal of an interlocutory injunction, or in this case, which party would suffer greater harm in the granting or refusal of the Receivership Order.

22. In *BG International Ltd. v. Canadian Superior Energy Inc.*, the Alberta Court of Appeal dealt with an appeal of a decision appointing an interim receiver to take control of an oil well operated by Canadian Superior Energy Inc. located off the coast of Trinidad and Tobago. The receivership order at issue was granted under the *Judicature Act* and the Court of Appeal provided the following commentary with respect to balancing the rights of the parties:[5]

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver

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[4] *MTM Commercial*, at para. 56.

[5] *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, at para. 17.

can have devastating effects. The respondent referred us to the statement in Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

23. Bow River is not opposing the Receivership Application and there is no indication that it will not work cooperatively with the Ministry to ensure that its Licensed Assets do not pose any health, safety or environmental risks.

24. Bow River has also advised that it is ceasing operations, will not have any directors or officers and all of its employees and contractors will be terminated on October 29, 2020.

25. Bow River has also advised it no longer has the financial resources to operate its assets in accordance with the regulatory and legislative requirements after October 29, 2020.[6] This is a significant point of concern for the Ministry especially as after October 29, 2020, if no Receiver is appointed, there does not appear to be any one who is a valid licensee and who will be able to have proper care and control of the Licensed Assets.

26. Bow River has also not filed an application seeking an extension of the stay of *CCAA* proceedings past October 30, 2020. Once the stay is lifted, and the Monitor discharged, there can be no further *CCAA* proceedings to advance.

27. The Ministry is acting in its capacity to regulate the Saskatchewan oil and gas sector, not as a creditor, and in a manner that has been held to be a valid and proper enforcement

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[6] Wagner Affidavit, at para. 17.

of valid provincial law. Bow River is not taking a position with respect to the Ministry's proposed relief and it cannot be said that any party would be prejudiced by the requested relief if granted. When weighing the position of the parties, it is respectfully submitted that any balancing of interests favors the position of the Ministry: Bow River must satisfy its EOL Obligations prior to returning any value from its estate to creditors and a Receivership Order is warranted in the circumstances.

28. It is respectfully submitted that there are no appropriate remedies short of appointing a Receiver over the Licensed Assets in the current case that would protect the interests of all of the stakeholders of Bow River.

V. RELIEF REQUESTED

29. For all of the foregoing reasons, the Ministry respectfully requests that this Honourable Court grant an Order appointing BDO Canada Limited as receiver of certain of the assets, undertakings and properties of the business assets of the Debtor in accordance with the terms of the draft Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2020.

MLT AIKINS LLP

Per: ______________________________
K. James Rose, counsel for Her Majesty the Queen, Saskatchewan (as Represented by the Minister of Energy and Resources

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VI. TABLE OF AUTHORITIES

JURISPRUDENCE	TAB
BG International Ltd. v. Canadian Superior Energy Inc., 2009 ABCA 127.	A
MTM Commercial Trust v. Statesman Riverside Quays Ltd., 2010 ABQB 647	B
Pelican Lake First Nation v. Bill, 2003 SKQB 566, 244 Sask. R. 182.	C

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

APPEAL by operator of oil well of decision appointing interim receiver.

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***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia.

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He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had

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already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

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Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles

Debtors and creditors --- Receivers — Appointment — General principles

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.

Contracts --- Remedies for breach — Injunction

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on

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balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.
Contracts --- Construction and interpretation — Miscellaneous
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.
Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion
M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

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

Introduction

1 By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");

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(c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;

(d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

2 By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

(a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and

(b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

3 The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

4 By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

5 After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

7 Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

8 Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

9 Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The

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potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

10 While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

12 The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.), as follows:

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

(i) Strength of the Applicant's Case

Breach of Agreements

13 Matco and Statesman set up a structure and entered into a series of agreements in order to develop the Project, which is to be a residential project in the Inglewood area of Calgary. In total, the Project is to include 615 apartments and 71 townhouses in six phases. Matco owned the land and Statesman was to provide the development services.

14 The Partnership was created, the units of which are held by a trust. Other investors invested in the trust, but Matco and Statesman hold the largest interests through corporate, individual, family and employee investments. The General Partner is SRQL, a corporation that Matco and Statesman own equally.

15 The USA provides that Matco and Statesman have equal representation on the board of directors of the General Partner and that all major decisions require unanimous directors' approval. Such decisions include approving related party transactions, executing any contract more than $100,000 and requiring capital contributions. The USA also provides that, to the extent development financing is available on reasonable market terms, it would be obtained rather than utilizing shareholders' equity. Matco submits that the result is that, while Statesman has day-to-day control of the General Partner's operations, Matco retains the ability to restrain the pace of development, to fund it through borrowing rather than equity and to oversee Statesman's management of the Project.

16 Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development,

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any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

17 Under the Limited Partnership Agreement, SRQL as General Partner agrees to discharge its duties honestly, in good faith, and in the best interests of the Partnership. If the General Partner breaches its obligations in such a way as would have a materially adverse effect on the business, assets or financial condition of the Partnership, the Limited Partner (being the trust) is entitled to remove and replace the General Partner by resolution.

18 While there is some confusion over terminology, it is clear that development of the Project was planned in phases. Subject to conditions for each phase, bank financing was obtained for land acquisition and infrastructure, and for construction of the first two phases of residential units (the Bank of Montreal Credit Agreement dated April 21, 2008).

19 Land acquisition and infrastructure (including a parkade for Phases 1 and 2) were funded by the Bank and are complete. Phase 1 of the residential unit construction was also funded and is essentially complete. Phase 1 is comprised of 124 residential condominium units and an amenities centre.

20 Phase 2 is to consist of a second building of 122 residential condominium units, plus two townhouses.

21 Only nine units in Phase 1 remained unsold as of July 20, 2010, although 14 sales were pending. As of that date, 57 units in Phase 2 had been pre-sold. The Credit Agreement was revised on June 9, 2010 to provide that, as a condition precedent to the Bank providing financing for Phase 2, there must be satisfactory evidence of not less than 166 eligible purchase agreements under Phase 1 and Phase 2. Statesman submits that sales agreements for 169 units have been submitted to the Bank for review.

