

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver Coastal Health Authority v.  
Seymour Health Centre Inc.*,  
2023 BCSC 1158

Date: 20230626  
Docket: S234171  
Registry: Vancouver

Between:

**Vancouver Coastal Health Authority**

Petitioner

And

**Seymour Health Centre Inc.**

Respondent

Before: The Honourable Justice Fitzpatrick

## Oral Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.  
June 23 and 26, 2023

Place and Date of Judgment:

Vancouver, B.C.  
June 26, 2023

## **INTRODUCTION**

[1] The petitioner, Vancouver Coastal Health Authority (“VCH”), applies for the appointment of a receiver manager over the assets of the respondent, Seymour Health Centre Inc. (“Seymour Health”). The central facts, from VCH’s point of view, concern the approximately \$6.8 million that it advanced to Seymour Health which is secured against Seymour Health’s assets.

[2] Seymour Health is adamantly opposed to a receivership. Seymour Health acknowledges that VCH advanced the monies and that, on the face of the documentation, the amounts are due and payable. However, Seymour Health has recently commenced an action against VCH and others seeking millions of dollars in damages arising from previous dealings concerning Seymour Health’s operations, which it says will entirely offset the amounts claimed by VCH.

[3] The overarching circumstances of this dispute are unique. In addition to the immediate interests of the parties, broader and significant community interests are engaged. Those interests are in respect of the many British Columbians—said to be between 70,000–100,000 persons—who rely on Seymour Health for the availability and delivery of urgent and primary health care services.

[4] Both parties seek a remedy that would see the continuation of the delivery of these very important health care services to British Columbians. In that respect, the ability of Seymour Health to continue operations is very much in dispute in the face of VCH’s position that another entity must assume control of Seymour Health’s operations as soon as possible to ensure continuity of care for patients and protection of the assets which secure its loans.

## **BACKGROUND FACTS**

[5] There are many disputed facts on this application. The following facts are either not controversial or, as I will indicate, the facts I have found as necessary for the purposes of this application.

**The Parties**

[6] VCH is a regional health board created pursuant to the *Health Authorities Act*, R.S.B.C. 1996, c. 180 [*HA Act*] and the *Regional Health Boards Regulation*, B.C. Reg. 293/2001. The purposes of VCH as a regional board include the delivery of health services through its employees or by entering into agreements with the government or other public or private bodies for the delivery of those services: *HA Act*, s. 5(1)(d).

[7] VCH's evidence on this application is primarily from Fernando Pica, who is VCH's Chief Financial Officer and VP Strategic Business Services.

[8] Seymour Health has been in the business of operating health clinics in the Vancouver area for many decades. Some time ago, it was purchased by Gursahib Bining and his spouse, Sandeep Kaur Parmar (collectively, the "Binings"). Mr. Bining is the Chief Executive Officer and a director of Seymour Health.

[9] Seymour Health's evidence on this application is from Mr. Bining and another director of Seymour Health, Dr. Eric Cadesky, who is also Seymour Health's Chief Medical Officer.

[10] Seymour Health is wholly owned by 13995526 Canada Inc. ("139"). 139 is owned one-third by BDC Capital Inc. ("BDC"). 139 is also owned two-thirds by 1016740 B.C. Ltd., whose shares are held by the Binings. In May 2022, BDC acquired its shares in 139 for \$10 million, which notionally valued Seymour Health at \$30 million. Seymour Health used the proceeds of that transaction primarily to repay existing debt, improve its balance sheet and reduce interest payments.

[11] Although not parties to this litigation, other government entities are indirectly involved to a degree.

[12] The Medical Services Commission ("Commission") is a nine-member statutory body established under the *Medical Services Act*, S.B.C. 1967, c. 24, as

repealed and continued pursuant to the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 [*MP Act*]. The Commission reports to the Minister of Health: *MP Act*, s. 3(2).

[13] Section 5 of the *MP Act* sets out the extensive responsibilities and powers of the Commission and, as is generally known, it administers the Medical Services Plan (“MSP”) which pays for medical services delivered by BC health care professionals. As relevant here, s. 33(1) of the *MP Act* allows the Commission to approve a “diagnostic facility” for the delivery of diagnostic services or procedures to patients while also, critically, allowing that facility to obtain payment for those services or procedures under the MSP.

### **Clinic Operations**

[14] In 2018, Seymour Health was operating a medical clinic on West 7th Avenue in Vancouver, offering what are described as “primary care” services (the “West 7th Clinic”). Physicians are either employees or independent contractors of Seymour Health. The doctors assign their MSP billings to Seymour Health, who in turn bills the Commission for payment. Seymour Health handles all of the administrative matters for the West 7th Clinic.

[15] At the West 7th Clinic, any diagnostic services required for patients are delivered off-site by other facilities not owned by Seymour Health.

[16] In 2018, Seymour Health was in the process of setting up a second primary care clinic on Hornby Street in downtown Vancouver. Around that same time, and in accordance with its mandate under the *HA Act*, VCH approached Seymour Health about expanding that clinic to include an “urgent and primary care centre” or “UPCC” as part of its operations.

[17] UPCCs are intended to provide primary care to patients, who do not have a family doctor or nurse practitioner or cannot access their family doctor, who have an urgent health issue and need weekend or after-hours care. UPCCs can be paired with on-site diagnostic services or be in close proximity to them.

[18] The parties agreed to this partnership of sorts in the eventual clinic, which the parties describe as the “City Centre Clinic”. As a result, in 2018, Seymour Health established the City Centre Clinic, offering primary care, the UPCC facilities and specialist care. The UPCC facilities were provided by Seymour Health under an Urgent Primary Care Services Agreement executed by it and VCH on November 26, 2018, which was renewed in April 1, 2021 (the “Services Agreement”).

