URGENT – EMERGENCY APPLICATION ENCLOSED

BY FASCIMILE AND PERSONAL DELIVERY

The Office of the Prothonotary
The Suprme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS, B3J 1S7

12 July 2023

To the Prothonotary of the Supreme Court:

Re: Re: Atlantic Sea Cucumbers Ltd.
In Re: s.50(4) of the *Bankruptcy and Insolvency Act* ("BIA") R.S.C. 1985 B-3

Court No: Hfx. 525172
Estate No: 51-2939212

We are counsel to Atlantic Sea Cucumbers Limited (the "**Company**" or "**ASCL**") in connection with the proposal proceedings commenced by the Company under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**") arising from the Notice of Intention to Make a Proposal (the "**NOI**") filed by the Company on May 1, 2023.

The Company seeks to obtain time before you to hear a Notice of Application in Chambers seeking Emergency Relief to be heard before your lordship in General Chambers in Halifax on Monday July 17, 2023, pursuant to Rule 28 of the Nova Scotia Rules of Civil Procedure.

A. Details of the Application:

The Company seeks to apply to a judge in General Chambers or to the Registrar in Bankruptcy in Halifax on July 17, 2023, for an Order:

a) abridging notice periods and service requirements pursuant to section 6 of the Bankruptcy and Insolvency General Rules; and

b) extending the time for the Applicant to make a Proposal in these proceedings by ten (10) days, pursuant to section 50.4(9) of the Bankruptcy and Insolvency Act.

Pursuant to the Order of Registrar Balmanoukian on May 31, 2023, the stay of proceedings granted in the proposal proceedings of the Applicant under the BIA expires on July 15, 2023.

On July 13, 2023, the Company appeared before Justice Rosinski of the Nova Scotia Supreme Court (the "**Court**") in order to obtain an Order converting the BIA proposal proceedings into proceedings commenced under s.11 of the *Companies Creditors Arrangement Act*, R.S.C. 1985 c-36 (the "**CCAA**"). This application was opposed by a creditor of ASCL, Weihai Taiwei Haiyang Aquatic Food Co. Ltd ("**WTH**").

By way of correspondence from the Court dated July 14, 2023, the Court declined to grant the Order converting the BIA proceedings into proceedings under the CCAA and indicated that written reasons were to follow.

By way of correspondence dated July 14, 2023 from counsel to the msi Spergel, in its capacity as Proposal Trustee of the Company, sought to clarify the meaning of His Lordship's statement that the matter would not be converted to a process under the CCAA. More specifically, clarity was sought as to whether the Court intended for the Company to continue its Division I proposal proceedings under the BIA, or whether the Court's ruling meant that the Company would be deemed bankrupt under s. 50.4(8) of the BIA. Counsel did not receive a response to this query.

As the Court declined to convert the matter to a proceeding under the CCAA, the Company nonetheless wishes to continue the Division I BIA proceedings. Given the ambiguity of the CCAA conversion ruling, the Company requires an emergency application to obtain an extension of the stay of proceedings under the BIA, on an emergency basis, to undertake the following:

a. Provide the Registrar with an opportunity to review the Second Report of the Proposal Trustee and consider the evidence of Songwen Gao as to (a) steps taken in furtherance of the BIA Proceeding to date, and (b) consider next steps to be taken in furtherance of the BIA Proceeding, including the implementation of the proposed sales and investor solicitation process that was originally contemplated to be executed within the proposed CCAA proceedings;

b. Make the appropriate submissions to the Registrar as to why the stay of proceedings under the BIA Proceeding should be extended for a further period of forty-five (45) days; and

c. The Company would propose a return date within ten (10) days for all parties, to make submissions on the within application for an extension of time under the BIA Proceeding.

B. Summary of the Applicants Position:

The applicant believes it is in the best interest of all stakeholders that the BIA Proceedings continue and that it is allowed to present a proposal to its creditors. In order that that applicant may have an opportunity to present its position to the Registrar for a further extension of time, the Applicant seeks an immediate ten (10) day extension to allow it an opportunity to have the materials that were filed in the CCAA application to be placed before the Registrar and conduct a hearing on the extension of the s.50.4 stay of proceedings. It is the applicant's position that a further ten (10) day extension to the stay of proceedings under the BIA would maintain status quo and would not result in any prejudice to any party. On the other hand, a deemed automatic bankruptcy would be the very catastrophic result that the BIA seeks to avoid through the BIA proposal process.

If this motion is *not* granted it will likely lead to a serious loss of property and capacity of the Applicant to preserve its business as a going concern, pending the presentation of its proposal, for the benefit of all creditors. This application seeks to preserve the Applicant's property for the benefit of its creditors by extending the time period for filing a proposal under s.50.3 of the BIA.

***Armoyan v. Armoyan*, 2015 NSSC 230**
[TAB 1]

As the Supreme Court of Nova Scotia has confirmed in *Capital Demolition & Environmental Services II Inc. v. Nova Scotia* (Attorney General), 2022 NSSC 368, Rule 28 requires that the moving party establish (having both the evidentiary and legally persuasive burdens) that the relevant factual circumstances, viewed contextually, amount to a request that the court decide on an *inter partes* basis, an issue whose gravity (the nature and seriousness of the issue itself, and the extent to which the untimely decision thereof will frustrate the ends of justice) is such that it is in the interests of justice to hear it, not just earlier than the normal course, but proportionately earlier ("a speedy" or proportionately accelerated hearing date) than would normally be the case.

***Capital Demolition & Environmental Services II Inc. v. Nova Scotia (Attorney General)*, 2022 NSSC 368, para. 31**
[TAB 2]

C. Applicable Rules:

Rule 28.01 of the Rules of Civil Procedure outlines the requirements for an emergency motion, as follows:

> **(1) A party may request the court appoint a time, date, and place for a motion to be heard as an emergency.**
>
> *ASCL would request a hearing by teleconference with the Court on 17 July 2023 at the earliest available opportunity.*
>
> **(2) The party must make the request for an emergency hearing by providing all of the following information to the prothonotary:**
>
> **(a) details of the motion the party wishes to make;**
>
> *The motion of ASCL is enclosed herewith.*
>
> **(b) all information concerning the availability of, and means of communicating with, a party who is to receive notice of the motion;**
>
> *The parties to receive notice of this application would be the creditors of the estate of ASCL. It is not possible to provide these creditors with same day notice. As a result, the applicant has asked for a short extension to the s.69 stay such that it can provide the appropriate notice.*
>
> **(c) the reasons for proceeding *ex parte*, if the party proposes an *ex parte* motion;**

ASCL seeks to proceed ex parte given it is not possible to provide notice to all of its creditors in the limited time frame. Notice will be given to the main protesting creditor, WTH.

(d) a description of the evidence to be presented;

The evidence is contained in the affidavits of Sam Gao dated 07 July 2023 and 11 July 2023, and the second report of the Proposal Trustee dated 11 July 2023.

(e) references to applicable legislation, Rules, or points of law;

The applicable legislative references are found in the applicants notice of motion, enclosed herewith. The relevant cases and materials are the following:

- ***Rule 28 of the Rules of Civil Procedure***
- ***Rule 22 of the Rules of Civil Procedure***
- ***Section 50.4 of the BIA***
- ***Armoyan v. Armoyan*, 2015 NSSC 230**
- ***Capital Demolition & Environmental Services II Inc. v. Nova Scotia (Attorney General)*, 2022 NSSC 368**

These materials are enclosed herewith.

(f) a statement of when the party will be ready to file an affidavit;

The applicant will be in a position to file further materials or affidavits, if required, within the ten (10) day timeframe as requested in the Notice of Motion.

(g) the amount of time the hearing is likely to require;

The applicant believes the hearing of this matter would take approximately 30 minutes.

(h) the reasons for concluding that an emergency exists.

This matter is an emergency due to the fact that the extension to the stay of proceedings expires at 5:00 p.m. on 17 July 2023. If the Company is deemed to be automatically bankrupt pursuant to the BIA, there will be a serious loss of property and value that would otherwise be available to its creditors.

Nova Scotia *Rules of Civil Procedure*, Rule 28
[TAB 3]

Pursuant to 22.03(1) (e) and 22.03(2)(d) or the *Rules of Civil Procedure*, a party may make an *ex parte* motion where the party has a right to make a motion, but the motion cannot be determined on notice within the time provided by the Rules, even if a judge exercises the power to shorten a notice period, or to direct a speedy method of notice. We believe such is the case here. Given WTH are likely to be an opposing party, the applicant has provided WTH with notice by email but has not provided notice to its other creditors as time does not permit it to do so.