22 Matco submits that Statesman has begun to disregard its obligations under the agreements. It asserts breaches of various agreements, some of which it submits amount to misappropriation and misapplication of funds. It alleges that, without seeking the necessary directors' or Management Committee approval, Statesman or one of its affiliates executed more than $12.5 million worth of construction contracts in excess of $100,000 each, and commenced Phase 2 of the development. Matco also alleges that Statesman instructed trades to carry out more than $2 million of Phase 2 construction work without first having met the Bank's funding requirements.

23 Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

24 Initially, Statesman submitted that the construction that was the subject of Matco's complaints was part of Phase 1 and that there had been no improper commencement of Phase 2 construction. It was now clear, from evidence from the architects, the City, the banking documents, the Statesman Project Manager, tradespeople, the Statesman Chief Financial Officer and even cross-examination of the President of Statesman, that Phase 2 construction has commenced and that more than $12.5 million of contracts that relate to Phase 2 have been executed by Statesman.

25 Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2 budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

26 Statesman does not deny that it did this. It submits, however, that, since the construction of Phase 2 of the Project is not an event outside the ordinary business of the General Partner or the Partnership, consent of all the directors of SRQL to the commencement of construction on Phase 2 is not required under the USA.

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27 Statesman argues that under the USA, the development of the Project as a whole has been approved and that there is therefore no need to obtain approval of each phase. These submissions do not deal with the alleged breaches of specific terms of the DMA and the USA.

28 Statesman submits that, at any rate, Matco's failure to give consent is not commercially reasonable. That is not within the province of this court to decide: Matco is not under any contractual obligation to act in a commercially reasonable manner in giving or withholding its consent, and Matco's motives or judgments in respect of its decision are not properly at issue before me, except to the extent that they may relate to considerations of irreparable harm or balance of convenience.

29 Statesman submits that, pursuant to the by-laws of SRQL's board of directors, the President of Statesman, Garth Mann, has a casting vote as Chairman of the board, and therefore effectively a determining vote with respect to construction matters.

30 However, Section 3.5 of the USA provides that each shareholder shall use its best efforts to cause its nominees to the SRQL board to act in such a way to ensure that the provisions of the USA shall govern the affairs of the corporation, and provides that if there is any conflict between the provisions of the USA and the articles or by-laws of SRQL, the articles or by-laws will be amended. The nature of a USA does not allow its provisions to be trumped by a procedural by-law, and the provisions of the USA that require approval by all directors of certain major decisions cannot in effect be vitiated by such a by-law.

31 Statesman also submits that Matco has no entitlement to halt construction until shareholders' loans are repaid (which it submits is the reason for Matco's reluctance to agree to the next stage of construction), citing section 8.1(d) of the USA which provides for equity injections by shareholders in certain circumstances. Matco rightly points out that additional capital contributions to the Partnership require the unanimous consent of the directors of SRQL.

32 Statesman submits that Matco was aware that construction had commenced on Phase 2. It appears from the evidence that Matco had begun to suspect that construction on Phase 2 had commenced in May of 2010, although there may have been general discussion of Phase 2 requirements in the months leading up to May. It also appears that Matco became aware of what it asserts are other breaches and misconduct of Statesman at about the same time. The Originating Notice was filed on July 8, 2010. Matco therefore acted with reasonable dispatch once it became suspicious that breaches had occurred.

33 Matco also submits that Statesman has beached the DMA in other ways. By the terms of the DMA, the Manager is a fiduciary to the Partnership, and the DMA "shall terminate upon any of" certain events. One such event is said to occur when the "Manager misappropriates any amounts or defrauds the Partnership in any manner whatsoever".

34 The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

35 Matco submits that, in breach of the express terms of Clause 5.06 of the DMA, SMBI misapplied Partnership funds to pay unauthorized sales commissions, salaries and fees to its staff. The amounts improperly taken appear to total about $51,328 not including an additional $6,000 of what Matco asserts are improper referral fees.

36 Statesman does not deny that SMBI paid such amounts to its sales staff, nor does it assert that it had Matco's approval or consent, but it claims that its actions represented good and necessary business decisions. Statesman also submits that the amounts paid are reasonable out-of-pocket costs and expenses under Clause 5.09 of the DMA and thus do not require Matco's consent.

37 Statesman says that these payments have been disclosed to Matco or its representatives in the Construction Superintendent Reports, and that, in any event, these issues should be dealt with by arbitration. Statesman submits that if the amounts paid are not permitted under the DMA, it will reimburse the Partnership.

38 The June 9, 2010 Management Committee Meeting minutes state the following with respect to this issue:

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> Mr. Mathison queried commission payments apparently made contrary to the agreed formula and in excess of budget. Mr. Mann acknowledged that higher commission payments had been made to Statesman salespeople. He stated that MLS Resale Listing fees were forgiven to stimulate sales where a purchaser had a product to sell, therefore, offset the higher commission payments with a zero net result. Mr. Mathison repeated that this decision was again made unilaterally without notice or the approval of Matco.

39 It therefore appears that Matco did not agree to this alleged breach, by silence or otherwise.

40 Matco also submits that Statesman breached the provision of the USA that requires approval by the SRQL directors of the execution of any contract involving more that $100,000.

41 Statesman submits that the DMA gives the Manager the responsibility of awarding construction contracts. That responsibility, however, is subject to the specific terms of the DMA agreement, which includes the provision that the Manager shall submit construction contracts to the Management Committee for approval, provided that in any disagreement Statesman has the determining vote. There is no evidence that these contracts were submitted to the Management Committee for approval. Statesman points out, however, that Phase 1 construction contracts were not all submitted to the Management Committee.

42 There is a certain amount of ambiguity in the agreements with respect to the concept of a Management Committee. The DMA does not define the structure of the Management Committee, but merely states it shall be "as constituted and subject to the Partnership Agreement" (Section 1.03). The Limited Partnership Agreement does not reference a Management Committee. The recitals to the DMA provide that the Partnership wishes to engage the Manager and Matco as to certain strategic management decisions and Section 1.15 of the DMA engages Matco as a "strategic manager" for the Project. However, the DMA clearly requires Management Committee oversight and approval of numerous matters, and the parties have operated with a Management Committee with equal representation from Matco and Statesman. Whether the Management Committee is a committee of the directors of SRQL or of SRQL as Manager and Matco as "strategic manager" is not entirely clear.