[19] The City Centre Clinic is located on leased premises on Hornby Street. VCH is the tenant of the premises under the lease. In May 2018, Seymour Health entered into a sub-lease with VCH for an annual basic rent of \$604,016 (\$50,334 per month) plus triple net costs as are payable under the head lease (the “Sub-Lease”).

[20] Central to the dispute between the parties is the fact that, in establishing the City Centre Clinic, Seymour Health included facilities for what it describes as “Ancillary Services”, meaning diagnostic and laboratory services (such as radiology and ultrasound). Those Ancillary Services were fully accredited and operational by early 2019. Mr. Bining says that having the Ancillary Services on site was consistent with Seymour Health providing services to patients based on a team-based approach and, in relation to the City Centre Clinic, the “Patient’s Medical Home” model.

[21] In late 2019, Seymour Health also agreed with VCH on the opening of another clinic in North Vancouver on Esplanade West to operate as a UPCC (the “North Shore Clinic”). Seymour Health signed a further services agreement for the North Shore Clinic. This Clinic was operated on a “hybrid” model, with some staff being VCH unionized employees. I understand that some limited diagnostic facilities are also on site, but other diagnostic services are nearby and are used by the North Shore Clinic.

[22] From the patients’ perspectives at least, Seymour Health’s operation of all three clinics (collectively, the “Clinics”) have been very successful in providing access to medical care. Seymour Health describes itself as BC’s largest medical clinic operator. As of April 2023, some 166 medical professionals worked at the

Clinics. The West 7th Clinic and the City Centre Clinic alone currently provide health services to between 70,000–100,000 people in Vancouver, representing about 15% of that population. In 2022, there were about 265,000 patient interactions at the Clinics.

### **Financial Difficulties**

[23] Mr. Bining says that the underlying dispute with VCH arises from the fact that Seymour Health never obtained the licenses and exemptions that would allow it to profitably operate the Ancillary Services at the City Centre Clinic. Although many details are not in evidence, Mr. Bining refers to various rejection letters from the Commission and the Ministry of Health (the “Ministry”) in response to various applications by Seymour Health.

[24] Mr. Bining says that, without being able to offer the Ancillary Services and to receive payment for those services under the MSP, Seymour Health suffered with poorer margins and had a negative cash flow of approximately \$200,000 per month. He says that this negative cash flow arose from the fact that, despite the lack of approvals and lack of payment from the Commission, Seymour Health continued to operate and provide the Ancillary Services.

[25] Mr. Bining has been attempting for years now to address Seymour Health’s ongoing financial problems and losses. After Seymour Health exhausted its own resources to cover the losses, the Binings advanced their own monies to Seymour Health in the amount of approximately \$3.4 million.

[26] The financial difficulties arose quickly.

[27] In July 2019, Seymour Health stopped paying rent to VCH under the Sub-Lease.

[28] In January 2021, VCH and Seymour Health entered into a Letter of Agreement dated November 27, 2020 (the “LOA”). The LOA provided Seymour Health with a repayment plan for the rental arrears under the Sub-Lease, which at

that time amounted to \$1,732,487 for the months leading to November 2020. Under the LOA, Seymour Health agreed to make equal monthly instalments to VCH over three years which was to be offset against the monthly payments by VCH under the Services Agreement. Around this time, Mr. Bining guaranteed payments of amounts due to VCH under the Sub-Lease.

[29] The LOA did not modify Seymour Health's obligations to continue to make monthly rental payments under the Sub-Lease for the months after November 2020. Rent payments appear to have re-started; however, Seymour Health ceased making monthly rental payments entirely after March 2022.

[30] By Mr. Bining's own account, by mid-2022, Seymour Health was in a "state of financial crisis" and had been brought to the "edge of insolvency". In addition to not paying its rent under the Sub-Lease, Seymour Health was having difficulty paying physicians, suppliers and staff. By this time, some suppliers were refusing to provide necessary supplies for the Clinics.

[31] To address this "crisis", Seymour Health considered its options for reducing costs, including shutting down the West 7th Clinic. In May 2022, when the Binings had exhausted their personal resources, they turned to BDC who, as before, invested \$10 million in exchange for shares. This equity injection was used to partially repay bank indebtedness and legal fees and later, the Binings borrowed more money against their residence to fully repay the bank.

[32] In addition, around this time, Mr. Bining became aware that VCH may be able to provide financial assistance.

### **VCH's Financial Assistance**

[33] VCH did provide Seymour Health with a "support package". Between June–September 2022, VCH advanced almost \$2 million to Seymour Health. These funds were used to pay physician compensation, staff, rent arrears and also, arrears owed to suppliers.

[34] By September 2022, VCH had agreed to advance total loans of \$2.5 million to Seymour Health. This amount included the initial advances of almost \$2 million and further funds to pay certain “Designated Services” to be advanced up to October 2022. These arrangements were set out in a Loan Agreement dated September 16, 2022 (the “Loan Agreement”). The terms of the financial arrangements in the Loan Agreement are not unusual. The loans are repayable with interest and the due date for payment of all of the amounts outstanding is June 30, 2023.

[35] To secure the amounts owing under the Loan Agreement, Seymour Health executed a general security agreement (“GSA”) granting VCH security over all of its personal property, which has been properly registered at the Personal Property Registry. In addition, the Binings guaranteed repayment of the loans under the Loan Agreement.

[36] Between October 2022–April 2023, VCH provided further advances to Seymour Health. These funds were used to pay Seymour Health’s payroll and suppliers who had refused to supply Seymour Health directly.

