QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 228**

Date: **2017 07 24**
Docket: QBG 783 of 2017
Judicial Centre: Saskatoon

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

BETWEEN:

AFFINITY CREDIT UNION 2013

PLAINTIFF

- and –

VORTEX DRILLING LTD.

DEFENDANT

Docket: QBG 1030 of 2017
Judicial Centre: Saskatoon

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

- and -

IN THE MATTER OF *THE* SASKATCHEWAN *BUSINESS CORPORATIONS ACT*, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

Counsel:

Jeffrey M. Lee, Q.C., and Paul D. Olfert	for the Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery and Jared Enns	for Vortex Drilling
Ian A. Sutherland and Jordan F. Richards	for the Receiver
Brent Warga	Representative of Interim Receiver (via phone)
P. Koliaskis	for the Proposed Monitor (via phone)

DECISION SCHERMAN J.
July 24, 2017

Introduction

[1] Affinity Credit Union 2013 [Affinity], a secured lender to Vortex Drilling Ltd. [Vortex], is owed in excess of $8,350,000 and has applied for the appointment of a Receiver of all of the assets and properties of Vortex under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and s. 64 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

[2] Vortex has applied under s. 11.02(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], for an initial order granting various relief including a stay of all proceedings against Vortex for a period of time to permit it to pursue a successful arrangement or reorganization.

[3] Vortex is insolvent. The other statutory requirements to permit Affinity to pursue the appointment of a Receiver under the *BIA* and for Vortex to seek an initial order and stay under the *CCAA* have been met or established.

[4] Affinity has since early 2015 accommodated financial difficulties being faced by Vortex and agreed, under the terms of various agreements, to interest only

payments for periods of time in return for various undertakings of Vortex. It says Vortex has breached those undertakings, has ceased making even interest payments and since April of 2017 has been in default under the terms of its credit agreements. Affinity has demanded payment in full of the indebtedness owed to it, and Vortex has failed to pay what it is contractually obligated to pay.

[5] Vortex is in the business of drilling oil wells. It says that its financial difficulties are the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. This has caused a related reduction in the demand for drilling rigs to drill new wells. Oil prices peaked well in excess of $100 U.S. per barrel and since 2014 have fallen to $50 U.S. or less per barrel.

[6] Vortex argues the economic climate in the Western Canadian oil industry is improving, it is expecting a substantial improvement in its cash flow, Affinity is fully secured for the indebtedness owed and the initial *CCAA* order it seeks should be granted so as to give it an opportunity to seek refinancing from other lenders or to facilitate the making of a compromise or arrangements with its existing creditors so as to permit it to be able to continue in business.

[7] The issue to be decided in the context of the competing applications is whether the appropriate order to make is to grant an initial order and stay of proceedings under the *CCAA* or to grant Affinity's application for the appointment of a Receiver.

Background Facts

[8] Vortex was created in November of 2010 and subsequently purchased and/or constructed three drilling rigs largely utilizing borrowed funds. Under the

terms of an August 12, 2013 Offer to Finance from Affinity [Credit Agreement] accepted and agreed to by Vortex, Affinity advanced Vortex, under three separate loan facilities, a total of $14,910,711 to pay out existing loans in respect of two rigs and to finance the construction of a third drilling rig. The individual loan facilities were each payable on demand, but before demand were to be paid by combined monthly principal and interest payments totalling $325,257. The Credit Agreement expressly provided that any material change in risk or adverse change in the financial condition of Vortex or failure to comply with any condition of the Offer to Finance would constitute an event of default entitling Affinity to demand payment of all sums owing and to realize on the security taken for the loan.

[9] As required by the Credit Agreement, Vortex granted to Affinity, under the terms of a general security agreement registered in the personal property registries of each of Manitoba, Saskatchewan and Alberta [GSA], a security interest in all of its present and after acquired property. The terms of the GSA included the right of Affinity, upon the occurrence of an event of default as therein defined, to seize and sell any of Vortex's property or to appoint a Receiver (see paragraphs 9 to 13 of the GSA). Events of default were widely defined and include the insolvency of Vortex.

[10] With the collapse of oil prices and the resulting downturn in the oil industry Vortex was unable to make the monthly payments contemplated by the Credit Agreement and sought accommodations from Affinity. By a series of agreements Affinity provided principal repayment deferrals to Vortex, which resulted in Vortex paying only interest for most of the months of 2016. Vortex failed to fulfil its commitments to make balloon principal payments and to resume principal and interest payments by dates and in amounts contemplated by these accommodations or deferral agreements.