Nova Scotia *Rules of Civil Procedure*, Rule 22
[TAB 4]

D. BIA Provisions:

Pursuant to section 50.4(9) an insolvent person may make an application for an extension to the period to file a proposal with the Superintendent of Bankruptcy. This section provides as follows:

> (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that:
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

***Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, s.50.4**
[TAB 5]

As is set out in the application materials and affidavits filed, the Applicant has been acting in good faith and with due diligence. This fact has also been confirmed by the Monitor.

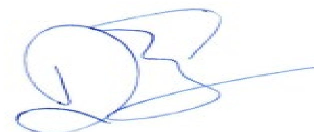
The Applicant believes that a sales process will likely result in it being able to present an acceptable proposal to its creditors. While WTH has indicated it will not entertain any proposal from the Applicant, this is not determinative. The Applicant believes WTH holds less than 50% of the outstanding debt and will not be able to “veto” the proposal contrary to earlier positions it has taken in this matter.

Finally, as set out in the within application, no creditor would be materially prejudiced by the modest ten (10) day extension requested such that the Applicant. However, is such an extension is not granted, the creditors of the applicant will be materially prejudiced though the loss of property and other economic damage to the Applicant.

The undersigned counsel will be available to speak with a Justice of the Court, Registrar, or Prothonotary on this matter at any time on 17 July 2023.

All of which is respectfully submitted.

O’KEEFE & SULLIVAN



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TAB 1

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Armoyan v. Armoyan*, 2015 NSSC 230

Date: 2015-07-29
Docket: *Halifax* No. 1201-065036
Registry: Halifax

Between:

Vrege Armoyan

Petitioner

v.

Lisa Armoyan

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: July 29, 2015, in Sydney, Nova Scotia

Oral Decision: July 29, 2015
Written Decision: July 29, 2015

Counsel: Vrege Armoyan, not present
Harold Niman and Leigh Davis for Lisa Armoyan

2015 NSSC 230 (CanLII)

By the Court:

Introduction

2015 NSSC 230 (CanLII)

[1] Lisa and Verge Armoyan are divorced spouses. Mr. Armoyan owes Ms. Armoyan millions of dollars as a result of successful litigation in Florida and Nova Scotia. Mr. Armoyan refuses to pay Ms. Armoyan the vast majority of the monetary awards granted to her by the courts. Neither has Mr. Armoyan paid Ms. Armoyan the substantial costs orders which are outstanding.

[2] Ms. Armoyan has experienced significant difficulty collecting the judgements because of the conduct of Mr. Armoyan. Mr. Armoyan transferred approximately $30 million in assets off-shore and encumbered his assets which remained in the jurisdiction. The execution process was thus rendered meaningless.

[3] Mr. Armoyan also recently abandoned the Nova Scotia litigation. He states that he is no longer residing in Nova Scotia or Canada. He refused to appear at the contempt hearing held in April 2015; he refused to attend the penalty hearing held in June 2015.

[4] In response, Ms. Armoyan hired an international recovery team. The recovery team has located some of the assets which Mr. Armoyan removed from this jurisdiction. The recovery team retained independent legal counsel to enforce the judgements in the jurisdictions where the assets are located.

[5] Ms. Armoyan recently filed two motions to assist with the recovery efforts. The first motion deals with a request to proceed on an emergency, *ex parte* basis, without notice to the media and the public, *in camera,* and with all documents associated with the motions to be subject to a sealing order. In a second motion, Ms. Armoyan seeks to be relieved of the implied undertaking rule so that certain financial disclosure can be used by the recovery team in other jurisdictions.

[6] This decision will determine the appropriateness of these requests.

Issues

[7] I will determine the following issues in this decision:

- Should the motions proceed on an emergency, *ex parte* basis?

- Should a confidential order issue?
- Should Ms. Armoyan be relieved of the implied undertaking rule?

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Analysis

[8] **Should the motions proceed on an emergency, *ex parte* basis?**

[9] Ms. Armoyan relies on **Civil Procedure Rules** 28.03 and 22.03 to support her request that the motions be processed on an emergency, *ex parte* basis. **Rule** 28.03 provides the court with the authority to grant an emergency, e*x parte* motion. **Rule** 22.03 provides guidance as to the types of situations which may necessitate the granting of an e*x parte* motion.

[10] I have considered these provisions, the evidence of Ms. Armoyan, and the submissions of counsel. I find that Ms. Armoyan has proven that the motions should proceed on an *ex parte*, emergency basis for the following reasons:

- Mr. Armoyan is not entitled to notice by virtue of the abuse of process decision reported at **Armoyan v. Armoyan**, 2015 NSSC 191 and order dated July 23, 2015 which struck Mr. Armoyan's pleadings.
- There are circumstances of sufficient gravity to justify the making of a motion without notice, because notice will likely lead to the destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss: **Rules** 22.03(1)(e) and 22.03(2)(c). It is probable that Mr. Armoyan would once again transfer his assets should he become aware that Ms. Armoyan is seeking to enforce judgements in those jurisdictions where Mr. Armoyan's assets are currently situate. I make this finding given Mr. Armoyan's past litigation conduct as extensively reviewed in **Armoyan v. Armoyan**, 2015 NSSC 191. Although history may not be destiny[1], in this case, Mr. Armoyan's prior litigation conduct strongly signals that Mr. Armoyan will do all that he can to shelter his assets from execution. Similar considerations were approved as supportive of an *ex parte* order in **Juman v. Doucette**, 2008 SCC 8, para 50.

[11] **Should a confidential order issue?**

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[1] Comments of Fichaud, J.A. in **S.A.D. v. Nova Scotia (Community Services),** 2014 NSCA 77 at para 82.

[12] **Rules** 59.60, 85.04, and 85.05 and s 37 of the **Judicature Act**, RSNS 1989, c 240 provide the court with the discretion to issue a confidential order by excluding the public and media, and by waiving notice to the media of the confidentiality request. Such remedies can only be granted if the court is satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings.

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[13] The Nova Scotia Court of Appeal thoroughly reviewed the principles to be engaged in the resolution of this issue in its decision of **Coltsfoot Publishing Ltd. v. Foster-Jacques**, 2012 NSCA 83. Saunders, J.A. made the following relevant observations:

- The **Dagenais/Mentuck** line of authority governs the judge's discretion under Rule 59.60. The open court principle, although derived from the common law, is now constitutionally embedded in s 2(b) of the **Charter**. The court must comply with constitutional standards when exercising its discretion: para 24.

- The open court principle is "neither a recent nor an ill-suited arrival" to family law: para 76. "[A]ccountability of the justice system is a fundamental purpose of the open court principle": para 88. The open court principle applies to trial and pretrial stages of the proceeding, and includes documents filed by the parties with the court: para 89.

- The burden is on the moving party and is based on a balance of probabilities: paras 30 and 38. The evidentiary basis must include more than conclusory statements and bald assertions: paras 31 and 32.

- The court must apply a two part test. The court must first determine whether a sealing order is necessary to prevent a serious risk to an important interest, because reasonable alternative measures will not alleviate the risk. The important interest must be real, substantial and well-grounded in the evidence, and involve a general principle of significance to the public, not just of personal interest of the parties. The judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important interest that requires confidentiality. Secondly, the judge must be satisfied that the salutary effects of the sealing order outweigh its deleterious effects, that include a limitation on the constitutionally protected freedom of expression: para 27.

- Matrimonial authorities grant such relief where the evidence establishes a risk of harm, usually involving a risk to children, and that no reasonable measure would alleviate that risk: para 33.
- The court must determine if there are reasonable alternative measures that would alleviate the risk in the specific case: para 55. Redaction and a partial publication ban are possible alternative measures.