[37] In February 2023, the further advances were incorporated into the Loan Agreement to increase the principal amount owing to \$3.7 million. In March 2023, further advances were incorporated into the Loan Agreement to increase the principal amount owing to \$4.9 million. VCH’s last advance was in April 2023.

[38] Despite these substantial loans from VCH, Seymour Health’s financial difficulties continued.

[39] In spring 2023, VCH and Seymour Health entered into discussions toward a sale of Seymour Health’s assets at all three Clinics, including goodwill and going concern value, to VCH. On February 14, 2023, the parties signed a Letter of Intent (“LOI”). Under the LOI, VCH provided Seymour Health with an Advance Payment of \$350,000, which was to be repaid in the event that the LOI was terminated.

[40] In late March 2023, VCH terminated the LOI. VCH demanded repayment of the Advance Payment of \$350,000 but it has not been paid.



**Defaults**

[41] There is no dispute that Seymour Health is in default under the Loan Agreement, principally arising from its failure to repay the loans to VCH which are due. In addition, various defaults have arisen under the terms of the GSA.

[42] In the March/April 2023 timeframe, VCH and Seymour Health engaged in a number of discussions, if not negotiations, to determine if there was a consensual path forward that would allow Seymour Health to continue to operate. These discussions also related to proposals as to how the debt owing to VCH would be repaid.

[43] Unfortunately, no agreement resulted from these discussions.

[44] Accordingly, on May 2, 2023, VCH demanded repayment by May 15, 2023 of the amounts owed, being approximately \$6.8 million. In addition, VCH served the requisite Notice of Intention to Enforce Security. The amounts owing were:

- a) \$4,699,439.12, plus accruing interest after May 1, 2023, fees, costs and expenses under the Loan Agreement;
- b) \$1,746,307.46, inclusive of GST and interest to May 1, 2023, under the Sub-Lease; and
- c) \$350,000 advanced under the LOI.

[45] Finally, on May 2–3, 2023, VCH demanded payment from the Binings under their guarantees of the amounts under the Sub-Lease and/or the Loan Agreement.

[46] In addition to the mounting debt owing to VCH, Seymour Health is facing other financial and operational changes and challenges. The Services Agreement has now expired and VCH is scheduled to assume the UPCC at the City Centre Clinic in August 2023. Similarly, the UPCC services agreement relating to the North Shore Clinic expired and VCH will assume all operations at the North Shore Clinic in August 2023.

**RELEVANT LEGAL PRINCIPLES**

[47] The relevant legal bases and principles that apply are not in dispute.

[48] VCH applies for the appointment of a receiver under s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [LEA], s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA], s. 66 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 and *Supreme Court Civil Rules*, R. 10-2.

[49] Under s. 39 of the *LEA*, the central question is whether it appears to the court that the appointment is “just or convenient” in the circumstances.

[50] As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 [Cascade Divide] at para. 81, the granting of a receivership order is “extraordinary relief which should be granted cautiously and sparingly.”

[51] The governing authorities have invariably endorsed the Court’s consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in *Bennett on Receiverships, 2nd ed.* (Toronto: Carswell, 1999), at p. 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 [Maple Trade] at para. 25, *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 [Textron Financial] at para. 50 and many other cases.

[52] The *Maple Trade* factors include:

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

- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

[53] Justice Gomery has recently confirmed that the above factors are not a checklist but are to be viewed holistically: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc.*, 2023 BCSC 514 at para. 9.

[54] Recently, the approach of this Court in considering and applying the above factors on an application to appoint a receiver was discussed in *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32 [*Ward Western BCCA*] at para. 49, affirming this Court's reasons indexed at 2021 BCSC 919 [*Ward Western BCSC*].

## **DISCUSSION**

[55] The onus remains on VCH to establish that the appointment is just and convenient, having regard to the overall circumstances.

[56] I do not propose to address each of the *Maple Trade* factors separately, as they may be considered within broader categories that address the issues raised by the evidence and the parties. Embedded within those broader categories, I have considered factor (f) as it concerns the balance of convenience.

**Interests at Issue**

[57] The interests and motivations of both VCH and Seymour Health are clear

[58] VCH says that it seeks the appointment of a receiver manager over Seymour Health's property to enforce and protect its security interest, given the defaults under the Loan Agreement and GSA. VCH says that Seymour Health has been relying on VCH to meet its liabilities to suppliers, staff and employees, and has consistently sought rent deferrals. Finally, VCH says that the loans have increased to a level that seriously jeopardizes its collateral and Seymour Health's ability to repay the loans.

[59] In essence, VCH says that Seymour Health's financial ability to continue in operation is tenuous at best without ongoing financial support from VCH. VCH also questions the ability of Seymour Health to retain its relationships with its suppliers and landlords without further financial support. No other financial "white knight" has emerged to put Seymour Health on a solid financial footing.

[60] Seymour Health argues that the \$6.8 million owing to VCH is insignificant compared to VCH's overall budget. That is unquestionably the case. However, all of those funds come from taxes paid by hardworking British Columbians who expect, and rightly so, that those funds be used in a fiscally responsible manner. That would include the collection of amounts loaned by VCH.

[61] Turning to Seymour Health's interests, I accept that the impact of a receivership to Seymour Health would be significant and negatively so (factor (k)). The result will be a replacement of current management with those of a receiver manager. In *Cascade Divide*, I stated:

[81] ... Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.

[62] The ultimate impact on Seymour Health from any receivership remains to be seen. Initially, VCH sought an order that the receiver immediately implement a sales and solicitation process toward arranging a sale of the business in short order. That relief has now been withdrawn although the proposed order would still approve the receiver manager seeking a sale, with court approval.