[11] As of January 2017 regular monthly principal and interest payments of $325,257 were again to resume but Vortex failed to make such payments. In March of 2017 Vortex informed Affinity that it could only afford to make monthly payments of $100,000 rather than the $325,257 per month then required by the Credit Agreement. Affinity prepared an amendment to the Credit Agreement which would have permitted such reduced payments on condition that Vortex approach its shareholders to obtain an injection of equity capital to finance its business operations and reduce the indebtedness owing to Affinity. Vortex did not sign that amending agreement, has not made the required monthly payments, nor remedied the defaults that have occurred under the Credit Agreement, as amended from time to time.

[12] By letter of May 1, 2017 Affinity gave Vortex notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded that the full outstanding obligations (stated to be $8,422,061.01 as at April 28, 2017) be repaid within 30 days, failing which Affinity would proceed to avail itself of its legal remedies including enforcing its security. On June 6, 2017 Affinity filed with this Court its notice of application, returnable June 9, 2017, seeking the appointment of a receiver. By agreement between counsel for Affinity and Vortex this application was adjourned to June 23, 2017.

[13] During this adjournment negotiations continued between the parties with Vortex seeking continuing accommodations or forbearance on the part of Affinity. Vortex was representing it had prospects to refinance the indebtedness with other lenders.

[14] Affinity takes that position that these negotiations resulted in a concluded agreement under which Affinity was to provide an additional two-week period of forbearance so as to give Vortex additional time to pursue refinancing and

would fund current payroll obligations of Vortex, in return for which Vortex would consent to the appointment of a receiver should its refinancing efforts fail. Vortex takes the position that no such agreement was ever concluded.

[15] Affinity's application for the appointment of a receiver came before me on June 23, 2017. Vortex sought an adjournment of that application, advancing the position that it needed time to respond to the affidavits filed by Affinity and to bring its own application for *CCAA* relief. In the circumstances I ordered the appointment of an interim receiver for a period ending July 23, 2017 under which the interim receiver could investigate, monitor and facilitate Vortex's continuing operation so as to give Vortex an opportunity to file opposition affidavits and make its *CCAA* application.

[16] That application and the affidavit evidence of both Vortex and Affinity on both applications are before me. As stated above, Vortex is insolvent, in the sense of being unable to pay its debts as they become due. The issue to be decided is whether in the circumstances the appointment of a Receiver or an initial order under the *CCAA* is most appropriate in the circumstances.

The Law Respecting *CCAA* Applications

[17] Jurisprudence establishes that the following principles are applicable to *CCAA* applications:

a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 15, [2010] 3 SCR 379 [*Century*].

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Chef Ready Foods Ltd. v Hongkong Bank of Canada* [1991] 2 WWR 136.

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate…

[18] I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

The Law Respecting Receivership Applications

[19] In a previous unreported decision in *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.* (25 February 2016) Saskatoon, QB 1639 of 2015 (Sask QB), I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd.* 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.* 2013 ABQB 63.

6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
>> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*(1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-

exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to 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.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

[20] Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

The Parties' Positions in Brief

[21] Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

[22] Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to

avoid the social and economic costs of liquidation. It says that the security that Affinity holds has a value significantly beyond the debt owed by it, and there will be no real prejudice to Affinity by granting an initial order and granting a stay.

[23] Affinity says the proper and appropriate order in the circumstances is the receivership order it seeks. It says that Vortex is insolvent, it has the contractual right to appoint a receiver or seize and sell the rigs upon an event of default (which both insolvency and failure to pay the debt owed are), it has already provided Vortex with lengthy and significant accommodations and for good and sufficient cause it has lost trust in Vortex. Affinity says Vortex has repeatedly failed to honour contractual commitments made to Affinity in return for the deferrals granted and that the evidence demonstrates that Vortex has not acted in good faith.

[24] Beyond these factors Affinity's position is that, given the realities of the oil industry and Vortex's financial position, the business is unviable now and into the foreseeable future. Over nearly 2 ½ years Affinity has accepted deferral in payments totalling some $4,500,000, but notwithstanding this accommodation Vortex has been unable to generate cash flow that permitted it to cover its variable operating costs, much less make a contribution to fixed costs. The application made by Vortex does not contain even the germ of a reorganization plan that has any prospect of succeeding. It relies on purported, but unverified, refinancing possibilities. Vortex has had many months' opportunity to obtain refinancing and has not been able to do so.

[25] Affinity says that continuing to operate the rigs without generating revenue sufficient to cover the fixed costs (which includes repayment of the loans) means the rigs will continue to depreciate and Affinity's security position will be eroded.