[14] Despite these strong comments, the Court of Appeal did not foreclose the availability of a sealing order in family proceedings at para 98, wherein Saunders, J.A. states in part, as follows:

> 98 That is not to say that a divorce file never may be subject to a partial or complete sealing order. I refer to the examples in the authorities set out earlier (para 33) that discuss various gradations of confidentiality orders. Such an order would require evidence that establishes a serious risk of harm beyond mere embarrassment, particularly but not exclusively where children are involved, and the inadequacy of alternative measures to alleviate that risk. …

[15] I have reviewed the affidavits of Ms. Armoyan, the submissions of counsel, the applicable **Rules** and case authorities. I find that Ms. Armoyan has proven on a balance of probabilities that a confidential order should issue, and that media notice of the request for confidentiality be waived for the following reasons:

- A sealing order is necessary to prevent a serious risk to an important interest. The important interest involves the administration of justice and the collection of maintenance and outstanding costs awards. Mr. Armoyan owes Ms. Armoyan in excess of $1.7 million in child and spousal support arrears. Mr. Armoyan owes Ms. Armoyan in excess of $1.3 million in outstanding costs, security for costs, suit costs and contempt penalties assessed by Canadian courts. Mr. Armoyan owes Ms. Armoyan in excess of $1.47 million in costs and forensic accounting fees awarded by the courts in Florida. Mr. Armoyan had the ability to pay these awards, and chose not to do so.
- Mr. Armoyan strategically transferred his property off-shore and encumbered the personal property that remained within the jurisdiction so that his assets would not be subject to execution. Mr. Armoyan also avoided personal penalties by failing to participate in the contempt proceedings and by abandoning the Nova Scotia litigation which he initiated. Mr. Armoyan's litigation conduct resulted in an abuse of process remedy because his

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conduct was so tainted that it brought the administration of justice into disrepute, while compromising the integrity of the court's adjudicative functions.

- Ms. Armoyan is the custodial parent. She is in desperate need of the money which Mr. Armoyan owes her. Ms. Armoyan and the children have a right to the outstanding maintenance arrears. Ms. Armoyan has a right to collect the other monetary judgements.

- If Mr. Armoyan learns that the recovery team has located his assets and are attempting to freeze and enforce the foreign judgements, he will once again transfer the assets out of the reach of Ms. Armoyan and the courts. Ms. Armoyan is thus subject to pronounced prejudice. This concern is grounded in the evidence; it is not speculative, nor conclusory.

- This concern transcends the personal interests of the parties. The collection of child and spousal support arrears is a matter of significant public interest.

- A public hearing, which in the past has attracted much media attention, has the real risk of alerting Mr. Armoyan to the fact that the recovery team has located his off-shore assets and are taking steps to freeze and enforce the foreign judgements. A confidential order is necessary so that Ms. Armoyan and the children can enforce their legal rights.

- Reasonable alternative measures are limited based on the unique factual circumstances of this case. A media ban would not prevent a private citizen from commenting and alerting Mr. Armoyan about the recovery team's success.

[16] The following provisions will apply to the confidential order:

- The public, inclusive of the media, are excluded from the hearing of these motions. The hearing will be confidential pursuant to **Rule** 85.04(3) and s. 37 of the **Judicature Act**.

- The confidential order will only apply to the motions being decided today, and will not impact on the balance of the court's record pursuant to **Rule** 85.04 (1).

- The prothonotary and court administrator must temporarily seal all documents filed in support of these motions, and the decision and order which are released pursuant to **Rule** 85.04(2)(a).

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- The prothonotary and court administrator must temporarily block public access to the recording of the motions hearing pursuant to **Rule** 85.04(2)(b).
- A temporary publication ban is issued in respect of the proceedings involving the two motions pursuant to **Rule** 85.04(2)(c).
- The notice requirement set out in **Rule** 85.05(1) is waived and a report of this decision will be filed with the prothonotary in Halifax in compliance with **Rule** 85.05(3), which report itself will be temporarily sealed pending further notice from this court.
- The confidential order will not be indefinite. The confidential order will be in effect until October 7, 2015, unless Ms. Armoyan makes further *ex parte* application to the court to show why the order should be extended. Thus, the public will eventually be made aware of the motions and decision.

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[17] In summary, I find that Ms. Armoyan has met the test set out in **Rules** 59.60, 85.04, and 85.05 and s 37 of the **Judicature Act;** the temporary confidential order is granted in the manner described above. I am satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings. I find that the salutary effects of the sealing order outweigh its deleterious effects because of the temporary nature of the confidential order and in the circumstances of this case. The confidential order is not a bar to free expression, rather, the order simply delays the media's ability to report, and the public's right to know, until a later time when the prejudice to Ms. Armoyan and the children is no longer present. Such an approach will ensure that the demands of justice are fulfilled.

[18] **Should Ms. Armoyan be relieved of the implied undertaking rule?**

[19] **Rule** 14.03 references the common law principle of the implied undertaking rule and the jurisdiction of the court to grant relief from the rule.

[20] In **Juman v. Doucette,** ***supra***, the Supreme Court of Canada discussed the criteria to be applied on a motion to be relieved of the implied undertaking rule. Binnie, J. stated that the moving party must demonstrate, on a balance of probabilities, "the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation": para 32.

[21] Binnie, J. further looked to case law for guidance as to when the court should grant relief from the implied undertaking rule. Similarity of parties and actions generally will result in a waiver of the implied undertaking rule. Binnie J. states as follows at para 35:

> [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 1985 CanLII 2251 (ON SC), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083;*Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 1988 ABCA 282 (CanLII), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998 (CanLII); *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).

[22] I have also reviewed the cases of **Fecteau v. Craft**, 2013 NBQB 123 and **Piche v. Chiu**, 2013 BCSC 747, which illustrate the favorable application of these principles.

[23] I find that Ms. Armoyan has proven on a balance of probabilities that she should be granted relief from the implied undertaking rule for the following reasons:

- The granting of Ms. Armoyan's request would further the interests of justice, while the failure to do so, could be construed as tactic approval and encouragement of Mr. Armoyan's obstructive behaviour.
- Ms. Armoyan engaged the services of an international asset recovery team. They have located some of the assets which Mr. Armoyan transferred from Nova Scotia during the course of these proceedings. The team is taking immediate action to freeze these funds for the satisfaction of the outstanding judgements that Ms. Armoyan has against Mr. Armoyan.
- The asset recovery team requires certain documents that demonstrate how and when the funds were transferred by Mr. Armoyan to their current location. Using this information, counsel in each jurisdiction can then take steps to freeze the funds. Some of the documents that will facilitate this process were disclosed by Mr. Armoyan in the Nova Scotia proceedings.

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- Mr. Armoyan has taken numerous steps throughout these proceedings to divest himself of assets and move money off-shore. He has thus avoided the payment of Nova Scotia judgements which exceed $3.47 million.
- The proceedings involve the same parties and similar issues. Ms. Armoyan simply seeks collection of the monetary judgements granted to her from assets which existed prior to separation and which Mr. Armoyan strategically removed from this jurisdiction. Given the clear relationship between this proceeding and the proposed action in other jurisdictions, there is little prejudice to Mr. Armoyan.
- The public interest in ensuring Ms. Armoyan collects the fruit of the litigation, which include child and spousal support arrears, outweighs any value the implied undertaking rule is designed to protect, in the circumstances of this case.

[24] Ms. Armoyan is therefore relieved of the implied undertaking rule as it relates to the following documentation:

- Transfer authorization letters;
- Statement of foreign income/investment income – these statements were included in Mr. Armoyan's tax returns between the years of 2010-2013;
- Transcript of the January 14, 2011 hearing in Supreme Court (Family Division); and
- Vrege Armoyan's 2014 Statement of Property filed with the Court on February 13, 2014.

Conclusion

[25] Ms. Armoyan's motions to proceed on an emergency, *ex parte* basis are granted where Mr. Armoyan's pleadings have been struck and where notice will likely lead to the destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss.

[26] Ms. Armoyan's motion for a temporary confidential order is granted. A confidential order which excludes the public and media from the motions hearing; which temporarily seals documents; which blocks public access to the recording of

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the motions hearing; and which waives notice to the media is appropriate because the court is satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings. This order is subject to the conditions previously reviewed.

[27] Ms. Armoyan is granted relief from the implied undertaking rule as it relates to certain specified documents disclosed by Mr. Armoyan in the Nova Scotia litigation and which is intended to be used by Ms. Armoyan's asset recovery team in other jurisdictions where the team has located the assets which Mr. Armoyan removed from Nova Scotia.

[28] The public interest in ensuring Ms. Armoyan collects the outstanding judgements outweighs any value the implied undertaking is designed to protect, in the circumstances of this case.

[29] Ms. Davis is to prepare the order.

Forgeron, J.

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TAB 2

SUPREME COURT OF NOVA SCOTIA

Citation: *Capital Demolition & Environmental Services II Inc. v. Nova Scotia (Attorney General)*, 2022 NSSC 368

Date: 20221213
Docket: Truro No. 514279
Registry: Halifax

Between:

Capital Demolition & Environmental Services II Inc.

Plaintiff

v.