[63] Prior to any sale being considered and possibly approved, Seymour Health would have the opportunity to seek other forms of financing or equity participation or some form of restructuring that might see some or all of its financial woes addressed, or least those relating to VCH. As stated above, to the extent that efforts were previously made to engage in discussions with VCH, nothing materialized and I am advised that Seymour Health is not making ongoing efforts to secure further financial support elsewhere.

[64] In addition, if any sale application is brought forward by a receiver manager, Seymour Health would have notice and be able to respond, including in relation to whether a sale is appropriate and, if so, what value can be achieved.

[65] To a large degree, and subject to my comments below about the litigation underway, Seymour Health's position in relation to VCH is that it wishes to be left alone to continue to operate as best it can for the time being, without repaying any amounts to VCH.

[66] I agree with VCH that such a position is untenable in the circumstances.

[67] The one—and significant—area of consensus between the parties is their concern for the BC citizens who rely on Seymour Health to provide necessary and urgent health care to them.

[68] Consideration of the interests of other persons, who have been described as “social stakeholders”, in insolvency matters is a not new concept. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court stated:

[60] ... the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and

creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, per Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, per Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, per Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[Emphasis added.]

[69] In Virginia Torrie & Vern W. DaRe’s article “The Participation of Social Stakeholders in CCAA Proceedings” (2019) Annual Review of Insolvency Law 9 (WL), the authors discuss circumstances where the court found consideration of such broader societal interests to be appropriate. I will mention a few examples taken from that article and from my own experience.

[70] In cases involving operations that raise environmental concerns, such as mines and pulp mills, Canadian courts have often considered the interests of the community in relation to such operations and their impact or potential impact on the environment, where the insolvency may raise risk factors. In *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. S.C.J.), the court stated:

[9] ... In a receivership such as this one, which reaches well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

[71] In the restructuring of a major Canadian airline, the interests of the public in having access to air travel as part of the Canadian transportation infrastructure were considered: *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 174.

[72] In *TLC (Re)*, 2015 BCSC 656 at paras. 63–65, I considered the broader public interests at play in light of the debtor’s role in the protection or conservation of properties with significant historical, cultural, scientific or scenic value.

[73] Closer to the medical context here, in *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306 (Ont. Gen. Div.) [Commercial List] at para. 50, the court considered the public interest that required a Canadian blood supply that operated with integrity and the need for a continuation of various humanitarian efforts.

[74] Consistent with its statutory mandate under the *HA Act*, VCH states that, in addition to seeking repayment of its loans, it has brought this proceeding given its concern that Seymour Health will be unable to continue to provide primary care services to patients, clients and residents in VCH's geographical region. Similarly, Seymour Health, and the medical professionals who work there remain committed to the well-being of their patients and recognize the need to operate on a basis that will provide the care that those patients need.

[75] I have no hesitation finding that the broader community interests engaged here are an appropriate additional consideration in terms of the health care needs of thousands of British Columbians.

### **Contractual Right to Appoint a Receiver**

[76] Factor (g) considers whether the secured creditor has the right to appoint a receiver under the loan documentation. Here, VCH clearly has that contractual right. In addition, given the opposition mounted here by Seymour Health, VCH has properly sought to involve the Court in terms of the enforcement of its contractual right, in terms of factor (h).

[77] In *Textron Financial* at para. 55, Justice Willcock, as he then was, stated that a court may, where appropriate, place “considerable weight” on this factor. Further, at para. 75, the Court stated that such a term ameliorates the extraordinary nature of the remedy.

[78] Similarly, in *Maple Trade* at para. 26, the Court described that this can be a “strong factor” in support of imposing a receiver.

[79] The most recent discussion on this issue is found in *Ward Western BCCA* at paras. 56–67. The court confirms the general approach in that this factor is but one factor to be considered with the others and that it remains within the discretion of the judge to assign the weight that will be given to that factor, given the circumstances. See also *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Ltd.*, 2021 BCSC 2449 at para. 24.

[80] As Justice Macintosh concluded in *Ward Western BCSC*, I consider that the contractual right of VCH to appoint a receiver is only one factor to be considered. It is not by any means an overwhelming factor that takes significance over the other *Maple Trade* factors in these overall circumstances.

### **Seymour Health’s Financial Picture**

[81] Factors (a)–(e) require the court to consider the nature of the assets, the risks that are at play and the potential consequences of those risks materializing if a receiver manager is not appointed.

[82] In April 2023, Seymour Health presented a “Business Update and Action Plan” to VCH containing various financial information and proposals toward seeking consensus on a path forward that would allow it to continue operating, including a section entitled “Stabilization Plan” (the “Action Plan”). The Stabilization Plan is extensive and includes the curtailment of services and personnel, addressing landlord issues and pursuing other operations to generate more revenue.

[83] This is followed by a section entitled “Next Steps” in the Action Plan, being:

- a) the continuation of the stabilization measures;
- b) renewal of the Services Agreement to continue the UPCC at the City Centre Clinic;



- c) the need for VCH to continue to fund an estimated \$500,000 for two months until the “stabilization plan can be executed”; and
- d) a restructuring of the outstanding amounts owing to VCH to a five-year term loan, along with a commitment to subordinate its security to a new capital provider and consider converting half of that amount to equity in lieu thereof.

[84] The picture that clearly emerges from the April 2023 materials is that Seymour Health’s only real option toward solving its financial difficulties lay in seeking concessions from VCH in terms of the collection of the outstanding amounts and even providing further funding. It is of some significance that Seymour Health had approached an entity about a capital raise, but Mr. Bining stated that would only be an option after the Action Plan had been implemented and Seymour Health had *returned* to profitability.