43 While this ambiguity exists, the issue is less the conduct of Statesman in entering into individual contracts, and more the complaint that it commenced construction on Phase 2 without Management Committee approval.

44 Section 4.4(f) of the USA provides that all directors of SRQL must approve "related party transactions and major decisions with regard to those transactions".

45 There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

46 Matco also submits that Statesman is guilty of misconduct that amounts to fraud and dishonesty, apart from alleged breaches that simply relate to breach of contractual provisions.

47 Matco submits that Mr. Mann committed the Partnership to a US $732,600 promissory note to pay an unrelated debt of an American affiliate of Statesman. It also submits that Statesman signed up a number of tradespeople to agreements to purchase residential units on the understanding that they would not be required to close such purchases.

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48 There is conflicting affidavit and cross-examination on affidavit evidence with respect to these serious allegations. With respect to the allegation that Mr. Mann on behalf of Statesman used SRQL to guarantee a settlement obligation of a Statesman affiliate that had nothing to do with the Project, Matco alleges Statesman did not just commit SRQL as a co-promissary on a promissory note that had nothing to do with the Project, but attempted to block the Applicants from obtaining information about this.

49 Statesman asserts that this was an innocent and inadvertent clerical error that was remedied within a few days, but at any rate by June 16, 2010. There are serious issues of credibility that arise from the documentation and the evidence of Mr. Mann and others on this issue. Given the serious nature of the allegation and the conflicting evidence, this issue requires *viva voce* evidence before a determination can be made.

50 With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called "investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

51 Matco complains of a number of other breaches and irregularities in the management of the Project. Given the conclusion I have reached on the alleged breaches described, it is not necessary to review all of these allegations.

52 While the first factor of the test set out in *RJR-MacDonald* only requires a serious issue to be tried, the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial. I am satisfied that in this case Matco has established a strong *prima facie* case of breach of contract with respect to the question of whether Statesman proceeded with the construction of Phase 2 of the Project without the necessary approvals of Matco as required under the various agreements.

53 I am also satisfied that these breaches amount to a breach of a negative obligation, which is in substance the obligation not to proceed to the next phase of construction without obtaining Management Committee approval or the approval of all of directors of SRQL under the USA.

54 The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

55 The contractual interpretations that Statesman submits would lead to the conclusion that approval of construction of Phase 2 of the Project is not necessary or that Mr. Mann has a casting vote that would allow Statesman to make the decision to proceed in the face of Matco's opposition do not address the structure of the development agreements as a whole, and ignore or fail to give effect to specific provisions to the contrary.

(ii) Irreparable Harm

56 While there are authorities that suggest that it is unnecessary to establish irreparable harm or that less emphasis will be placed on this factor in the context of an injunction application involving a negative context (see John D. McCamus, *The Law of Contracts*, Irwin Law Inc., 2005 at page 995, note 197), I have considered the application with reference to this factor. To

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show that it would suffer irreparable harm, Matco must establish either that failure to enjoin Statesman's continued breach of contract would give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured.

57 Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk. If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

58 In the usual case of an application for injunctive relief, the moving party would provide an undertaking in damages in the event it is not ultimately successful. Given the manner in which this application has proceeded, Matco has not had an opportunity to address this requirement. If Matco is unwilling to supply the usual undertaking as to damages, it has leave to apply to be relieved from such an obligation. Such an undertaking should be supplied or an application to relieve from the undertaking should be made within two weeks, and Statesman will of course be allowed an opportunity to respond to the application.

(iii) Balance of Convenience

59 This factor requires the Court to consider which of the parties would suffer the greater harm from the granting or refusal of an interlocutory injunction.

60 It is clear that failure to enjoin Statesman from continuing to breach the agreements by continuing construction on Phase 2 of the Project would nullify Matco's right to a say in whether construction on the Project should continue at this time. As noted by Matco, Statesman has indicated no commitment to discontinue the alleged breaches: rather, by its response to the application, it asserts its right to proceed without consultation or approval and applies to be relieved of its voluntary undertaking to stop construction and for confirmation of what it says is its right to proceed.

61 The enforcement of the negative obligation not to continue construction on Phase 2 without Matco's consent would not required Court supervision and has in fact already been effected through the voluntary shut-down of the Project. It is possible to readily define what Statesman should be enjoined from doing. There is no issue that permanent injunctive relief may not have been an available remedy to Matco after trial, given the nature of the obligation as a negative obligation.

62 Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

63 It is noteworthy that Matco does not propose that the Project be abandoned or that development cease on a permanent basis: what is involved is a difference of opinion between two experienced partners to a development with respect to the timing of development, the structure and availability of financing and the use of funds. Whether Matco or Statesman is correct with respect to these matters is not a question to be decided by this Court. What the Bank may do in the face of a failure to recommence construction on Phase 2, what various tradespeople or purchasers who have entered into pre-sale agreements may do is only speculative at this point, and does not tip the balance of convenience in favour of one party or the other.

64 It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

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65 I find that the balance of convenience favours Matco in this case, as failure to grant the injunction would nullify its contractual right to be part of the decision to proceed. If the remedy was withheld, that right would be so impaired by the time the issues could be ultimately determined on their merits by unilateral action by Statesman that it would be too late to afford Matco complete relief.

C. Should There Be an Order Confirming the Termination of SMBI as Manager of the Project?

66 As previously indicated, the DMA provides that it shall terminate if the Manger "misappropriates any monies or defrauds the Partnership in any manner whatsoever." Matco submits that misappropriation does not require fraud or even dishonesty and that it is sufficient if there is a failure by a fiduciary to meet an obligation, even where the fiduciary believes the reasons for his failure to be valid, citing *Kitnikone, Re* (1999), 13 C.B.R. (4th) 76 (B.C. S.C.) at 77 -78 and *Janco (Huppe) v. Vereecken* (1982), 44 C.B.R. (N.S.) 211 (B.C. C.A.) at 213 -214.