The Attorney General of Nova Scotia

Defendant

DECISION

Judge: The Honourable Justice Peter Rosinski

Heard: December 12, 2022, in Halifax, Nova Scotia

Written Decision: December 19, 2022

Counsel: Dennis J. James, K.C. and Grace A. MacCormick for the Plaintiff
Daniel Boyle and Myles Thompson, for the Defendant

2022 NSSC 368 (CanLII)

By the Court:

Introduction

2022 NSSC 368 (CanLII)

[1] Capital had the Contract to demolish the Colchester Regional Hospital (owned by the Province) which is in Truro, Nova Scotia.

[2] Under the Contract Capital was entitled to keep as its own property "materials for removal".

[3] The Province terminated the Contract with Capital before completion of the work.

[4] Capital has sued the Province for unlawful termination of the Contract and damages, specifically including the loss of expected profit from "materials for removal" [known more commonly as salvageable and saleable materials] including those that would have become Capital's property, had it been permitted to complete the Contract work.

[5] Capital has not been permitted on the site since July/August 2021.

[6] Therefore, in its attempts to quantify the damages of loss of expected profit from "materials for removal", Capital has had to rely upon the Province to inform it of what "materials for removal" were removed.[1]

[7] Capital says:

(i) that the Province's recordkeeping and provision of what "materials for removal" were removed, has been unreliable, and I should infer that it will remain so during the final demolition of the last remaining building (i.e., the Main Hospital Building) which is scheduled to commence by mid-January 2023;

[1] The Province acknowledged that, given the litigation, it has an ongoing obligation to disclose to Capital such information pursuant to Civil Procedure Rule ("CPR") 14.

(ii) these recordkeeping problems prejudice Capital's ability to accurately assess and present at trial, the evidence of its loss of expected profit from the "materials for removal".[2]

[8] Pursuant to CPR 28.02(4), Capital filed "an emergency" notice of motion on December 1, 2022, in Truro.[3]

[9] Capital seeks a Preservation Order (for the preservation of evidence by injunction) pursuant to CPR 42.02; and as a necessary corollary, access to the site where the demolition of the Colchester Regional Hospital is expected to continue in mid-January 2023.

[10] Capital says it has presented evidence and argument that there is "an emergency" of sufficient gravity that it be permitted to access the site and record by video and photographs (over up to 5 days) what "materials for removal" are associated (still present or which have already been removed) with the Main Hospital Building, before it is demolished.

[11] I am not satisfied that the circumstances amount to "an emergency" as contemplated by CPR 28.

[12] However, in the very specific circumstances of this motion: wherein the parties agreed that should I find "an emergency", I should go on to consider the merits of Capital's motion for a Preservation Order based on the evidence presented; yet although not having found "an emergency", I find it to be in the interests of justice for me to consider this motion on its merits *as if* it were a

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[2] According to the evidence before me from Lawrence Bellefontaine, this is no trivial issue. He estimates that the "materials for removal" associated with the Main Building of the Hospital, "to be approximately $350,000".
[3] Justice Hunt who presides in Truro, initially conducted a "status call" with the parties on November 30, in response to Capital's written materials/submissions requesting an emergency motion. Because he was conflicted, the matter was referred to me. Prior to my involvement it was set down for hearing on December 12, 2022, but *only* to decide whether the matter should be heard on "an emergency" basis. Capital correctly says in its December 7, 2022, brief that CPR 28.02 "provides a preliminary step for a motion to be heard on an emergency basis". At the hearing, on December 12, 2022, counsel agreed that I could consider the merits of the motion as well, should I find "an emergency" exists. More specifically, counsel were agreeable to arguing both whether the "an emergency" precondition had been met and the merits of the motion at the same time, rather than bifurcating them. The Court proceeded on that basis. One affidavit was presented by each of the parties: Lawrence Bellefontaine for Capital; and Terry Randell for the Province. Neither affiant was cross-examined.

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properly filed regular motion (under CPR 23) set for hearing on December 12, 2022, based on the fulsome evidence presented and arguments made by counsel on that date.[4]

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[13] Having considered the evidence and arguments made by the parties, I am satisfied that the Preservation Order should issue.

Background

[14] In brief compass, the background is as follows.

[15] On July 30, 2020, Capital was awarded the Contract to demolish the Colchester Regional Hospital.

[16] The Contract stipulated that it was entitled to consider as its own property unless otherwise stated, any salvageable material after demolition [“materials for removal become the contractor’s property”].

[17] Capital wishes to have an opportunity to videotape/take still photographs of the salvageable materials left in the Main Building of the Colchester Regional Hospital, which has been slated for demolition commencing in mid-January 2023.

[18] It says that it needs to document what salvageable materials were there and are there, because it *has not* been able to, and *is not* able to rely upon the Province to reliably record what evidence of salvageable material remains on site.

i-*The Lawsuit*

[4] I note that while present in court, I did not consider this option, and therefore the parties have not had a chance to address it. Had I determined at the end of the oral arguments that there was no emergency, I could have immediately advised the parties (as a result of a quirk of my own scheduling availability within the next week, i.e. I either had no scheduled matters or they were unexpectedly and recently removed from my docket on December 13, 14 or 19, 2022) that I was available to hear the matter as a regular motion on an expedited basis on one of those dates. I add here that the official Available Dates List from the court scheduling office showed that as of December 12, 2022, between December 12 and February 28, 2023, the only one day available slots for the hearing of this motion by any Justice were limited to January 3 and January 4, 2023. I conclude that delaying the hearing of the motion to those latter dates would not be in the interests of justice, as it appears to me that fulsome evidence and arguments having been presented on December 12, 2022, there is no material unfairness to either of the parties arising from me proceeding as I do herein.

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[19] On April 20, 2022, Capital filed a notice of action against the Province wherein it claimed that the Province "terminated the Contract on December 10, 2021", and that it "has suffered damages including but not limited to: … The loss of its expected profit from the salvageable materials present at the site;".

[20] The Province filed a notice of defence and counterclaim on May 18, 2022. Capital filed a notice of defence to counterclaim on June 16, 2022.

ii-*The Notice of Motion*

[21] In its notice of motion pursuant to CPR 42 [Preservation Order], Capital requests:[5]

(i) an order to permit it temporary access to the site of the former Colchester Hospital in Truro over a period of five days in order to, firstly:

a. Document by visual record the state of abatement and demolition work completed;

c. Document by visual record evidence of any items removed or destroyed from the work site; and

d. Document by visual record any salvageable materials or goods remaining on site"; and

secondly:

[5] Counsel for the Province fairly pointed out that to achieve access to the site and photograph/video the Main Hospital Building, Capital could have sought an order under CPR 17.05 (see also CPR 17.04 – demand for inspection) - which position must presume that the anticipated partial or total demolition of the Main Hospital Building would also have required injunctive relief to forestall that under CPR 17.05(c). CPR 17.05 reads: "A judge may order a person to permit inspection of a thing, and the order may include terms to assist the inspection, including terms on any of the following subjects: (a) permission to enter on lands and inspect the land, a fixture, or a movable; (b) a time, date, and place for the inspection; (c) an injunction or other order to secure the cooperation of a named or unnamed person; (d) a requirement that a person deliver a thing to a person or place." At the hearing, counsel for Capital clarified that it is not seeking an injunction that the Province/its contractors cease work until Capital can attend at the site to take the videotapes and photographs. The injunctive relief was aimed only at preventing the partial or total demolition of the Main Hospital Building until Capital could attend at the site and complete its videotaping/photography. Capital says Mr. Bellefontaine would expeditiously be able to attend at the site and would endeavour not to be disruptive to the ongoing work while he was there.

(ii) "for an injunction preventing the demolition of the remainder of the former Colchester Hospital pending the completion of Capital's ability to access the site."

[22] This motion was "made on an emergency basis as the plaintiff/defendant by counterclaim understands that former Colchester Hospital is scheduled to be demolished on or before January 8, 2023."

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iii-*The affidavits*

[23] Capital's Lawrence Bellefontaine stated in his affidavit:

> 20 - These salvageable materials included but were not limited to sheeting, lumber, ferrous and nonferrous items including copper ductwork's, copper piping, copper expansions, brass piping and fittings, extensive amounts of stainless steel and a fully functional kitchen with fridges, freezers, cook stoves and ovens.
>
> …
>
> 22 - Based on expertise and experience, I estimate the value of the salvageable materials in the Main Building alone to be approximately $350,000.
>
> ...
>
> 59 - Capital was ordered off site on August 12, 2021 and has not been permitted on site since that date…
>
> …
>
> 61 - As part of this lawsuit, Capital seeks damages for the loss of value of the salvageable materials within the Former Hospital.