[85] Mr. Bining in his Affidavit #1 states that the filing of VCH’s petition seeking the appointment of a receiver manager signalled to him and his wife that they needed to urgently restructure the operations of Seymour Health to ensure that it is “viable without revenue from diagnostic services and from the UPCCs”. He indicates that he has now taken the “first step” in the restructuring efforts, by laying off staff.

[86] To my mind, this is a puzzling statement. The lack of revenue and losses arising from the Ancillary Services has been happening since 2019, many years ago.

[87] In addition, the mid-2022 “financial crisis” described by Mr. Bining and the later need for VCH’s “support package” from mid-2022 which still led to ongoing defaults, and the May 2023 demand letter would clearly have signalled then, if not before, the urgent need to restructure operations. Seymour Health’s approach to these circumstances, along with others that have recently arisen, as detailed below, are indicative of a reactive posture to ongoing financial problems that are only really addressed in a crisis mode.

[88] At this hearing, somewhat consistent with the Action Plan, Seymour Health indicates that it has taken the following recent steps to improve its financial status:

- a) The North Shore Clinic UPCC services agreement with VCH expired some time ago and has been extended on a month-to-month basis. VCH is set to take over the UPCC and the entire North Shore Clinic in August 2023;
- b) Seymour Health expects to receive increased revenue from MSP for primary care physician services, given changes implemented in February 2023;
- c) New physicians are being recruited;
- d) New services are being added, being podiatric surgery services and a sleep lab, although I understand that those facilities are not yet open. They are estimated to generate annual profits of \$80,000–230,000;
- e) Operational changes have been implemented, being staff layoffs; and
- f) Seymour Health closed the Ancillary Services on June 7, 2023.

[89] I would first observe that the above operational changes have only recently been introduced and implemented and what effect, if any, they will have on Seymour Health's overall finances remains to be seen.

[90] Given the circumstances leading up to this application, it would have been helpful to have a fulsome understanding of the current finances of Seymour Health. Some financial information as of April 2023 is contained the Action Plan. Unfortunately, the information provided by Mr. Bining as to the *present status* of Seymour Health can only be described, to use his counsel's expression, as "thin".

[91] Mr. Bining states that he has now prepared a "restructuring plan" with the assistance of Fernando Ong Tsutiya, an Associate Principal, Growth Equity Partners at BDC. It is not clear to me why Seymour Health's own accountants were not

involved in developing a financial plan. This document was based on Mr. Bining's business decisions, and the financial data was then input by Mr. Tsutiya, using the program that BDC relied on in making its \$10 million equity injection. It appears to have been created in June 2023.

[92] However, this document is not a "restructuring plan"; rather, it is more accurately described as a very "high-level" cash flow showing anticipated cash inflows and outflows on both a "with primary care and UPCC" scenario and a "no UPCC" basis (the "Cash Flow").

[93] The Cash Flow, as it relates to the "no UPCC" scenario (which is set to occur in August 2023), reveals the following:

- a) Projected monthly revenue of \$1,399,827;
- b) Mandatory monthly cash outflows total about \$1.1 million, for physician compensation, payroll, management expenses and pre-authorized debit expenses;
- c) Curiously, what are described as "discretionary" cash outflows include ongoing rent at the West 7th Clinic and City Centre Clinic, although rent can hardly be described as discretionary from the landlord's point of view;
- d) No amounts are to be paid to VCH toward the amounts owing under the Sub-Lease for the City Centre Clinic (which has since increased to include the June 2023 rent amounts, which were also not paid);
- e) Monthly "vendor payments" of \$107,341 are budgeted for June 2022. Yet, there is no information about whether this is just for ongoing expenses and if so, what they are;
- f) There is no indication that the suppliers who refused to supply to Seymour Health in the not too distant past have now agreed to do so and, if so, on what terms; and

g) No contingency amounts have been budgeted.

[94] The Cash Flow reveals a cash surplus of \$11,326 per month. While there is a reference to further income being generated by other ventures, such as the sleep lab and podiatric surgery, no details are provided.

[95] Unfortunately, the Cash Flow is silent on many issues that would have given a more accurate picture of Seymour Health's finances. The document raises more questions than it yields answers. No balance sheet has been produced that would indicate values for both assets and liabilities. For example, in the Action Plan (p. 36), Seymour Health refers to its accounts payable. Those amounts were not insignificant, totalling almost \$3 million. Of more concern is that over \$2 million of those payables were owing in excess of 120 days. This includes a large amount owing to VCH but also includes over \$570,000 of "operating payables". There is no evidence as to what vendor amounts are currently outstanding. There is no information as to whether Seymour Health is up to date in respect of its employee remittances to Canada Revenue Agency. There is no information as to whether GST remittances are up to date.

[96] In an operating business, cash resources are important. I have no information as to the cash held by Seymour Health in terms of meeting its day-to-day financing needs. This is particularly concerning as I understand that Seymour Health does not have a line of credit to allow payments in the ordinary course that are not timed exactly with revenue.

[97] Other serious issues also arise with respect to the lease of the West 7th Clinic.

[98] In June 2022, the landlord's statements indicated that Seymour Health owed almost \$305,000, which included rental amounts for May/June 2022. Payments were later made to "catch up" on the arrears. In June 2023, those statements indicated amounts owing of approximately \$609,000.

[99] On the very eve of this application, June 15, 2023, the West 7th Clinic landlord served a demand for payment on Seymour Health, indicating that failing payment, it would possibly terminate the lease. By June 19, 2023, the matter had not resolved and the landlord advised VCH that if the rent was not paid, an eviction on June 21, 2023 would result. The landlord later told Mr. Pica that no action would be taken pending the outcome of this application.