67 Matco submits that the alleged misappropriation by SMBI of partnership funds to pay unauthorized sales commissions to its staff is a misappropriation that has terminated the DMA. Statesman's response to this submission has been set out previously in these reasons. While Matco has established a strong *prima facie* case of contractual breach, the issue of whether this alleged breach is a misappropriation is not entirely without doubt.

68 It will also not be clear until the issue of whether SRQL remains the General Partner of the Partnership who has authority to act for the Partnership in order to instigate termination of the DMA.

69 For these reasons, and since the issue of the removal and replacement of the General Partner remains to be determined on its merits for the reasons set out later in this decision, I make no final determination of this issue at this time.

D. Should There Be an Order Confirming the Removal of SRQL as General Partner?

70 By the terms of the Limited Partnership Agreement, SRQL was appointed as initial General Partner. Statesman has had day to day authority over the operation of SRQL, but the USA provides that all "Major Decisions", including the approval of related party transactions and the execution of any contract involving more than $100,000, require the approval of all directors. SRQL itself specifically committed to act exclusively as General Partner of the Partnership and to comply with these approval requirements. By the Limited Partnership Agreement, SRQL covenanted to discharge its duties honestly, in good faith and in the best interests of the Partnership.

71 The Limited Partnership Agreement provides that "the Limited Partners may remove the General Partner and appoint a successor by Extraordinary Resolution" where the "General Partner has breached its obligations under this Agreement in such a manner as would have a material adverse effect on the Business, assets or financial condition of the Limited Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010, the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

72 Matco submits that SRQL's actions in commencing over $2 million of Phase 2 construction and committing the Partnership to over $12.5 million of Phase 2 construction contracts without the approval of the directors of SRQL as required by the USA and without meeting the Bank's requirements for funding of the Phase 2 credit facility, SRQL's involvement in the alleged "dummy trades" scheme and the use of SRQL as a co-signatory on a promissory note unrelated to the Project all justify the removal of SRQL as General Partner of the Partnership.

73 While the Limited Partner of the Partnership, being MTM Commercial Trust, may remove the General Partner and appoint a successor by Extraordinary Resolution, Section 15.1(b) provides that if a breach is capable of being cured, the General Partner can only be removed if such breach continues unremedied for a period of twenty business days after the General Partner has received written notice of such breach from any Limited Partner, which in this case means MTM Commercial Trust.

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74 The alleged breaches with respect to the "dummy trades" and the promissory note problem have been addressed by the General Partner, although it may be an issue whether a fiduciary may cure a breach of trust of this kind. As indicated previously, these allegations, however, raise issues of credibility that cannot be determined in an application of this kind. The alleged breach of proceeding with construction of Phase 2 without required approval is less subject to credibility issues, and the question is whether it is appropriate to made a final determination of the issues of whether Statesman has breached the agreements in this respect, whether such breaches have had a material adverse effect on the business or financial condition of the Partnership, whether such breaches are capable of being cured and it so, whether proper notice has been given and thus whether the Limited Partner was justified in removing the General Partner as part of this summary application.

75 The interlocutory injunction granted in this application achieves the purpose of enjoining further alleged breaches while preserving Statesman's rights to fully present evidence and argument on these issues of contractual authority. While Matco has established a strong *prima facie* case, there are ambiguities in the agreements and submissions made with respect to contractual interpretation that do not make the matter entirely without doubt. I therefore decline to confirm the removal of SRQL as General Partner of the Partnership at this stage of the proceedings. It follows that confirmation of the appointment and confirmation of 1358846 Alberta Ltd. as new General Partner is premature.

76 For the same reasons that I decline to make a final order with respect to SRQL as General Partner and SMBI as Manager of the Project on the motion by the Applicants, I decline to confirm SRQL as General Partner and SMBI as Manager of the Project in accordance with Statesman's counter motions.

E. Should the SMBI Issue Be Stayed and an Arbitrator Appointed Pursuant to the Terms of the DMA?

77 I agree that the parties have gone too far down the litigation trail for some of the inter-related issues to be now referred to arbitration.

78 While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA. It would be undesirable to have a multiplicity of proceedings where there is clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 (Alta. C.A.) at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Alta. Q.B.) at paras. 6-9.

Conclusion

79 Statesman is enjoined from continuing construction on the Project until the issues of alleged breach of contract and other misconduct can be resolved on their merits or until the parties agree otherwise. I will remain seized of the matter as case management judge to hear applications to have the matters in issue proceed to a full hearing on an expedited basis and to hear any other related motions.

80 If the parties are unable to agree on costs of these applications, they may be addressed.

Application granted in part; cross-application dismissed.

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2003 SKQB 566
Saskatchewan Court of Queen's Bench

Pelican Lake First Nation v. Bill

2003 CarswellSask 883, 2003 SKQB 566, [2003] S.J. No. 866, [2004] 6 W.W.R. 314, 244 Sask. R. 182

Chief PETER BILL, Councillor GILBERT CHAMAKESE, Councillor ROMEO THOMAS, Councillor WILLIE THOMAS, Councillor ALLAN THOMAS, Councillor DAVID THOMAS and Councillor PETER SAKEBOW, AS REPRESENTATIVES OF THE CHIEF AND BAND COUNCIL OF THE PELICAN LAKE FIRST NATION (Plaintiffs) and EDWARD BILL, FRED THOMAS, DONALD ABBOT, GLEN THOMAS, NORMAN THOMAS, BERNICE BILL, LESLIE BILL, JIMMY BILL, ROGER WAYNE THOMAS, SIDNEY BELL, DENNIS BILL, LAUREEN THOMAS, KIMBERLY BILL, CHERYL THOMAS, RANDY HARRIS, SAMMY BILL, ANNABELLE HARRIS, HARVEY ABBOT, MARILYN THOMAS, ARLENE SAKEBOW, HARRIOT MYO, DORIS AHENAKEW, JONES THOMAS, PANCY HARRIS and MARY HARRIS (Defendants)

Klebuc J.