[24] In his affidavit he further states:

> 84 - Capital states that without performing this analysis [completion of a room- by- room survey of the remaining structure/Main Building while taking photographs and videos over up to five days] it will be prejudiced in being able to assess its losses.
>
> **Emergency circumstances**

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85 - The demolition of the former Hospital is ongoing.

86 - The Annex building has already been demolished.

87 - I understand that the demolition of the Main Building will be complete on or before January 8, 2023.

88 - Capital will lose its ability to assess a significant portion of its damages as soon as the Main Building is destroyed. Capital states that this will prejudice its ability to put forward its case.

…

91 - Capital will make efforts to minimize the impact of this visit on the ongoing demolition work.

[25] In his affidavit for the Province, Terry Randell states:

1 - I am an Environmental Analyst at the Nova Scotia Department of Public Works ["Public Works"]. In the course of my employment, I have been involved in the demolition of the former Colchester Hospital… since August 2020.

…

12 - Estimates of value of anticipated salvageable material may be based on multiple considerations, including building plans made available during the tender process, observations made by potential bidders during site visits during the tender process, and market rates for certain classes of salvageable materials. Such valuation would be known to contractors at the time they factor them into their individual bid packages.

…

30 - During Capital's time on site, they had sufficient opportunity to adequately quantify or remove the salvageable materials located within the structures, including the Main Hospital Building. This could have been accomplished during the site visits in June and July 2020 or from the date of Capital's mobilization on August 18, 2020 until a change directive was issued to de-mobilize from the Main Hospital Building.

31 - Capital's contract with Public Works required Capital to prepare a listing of each material proposed to be salvaged, reused, recycled, or composted during the project, and

the proposed local market for each material. Capital submitted a Waste Management Plan to WSP [Canada Inc. which were the engineering consultants on the work site], which also references a Waste Audit sheet for specific quantities of materials to be reused, recycled and disposed of. At no time during Capital's contract was any Waste Audit sheet provided to Public Works.

…

33 - Capital remained present on site until July 2, 2021… was permitted on site by WSP for a brief period during the second week of August 2021, …";

…

35 - WSP documented the contents of all rooms within the structure with a full photo log in December 2021 – which contained evidence of loose salvageable items within the buildings.

36 - On November 23, 2022, demolition on the Annex Building was completed. The salvage associated with this structure is no longer present on the site. …

37 - Limited salvageable material remains in the basement, the fourth floor in the sixth-floor mechanical space inside the Main Hospital Building. These materials are scheduled to be removed by the end of December 2022. …

38 - I have personally directed WSP to ensure that such material is weighed and documented prior to leaving the site. Furthermore, copies of waybills from the receiving facilities for all materials leaving the site, salvage or otherwise, will be produced by the contractor and given to WSB to document the removals.

39 - Other than the limited remaining salvageable material (scrap metals) contained in the Main Hospital Building, and metal rebar broken out of concrete during deconstruction work, no further salvageable materials remain on site.

40 - In November 2022, Capital requested summaries of salvageable materials removed from site by others since termination of Capital's contract to assist in their preliminary assessment of damages.

41 - In good faith, Public Works provided partial summaries to Capital on November 24, 2022. The account of materials was complete for salvage removed from site, but Capital expressed concern about gaps in the information between June 2021 and September 2022.

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> Further records including comprehensive Truck Logs provided by WSP on December 1, 2022, for all materials removed from the suite [sic] are attached hereto as exhibit "E".[6]
>
> …
>
> 52 - I spoke with Peter Field, [Project Director and Senior Industrial Engineer at WSP] on December 1, 2022, and reaffirmed that the current method for documenting all materials leaving the site continue as intended by the contract.
>
> 53 - Demolition of the Main Hospital Building is scheduled to commence by mid-January, 2023. …
>
> …
>
> 56 - Specifically, Capital seeks access over a period of five days but have not provided any details or rationale to substantiate to Public Works why they would need five days to document the condition of a near empty building.
>
> 57 - The record of salvageable materials documented by WSP is the most complete and accurate record of materials removed from the site and will be fully disclosed in due course.

The issues

[26] Both parties agree that the following questions arise from this proposed motion:

(i) should this matter proceed on "an emergency" basis? [I have already summarily answered this question and given the unusual circumstances, it is presently irrelevant.]

(ii) should the court grant Capital's motion for access to the site (for up to 5 days) to allow it to create a video/photographic record relevant to its claim for damages, and "an injunction preventing the demolition of the remainder of the former Colchester Hospital pending the completion of Capital's ability to access the site"?

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[6] Although I note there are some "missing data" referenced by Public Works therein.

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Issue 1 - is there "an emergency" per CPR 28?

[27] Capital asks me to declare that the motion should proceed on an emergency basis.

[28] Before I may find an emergency basis exists, per CPR 28.02 (1), I must be satisfied on each of the following:

(a) an emergency exists of sufficient gravity to require a speedy hearing;

(b) it is possible for all parties who wish to be heard to be in attendance for the motion;

(c) the gravity of the emergency outweighs any inconvenience to a party.

[29] When one thinks of "an emergency" in common parlance, firetrucks and ambulances come to mind.

[30] The Random House Dictionary of the English language, second edition unabridged 1987, Random House of Canada Limited, Toronto Ontario defines "emergency" as:

> A sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.

[31] In summary, CPR 28.02 requires that the moving party establish (having both the evidentiary and legally persuasive burdens) that the relevant factual circumstances, viewed contextually, amount to a request that the court decide on an *inter partes* basis, an issue whose gravity (the nature and seriousness of the issue itself, and the extent to which the untimely decision thereof will frustrate the ends of justice) is such that it is in the interests of justice to hear it, not just earlier than the normal course, but proportionately earlier ("a speedy" or proportionately accelerated hearing date) than would normally be the case.[7]

[7] To be clear, I am speaking only for myself in making this elaboration.

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[32] In relation to whether this is "an emergency", Public Works' argument from its brief (paras. 18-21] deserves serious consideration:

> A - "Capital says that this is an emergency because it seeks access to a building that is scheduled to be demolished next month. Respectfully, Capital first requested access to the site in December 2021 and the request was denied per the letter attached as Exhibit "H" of the Bellefontaine Affidavit. As evidenced at paragraphs 42 and 43 of the Randell Affidavit, Capital did not raise the issue of access again until November 2022."
>
> B- Although Capital is correct to say that the Main Hospital Building will be demolished by mid-January 2023, the relief they seek is either irrelevant (item "a" of the requested relief above [document the state of abatement and demolition work completed] impossible (item "b" of the requested relief above [document any materials Capital intended to resell or reuse] – it is not possible to document items removed or destroyed, where they have already been removed or destroyed, by attending the site) or moot due to passage of time (items "c" [document any items removed or destroyed from the work site] and "d" [document the (sic) any salvageable goods remaining on site])."[8]

[33] There is little jurisprudence directly on point, however I find helpful Justice Beveridge's reasons (as he then was) in *Aurelius Capital Partners v. General Motors Corporation*, 2009 NSSC 100, and will liberally repeat them here.

[34] He set out the circumstances as follows:

> 4 The plaintiffs then filed a motion for the appointment of a receiver on May 1, 2009. This included the draft order and the affidavit material that the plaintiff wished to rely on. *The plaintiffs' request that the court treat the motion for the appointment of a receiver as an emergency motion under Civil Procedure Rule 28, and abridge the time that the Rules would otherwise call for in dealing with this motion. The corporate and individual defendants object.* They cite a number of outstanding procedural matters that they contend need to be dealt with at or at the same time as the motion for the interim receiver. In no listing of priority these include: an application for security for costs; an application for summary judgment on the pleadings; an application for summary judgment on the evidence; and an application to strike portions of the affidavits filed by the plaintiffs on their motion to appoint an interim receiver.

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[8] The Province's position cited above does overreach its legitimate limits, but the overall tenor of its argument is still capable of being persuasive.

5 *The defendants contend that there is no emergency and that abridgment of the time lines put them at an unfair disadvantage.* The defendants also point out that the motion for the appointment of an interim receiver is still not perfected even though it was filed on May 1, 2009. In particular I note that Civil Procedure Rule 23.11 requires the filing of the brief in support of the motion on the same date as the notice of motion and draft order.

