KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 220**

Date: **2024 12 19**
File No.: KBG-SA-01031-2024
Judicial Centre: Saskatoon

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

- and -

CUSTOM AGRICULTURAL INTELLIGENCE INCORPORATED, GREEN CHEM CONSULTANTS INC., BERMMAN MICRONUTRIENT INCORPORATED AND BERMMAN HAVEN INCORPORATED

RESPONDENTS

Counsel:

Craig P. Frith and Corbin W. Golding	for the receiver, BDO Canada Limited
Janine L. Lavoie-Harding and Taylor L. Wilcox	for CIBC
Jeremy P. Klassen	for the respondents

FIAT — GERECKE J.
December 19, 2024

A. Overview

[1] Insolvency is frequently described as "real-time litigation". Depending on the observer's perspective, insolvency matters proceed very quickly at times, while simultaneously seeming to take forever. This fiat relates to one aspect that happens very quickly for debtors and creditors involved in such proceedings.

[2] More particularly, this fiat relates to requests by receivers for Court approval of their activities at the time that they bring an application. Here, BDO Canada

Limited [receiver] applied for Court approval of a sale process concerning certain assets of the respondent parties [debtors]. As part of the same application, the receiver requested that the Court approve the receiver's actions and activities described in the receiver's first report.

[3] The issue in my mind is not whether the receiver's activities merit such approval. Such approval is routinely granted in Canadian insolvency proceedings, and generally during the proceeding rather than requiring the receiver to wait until the proceeding is complete. Moreover, nothing was brought to my attention in this matter that raises concerns about this receiver's activities or actions.

[4] My concern is focused on the timing of the request. Most interested parties were served with the application three days before I heard it. The draft order contained the following:

> 18B The First Report, and the Receiver's actions and activities described therein, are hereby approved.

[5] The report in question was dated November 1, 2024. Most interested parties, including the debtors and most creditors, were served with it by email (directly or on their counsel) on November 4, 2024. Some creditors were served by fax or regular mail.

[6] As I observe above, my concern was the timing. Court approval would erect obstacles to an aggrieved party taking action against the receiver on three days notice, perhaps less. The *King's Bench Rules* require 14 days notice for most applications in this jurisdiction.

[7] This fiat addresses that timing concern. I conclude that the Court should permit requests for such approval to be made at the same time as the related substantive relief is sought. It should be left to the court officer as to whether they wish to seek approval then or at a later date, with the knowledge that later approval may provide

more effective protection.

B. Background

[8] In its application, the receiver sought an order to approve the sale of certain of the debtors' personal property assets through an auction process. I granted that order in chambers but reserved with respect to the receiver's request for Court approval of its activities.

[9] Applications by receivers in this jurisdiction are frequently brought on very short notice. Such applications regularly involve large packages of materials, including a receiver's report addressing what may be a wide range of matters that the receiver has dealt with since the prior court appearance. Substantial work goes into preparation of reports of court officers. Depending on the matter's complexity, a report can span many pages of discussion, with numerous exhibits in support. A longstanding proceeding might take years to conclude, resulting in a dozen or more reports being served over the course of a file. Each package can be overwhelming for interested parties, particularly those without legal representation, or whose counsel is not familiar with insolvency proceedings and principles.

[10] Why do receivers bring applications on very short notice? There are several considerations at play. Receiverships and other insolvency proceedings are costly. Assets might need to be secured until sold, such that their sales reduce the associated holdings costs. The packages take time to prepare. Court dates are secured differently than in other matters, at least in Saskatchewan. Counsel on an insolvency matter must request a date from the Local Registrar, who must ensure a judge on the insolvency panel is available to hear the matter. Sometimes an application's urgency combines with the availability issue to result in the receiver learning of the date only a few days in advance. Because of that, considerable advance notice to creditors and the debtors is logistically impossible in many cases.

[11] I heard this application on November 7, 2024. Most parties were served with the application materials on November 4, 2024. That was not short service in this case, because the receivership order authorized service of materials for future applications on three days notice.

[12] To my knowledge, nothing particularly controversial has occurred on this matter. I ordered the sealing of a confidential supplement to the receiver's report, but that was to protect against disclosure of financial details of competing proposals for the sale process and how the proposing parties may have valued the assets in question.

C. Analysis

[13] Insolvency orders generally contain multiple provisions to protect court officers. The receivership order in this matter provides that:

a. The receiver cannot be sued concerning its actions as receiver without the receiver's prior written consent or leave of the Court, and any right of action against the receiver is stayed absent such consent or leave.

b. The receiver can be found liable only for gross negligence or wilful misconduct, and the quantum of its liability cannot exceed the indemnity it could obtain from the debtor's property.

Those are standard provisions contained within the template receivership order that this Court has approved for use, and they represent normal language found in almost every Saskatchewan receivership where the Court appoints the receiver.

[14] Requests for approval of activities are routinely made in both receivership proceedings and proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. As Morawetz J. (as he then was) observed in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 CBR (6^{th}) 311 [*Target*], in most cases such requests are

unopposed, and the relief is granted routinely.