[26] For all of these reasons it says to issue an initial order and grant a stay of proceedings under the *CCAA* would be inappropriate and that is just and convenient to appoint a receiver.

Analysis of Vortex's Position that *CCAA* Relief is Appropriate

i. Evidentiary Concerns

[27] At paragraphs 20 to 22 of the Vortex Brief of Law counsel argues as follows:

> 20. A stay of proceedings would fulfill the legislative objective of the CCAA by permitting Vortex to carry on its business operations during the reorganization process. The evidence in support of this application clearly demonstrates that such an order is appropriate in these circumstances:
>
> (a) the industry within which Vortex operates is seasonal, and Vortex's Rigs are generally deployed from the month of June onwards (Twietmeyer Affidavit, at para 18);
>
> (b) as the industry itself is seasonal, so too is Vortex's cash flow (Twietmeyer Affidavit, at para 18);
>
> (c) Vortex's assets are worth significantly more than its debts (Twietmeyer Affidavit, at paras 2 and 17);
>
> (d) two of Vortex's three Rigs are currently deployed and operational for the 2017 season, one for Crescent Point Energy Cop. (sic), which is one of Canada's largest light and medium oil producers, and the second Rig is currently in operation for Aldon Oil Ltd. (Twietmeyer Affidavit, at para 19);
>
> (e) Vortex's general manager and sales consultant are currently deploying significant efforts in order to secure a contract in respect of its third Rig. The evidence before this court is that these efforts have successfully generated new business for Vortex, including its most recent contract with Aldon Oil Ltd. Accordingly, and through these ongoing efforts, it is

> believed that it is highly likely that Vortex will secure a contract for its third Rig (Twietmeyer Affidavit, at para 20); and
>
> (f) assuming all of the relief sought in this application is granted, Vortex's cash-flow projections indicate that, if DIP Financing is approved, Vortex will have enough liquidity to meet its cash flow needs through to the end of the 13-week forecast period (Twietmeyer Affidavit, at para 61).

[28] It should be noted that for each of the points in paragraph 20 (a) to (f) counsel references supporting evidence from affidavits of one Tina Twietmeyer. I have concluded that it is not appropriate for me to rely on much of the affidavit evidence of Tina Twietmeyer for the reasons that follow:

a. In paragraph 1 of her affidavit she describes herself as the Administrative Director of Vortex without providing any information or details as to what that job function involves and how it would give her the personal knowledge she claims to have. The evidence establishes she is not and has never been a corporate director of Vortex.

b. Notwithstanding her statement that she has personal knowledge of matters in question, on a close read of her affidavits it is apparent much of her evidence is based on information and belief without the basis for her information and belief being provided.

c. Rule 13-30 of *The Queen's Bench Rules* requires that an affidavit must be confined to facts within the personal knowledge of the person swearing the affidavit except that on an interlocutory application affidavit evidence based on information and belief is permissible provided the basis for the claimed information and belief is disclosed.

d. Applying the test in *Verlaan v Lang Estate*, 2004 SKQB 376, that an application is interlocutory where the decision in respect of it given in one way would finally dispose of the matter but if given in another way would allow the action to go on, I am of the opinion that an application for an initial order and stay of proceedings under the *CCAA* is not an interlocutory application. I fully appreciate that if the initial order is granted a further application approving a restructuring plan would be required. While the current application may lie close to the tipping point between what is a final application and an interlocutory application, it is my conclusion that Vortex's *CCAA* application has more of the characteristics of a final application than of an interlocutory application and thus I find the application to not be an interlocutory application. The result is that affidavit evidence based on information and belief is not admissible and should not be considered.

e. If I am wrong in my conclusion that the application is not interlocutory, then nonetheless, in various instances where Ms. Twietmeyer is giving evidence based upon information and belief for which the basis is not provided, the weight and reliability to be given to much of her evidence cannot be assessed.

f. Beyond these concerns, the Rules applicable to affidavit evidence do not permit opinion, argument, irrelevant matters or hearsay on either an interlocutory or final application. Much of Ms. Twietmeyer's affidavit evidence consists of opinion, argument and hearsay or irrelevant matters and thus should not be considered on those grounds.

g. An example of this is her evidence at paragraph 3 of her referenced affidavit that "the economic climate in the Western Canadian oil industry is improving. As a result, Vortex is experiencing significant growth in its business and is expecting a substantial improvement in its cash flow". This evidence includes inadmissible opinion, speculation and argument.

h. On the basis of all of the evidence, I conclude it is wrong to say that Vortex is experiencing significant growth. Rather it is limping along drilling wells on a "one-off" basis as and when such contracts come available. This work is done at depressed prices that cover the variable costs of operation, if that, and the bulk of its capacity is unused.

i. Ms. Twietmeyer is in no position to provide opinion evidence that the economic climate in the Western Canadian oil industry is improving, and her statement that Vortex is expecting a substantial improvement in its cash flow can at best be viewed as her hope, but in the context of affidavit evidence is inadmissible speculation.