6 The defendants also point out that one of the usual and mandatory requirements of bringing such an application is an appropriate undertaking by the moving party for damages pursuant to Civil Procedure Rule 41.06. *The defendants also submit that there really is no emergency; that any emergency is more apparent than real, it having been created by the plaintiffs letting a full two months pass before bringing their motion for the appointment of an interim receiver.*

[35] Then next he stated:

8 I would venture to say that most rules of court would provide some discretion in the Court in abridging or extending time requirements. Nova Scotia Civil Procedure Rules are no different. Rule 2.03(1) provides that a judge has the discretions, which are limited by these rules only as provided in Rules 2.02 and 2.03(3), to do any of the following:

(a) give directions for the conduct of a proceeding before the trial or hearing;
(b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
(c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

9 All parties here today accept that I have a discretion by the Rules to abridge the time requirements. *It seems to me that discretionary decisions must be guided by principle, otherwise decisions may become, or at least suffer from the appearance of being, arbitrary. It also seems to me that the burden should be on the moving party to satisfy the court that without the requested abridgment the remedy they seek to establish an entitlement to would become moot by the mere passage of time, and the respondents will not be unfairly prejudiced by the abridgment of the normal time lines.*

10 However, more specifically, Civil Procedure Rule 28.02(1), which the moving party relies on, provides that:

The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:

(a) an emergency exists of sufficient gravity to require a speedy hearing;

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(b) it is possible for all parties who wish to be heard to be in attendance for the motion;

(c) the gravity of the emergency outweighs any inconvenience to a party.

…

15 I do not think it appropriate for me on this motion to make any preliminary or tentative views of the merits of the relief being sought by the plaintiffs, either in their overall action or in their motion for the appointment of interim receiver.

16 Although I need not decide this issue here, I do think there is some merit in the argument by Mr. Rogers that if the relief being requested in the motion, where the court is being asked to abridge time, is patently without merit, the court should be slow to abridge the time frames required by the usual rules of court. However, this approach should be relied on or utilized only in the clearest of cases. Mr. Keith argues ably that it is unfair to delve into the merits of a moving parties' request for relief when they have not yet had an opportunity to develop the evidence and make submissions to the court that obviously have the potential to influence how a court may ultimately view the merits of any particular motion.

17 Looking at the criteria that I referred to earlier under C.P.R. 28.02 I am not satisfied that an emergency exists of sufficient gravity to require a speedy hearing. The plaintiffs have not satisfied me that there was a legitimate reason for delaying the bringing of the motion. Even if I was satisfied that there was an emergency and it was otherwise of sufficient gravity to require a speedy hearing, I am still required to then turn my attention to each of the requirements set out in 28.02(1) (b) and (c).

18 I do not think the responding parties here have suggested that it would be impossible for them to be in attendance for the motion. *The real crux of their position is under paragraph (c) with respect to the requirement that the gravity of the emergency must outweigh any inconvenience to a party. No one has suggested to me exactly what meaning to attribute to the word "inconvenience", but it strikes me it is not what you would find in an ordinary dictionary meaning. I think the proper approach to that term would be it works some unfairness, some prejudice to the responding parties' abilities to marshal their evidence, to prepare for cross-examination and other procedural steps, and ultimately to be in an appropriate situation or position to deal with the merits of the motion.*

[My italicization added]

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[36] On a superficial examination, I generally agree with the Province, when it says in its brief that "the perceived emergency is artificial and of Capital's own making, due to delay."

[37] On the one hand, Capital argues that the Province's past unreliable reporting supports its position that it cannot rely on such records produced by the Province's contractors (Inflector Environmental Services) or its own Public Works.

[38] Capital was denied any meaningful access to the site after July/August 2021; although Mr. Bellefontaine noted:

> (para. 43) "The work was formally removed from Capital's hands by letter dated December 10, 2021".

[39] Mr. Bellefontaine continued:

> (para.51) "In the Spring of 2021, Capital became very concerned with Inflector's practice regarding salvageable materials. At that time Capital remained the contractor for the demolition of the entire site.";
>
> (para.64) "Capital has requested access to the site to survey and document the salvageable materials remaining on site. The defendant/plaintiff by counterclaim has denied this request, including by letter dated December 24, 2021 [which was just after (by letter dated December 10, 2021), when "the work was formally removed from Capital's hands."]"

[40] Capital's own evidence indicates that it was aware as early as in the Spring of 2021 that there was cause for concern, and there was little basis for it to believe that the situation had changed at any time before November 2022.

[41] On April 20, 2022, Capital filed its notice of action against the Province.

[42] Capital did not request a motion to videotape/photograph the Colchester Regional Hospital premises to capture details of what salvageable materials had been present or were still present until late November 2022.

[43] Mr. Bellefontaine stated in relation to records that Capital was provided by the Province on November 24, 2022:

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> (paras. 69-73) "I have reviewed these records and they are not sufficiently detailed to allow me to properly assess Capital's damages. Further, these records only show a fraction of the items that Capital knows to have been on site. There is a large quantitative discrepancy between what Capital observed on site and in plans and what the defendant/plaintiff by counterclaim shows as having been removed. As the value of resalable and salvageable material was important to Capital, which fact was known to the defendant/plaintiff by counterclaim, and to its consultant WSP, I expect much more detailed records that showed the detailed listing of items removed, the date removed and the location in the building that the material was removed. The records provided do not contain that detail. Finally, these records show a significant gap in information from June 2021 until early September 2022."
>
> [My underlining added]

[44] On the other hand, Capital did not cross-examine the Province's affiant, Mr. Randell, on his statements that:

> (paras. 29-30) "Typically, removal of salvageable items is a first order of operations during any demolition program to avoid contamination from hazardous materials during abatement activities. During Capital's time on site, they had sufficient opportunity to adequately quantify and or remove the salvageable materials located within the structures, including the Main Hospital Building. This could have been accomplished during the site visits in June and July 2020, or from the date of Capital's mobilization on August 18, 2020 until a change directive was issued to demobilize from the Main Hospital Building" [see also para. 27: "As a result of the June 17, 2021 incident and Capital's unwillingness to perform other work in the meantime, Public Works ordered Capital off-site effective July 2, 2021 to permit Inflector to safely complete its work."]
>
> (para. 41) In good faith, Public Works provided partial summaries to Capital on November 24, 2022. The account of materials was complete for salvage removed from site, but Capital expressed concern about gaps in the information between June 2021 and September 2022. Further records including comprehensive Truck Logs provided by WSP on December 1, 2022, for all materials removed from the suite [sic] are attached hereto as exhibit "E"."[9]
>
> (para. 57) "The record of salvageable materials documented by WSP is the most complete and accurate record of materials removed from the site and will be fully disclosed in due course";
>
> [My underlining added]

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[9] The timing of the creation and filing of the affidavits is such that I infer Mr. Bellefontaine would not have had access to Mr. Randell's evidence in paragraph 41.

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[45] Even if I had accepted that "an emergency exists", I am not satisfied that it is "of sufficient gravity to require a speedy hearing", given the disclosure the Province has made to date and in light of the relief sought which would be available on the dates of January 3 and 4, 2023.

[46] Therefore, I dismiss Capital's request that this motion be heard on "an emergency" basis.

[47] Nevertheless, because of my own near- immediate availability on December 13, 14 and 19, 2022, and counsel's agreement that I could consider the merits of this matter on December 12 had I found "an emergency" exists, I find it in the interests of justice to go on and consider the merits of the motion, *as if* it had been a regularly scheduled motion.

ISSUE 2- Should the court grant a Preservation Order?

[48] Capital puts its position on the merits in its brief as follows:

> "The substantive nature of this motion is one which seeks to preserve evidence of the damages sought by Capital in its larger action. Rule 42 provides for the preservation of evidence by way of injunction… Capital claims that a portion of its damages arise from the salvageable and saleable materials to which it would have been entitled throughout the demolition project. It makes this motion in order to prevent the Province from demolishing the former Hospital until such time as Capital has performed its survey… to document and catalogue the remaining saleable and salvageable materials and evidence of those items that have been removed… Capital has made the required undertakings within the affidavit of Lawrence Bellefontaine and has served the party who is in control of the evidence."

[49] The Province agrees that CPR 42 permits a Preservation Order where evidence that is relevant to an issue in the proceeding is sought to be preserved.

[50] Both parties agree that the test for granting an injunction for the preservation of evidence under CPR 42.02 was set out in *Korem v. Crown Jewel Ranch Inc.*, 2011 NSCA 102. Chief Justice MacDonald stated for the court:

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The Test

8 Our *Civil Procedure Rules* authorize the issuance of preservation orders in certain circumstances:

> 42.01 (1) A party to a proceeding may make a motion for an order preserving any of the following, in accordance with this Rule:
>
> . . . . .
>
> (c) assets that would be available to satisfy a judgment claimed in the proceeding.
>
> 42.02 (1) A party who files an undertaking as required by Rule 42.07 may make a motion for an injunction ... to preserve property claimed in, a proceeding.
>
> (2) The motion must be made on notice to each party and the person in control of the evidence or property, unless the motion may be made ex parte under Rule 22.03, of Rule 22 - General Provisions for Motions.
>
> (3) The order may be restraining, mandatory, or part restraining and part mandatory.