Judgment: December 12, 2003
Docket: Battleford Q.B.G. 271/03

Counsel: Benjamin J. Partyka for All Plaintiffs
J. Ronald Clerkewich for Defendants, Jones Thomas, Elder Norman Thomas, Elder Fred Thomas, Elder Pancy Harris, Elder Leslie Bill, Elder Jacob Bill (not listed in style of cause)

Headnote

Aboriginal law --- Bands and band government — Elections — Validity

Native band held elections to elect chief and band council — Election was set aside by Federal Court due to conflicts with federal election laws — Administrator company appointed to manage and distribute assets of band — Band passed new election laws which conformed to federal standards — New elections conducted — Applicants brought application to Appeal Board to nullify election results — Application dismissed — Applicants brought application for judicial review of Appeal Board decision — Appeal allowed and matter sent back to Appeal Board for reconsideration — Applicants brought application for appointment of interim receiver and manager to handle band's assets and businesses while validity of election was determined by Federal Court — Application dismissed — Weight of evidence indicated appointment of evidence not appropriate — Applicants failed to set forth claim or nature of their interest in assets to be placed under control of receiver — Applicants failed to set forth status to seek appointment of receiver in statement of claim or counterclaim — Appointment of receiver might have confused and complicated political difficulties of band.

Receivers --- Appointment — Application for appointment — Grounds

Native band held elections to elect chief and band council — Election was set aside by Federal Court due to conflicts with federal election laws — Administrator company appointed to manage and distribute assets of band — Band passed new election laws which conformed to federal standards — New elections conducted — Applicants brought application to Appeal Board to nullify election results — Application dismissed — Applicants brought application for judicial review of Appeal Board decision — Appeal allowed and matter sent back to Appeal Board for reconsideration — Applicants brought application for appointment of interim receiver and manager to handle band's assets and businesses while validity of election was determined by Federal Court — Application dismissed — Weight of evidence indicated appointment of evidence not appropriate — Applicants failed to set forth claim or nature of their interest in assets to be placed under control of receiver — Applicants failed to set forth status to seek appointment of receiver in statement of claim or counterclaim — Appointment of receiver might have confused and

complicated political difficulties of band — Moving party should undertake to pay damages if determined that appointment of receiver ought not have been made — Applicants did not undertake to pay damages as part of application.

***Klebuc J.*:**

1 The applicants (defendants) by notice of motion served on the respondents (plaintiffs within action) applied under s. 65 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, for an order appointing a receiver and manager for the Pelican Lake Indian Band ("the Band") with power to manage and operate the Band's businesses and assets until the Federal Court of Appeal determines the validity of an election conducted by the Band on February 28, 2001. A draft copy of the proposed order is attached as a schedule.

2 Of particular note, the applicants brought their motion in the within action wherein the respondents, as plaintiffs, seek damages against a number of defendants, including the applicants, for wrongfully blocking their access to Band property and intimidating and interfering with Band employees in the discharge of their duties. The respondents also sought and obtained an interlocutory injunction prohibiting the defendants named in their statement of claim from unlawfully interfering with the use of Band property and the administration of essential services. Several of the applicants breached the injunction but subsequently purged their contempt by undertaking to comply with its terms, as amended. No defence or counterclaim has been filed in the within action nor have the applicants issued a fresh statement of claim outlining the nature of their interest in the Band's assets and businesses, or any inability of the respondents to manage Band assets and businesses, or any misappropriation of Band assets by the respondents.

FACTS

3 In 1999, the Band wished to replace the procedures for electing a Band Council prescribed under s. 74-280 of the *Indian Act*, R.S.C. 1985, c. I-5, to a "customary electoral system" by means of an election Act approved by the Band. To that end, it prepared a draft version of *The Pelican Lake Band Election Act* ("the Election Act") and held several public information meetings wherein members of the Band could discuss the election procedures contemplated by the draft. In a subsequent referendum, the Election Act was not approved by a majority of eligible electors and the Minister did not approve it in substitution for the election procedures prescribed by the *Indian Act*.

4 Following advice received from Indian and Northern Affairs and Northern Development ("INAC"), the Band conducted an election for Band Council on April 14, 2000 ("the 2000 Election") pursuant to the Election Act and a Band Council Resolution ("BCR") passed in accordance with the requirements of the Election Act. The respondent Peter Bill was elected Chief of the Band and other persons were elected Band councillors. Their election was set aside by the Federal Court of Canada because the 2000 Election had been conducted pursuant to the Election Act when it was not valid or in force. In the result, a new election was necessary.

5 In the absence of a duly elected Chief and Band Council, INAC entered into an agreement entitled Pelican Lake First Nation Interim Third Party Agreement ("Management Agreement") with 629794 Saskatchewan Ltd. ("Administrator") in the latter part of 2000. In the Management Agreement the Administrator covenanted and agreed to administer funds payable by INAC to the Band pursuant to a Comprehensive Funding Arrangement dated March 8, 2000. Messrs. Peter Bill, Romeo Thomas, Pete Sakebow, Allan Thomas, Willie Thomas, Gilbert Chamakese, and David Thomas executed the Management Agreement in their capacity as the Administrator's directors. They further provided their several personal guarantees wherein they covenanted in their personal capacity and as directors of the Administrator to duly perform and observe the covenants of the Administrator contained in the Management Agreement, and severally acknowledged their liability to the Minister for any breach of the Administrator's obligations thereunder. In their personal guarantees, they also agreed not to hold themselves out as members of the "council of the band", and not to exercise or purport to exercise any powers or authority that would have vested in them as "council of the band" as defined in the *Indian Act*, if their election had not been contested. Following execution of the Management Agreement, the Administrator received funds from INAC and distributed them to Band members in relation to services covered by the Comprehensive Funding Arrangement.

6 Audits have been performed concerning the Administrator's handling of funds. There is no evidence of INAC being dissatisfied with the Administrator's performance. However, the respondents on several occasions breached their undertaking not to represent themselves as members of the "council of the band".