[100] It would have been obvious to Mr. Bining that the potential scenario of being evicted by the West 7th Clinic landlord would not have assisted him in opposing the appointment of a receiver. I am now told that some very late in the day negotiations with the landlord have staved off any action. Apparently, there is an issue regarding the renewal of the lease and a large portion of the amount owing is said to relate to “overholding” charges which may or may not be payable. The landlord has agreed to a 30-day grace period in order to enter into “good faith” negotiations relating to a possible lease renewal and the amounts claimed by the landlord. This reprieve was only available to Seymour Health if it delivered payment to the landlord in the amount of \$276,654, which was the amount not in dispute. That amount was paid on the first day of the hearing but I have no information as to where that money came from and what effect, if any, it has had on the overall financial picture.

[101] It remains to be seen what might happen in Seymour Health’s negotiations with the West 7th Clinic landlord. However, what is manifestly clear from these events is that Seymour Health faces serious financial issues that are unresolved at this time and those issues are such that any actions by creditors against Seymour Health will affect its ability to continue to operate, failing timely if not urgent action and a resolution. The very late manner in which Mr. Bining addressed these issues can perhaps be taken as indicative of the precarious nature of the options that are available to Seymour Health at this time.

[102] All of this is to say that, from the limited financial information before me, it appears that Seymour Health’s “financial crisis” in mid-2022 has continued and is very much an accurate description of its current state. I conclude that the only

reason why that crisis has not fully materialized into financial collapse since then is the funding that VCH provided, which has now decidedly come to an end and only recently in April 2023. I do not accept Seymour Health's contention that it can now continue operating "indefinitely", even without funding from VCH.

[103] In other words, I conclude that Seymour Health is back to being, not just on the edge of solvency, but in the thick of an insolvency.

[104] Although not strictly necessary given VCH's right to appoint a receiver, I consider that this financial picture gives rise to a serious risk of non-recovery of its loans if a receiver is not appointed to safeguard the assets and business operations.

[105] Despite Mr. Bining's very recent efforts to address certain aspects of Seymour Health's financial situation, the reality is that significant questions remain as to how—or more importantly, if—Seymour Health can continue to operate in the ordinary course. To some degree, the evidence indicates that Mr. Bining's very recent efforts may be, as the saying goes, "too little, too late".

[106] I agree that the path forward is tenuous at best and the precarious nature of the operations very much militates in favour of the appointment to avoid the manifestation of the risks that would result in serious repercussions to VCH and also, to the patients who rely on critical health services from the Clinics.

### **Dispute over Ancillary Services**

[107] The major plank of Seymour Health's defence to the receivership relates to a dispute with VCH that has only recently emerged, at least on the face of the evidentiary record here. This engages factor (I), being the conduct of the parties.

[108] In his Affidavit #1, Mr. Bining refers to various communications from the Commission and the Ministry denying Seymour Health's requests for various approvals and exemptions with respect to the operations. These began in May 2019 and continue into 2020, and even into May 2023. In all of these cases, the Commission and the Ministry indicated that Seymour Health had not demonstrated

the necessary “urgent health or safety needs” and other criteria to justify what was sought.

[109] On June 8, 2023, Seymour Health filed a notice of civil claim (“NOCC”) in BCSC Action No. S234193 (Vancouver Registry). The named defendants include VCH, the Commission, and the Provincial government (the “Province”). As I have discussed above, Seymour Health stated that its “economic viability” in relation to the operation of the UPCCs was “critically dependent” on it being able to operate the Ancillary Services. Mr. Bining states that, if Seymour Health was not to be paid for the Ancillary Services, it would not have installed them in the first place.

[110] Seymour Health alleges in its NOCC: that VCH and the Province had a duty to warn Seymour Health that it would not get the Commission’s approval to bill for the Ancillary Services; that VCH and the Province breached their duty of honest contractual performance in failing to direct the Commission to grant the approvals or advise that such approvals would not be forthcoming; that the Province and Commission committed the tort of inducement of breach of contract when the Commission failed to approve the Ancillary Services; that the Commission has been unjustly enriched and owes Seymour Health restitution; and, finally, that all of defendants conspired to withhold the approvals with the intention of causing Seymour Health to suffer financial distress and create conditions for VCH’s “hostile takeover” of Seymour Health’s operations.

[111] In the relief sought in the NOCC, Seymour Health seeks damages. At this hearing, counsel suggested that the cost of building the Ancillary Services facility and feeding the negative cash flow was about \$16 million. Counsel also referred to the possibility of seeking expectation damages which were estimated at \$30 million, being the suggested value of the business (per BDC’s investment in 2022).

[112] Specifically in relation to this application, the NOCC seeks an injunction to restrain VCH from seeking the appointment of a receiver. At this hearing, Seymour Health seeks an order dismissing VCH’s petition or alternatively, converting this proceeding to an action and referring the matter to the trial list.

[113] The litigation is obviously in its early days and no responses to civil claim have been filed.

[114] Yasmin Jetha, VCH's Vice President of Community Services, has responded to the allegations in her Affidavit #1. She states that VCH did not require that Seymour Health establish the Ancillary Services at the City Centre Clinic as a prerequisite to providing either the primary care services or the UPCCs. VCH confirmed this to Mr. Bining in a further Letter of Agreement between the parties dated March 23, 2021.

[115] Further, Ms. Jetha states that, contrary to the allegations, VCH expressly warned Seymour Health that they would not likely obtain the approvals sought to operate and bill the Ancillary Services, leaving aside the fact that it was not even a VCH decision (it was the decision of either the Commission or other BC government agencies and VCH says that it had no involvement in those decisions).

