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COURT COURT OF KING'S BENCH
OF ALBERTA

JUDICIAL CALGARY
CENTRE

PLAINTIFF CANADIAN WESTERN BANK

DEFENDANT 2004639 ALBERTA LTD.

DOCUMENT **BRIEF OF CANADIAN WESTERN BANK**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

McLennan Ross LLP
#600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: Charles P. Russell, K.C.
Telephone: (780) 482-9115
Fax: (780) 733-9757
Email: chuck.russell@mross.com
File No.: 20230779

TABLE OF CONTENTS

PART 1	INTRODUCTION	1
PART 2	SUMMARY OF FACTS	1
PART 3	ISSUES	5
PART 4	ARGUMENT	6
A.	LAW	6
B.	ARGUMENT	8
PART 5	SUMMARY AND RELIEF REQUESTED	11

PART 1 INTRODUCTION

1. This brief is submitted on behalf of CWB in support of its application for an appointment of FTI Consulting Canada Inc. as Receiver and Manager over the property of the Borrower.
2. CWB submits that it is just or convenient in these circumstances to grant CWB's application to appoint a Receiver and Manager over the property of the Borrower.
3. All capitalized terms not defined herein shall have the same meaning ascribed to them in the Affidavit of Cory Stark.

PART 2 SUMMARY OF FACTS

4. The Borrower is a corporation incorporated pursuant to the laws of Alberta. By way of an assignment of sublease from Simplex, the Borrower subleases office space from the CAA located within the Calgary International Airport area.
5. The office building, known as Airport Corporate Centre is an 8 storey office building with an underground parkade that is located at the Calgary International Airport (the "**Building**").
6. The Building is attached to the main airport terminal via a Plus 15 Walkway; as well the underground tunnel system at the airport. The overall structure contains over 180,000 square feet. The Borrower has a leasehold interest of floors 2 to 8 comprising 146,329 square feet and all revenue contained therein. The CAA maintains ownership of the parkade floors, the basement, lobby and first floor. The underlying Lands are under lease from Transport Canada to the CAA, who in turn subleased a component of the Lands to the Borrower. The space leased to the Borrower is of good condition and quality. The Building has consistently shown a high rate of vacancy and difficulty attracting and retaining tenants. As at January 1, 2024, the vacancy rate was at least 51.6%.

Affidavit of Cory Stark, sworn April 17, 2024 [the "**Stark Affidavit**"], at paras 4-5 and Exhibits "A" & "B".

7. The Lands are subject to a Mortgage of Lease as between the Borrower, the CAA and Simplex. The Borrower assigned the Mortgage of Lease to CWB by way of a Leasehold Mortgage. As at June 12, 2023, Simplex owed \$2,903,992 to the CAA under the Mortgage of Lease.

Affidavit of Cory Stark, sworn April 17, 2024 [the "**Stark Affidavit**"], at paras 8(b) & 24 and Exhibits "F" & "S".

8. CWB issued to the Borrower a Commitment Letter dated March 23, 2017, as amended, by letters including those dated April 12, 2018, May 4, 2021, July 7, 2021 and May 12, 2022 (collectively, the “**Commitment Letter**”), by which CWB agreed to provide financing to the Borrower repayment (the “**Loans**”), in exchange for regularly scheduled repayments and financial reporting.

Stark Affidavit, at para 6 and Exhibit “C”.

9. Payment of the Loans was secured by:

- (a) a GSA from the Borrower wherein the Borrower charged in favour of CWB all of its present and after acquired property;

Stark Affidavit at para 8(a) and Exhibit “E”.

- (b) a Mortgage charging the Lands; for securing payment of the sum of \$19,950,000.00, together with interest at a rate of 3.0% above CWB’s prime rate;

Stark Affidavit, at para 8(b) and Exhibit “F”.

- (c) a Leasehold Mortgage Tri-Party Agreement between the CAA, the Borrower, and Simplex by which the CAA bequeathed certain rights as landlord to the Borrower;

Stark Affidavit, at para 8(c) and Exhibit “G”.

- (d) a General Assignment of Rents and Leases executed April 6, 2017 and registered against the Lands;

Stark Affidavit, at para 8 and Exhibit “H”.