[15] The effect of approval of activities was considered in *Royal Bank of Canada v 6382330 Manitoba Ltd.*, 2021 MBQB 72 [*Royal Bank*]. There, the court observed that courts apply two different standards when a party seeks leave to commence action against a receiver. On the less stringent standard (used when no approval of activities has been granted), leave to commence is granted unless it is clear that there is no foundation for the claim or that it is frivolous or vexatious. The higher standard is that of a strong *prima facie* case. It is generally used where the matters complained of could have been raised previously by the party seeking to sue. See: *Royal Bank* at paras 6 to 11. While I have probably over-simplified those characterizations, they suffice for this discussion.

[16] Morawetz J. in *Target*, outlined the objectives of such approval as follows, explaining at paragraph 23 that it:

> (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
>
> (b) brings the Monitor's activities before the Court;
>
> (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
>
> (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
>
> (e) provides protection for the Monitor not otherwise provided by the CCAA; and
>
> (f) protects the creditors from the delay and distribution that would be caused by:
>
> (i) re-litigation of steps taken to date, and
>
> (ii) potential indemnity claims by the Monitor.

[17] The request for approval of activities was opposed in *Target*, a matter under the *CCAA*. Two landlords of the debtors contended that the request was both premature and unnecessary, and that granting the approval would be unfair to creditors

when not all underlying facts had been disclosed. They also argued that the request was entirely unnecessary because the *CCAA* and the initial order granted in the proceeding already provided ample protection to the monitor. Notwithstanding the landlords' objections, Morawetz J. granted approval of activities, though using language different from what is generally used in this Court.

[18] Insolvency is a unique and specialized area of practice. Courts are traditionally inclined to protect their court officers to promote efficiency and cost-effectiveness in such proceedings. If ongoing approval of activities were not available to monitors and receivers, the cost of insolvency proceedings might escalate, with insolvency professionals passing on the cost of what they perceive as increased risk of liability. That would not benefit creditors or debtors.

[19] That said, seeking approval of activities at the same time as substantive relief might not provide the added protection contemplated by the receiver here, depending on the circumstances. In *Royal Bank*, the Court stated in part:

> [15] Based on the applicable authorities, I summarize the principles governing a motion seeking leave to bring an action against a receiver as follows:
>
> …
>
> c) Where the factual and legal issues underlying the moving party's proposed claim have been previously adjudicated and approved by a court order, the court applies a more stringent, strong *prima facie* case test;
>
> d) The strong *prima facie* case test may apply and is appropriate in situations where the matters complained of could have been raised by the moving party previously;
>
> e) In applying the last principle, the court should consider when the moving parties received the information or facts to advance a cause of action and whether they acted with reasonable diligence to advance the claim.

That discussion reiterates and amplifies the point made earlier in *Royal Bank*, that where a party seeks leave to sue, the test that courts use to determine whether to give

leave is more stringent when the matters could have been complained of could have been raised previously.

[20] What does "previously" mean in that context? There are two possibilities – the date when the substantive relief was granted, and when the approval of activities was granted. Where those occur on the same day, being the day that the substantive relief was before the Court, other interested parties usually have had only a brief opportunity to start to assess their position regarding the substantive relief, let alone whether they would object to approval of the court officer's activities.

[21] What does that short notice mean to the *Royal Bank* analysis set out above? It is highly relevant to the question of when a party later seeking to sue received the information or facts to advance a cause of action and whether they acted with reasonable diligence to pursue a claim. Where a party wishes to sue a court officer, having received notice of three days (or anything in that range) of the application for relief and for approval of activities, that may strongly influence a court to later use the less stringent frivolous or vexatious standard in determining whether to grant leave.

[22] In other words, where notice was shorter when approval of activities was sought, this Court should be less likely to apply the more stringent strong *prima facie* case standard.

[23] Court officers may therefore wish to defer seeking approval of activities to when they make a subsequent application. If there is a later application for leave to commence an action against them, they will have a better argument that the complaint should have been raised earlier and in particular before the Court approved activities. Another factor relevant to a later leave application could be whether the court officer informed the Court of the impugned issue and pertinent facts when approval of activities was sought.

[24] Given the foregoing discussion, I do not find it necessary to impose a rule that requests for such approval cannot be made at the same time as the related substantive relief is sought. That can be left to the court officer to determine, understanding the considerations that this Court may later apply in light of this discussion.

[25] This fiat may and should be interpreted as introducing some uncertainty concerning the effect of Court approval of activities of a court officer in cases where that approval is sought on short notice. The Court remains concerned about being requested to approve the activities of a court officer on short notice. Even 14 days seems short in this context, given the bar to commencing action that it might erect, and the other protections for receivers and monitors that are routinely granted.

[26] What might be done going forward? During oral argument of this matter, I wondered aloud whether approval requests could be made in conjunction with subsequent applications, but not every insolvency matter features regular court appearances. This Court has a long history of working with committees of the Bankruptcy & Insolvency Section of the Canadian Bar Association Saskatchewan Branch to improve insolvency practice in this jurisdiction. Such committees carried out the development work and underlying research that led to the Court approving the template orders used in commercial insolvency matters before the Court. If insolvency practitioners desire greater certainty than afforded by this fiat, I invite the present or next such committee to engage with the Court's insolvency panel to discuss potential alternative approaches.

[27] Here, the receiver seeks approval of the First Report dated November 1, 2024, and the receiver's actions and activities described therein. As no complaints have come to the Court's attention, such approval is granted in substantially the language

that appears in paragraph 18B of the draft order filed November 4, 2024. The receiver has leave to take out a formal order to that effect.

J.
D.G. GERECKE