[116] I agree with VCH that Mr. Bining's evidence as to the allegations is somewhat vague. He does not refer to any written or email communication from VCH that would suggest anything contrary to what Ms. Jetha states. Similarly, Dr. Cadesky's assertions that Seymour Health was "promised" the approvals is not supported by any documentation. Nevertheless, I am aware of the summary nature of this application and I will consider this evidence, such as it is.

[117] In any event, various questions come to mind in relation to Seymour Health's allegations.

[118] For example, Seymour Health operated the Ancillary Services without any corresponding payment from the Commission for years following their establishment in 2019. It only ultimately approached VCH for funding in mid-2022. In addition, in the NOCC, Seymour Health asserts that it had no other option but to accept VCH's funding and corresponding loan and security documentation on a "take or leave it" basis, resulting in it being coerced into entering into those contracts under



“economic distress”. However, this is perhaps inconsistent with Seymour Health’s current position that it can operate without further funding from VCH.

[119] The timing of the NOCC’s filing also raises questions. Despite years in dealing with the lack of approvals and dealing with VCH and the Commission in relation to these matters, the NOCC was only filed on June 8, 2023. The lateness of the filing would strongly suggest that it was more of a defensive move in relation to VCH’s enforcement actions, rather than a proactive move to advance a legitimate claim.

[120] I do not mean to suggest that I have made any determinations about the merit or lack of merit of Seymour Health’s allegations. I agree with its counsel that serious and substantial questions are raised. The legal and factual issues include those relating to duties within the parties’ relationships, conspiracy, set-off (both legal and equitable) and unjust enrichment. As VCH’s counsel points out, both the Loan Agreement and GSA expressly prohibit any set-off; however, any unconscionability may negate such provisions: *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 at para. 45.

[121] Seymour Health’s counsel also refers to issues of duress and unconscionability, although those are not raised specifically in the NOCC. I accept that the reference to “economic duress” in the “Statement of Facts” portion of the NOCC could be said to raise those issues, albeit very obliquely.

[122] When significant issues are raised, it will generally be the case that it is not possible to resolve the conflicts on an application such as this where there is a limited evidentiary record: see, for example, *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 at para. 40.

[123] I am certainly not in a position to decide any of these issues on the basis of the limited record before me; nor would it be appropriate for me to speculate on the merits of those issues on this application.

[124] Germane to the issue before me is the substantial documentation that Seymour Health executed in favour of VCH acknowledging the advances as loans to be repaid, and giving VCH the right to enforce collection against Seymour Health's assets. In argument, Seymour Health stated that the documentation is challenged as being unenforceable on the basis that the inability to bill for the Ancillary Services negatively affected its finances to the point that they were "forced to" sign the loan and security documentation in order to obtain the much-needed loans. It alleges that VCH obtained the signed agreements by putting more than "legitimate commercial pressure" on Seymour Health. Again, Seymour Health asserts that it had no alternative course of action and that it was "coerced" into signing the agreements under "economic duress".

[125] Yet, the relief sought in the NOCC does not attack the validity of the loan and security documentation; nor is the amount of the debt and loans put in dispute. The NOCC only seeks a *stay* of any enforcement proceeding. What I take from this pleading and counsel's submissions is that Seymour Health's overall strategy appears to be that it hopes to prosecute its claim against the defendants and, assuming the petition is converted to a trial, file a counterclaim to this proceeding. From there, if and when Seymour Health is successful in proving its allegations, the damage award will be offset against the amounts owing to VCH.

[126] As was discussed by Justice Wilson in *Yu Yue Construction & Development Ltd. v. 1098686 B.C. Ltd.*, 2022 BCSC 248 at para. 21, citing *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 (S.C.), it is important to distinguish between a defence and a counterclaim. What the defendant seeks is not really a defence to the debt or contractual claim to security; rather, it is an entirely separate cause of action that may give rise to a counterclaim to set off against the debt owing.

[127] Further, in *Ward Western BCCA*, the court confirmed that even the existence of a *bona fide* dispute concerning the debt and/or security is not determinative as to whether a receiver may be appointed. Justice Voith stated:

[82] The appellants do not contest this assertion and it aligns with their own acknowledgement that even when an underlying debt is in dispute, a

receiver manager may be appointed if there is evidence of serious potential prejudice or jeopardy to a creditor's rights to recover under its claim and security interests.

[83] This proposition is also supported by several of the considerations that are identified in *Bennett on Receiverships*. For ease of reference I have repeated some of these factors, each of which was addressed by the judge:

- b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c. the nature of the property;
- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;

[128] Seymour Health cites *M & K Construction Limited et al. v. Kingdom Covenant International*, 2015 ONSC 2241. In that case, Justice McEwen refused to appoint a receiver where there was ongoing litigation between the parties involving triable issues. However, that case is distinguishable in that the property in issue was not diminishing and the value of the property greatly exceeded the outstanding debt (para. 6). A similar result and reasoning can be found in *Visser v. Godspeed Aviation Ltd.*, 2020 BCSC 1241 at paras. 46–47.

[129] On this point, I have also considered other authorities referred to by Seymour Health, where a *bona fide* dispute had arisen between the parties: *Canned Heat Marketing Inc. (Re) (Trustee of)* (1995), 36 C.B.R. (3d) 257 (B.C.S.C.) at paras. 14–19 and *Concept Marketing Ltd. (Re)*, [1975] O.J. No. 1625 at paras. 7–8.

[130] The scenarios in those cases that justified the court refusing or adjourning the appointment of a receiver pending a resolution of a *bona fide* dispute are not akin to the situation before me, as I have discussed above. I have found that the property in issue is in jeopardy and that important interests are at risk, being not only those of VCH but others. In essence, the ability of Seymour Health to even survive to prosecute its claim is very much in issue given its financial picture.