[29] With reference to the points made in paragraph 20 of the Vortex Brief of Law above:

i. The facts stated in paragraphs 20 (a) and (b) that the industry in which Vortex operates and thus its cash flow is seasonal is of no or little relevance. The fact that the oil well drilling industry cash flow is seasonal is simply a fact of the business that should be accommodated in the budgeting. The evidence establishes that over a continuous 2 ½ years this business has been unviable.

ii. The statement at paragraph 20 (c) that Vortex's assets are worth significantly more that its debts is either or both inadmissible hearsay evidence or inadmissible opinion evidence. Paragraph 17 of Ms. Twietmeyer's affidavit indicated that an appraisal of the equipment had been obtained valuing it at $17,146,000, but Vortex has not filed this appraisal claiming confidentiality. This is not an acceptable reason for not filing an appraisal relied upon. Where appropriate, evidence with confidentiality concerns can be filed on a basis that protects the confidentiality.

iii. Opinion evidence can only be given by an individual found to be qualified to give such opinion evidence. To attempt to bootstrap opinion evidence of value into the record in this way is an attempt to introduce hearsay evidence. It denies Affinity any ability to test the opinion evidence or respond. Opinion evidence of value should be provided directly by the person expressing the opinion accompanied by the details of qualifications and the opinion so as to give the party opposite and this Court an opportunity to assess its reliability.

iv. Given no evidence that establishes the expertise of the provider of such appraisal and other evidence that the daily rates for drilling rigs have declined from in excess of $16,000 per day to under $7,000 per day and that only one out of three of Vortex's rigs has been operating on any regular basis gives significant basis to be concerned about the reliability of such evidence.

v. Paragraph 20 (d) of the Vortex brief argues, based on paragraph 19 of the Twietmeyer affidavit, that two of Vortex's three rigs are operational for the 2017 season. This is misleading as to the true

state of affairs. The current evidence, as of the date this matter was heard, was that the second rig had drilled one well for Aldon, over a period of approximately one week, and has since been idle. While there may be two rigs which are in operating condition, the relevant fact is that these two rigs are far from fully engaged.

vi. The argument advanced at paragraph 20(e) of the Vortex brief that "it is believed that it is highly likely that Vortex will secure a contract for its third Rig" is based on an expressed "belief" in paragraph 20 of the Twietmeyer affidavit without Twietmeyer having provided any basis for such belief other than reference to efforts on the part of a Messrs. Geysen and Rae. If there is relevant evidence on efforts and prospects for future work it should be given by these individuals rather than in the second-hand, hearsay manner here attempted. Reduced to its essence this is speculation and argument, not evidence.

[30] An applicant seeking relief under the *CCAA* should be placing before the Court the best evidence available. Section 11.02(3) of the *CCAA* requires the applicant to satisfy the Court that circumstances exist that make the order sought appropriate. It is a concern to me that I have a number of affidavits from Ms. Twietmeyer but no affidavit on this application from Mr. Geysen, who is the President and General Manager of Vortex, and thus presumably the responsible person within the company who has the requisite personal knowledge.

[31] Counsel for Vortex argues that I should have similar or enhanced concerns with respect to the affidavit evidence filed on behalf of Affinity and says I need to consider Ms. Spencer's affidavits with great care. I do not find reason for overall concern. While Ms. Spencer has expressed opinions or beliefs with regard to

the impact on the viability of Vortex given Mr. Big Eagle is no longer on the Board or the Chief Executive Officer of Vortex, I have not relied on that evidence for the decisions I have made.

[32] Ms. Spencer's affidavits make it clear that she has had day-to-day responsibility for administration of Affinity's account relating to Vortex and that she has conducted a detailed review of the books, records, files and correspondence of Affinity relating to that account. To the extent to which she provides factual evidence based upon the knowledge of the books, records, files and correspondence of Affinity, I find the factual evidence provided by Ms. Spencer in her affidavits to be appropriate and reliable. To the extent to which she engaged in measures of speculation, argument or providing evidence that she did not have personal knowledge of, I have not relied on such evidence.

ii. Good Faith Considerations in *CCAA* Applications

[33] I find on the basis of the evidence before me that there have been elements of bad faith in Vortex's dealings with Affinity. Vortex had, arising from both the nature of their relationship and by virtue of express contractual provisions, an obligation to provide complete and accurate financial information to Affinity and to not hide or misrepresent matters relevant to their relationship. Good faith of the applicant is a baseline consideration for a Court when considering *CCAA* applications.