9 **The test for granting this type of injunctive relief is well established. Specifically, Mr. Korem would have had to establish three things: namely, that (a) his claim has merit to the extent that it at least represents a serious issue to be tried; (b) without a preservation order, he will suffer "irreparable harm"; and (c) when the consequences of making such an order are fully considered, the "balance of convenience" favours its issuance.**

10 For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada confirmed:

> ¶43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

See also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) at para. 12 and *Sheet Harbour Offshore Development Inc. v. Tusket Mining Inc.*, 2007 NSCA 59 (N.S. C.A.) at para. 6.[10]

[My bolding added]

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[51] The Province argues that:

(para. 28) While there is a serious question to be tried in this matter, there is no irreparable harm that the plaintiff will suffer if the Preservation Order is not granted and, on a balance of convenience, the Attorney General of Nova Scotia and the public interest in completing the demolition of the former Colchester Hospital without further delay will suffer greater harm from granting Capital's requested relief.

…

(para. 31) ... there is greater potential for irreparable harm to the Province, if Capital obtains its relief.

…

(para. 34) Effectively, Capital is saying the irreparable harm it will suffer if the order is not granted is the inability to adequately assess quantum of damages. Respectfully, Capital's estimated salvage calculation should be readily available to them based upon the rates they put forward in their tender bid, as described at paragraph 11 of the Randell Affidavit. This presumption is further confirmed in the Bellefontaine affidavit at paragraph 19, where Mr. Bellefontaine asserts that Capital factored the value of salvageable and resalable materials into its pricing. *Surely, then, they have a sense of what the value of salvageable and recoverable materials would have been at the time they submitted a bid*.

…

(para. 36) *Capital has at least some basis which it can use to argue damages in the main proceeding*… Mr. Bellefontaine estimates at paragraph 22 of the Bellefontaine Affidavit that salvageable materials 'in the main building alone' would be approximately $350,000.… in addition to the assertion that some value factored into Capital's bid price,

[10] I recently considered such issues in *IFORM Works Inc. v. Maynard Holdings Limited*, 2022 NSSC 210, affirmed 2022 NSCA 54.

raise questions as to what irreparable harm would be suffered should they not succeed in this motion.

...

(para. 39) Moreover… *very little salvageable material remains on site*. Any ‘irreparable harm’ to Capital has already occurred.

(para. 40) Further, the *summaries of materials removed from the site* is set out as Exhibit “E” of the Randell Affidavit show that the weight of salvageable material removed from the site, which *represents the best evidence for assessing damages*.

(para. 41) *There is no risk that Capital will not be able to assess and collect its damages* from the Province should it be successful in the main proceeding.

…

(para. 43) *Although Capital will not suffer irreparable harm if their requested relief is granted, an injunction and site access to Capital could cause irreparable harm to the Public Works in this matter by harming public interest*. [Referencing Justice Hood’s decision in *Nova Scotia Real Estate Commission v. Lorway*, 2006 NSSC 76,]:

[at para. 5 citing *Sharpe on Injunctions and Specific Performance*]

> ‘The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship and injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds..”’ ;

[at paras. 58 and 59, citing Justice Richard Coughlan’s decision in *College of Chiropractors (Nova Scotia) v. Kohoot*, 2001 NSSC 136 quoting from Justice Roscoe’s decision (1991) 103 NSR (2d) 426 (NSTD) quoting the Supreme Court of Canada in *Metropolitan Stores (MTS) Ltd.* [1987] 1 SCR 110]:

> ‘… The judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffer irreparable harm.’

[And a further reference to an English case cited by Justice Beetz in *Metropolitan Stores*]

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> '… He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authorities right in saying that where the defendant is a public authority performing duties for the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed… '.

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[52] While these authorities are generally helpful, the reasoning is not persuasive in the circumstances here, where Nova Scotia Public Works can continue performing its statutory duties in relation to the premises in question, while at the same time without material difficulty accommodating Capital's representative recording the state of the premises and salvageable materials.

[53] Insofar as the utility of Capital's proposed recording of the state of the remaining building on the premises, that is a determination best left to Capital, which should be permitted all reasonable requests to assemble evidence in pursuit of its claims.

[54] I do not conclude that there will be any material delay in the completion of the demolition project by the attendance of Capital's representative, even if I permit it for up to five days in total to conduct the recording proposed.

[55] In summary, there is a serious issue to be tried, and without a Preservation Order, I am satisfied that Capital will suffer a sufficient degree of irreparable harm. The balance of convenience favours Capital.

Conclusion

[56] I am satisfied that Capital is entitled to a Preservation Order per CPR 42, such that demolition of the Main Hospital Building is prohibited until Capital has had access to the site for up to five days to video record, photograph, and otherwise document the state of the premises generally, and specifically the physical aspects of the premises relevant to gathering evidence of what salvageable materials had been present, and those that are still present, on the premises.

[57] The Court expects Capital to act diligently, expeditiously and reasonably, so as not to unreasonably interfere with the scheduled work that the Province would otherwise have undertaken.

Rosinski, J.

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TAB 3

Rule 28 - Emergency Motion

28.01 Request for emergency hearing

(1) A party may request the court appoint a time, date, and place for a motion to be heard as an emergency.

(2) The party must make the request for an emergency hearing by providing all of the following information to the prothonotary:

(a) details of the motion the party wishes to make;

(b) all information concerning the availability of, and means of communicating with, a party who is to receive notice of the motion;

(c) the reasons for proceeding *ex parte*, if the party proposes an *ex parte* motion;

(d) a description of the evidence to be presented;

(e) references to applicable legislation, Rules, or points of law;

(f) a statement of when the party will be ready to file an affidavit;

(g) the amount of time the hearing is likely to require;

(h) the reasons for concluding that an emergency exists.

(3) The information must be in writing, unless a judge permits otherwise.

28.02 Emergency motion on notice

(1) The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:

(a) an emergency exists of sufficient gravity to require a speedy hearing;

(b) it is possible for all parties who wish to be heard to be in attendance for the motion;

(c) the gravity of the emergency outweighs any inconvenience to a party.

(2) The court must provide directions for giving notice, unless the parties agree on giving notice, and the directions may include a short notice period and a speedy method of giving notice.

(3) A judge may give directions for conduct of the motion, including directions on notice, form of documents, filing deadlines, or evidence.

(4) If a judge does not give directions on form of notice, the party who makes the motion may notify other parties by delivering a notice of motion under Rule 23 - Chambers Motion, with both of the following modifications:

(a) the notice need not refer to the time required for the motion to be heard, and it must not refer to the judge as presiding in chambers;

(b) the notice must state the name of the judge and that the motion is by special appointment to respond to an emergency.

28.03 *Ex parte* emergency motion

(1) The court may provide a time, date, and place for an *ex parte* emergency hearing, if a judge is satisfied that the motion falls within one of the circumstances in Rule 22.03 and that the motion cannot be heard in chambers.

(2) A judge may give directions for making the motion, responding to the motion, and conduct of the hearing.

28.04 Manner of providing evidence

(1) A judge may provide directions on the manner in which evidence is to be provided on an emergency motion.

(2) Evidence may be provided in the same ways as evidence is provided under Rule 23.08, of Rule 23 - Chambers Motion, unless the judge directs otherwise.

28.05 Emergency hearings outside court hours or courthouse

(1) A judge may hear a motion, at any time or place, if the judge is satisfied that the motion must be heard quickly and cannot be heard in the usual course of the court's business.

(2) The judge may give directions for the conduct of the motion, including directions for making and keeping a record.

TAB 4

Part 6 - Motions

Rule 22 - General Provisions for Motions

22.01 Scope of Part 6 - Motions

(1) A motion is an interlocutory step in a proceeding, not an original proceeding (for kinds of original proceedings, see Part 2 - Civil Proceedings).