[131] That concern is also further heightened by the obvious question that arises, even assuming that Seymour Health is able to continue operations until the issues in

the NOCC are resolved. It goes without saying that the prosecution of Seymour Health's claim will be no easy task and the cost will not be insubstantial. I have no doubt that the defendants will vigorously defend the litigation and they obviously have substantial financial resources to mount any defence. I have no doubt that long and complex litigation will be required to resolve the issues.

[132] No answer is readily available to the question of financing the costs of the litigation, beyond counsel's suggestion in argument that Seymour Health might seek a funding partner to finance the litigation under what is commonly referred to as a litigation funding agreement.

[133] What I conclude from the overall circumstances is that, even assuming that a *bona fide* issue is present and VCH is not repaid in the meantime, Seymour Health's ability to prosecute its claims in the NOCC is highly questionable.

[134] I have considered the outstanding litigation in the NOCC as a factor in coming to my conclusion. However, I do not see it as a controlling factor given the circumstances. In fact, I conclude that the other circumstances very much attenuate Seymour Health's concerns that a receivership will prejudice, if not eliminate, its ability to advance its claims.

#### **Role / Duties of a Receiver**

[135] Factors (j), and (m)–(p), address what might be accomplished through a receivership, taking into account the powers that could be assigned to a receiver manager and the cost of that step in a proceeding.

[136] Seymour Health says that patient and physician outcomes will be worsened if an insolvency professional takes over. However, I have no doubt that the professionals at Ernst & Young Inc. ("E&Y") will obtain whatever assistance they need to perform their duties as a receiver manager. This situation is not unlike any other receivership where the insolvency professional is unfamiliar with the specific business involved. To some degree, this concern, if valid at all, is attenuated by the

fact that E&Y is already familiar with Seymour Health's operations and finances by reason of having conducted a "look-see" engagement for VCH in August 2022.

[137] Seymour Health states that VCH's own clinics are not well-run, and states that the "hybrid" model at the North Shore Clinic with VCH's unionized staff has not resulted in the success of the other Clinics that are operated by Seymour Health only. Seymour Health points to various examples of stresses and strains in BC's health care system, as has been discussed in public forums for some time. Dr. Cadesky states in his affidavit that he expects that significant physician attrition will occur if a receiver takes over the Clinics.

[138] For obvious reasons, this is a very contentious subject and VCH strenuously objects to any such accusation or inference that would suggest that its delivery of health care services to patients is wanting.

[139] In my view, it is neither necessary nor desirable to wade into the issue of quality of care as between Seymour Health and VCH, even assuming that any difference exists, upon which I make no comment. I need not address this issue for the purpose of reaching a decision here.

[140] In addition, what changes, if any, that may arise in the operation of the Clinics arising from any receivership are, in my view, entirely speculative.

[141] The primary purpose of any receivership is to stabilize the situation for the benefit of all stakeholders. These stakeholders would include the physicians and other staff. The stabilization is accomplished in part by imposing a stay of proceeding against a debtor and its property. A stay of proceeding avoids creditors taking unilateral action against the debtor and its assets to the detriment of the overall estate. It also allows for an orderly continuation of operations toward maximizing the value of the estate for all stakeholders to ensure a fair distribution, if a sale ultimately results and proceeds are realized.

[142] I see that as a significant benefit here in that the receiver manager is to be granted the power to borrow funds to ensure a continuation of Seymour Health's

operations. The proposed order at para. 25 would authorize borrowings of up to \$2.5 million. I am advised that VCH has committed to providing that funding, which will be in priority to its present secured loans.

[143] I accept that there will be a cost to the estate by a receivership and that, in this case, that cost may be substantial. However, this is not unusual and unfortunately, it is simply an inevitable expense in these circumstances where the involvement of an insolvency professional is required to address these urgent concerns.

[144] Before I leave the discussion of issues concerning the receiver manager, I acknowledge that Seymour Health objected to the Court's consideration of E&Y's Proposed Receiver's Report dated June 7, 2023. I have not relied on that report, save as it relates to E&Y's qualifications (which are not in dispute) and also as to the fact of its prior involvement in August 2022, as set out above.

### **CONCLUSION**

[145] I find that the appointment of a receiver manager is just and convenient. The order appointing E&Y as receiver manager is granted.

[146] I accept the changes to the proposed order, as discussed by BDC's counsel, to remove the receiver's power to assign Seymour Health into bankruptcy and another unnecessary provision regarding subsidiaries. Otherwise, BDC takes no position on the application.

[147] I also agree that it is appropriate to amend para. 3(j) of the proposed order that allows the receiver to manage and direct all legal proceedings in respect of Seymour Health and its property. Given the concerns raised by Seymour Health in relation to its NOCC, the receiver is authorized to take any steps in relation to that claim only with the agreement of Seymour Health or as approved by this Court.

[148] Seymour Health’s application filed June 21, 2023 to convert this petition proceeding to an action and refer the matter to the trial list pursuant to R. 22-1(7) is dismissed.

[149] VCH is entitled to its solicitor-client costs in accordance with the terms of the Loan Agreement (s. 16.1) and the GSA (Article 8.7(b)). I see no basis upon which I would exercise my discretion to deny those costs in that event: *Rozdilsky v. Kokanee Mortgage M.I.C. Ltd.*, 2020 SKCA 1 at paras. 8–13; *Cardero Coal Ltd. v. Carbon Creek Partnership*, 2022 BCSC 1103 at paras. 41–43.

“Fitzpatrick J.”