7 At a Band membership meeting on December 12, 2000, a motion "to have the ex- Chief and Council elected on April 14/00 to be the administrators of the 3rd Party Interim Government Agreement until the next Election" was passed by 101 in favour of the motion, six abstaining, and none against the motion. At the same meeting, Band members approved by a vote of 110 in favour, none against and no abstentions, a motion "that the present 3rd party management have signing authority for Clearwater and Carrier Lumber issues." These assets and businesses of the Band are not subject to the Management Agreement.

8 By referendum conducted prior to April 2000, the Band approved the Election Act. The Minister of Indian and Northern Affairs and Northern Development ("Minister") by Ministerial Order dated April 14, 2000 authorized the Band to conduct elections under Band custom rather than in accordance with the *Indian Act*. Section 11(1) of the Election Act provides for the appointment of an Appeal Board by Band members at a nomination meeting constituted for the purpose of selecting candidates who wish to run for the position of Chief or Band Councillor. At a meeting convened on December 12, 2000, the Band members by resolution authorized an election to be held on February 28, 2001, for the election of Chief and Band Council. The motion was based on the BCR passed by the Band Council in place before the 2000 Election.

9 On February 12, 2001, the Band held a nomination meeting during which Peter Bill, Edward Bill and Willie Thomas were nominated as candidates for the position of Chief. Following the nomination of candidates, including candidates for Band Council, the Band members present appointed Miriam Thomas, Elmer Thomas, Walter Lewis, John Malanowich and Isaac Chamakese to the Appeal Board prescribed by s. 11 of the Election Act. Isaac Chamakese resigned from the Appeal Board prior to the election slated for February 28, 2001 ("the 2001 Election").

10 On February 28, 2001, 439 of 507 eligible electors of the Band voted: 53 percent in favour of Peter Bill, 40 percent in favour of Edward Bill and 7 percent in favour of Wilson Thomas. Messrs. Gilbert Chamakese, Romeo Thomas, Willie Thomas, Allan Thomas, David Thomas and Peter Sakebow were elected Band Councillors.

11 Messrs. Edward Bill and Jimmy Bill, two unsuccessful candidates for Band Council, and Harvey Abbot appealed the election results to the Appeal Board pursuant to s. 12 of the Election Act. Therein they alleged:

> a) a serious error or violation of the *Pelican Lake Election Act* was made in the interpretation and application of the provisions of the *Act* and which errors or violations affected the outcome of the *Election* being contrary to Section 12(1)(a) of the *Act*; and
>
> b) the conduct of the *Election* extensively violated the requirements and procedures of the *Act* so as to constitute the *Election* corrupted being contrary to Section 12(1)(c) of the *Act*.

12 The remaining members of the Appeal Board considered the aforementioned appeal and rendered a written decision dated March 18, 2001, wherein they denied the appeal for the following reasons:

> 1) That the motion passed by a majority of adult members of the Pelican Lake Band at a December 12th, 2000 membership meeting, stated that they wished to hold a February 28, 2001 election, is valid and binding.
>
> 2) That the Pelican Lake Band Election Act is valid.
>
> 3) That the Election held on February 28th, 2001, electing a Chief and six Councilors is valid.
>
> 4) That the Election of February 28th, 2001 was held in a fair manner.

> 5) In a vote held by the Appeal Board members, the majority decision of the Appeal Board denies the Appeal by the Appellants; Harvey Abbot, Edward Bill, and Jimmy Bill.

Messrs. Harvey Abbot, Edward Bill and Jimmy Bill then applied to the Federal Court of Canada, Trial Division, for a judicial review of the Appeal Board's decision. By reasons for order and order dated March 25, 2003, Madam Justice Danièle Tremblay-Lamer set aside the Appeal Board's decision of March 18, 2001, on the grounds that the Appeal Board "was not properly constituted because there were only four members present, whereas the Act [Elections Act] states that five members are required", and the Appeal Board "failed to observe procedural fairness by hearing the opinion of the CEO and DRO while not providing the applicants an equal opportunity to respond". She remitted the matter back to the Appeal Board for further consideration in accordance with the Election Act. The Appeal Board appealed the decision of Tremblay-Lamer J. to the Federal Court of Appeal.

13 As of October 29, 2003, more than 180 days have elapsed since the filing of the notice of appeal by the Appeal Board. The Federal Court of Appeal by notice of status review dated October 29, 2003, required the Appeal Board "to show cause by written submission, to be served and filed no later than Friday, November 28, 2003, why this Appeal should not be dismissed for delay". Whether the Appeal Board had taken any steps is unknown. Thus, the status of the Chief and Band Council remains in limbo.

THE LAW

Statutory Provisions

14 Section 65 of *The Queen's Bench Act, supra*, provides that a judge of this Court may, on an interlocutory application, appoint a receiver where it appears to the judge that such an order is appropriate or convenient. The section also empowers the Court to impose terms and conditions as part of a receivership order.

15 Rule 387A of the *Saskatchewan Queen's Bench Rules* provides that an order for the interim preservation of property may be made by the Court on an application or upon such notice as the Court may direct. Rule 397 provides:

> 397 In every case in which an application is made for the appointment of a receiver by way of equitable execution, the court, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment; and may direct any inquiries on these or other matters before making the appointment.

Rule 3 defines "receiver" to include a "manager appointed by . . . the court".

Jurisprudence

16 McKeague in *The Queen's Bench Rules of Saskatchewan: Annotated*, 3d ed. (Regina: Law Society of Saskatchewan Libraries, 2001) at 33-3, paraphrased the law pertaining to the appointment of receivers articulated by Walker J. in *First Investors Corp. v. 237208 Alberta Ltd.* (1982), 20 Sask. R. 335 (Sask. Q.B.), as follows:

> Appointment of receivers, generally, is for the purpose of preserving property or by way of equitable execution. The court, in exercise of its statutory jurisdiction found in s. 65 of *The Queen's Bench Act, 1998*, may appoint a receiver by interlocutory order to receive and manage the property which is the subject of litigation whenever it appears to the court appropriate or convenient to do so . . . The power is discretionary, to be judicially exercised on all the circumstances of the case. The court has no jurisdiction to appoint a receiver to preserve property other than where there is a pending action. When appointed, a receiver is an officer of the court. The appointment does not affect ultimate third party property rights, and creates no estate in the receiver.