- (e) an Environmental Agreement and Indemnity dated April 6, 2017.

(collectively, the “**Security**”).

Stark Affidavit, at para 8(d) and Exhibit “I”.

10. The Security was duly registered by CWB in the Province of Alberta as required by law.

Stark Affidavit, at para 9 and Exhibit “J”.

11. On April 10, 2018, the Borrower executed a Demand Note affirming its obligations with respect to the Debt.

Stark Affidavit, at para 10 and Exhibit “K”.

Forbearance Agreements and Acts of Default

12. By mid-2023, the Borrower was in default of its scheduled repayment obligations, and had demonstrated poor operating results over an extended period of time.
13. On April 28, 2023, CWB issued a demand for payment and Notice of Intention to Enforce Security regarding the Loans in accordance with the Commitment Letter and the Security, and to date has not received payment.

Stark Affidavit, at para 13 and Exhibit “L”.

14. As of March 15, 2024, the outstanding amounts owing to CWB by the Borrower are:

LOAN 101008003484	\$18,279,642.24
LOAN 101017105958	<u>\$25,226.29</u>
TOTAL	\$18,304,868.53

this amount is exclusive of interest, costs, and legal fees on a solicitor and own client full indemnity basis, which continue to accrue (collectively the “**Debt**”).

Stark Affidavit, at para 7 and Exhibit “D”.

15. On June 15, 2023, CWB, the Borrower, and the Guarantors executed a Forbearance Agreement, under which CWB agreed to abstain from enforcing its security interests against the Borrower with respect to the Loans in exchange for certain conditions, with the forbearance period ending November 30, 2023 (the “**Forbearance Term**”). Following the end of the Forbearance Term, the Forbearance Agreement gave CWB the unrestricted right to realize upon the Security, including the appointment of a Receiver and Manager. During the Forbearance Term, the Borrower failed to meet certain monthly reporting requirements.

Stark Affidavit, at paras 14-15 and Exhibit “M”.

16. Following the expiration of the Forbearance Term, CWB chose to postpone enforcement of its Security to allow for the Borrower to attempt to correct its record of non-payment or, alternatively to allow the Borrower to market its assets in an effort to pay off the Debt.

Stark Affidavit, at para 16 and Exhibit “N”.

17. On February 13, 2024, CWB, the Borrower, and the Guarantors executed the Forbearance Amending Agreement, under which CWB agreed to renew and extend the Forbearance Term (the “**Extended Forbearance Term**”) to February 29, 2024 to give the Borrower further time to market its assets with a view to discharging the Debt. The Borrower was required to make ongoing payments to CWB during the extended Forbearance Term.

Stark Affidavit, at paras 17-18 and Exhibit "O".

18. During the Extended Forbearance Term, the Borrower's failure to meet its reporting obligations continued and the Borrower also failed to make timely payments to CWB and aggressively market its assets for sale.

Stark Affidavit at para 19.

19. CWB had requested from the Borrower an explanation regarding its noncompliance and demanded rectification of its breaches, which did not occur.

Stark Affidavit, at para 19 and Exhibit "P".

20. On February 21, 2024, CWB advised the Borrower of the upcoming expiration of the Forbearance Amending Agreement and asked for justification of the Borrower's noncompliance with the terms of the Commitment Letter, the Security, and Forbearance Agreements and requested the Borrower provide CWB with a realistic and suitable plan to discharge the Debt. No viable plan was put forward by the Borrower to cure its defaults under the Commitment Letter, Security and Forbearance Agreements.

Stark Affidavit, at para 20 and Exhibit "Q".

PART 3 ISSUES

21. The issue before this Honourable Court is whether it is just or convenient to appoint a Receiver and Manager over the Borrower' assets in these circumstances?

PART 4 APPOINTMENT OF A RECEIVER AND MANAGER

A. LAW

22. This Honourable Court has authority to appoint a Receiver and Manager where it is just or convenient to do so pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, section 13(2) of the *Judicature Act*, RSA 2000 c J-2, section 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, and section 99 of the *Business Corporations Act*, RSA 2000, c B-9.

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

[Tab 1]

Judicature Act, RSA 2000, c J-2, s 13(2).