(2) Part 6 provides general procedures for all motions (Rule 22 - General Provisions for Motions) and specific procedures for the motions made in the ways listed below:

(a) in chambers (Rule 23 - Chambers Motion);

(b) by appearance motion (Rule 24 - Appearance Motion);

(c) by special appointment with a judge in person or by teleconference (Rule 25 - Motion by Appointment);

(d) at a meeting or conference (Rule 26A - Conference);

(e) by correspondence (Rule 27 - Motion by Correspondence);

(f) in an emergency (Rule 28 - Emergency Motion);

(g) to a judge who presides or presided over the trial of an action, or hearing of an application (Rule 29 - Motion to Presiding Judge);

(h) to the prothonotary (Rule 30 - Motion to Prothonotary).

(3) A person may make or respond to a motion, in accordance with this Part 6.

22.02 Notice

A party must make a motion on notice unless the party satisfies the judge hearing the motion that it is properly made *ex parte*.

22.03 *Ex parte* motion

(1) A party may make an *ex parte* motion in one of the following circumstances:

(a) the order sought does not affect the interests of another person;

(b) the party makes a motion in an *ex parte* application;

(c) the other party is disentitled to notice under Rule 31 - Notice;

(d) legislation or these Rules permit the motion to be made *ex parte*;

(e) there are circumstances of sufficient gravity to justify making a motion without notice, for which examples are listed in Rule 22.03(2).

(2) Each of the following is an example of circumstances of sufficient gravity to justify an *ex parte* motion:

(a) a child may be harmed if notice is given, and the court's obligation to secure the best interests of the child requires the court to proceed without notice;

(b) notice will likely lead to violence, and an *ex parte* order will likely avoid the violence;

(c) notice will likely lead to destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss;

(d) a party facing an emergency has a right to make a motion, but the motion cannot be determined on notice within the time provided by these Rules, even if a judge exercises the power to shorten a notice period, or to direct a speedy method of notice.

22.04 Continuing *ex parte* motion on notice

A judge who hears an *ex parte* motion may require that the motion continue on notice and give directions for notice to each other party.

22.05 Full and fair disclosure on an *ex parte* motion

(1) The party who makes an *ex parte* motion must include, in an affidavit filed for the motion, any evidence known to the party, personally or by information, that weighs against granting the order.

(2) A party who makes a motion for an *ex parte* order must advise the judge hearing the motion of any fact that may weigh against granting the order.

(3) A judge who is satisfied that an *ex parte* order was obtained without full and fair disclosure may set aside the order.

22.06 Rehearing of *ex parte* motion

(1) A party who obtains an *ex parte* order affecting the rights of a party not disentitled to notice must immediately deliver a copy of the order to the affected party, unless a judge orders otherwise.

(2) A party who is affected by an *ex parte* order may require the motion to be heard again in chambers by filing a notice to that effect.

(3) The judge rehearing the motion may set aside, vary, or continue the order.

22.07 Notice of rehearing *ex parte* motion

The prothonotary must notify the parties of the time, date, and place for rehearing an *ex parte* motion no more than two days after the day a notice for a rehearing is filed.

22.08 Affidavits for rehearing

(1) A party who obtains an *ex parte* order may only rely on the following affidavits at a rehearing:

(a) the affidavit filed on the *ex parte* motion;

(b) an affidavit filed by another party;

(c) an affidavit substituting direct evidence for hearsay in the affidavit filed on the *ex parte* motion;

(d) a rebuttal affidavit limited to new points raised by the other party's affidavit;

(e) an affidavit allowed by a judge who is satisfied that the party has good reason for not having provided the evidence on the *ex parte* motion.

(2) The affidavit substituting direct evidence for hearsay may be filed no later than the deadline for filing a supporting affidavit in Rule 23.11, of Rule 23 - Chambers Motion.

(3) A judge who rehears a motion may only consider hearsay in the affidavit filed on the *ex parte* motion that is admissible under an exception recognized by the rules of evidence or is within the further exceptions provided by Rule 22.15.

22.09 Application of Rule 23 - Chambers Motion on rehearing

Rules 23.08 to 23.10, the deadlines in Rule 23.11 except the deadlines for a notice of motion and supporting affidavit, Rule 23.12 and Rule 23.15 apply to the rehearing of an *ex parte* motion.

22.10 Acting on own motion

A judge, prothonotary, referee, or commissioner may make an order on their own motion.

22.11 Motion involving non-parties

(1) A person who is appointed by a judge to carry out an assignment, such as a sheriff or receiver, may make a motion in connection with the assignment.

(2) A person who is not a party to a proceeding, and is not appointed in the proceeding, may make a motion in the proceeding only if a judge permits, except the person requires no permission to make a motion to intervene under Rule 35 - Parties.

(3) A party may move for an order binding a non-party only if legislation or these Rules allow, or a judge permits.

(4) A non-party who makes a motion, or against whom a motion is made, may be joined as a party to the proceeding in accordance with Rule 35 - Parties.

(5) In addition to the obligation to give notice to the other party, a party who moves for an order binding a non-party must make the motion on notice to the non-party, unless the party satisfies the judge hearing the motion that it is properly made without notice to the non-party.

(6) Rules applicable to a party on a motion, including Rules about an *ex parte* motion, must, as nearly as possible, be applied to a non-party who moves for an order or who is sought to be bound by an order, as if the non-party were a party.

22.12 Motion by prothonotary

(1) A prothonotary may make a motion to a judge in any manner the prothonotary sees fit, unless these Rules or legislation provides or a judge directs otherwise.

(2) The prothonotary may make a motion based on the prothonotary's representations, unless a judge directs that an affidavit be provided.

(3) The prothonotary may file a "Notice of Prothonotary's Motion" signed by the prothonotary to make a motion in chambers, by appearance motion, or in court.

(4) The notice of prothonotary's motion must state all of the following:

(a) the time and date when, and the place where, the motion is to be heard;

(b) the contents of the proposed order;

(c) a reference to the legislation, Rule or point of law under which the motion is made;

(d) the prothonotary's representations of the facts supporting the order.

(5) The notice may be in Form 22.12.

(6) Rules applicable to a party on a motion apply to a prothonotary as if the prothonotary were a party, unless these Rules provide or a judge directs otherwise.

22.13 Motion to commissioner or referee

A party may make a motion to a commissioner or a referee appointed in the proceeding, and the motion may be made in one of the ways a motion may be made to a judge, except under Rule 23 - Chambers Motion, and Rule 24 - Appearance Motion.

22.14 When appointments required

A party who wishes to make any of the following motions must obtain an appointment:

(a) a motion in the Family Division, a motion that requires more than a half-hour in chambers, a motion by special appointment, and an emergency motion;

(b) a motion to a judge assigned to a trial or hearing, unless the motion is made at the trial or hearing or the judge permits the motion to be made without an appointment;

(c) a motion to the prothonotary, a referee, or a commissioner concerning the conduct of a hearing by the prothonotary, an inquiry by a referee, or the taking of evidence by the commissioner, unless the motion is made at the hearing or inquiry or when the commission evidence is taken.

22.15 Rules of evidence on a motion

(1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.

(2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:

(a) an *ex parte* motion, if the judge permits;

(b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;

(c) a motion to determine a procedural right;

(d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;

(e) a motion on which a Rule or legislation allows hearsay.

(3) A party presenting hearsay must establish the source, and the witness' belief, of the information.

(4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

22.16 Transferring motion to courtroom

A party who is notified of a motion to be heard outside a courtroom, or who is present for a motion being heard outside a courtroom, may make a motion to transfer the hearing to, or continue the hearing in, a courtroom.

22.17 Notify court of failure to deliver notice of motion

A party who fails to deliver a notice of a motion before a deadline for doing so must immediately notify the court of that fact and whether, when the party appears on the motion, the party will consent to dismissal, request an adjournment, or make a motion for an order excusing compliance with the deadline and permitting the motion to proceed.

22.18 Attendance, withdrawal, and adjournment

(1) A party who makes a motion to be heard at a time and date set by the party or appointed by the court at the party's request must appear at the time and date, and in the place or by the method set for the hearing, unless one of the following apply:

(a) all parties consent to the motion being withdrawn or adjourned, the party making the motion immediately advises the prothonotary and the judge of the agreement, and the party confirms the advice in writing delivered to the prothonotary and the judge's office;

(b) a judge gives permission to withdraw the motion, or adjourns the hearing of the motion.

(2) A motion for permission to withdraw or adjourn a motion may be made under Rule 28 - Emergency Motion, or such other Rule in Part 6 - Motion as a judge permits.

(3) A new time and date may be appointed for a motion adjourned by agreement in the same manner as the time and date of the adjourned motion was appointed or as a judge directs.

TAB 5

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to June 21, 2023

Last amended on April 27, 2023

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Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;