In his reasons, Walker J. used the words "just or convenient" when considering an application by a mortgagee for the appointment of a receiver and manager of real estate subject to its mortgage.

17 In *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada)* (1995), 169 A.R. 138 (Alta. C.A.), the Court appointed a receiver to manage a shopping centre pursuant to its power to preserve property pending litigation without reference to any right to appoint arising pursuant to a security instrument. It follows that the Court has jurisdiction under s. 65 of *The Queen's Bench Act, 1998* to preserve assets and businesses by appointing a receiver or a receiver and manager in appropriate circumstances in the absence of an instrument authorizing the same.

18 The law of receivership is fully canvassed by Frank Bennett in *Receiverships* (Toronto: Carswell, 1985), and in *Bennett on Receiverships* (Toronto: Carswell, 1999). In both texts the learned author focuses on receiverships arising out of secured transactions, bankruptcy proceedings, partnership disputes, shareholder disputes and equitable executions following a judgment. At the heart of each form of receivership rests a dispute over the ownership or preservation of property in which the moving party purports to have an interest that is in the possession or control of the other party.

19 At pp. 3 and 4, *Bennett on Receiverships* summarized the method for obtaining a court-appointed receiver and the purpose for such a receiver in these words:

> . . . Under section 101 of the *Courts of Justice Act*, a court may appoint a receiver or a receiver and manager where it appears to the judge that it is "just or convenient" to do so . . . . The most common use of this section is by a security holder who seeks the assistance of the court for the purpose of enforcing the rights under a security instrument against the debtor's assets. It is also used in many different situations whether at common law or in equity . . . .
>
> In addition, the court may appoint a receiver pursuant to the power granted by another statute or by way of equitable execution following a judgment against the debtor. Lastly, the court may appoint a receiver where it is necessary to preserve specific property from some danger during the course of a lawsuit between the parties. This situation does not arise as frequently as the others. Such a receiver is seldom given the power to sell the property except in the ordinary course of business. In this case, the receiver is a custodian of the property pending disposition of the action. The plaintiff usually claims some proprietary interest in the property.

At p. 134, *Bennett on Receiverships* enumerates circumstances in which a court will appoint a receiver, or a receiver and manager, namely:

> (1) any partnership dispute in order to protect assets that may be in the possession and control of one of the partners;
>
> (2) by an execution creditor for the appointment of an equitable receiver in aid of execution;
>
> (3) by shareholders of a corporation which is mismanaged; or in a shareholders' dispute where there is a "hopeless deadlock";
>
> . . .
>
> (7) by a party to an action where it is necessary to preserve and protect the property that is in dispute pending a declaration or a judgment.

The phrase "just or convenient" is often referred to in receivership applications. In *Receiverships*, Bennett at p. 91 articulates the essential requirements of such phrase:

> In determining whether it is "just or convenient" that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others.

20 It is also well established that the moving party must identify in its statement of claim the property to be received or managed and the nature of its interest therein. *Moose Jaw Merchandisers Ltd. v. Westport Enterprises Ltd.* (1971), 23 D.L.R. (3d) 21. It also follows that the property interest to be received or managed must be in the control of the defendants who are to be named as defendants in the plaintiffs' action. In other words, an action must be commenced except where time is of the essence.

21 The applicants relied on *Chapman v. Chicago* (1991), 5 O.R. (3d) 220 (Ont. Div. Ct.) where the Court appointed a receiver and manager in circumstances akin to those in the present case. In *Chapman v. Chicago,* the plaintiffs commenced an action seeking an order declaring null and void the election of the defendants as Chief and Council of Lac des Mille Lacs Indian Band, an order appointing an interim receiver and manager of the band's assets, damages against the defendant Chicago for misappropriation of band assets, and an accounting by the defendants. The sole issue before the Divisional Court was whether Ontario courts had jurisdiction to appoint a receiver and manager over the assets and affairs of Indian bands. It concluded that the Ontario Court of Justice, General Division, had the necessary jurisdiction without commenting on the merits of the appointment confirmed by Wright J. of the General Division.

22 In his unreported decision, Wright J. extended the appointment of a receiver and manager for the Indian Band for a short period by another judge of the General Division Court. The plaintiffs in their statement of claim challenged the validity of the election of the defendants as chief and band councillors and the ability of the defendant, Calvin Chicago, to administer the affairs of the band. In confirming the appointment, Wright J. noted that the band "has no infrastructure of its own, no schools to run, no welfare program to administer directly, no streets to keep up, no hydro to provide and so the work of the Band administrator is rather minimal". In those circumstances he considered it to be appropriate for "the assets of the Band be administered by an impartial third person until such time as there may be a determination of the status of the council . . . ". His reasons do not address whether the plaintiffs had an interest in the band's assets or otherwise met the usual requirements for the appointment of a receiver and manager. In result, the decision provides little guidance beyond confirming this Court has jurisdiction to appoint a receiver and manager of the Band's assets and affairs.

POSITIONS ADVANCED BY THE PARTIES

23 The applicants allege that (1) the respondents were not duly elected to the offices of Chief and Band Council and therefore they have no right to administer the affairs of the Band; (2) the respondents have administered the Band's assets without due authority; (3) the respondents have used Band funds to cover legal expenses they incurred in the within action and have paid themselves for services they provided on behalf of the Band; (4) the Management Agreement is invalid because it was not approved by a resolution of Band Council. However, they do not allege any misappropriation of funds save as noted. The respondents further submitted a receiver and manager would expedite the holding of a new election and the receiver and manager they propose would work with them to that end.

24 The respondents oppose the application on the grounds that (1) the applicants failed to establish a *prima facie* case by setting out a recognized private interest in a statement of claim or counterclaim; (2) the applicants have no right or status to pursue the public interest of the Band; (3) the applicants come before the Court without clean hands and therefore are not entitled to the equitable remedy sought; (4) the applicants are delinquent in bringing their application some 32 months following their appeal to the Appeal Board and therefore the doctrine of *laches* applies; (5) the applicants will not suffer irreparable harm should the respondents continue to administer the affairs of the Band; (6) the balance of convenience favours a refusal of the application; (7) the applicants have failed to undertake to pay damages or to post security; and lastly, (8) the Administrator distributes funds to Band members on behalf of INAC pursuant to the Management Agreement and not in their capacity as Chief or Band Council.