[Tab 2]

Personal Property Security Act, RSA 2000,
c. P-7, s 65(7).

[Tab 3]

Business Corporations Act, RSA 2000, c B-
9, s 99. [Tab 4]

23. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”), a court may appoint a Receiver and Manager on application by a secured creditor over the assets and property of an insolvent person and upon the expiry of 10 days’ notice.

Bankruptcy and Insolvency Act RSC 1985,
c B-3, s 243(1.1). [Tab 1]

24. The test to appoint a Receiver and Manager is whether it is just or convenient to do so in light of the circumstances.

*Servus Credit Union Ltd. v Proform
Management Inc.* (“**Proform**”), 2020 ABQB
316 at para 65.

[Tab 5]

25. A Receivership is appropriate when required to protect the interests of a secured lender and when it is just or convenient, having considered and balanced the interest of the parties.

Kasten Energy Inc. v Shamrock Oil & Gas Ltd., 2013 ABQB 63, at para 20.

[Tab 6]

26. In *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430, the Honourable Justice Romaine adopted the following non-exhaustive list of factors cited by Frank Bennett in *Bennett on Receiverships* in determining whether it is appropriate to appoint a receiver:
- (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 and Manager is not appointed, particularly where the appointment of a Receiver and Manager 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 and Manager 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 debtor and others;
 - (i) the principle that the appointment of a Receiver and Manager is extraordinary relief which should be granted cautiously and sparingly;
 - (j) the consideration of whether a court appointment is necessary to enable the Receiver and Manager 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 and Manager may be in place;
 - (n) the cost to the parties;
 - (o) the likelihood of maximizing return to the parties; and
 - (p) the goal of facilitating the duties of the Receiver and Manager.

Paragon Capital Corp. v Merchants & Traders Assurance Co., 2002 ABQB 430 at para 27 (“*Paragon Capital*”). [Tab 7]

27. The extraordinary nature of appointing a Receiver and Manager is less influential to the court’s determination where the secured creditor holds security that provides for the appointment of a Receiver and Manager.

Schendel Management Ltd, 2019 ABQB 545, at para 44. [Tab 8]

28. Where there was no plan to repay any of the debtor’s indebtedness and no persuasive evidence that the appointment would cause undue hardship to the debtor, a Receiver and Manager should be appointed.

Paragon Capital at para 31. [Tab 7]

29. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a Receiver and Manager is not appointed.

Bank of Nova Scotia v Freure Village of Clair Creek, 1996 CanLII 8258 (ON SC), at para 10, 40 CBR (3d) 274. [Tab 9]

30. In *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, Kasten Energy Inc. applied to this Court for the appointment of a Receiver and Manager of the debtor’s assets and undertaking pursuant to a security interest given in a general security agreement over all of the debtor’s present and after acquired property. The Court held that even if the applicant could not demonstrate irreparable harm in the circumstances, the security document authorized the appointment of a Receiver and Manager:

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27.

Kasten Energy Inc. v Shamrock Oil & Gas Ltd., 2013 ABQB 63, at paras 20-21. [Tab 6]

31. In *Servus Credit Union Ltd. v Proform Management Inc.*, Servus Credit Union Ltd. applied to this Honourable Court for the appointment of a Receiver on the basis of a consent receivership order. The Court noted the presence of a consent order is highly influential and settled on the following principles for approaching a consent order:

60 On how to approach a consent order, the guiding principles are as follows:

- the Court is not obliged, from the mere fact of consent, to grant a consent order; and
- the Court must be satisfied (at minimum) that:
 - it has the jurisdiction to grant the order;
 - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
 - consent has actually been provided;
 - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
 - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
 - the proposed relief does not exceed that consented to; and
 - consent aside, the ordered relief is warranted in the circumstances.