[34] As of June 20, 2017, with Affinity's receivership application before this Court, but adjourned while the parties were negotiating a potential forbearance agreement, Vortex represented to Radius Credit Union (a member of the Affinity lending syndicate and independently providing an operating line of credit to Vortex) it had no accounts payable. This it did by writing cheques purporting to pay various

accounts payable, but then holding those cheques totalling some $235,548 and not delivering them to the payees. This accounting fiction that accounts payable had been paid was used by Vortex to access, under the Radius margining formula, some $121,000 in operating credits that would not have been available had the facts been accurately disclosed. I find this to be a breach of Vortex's contractual covenants to Affinity to provide honest and accurate financial information to Affinity notwithstanding that the misrepresentation was made to Radius in the first instance. Given the circumstances and Affinity's concerns with respect to Vortex's financial position, this action was a failure to act in good faith. It only came to light by reason of investigations by the Interim Receiver.

[35] In a June 30, 2016 revision to the Credit Agreement, which allowed Vortex's request to pay interest only from July through November, Vortex agreed that any financial settlement with one Harvey Turcotte would be funded from outside sources and not from Vortex's cash flow. Notwithstanding this agreement, in February of 2017 Vortex made a payment of $525,000 to Harvey Turcotte from its cash flow in breach of this agreement. This fact was not disclosed by Vortex to Affinity and only came to light by reason of investigations by the Interim Receiver. This I find to be a failure on the part of Vortex to act in good faith.

iii. Is *CCAA* Relief Appropriate or the Appointment of a Receiver Just and Convenient?

[36] On the basis of the totality of the evidence before me, I have concluded that it is not appropriate to make an initial order nor grant a stay of proceedings as requested by Vortex in its *CCAA* application. For reasons that overlap, I find it is just

and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

[37] Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 ½ years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to suggestions that there are real prospects of refinancing that do not involve either substantial write-off of

current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 ½ years. No statistical evidence has

been provided that establishes the number of rigs available in Western Canada and their current utilization rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available

to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

[38] The contractual agreement between Affinity and Vortex clearly contemplated loans payable on demand, with specified principal and interest payments before demand. Affinity has provided significant relief from the contractual terms over a two-year period. In a practical sense, Affinity has already effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*. Vortex has had the benefit of two years of debt repayment accommodations and forbearance and the opportunity to seek alternate financing. During this period Vortex has failed to honour undertakings it gave in exchange of the deferral relief provided. Affinity is contractually entitled, following its demand, to either seize and sell the rigs or to have a Receiver appointed. Having regard to the relevant factors I outlined in paragraph 19 above, I conclude that it is just and convenient to appoint a Receiver as sought by Affinity.

iv. Other Considerations

[39] Affinity argued that there was a concluded agreement in which Vortex had agreed to consent to the appointment of a Receiver. Vortex disputes that such an agreement was concluded and took exception to evidence Affinity wished to rely on as being without prejudice communications. In light of the conclusions I have reached above, I do not find it necessary to address these arguments and the related argument relating to settlement privilege. My decision is made without regard to the evidence and argument submitted surrounding these issues.

Conclusion

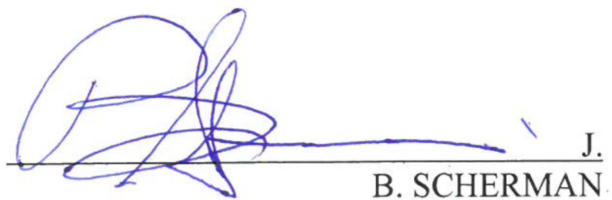
[40] For the reasons set forth above:

a. I dismiss Vortex's application for relief under the *CCAA*.

b. I order that Deloitte Restructuring Inc. be appointed Receiver of Vortex effective immediately.

c. I contemplate that the form of that order will be substantially in the form of the draft order filed by counsel for Affinity on July 6, 2017. However, at the hearing of the applications counsel for Affinity and Vortex asked that the final form of the order not be settled until after counsel had reviewed my decision and had discussion on the final form of order. I ask counsel to consult promptly. If they are able to agree on the form of order they shall file same for my approval. If they cannot agree on the form of the order, a conference call with me shall be arranged to settle this matter.

c. I approve the actions of the Interim Receiver since the date of appointment as Interim Receiver to the termination of that order.



J.

B. SCHERMAN