ANALYSIS

25 I agree with the statement in *Bennett on Receiverships* at pp. 142-43 that the moving party must commence a legal action against the defendants and in such action establish a *prima facie* legal right to the relief sought regardless of whether the right claimed arises pursuant to a security instrument or otherwise. Thus, only after an action has been commenced by way

of statement of claim or a counterclaim may the moving party bring a motion for the appointment of a receiver and manager. To proceed otherwise would leave courts with no pleadings defining the scope of the issues, the nature of the moving party's claims, or the other party's position.

26 In the present case, the applicants have not set forth their claim against the respondents, the nature of their interest in the assets to be placed under the control of a receiver and manager, or their status to seek the appointment of a receiver in a statement of claim or counterclaim. Accordingly, their application must fail on this ground alone. It is of note that in *Chapman v. Chicago* the plaintiffs commenced an action against the defendants and therein sought the appointment of a receiver and manager.

27 Even if I had determined that the application was properly before me, I would not have appointed a receiver and manager because it would not have been just or convenient to do so having regard to all the circumstances. Of particular importance in my reasoning is the Management Agreement between INAC and the Administrator, the purpose of which is clearly identified in the preamble thereto. It reads:

> WHEREAS the Minister and the Pelican Lake First Nation entered into a Comprehensive Funding Arrangement, executed on March 8, 2000, providing for certain services to the community members of The Pelican Lake First Nation . . . ; and
>
> WHEREAS the Administrator is willing and prepared to administer those funds on behalf of the Pelican Lake First Nation for the period during which there is some uncertainty as to the legal status of the Chief and Council members elected pursuant to a band council election conducted on April 14, 2000.

28 The clear intent of the Management Agreement is to ensure funds flow from INAC to cover the cost of essential services for members of the Band that otherwise would be interrupted in the absence of a recognized Band Council. By entering into the Management Agreement, INAC implicitly concluded the Administrator was able to manage the flow of its funds to Band members. Also, since the Management Agreement has been in place for the better part of three years, it is reasonable to assume that INAC is satisfied with the Administrator's performance and that the interests of Band members are being attended to pending resolution of election issues.

29 The applicants submitted that the Management Agreement is null and void because it was executed on behalf of the Band without the approval of a Band Council required by s. 2(3)(b) of the *Indian Act*. I reject this submission because the Management Agreement is not an agreement between INAC and the Band but rather one between INAC and the Administrator, a third party. In the result, the Band is not bound by its provisions and the ratio in *Heron Seismic Services Ltd. v. Peepeekisis Indian Band* (1990), 74 D.L.R. (4th) 308 (Sask. Q.B.), aff'd (1991), 86 D.L.R. (4th) 767 (Sask. C.A.), does not apply.

30 Any receiver and manager appointed by this Court would not have a unilateral right to step into the shoes of the Administrator and perform its obligations under the Management Agreement, nor would INAC be obligated to cancel the Management Agreement in such event. Thus, the appointment of a receiver and manager could be of little value and might confuse and complicate the political difficulties the Band currently faces. Collateral thereto is the applicants' failure to demonstrate an ability or willingness to pay the costs of a receiver and manager. Consequently, the Band could be called on to pay both a receiver and manager's fee and the Administrator's fee. I also took into account that a substantial number of Band members present at the December 12, 2000 meeting passed, by a very wide majority, a motion approving the Administrator managing funds flowing to them from INAC.

31 I accepted the applicants' submission that the respondents are administering Band assets that are not covered by the Management Agreement. Unfortunately, the evidence does not canvass the nature of the assets, whether they are in need of preservation, or any unique skills a receiver and manager must have in order to manage them. The only concrete evidence before the Court is the resolution passed by a substantial number of Band members present at a public meeting on December 12, 2000, wherein they unanimously agreed to the respondents administering the Band's "Carrier Lumber and Lac Eauclaire" contracts on the terms set forth in the Management Agreement. While the resolution does not fully comply with the *Indian Act*, it reflects the wishes of a substantial number of Band members as well as their confidence in the respondents to look after the Band's interest.

32 Without some information as to the extent of the assets involved and the nature of the applicants' concern regarding the improper disposition or impairment of Band assets, I am of view that it would be imprudent to impose a receiver and manager for the Band in light of the aforementioned resolution.

33 Governing jurisprudence also provides that the moving party should undertake to pay damages if a court of competent jurisdiction subsequently determines that the appointment ought not to have been made. In the absence of such an undertaking, the Band and the applicants may have no recourse against either the applicants or the receiver and manager. In the present case, the applicants did not undertake to pay damages as part of their application. During argument their counsel suggested they would provide appropriate undertakings if a receiver and manager were appointed. Such an arrangement in my view is inappropriate to the extent it calls upon the Court to make a significant ruling in the absence of a material requirement.

34 Of further concern is the failure of the applicants and the proposed receiver and manager to undertake to provide a cash or surety bond covering any loss to the Band or the respondents arising out of the negligence of the receiver and manager. The proposed receiver and manager also failed to demonstrate a significant net worth that the Band and the respondents could look to in the event of misfeasance or malfeasance on his part. While the posting of such security is not an essential part of the application, the receiver's ability and the willingness to provide security. As previously touched upon, the Court should have some idea of the assets involved in order that it may assess potential losses that could arise should the receiver and manager default.

35 When all the above factors are weighed against the potential benefits of having a receiver and manager appointed, I am satisfied that the weight of the evidence materially preponderates in favour of the respondents. Many of the issues between the parties are of a political nature that should be in the political arena and not in the courts. A good starting point would be to facilitate a new election by amending the Election Act to avoid the pitfalls the Band has encountered, or to repeal it and return to the election procedures prescribed by the *Indian Act*. Accordingly, the application is dismissed with costs to the successful party.

Application dismissed.