Proform, at paras 60, 64-68, and 72. [Tab 5]

B. ARGUMENT

32. CWB respectfully submits that this Honourable Court should exercise its discretion to appoint FTI Consulting Canada Inc. as Receiver and Manager of the Borrower.
33. CWB states that the Borrower is an “insolvent person” for the purposes of the BIA, being generally unable to meet its obligations to CWB as they become due.
34. Having regard to the factors listed in *Paragon Capital*, CWB notes:
 - (a) CWB is the first-ranking secured creditor of the Borrower and holds a first ranking security interest in all of its present and after-acquired property and various serial numbered goods;
 - (b) the GSA authorizes the appointment of a Receiver and Manager under section 9(f);
 - (c) the Forbearance Agreement authorizes the appointment of a Receiver and Manager under section 2.6(a) and Schedule “A”;
 - (d) the Borrower has further consented to the appointment of a Receiver and Manager by executing a Consent Order authorizing the appointment of a Receiver and Manager over its assets and affairs, to be used in the present circumstances as contemplated by sections 2.1(b & c), 2.6(a), and Schedule “A” of the Forbearance Agreement;
 - (e) the risk to CWB is significant at approximately \$18,304,868.53;

- (f) the Borrower has shown poor operating results over an extended period of time, and failed to issue timely financial statements;
 - (g) the assets of the Borrower are such that judicial assistance will be required to maximize value, given the complexity of the arrangements between the CAA, Simplex, the Borrower, and CWB;
 - (h) a court appointment is necessary to enable the Receiver and Manager to carry out its duties efficiently and to obtain court approval for preservation of property and eventual liquidation;
 - (i) the appointment of a Receiver and Manager would ensure court oversight and ensure consistent treatment of all stakeholders;
 - (j) a court-appointed Receiver and Manager will guarantee maximum value and a transparent process under the court's supervision; and
 - (k) CWB is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver and Manager.
35. Given the facts set out above, it is submitted that it is both just and convenient to appoint a Receiver and Manager over the Borrower.
36. In light of the current state of the Borrower, the Borrower's defaults under the Commitment Letter, the Security, and Forbearance Agreements, and expiration of the Extended Forbearance Term, administration of the Borrower through appointment of a Receiver and Manager will be the most effective way of maximizing value for CWB, and it would be just and equitable that a receiver and manager is appointed over the Borrower's assets.
37. There are no other remedies short of the appointment of a Receiver and Manager which are available to CWB which will sufficiently protect its interests. The Borrower has had sufficient time to pay back the Loans but has been unable to do so. The balancing of interests of the parties favours CWB and the appointment of a receiver.
38. The Borrower has further consented to a form of order for the appointment of a Receiver and Manager, which consent is valid. The order is within the jurisdiction of this Honourable Court, and the triggering circumstances for its use under the Forbearance Agreements have been met.
39. FTI Consulting Canada Inc. is a recognized and respected insolvency firm, and is capable of dealing with the rights of all interested parties in a fair manner.


PART 5 SUMMARY AND RELIEF REQUESTED

40. CWB respectfully submits that it is both just and convenient to grant CWB's Receivership Application and appoint FTI Consulting Canada Inc. as Receiver and Manager of the Borrower.
41. CWB is entitled to such a remedy in the GSA and Forbearance Agreements, and on a balance of convenience and with respect to the totality of circumstances, this fact favours CWB's Receivership Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 22nd day of April, 2024.

MCLENNAN ROSS LLP

 Per:



Charles P. Russell, K.C.
Solicitor for Canadian Western Bank

TABLE OF AUTHORITIES

<u>Bankruptcy and Insolvency Act</u> R.S.C. 1985, c. B-3, s. 243(1)	TAB 1
<u>Judicature Act</u> , RSA 2000, c J-2, s 13	TAB 2
<u>Personal Property Security Act</u> , RSA 2000, c. P-7, s 65(7)	TAB 3
<u>Business Corporations Act</u> , R.S.A. 2000, c. B-9, s. 99.....	TAB 4
<u>Servus Credit Union Ltd. v Proform Management Inc</u> , 2020 ABQB 316.....	TAB 5
<u>Kasten Energy Inc. v Shamrock Oil & Gas Ltd.</u> , 2013 ABQB 63.....	TAB 6
<u>Paragon Capital Corp. v Merchants & Traders Assurance Co.</u> , 2002 ABQB 430.....	TAB 7
<u>Schendel Management Ltd</u> , 2019 ABQB 545.....	TAB 8
<u>Bank of Nova Scotia v Freure Village of Clair Creek</u> , 1996 CanLII 8258 (ON SC)	TAB 9