Clerk's Stamp:

COURT FILE NUMBER	1303 06092
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**ROYAL BANK OF CANADA**
DEFENDANTS	**DOWLAND CONTRACTING LTD., DOWLAND INDUSTRIAL WORKS LTD., DOWLAND CONSTRUCTION, INC. and 6070 N.W.T. LIMITED**
DOCUMENT	**BENCH BRIEF OF ROYAL BANK OF CANADA IN SUPPORT OF AN APPLICATION FOR A RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Ray C. Rutman Dentons Canada LLP 2900 Manulife Place 10180 – 101 Street Edmonton, Alberta T5J 3V5 Ph. (780) 423-7246 Fx. (780) 423-7276 File No.: 125665-8417/RCR

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I. INTRODUCTION

1. The Defendants, Dowland Contracting Ltd. ("Contracting"), Dowland Industrial Works Ltd. ("Industrial"), Dowland Construction, Inc. ("Construction") and 6070 N.W.T. Limited ("6070") (Contracting, Industrial, Construction and 6070 being referred to herein individually and collectively as the "Defendants") are directly and indirectly indebted to the Royal Bank of Canada ("RBC").

2. The Defendants have granted to RBC security over all of the Defendants' real and personal property. RBC demanded payment of the indebtedness and sent out the appropriate demands and notices to enforce its security. RBC seeks the appointment of a receiver/manager of the undertaking, property and assets (the "Receiver") of the Defendants.

3. The Defendants admit the debt, admit being in default of their obligations to RBC, admit the security and have granted to RBC a Consent Receivership Order on April 15, 2013 (the "Consent Order"). Further the security documents granted by the Defendants to RBC provide for the appointment of a Receiver.

4. The Defendants are in default of their obligations to RBC and circumstances for the utilization of the Consent Order exist.

II. ISSUES

A. Should this Honourable Court exercise its discretion to give effect to the Consent Order executed by the Defendants?

B. Should a Receiver be appointed by the Court in the present circumstances?

C. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed Receiver?

D. Should this Honourable Court exercise its discretion to appoint a Receiver of the property of Construction, having regard to Construction being a company incorporated pursuant to the laws of the State of Alaska?

E. If this Honourable Court exercises its discretion to grant a Receivership Order ("Receivership Order") should any of the Defendants' property, assets or undertakings be excluded from administration by the Receiver pursuant to a Receivership Order?

F. If the Defendants are applying for an Initial Order under the *Companies' Creditors Arrangement Act* ("*CCAA*"), is such an Order appropriate under the circumstances?

III. RBC'S POSITION

5. RBC respectfully submits that:

   (a) this Honourable Court ought to exercise its discretion to give effect to the Consent Order;

   (b) having regard to the circumstances it is just and convenient to appoint a Receiver of the undertakings and property of the Defendants;

   (c) Alvarez & Marsal Canada Inc. ("Alvarez & Marsal") ought to be appointed as Receiver as it is familiar with the Defendants financial circumstances, is a well-recognized and respected insolvency firm and is able to deal with the rights of all interested parties in a fair and evenhanded manner;

   (d) this Honourable Court has jurisdiction over Construction as it has attorned to the jurisdiction of Alberta, and in any event, Alberta is the proper forum. Any recognition and assistance required of the Alaska courts in carrying out the terms of the Consent Order may be properly sought and obtained by the Receiver;

   (e) all of the Defendants' property and undertakings should be subject to a Receivership Order and administered by the Receiver; and

   (f) the Defendants have not shown that circumstances exist which make the granting of an Initial Order under the *CCAA* appropriate.

IV. FACTUAL BACKGROUND

6. Contracting is indebted to RBC for loans or other credit extended by RBC.

7. Industrial, Construction and 6070 granted guarantees guaranteeing the indebtedness of Contracting to RBC.

8. Industrial is indebted to RBC for loans or other credit extended by RBC.

9. Contracting, Construction and 6070 granted guarantees guaranteeing the indebtedness of Industrial to RBC.

10. All of the Defendants granted security to RBC to secure its obligations to RBC.

11. Effective April 15, 2013 the Defendants and RBC entered into a Forbearance Agreement (the "Forbearance Agreement").

- Paragraphs 6-11 being evidenced by the Forbearance Agreement attached as Exhibit "E" to the Affidavit of Gary Ivany, sworn April 29, 2013

12. By the Forbearance Agreement the Defendants acknowledged, agreed and represented that:

a. there is no defence or set off to the claims of RBC for repayment of the loans or pursuant to the guarantees;

b. the loans are due and payable to RBC;

c. the Defendants are in default of its obligations to RBC;

d. the indebtedness guaranteed by the guarantees is due and owing to RBC; and

e. the security executed by the Defendants was duly and properly executed and is valid and binding.

- Affidavit of Gary Ivany at para. 20.

13. The Defendants executed the Consent Order consenting to the appointment of a Receiver over all of the Defendants property.

- Affidavit of Gary Ivany at Exhibit "E" (attached as Schedule "G" to the Forbearance Agreement).

14. The Defendants are in default of their obligations pursuant to the loans and the guarantees.

- Affidavit of Gary Ivany at para. 20.

15. The Defendants defaulted in their obligations to RBC pursuant to the Forbearance Agreement. Amongst other defaults the Defendants failed to make the required payments to RBC as stipulated in the Cash Flow attached as Schedule "F" to the Forbearance Agreement.

- Affidavit of Gary Ivany at paras. 27 and 32.

16. RBC issued demands and notices to the Defendants.

- Affidavit of Gary Ivany at Exhibits "H", "L" and "M" and paras. 30 and 34.

17. The Defendants have not made the payments required by the demands to RBC.

- Affidavit of Gary Ivany at para. 149.

V. LAW AND ARGUMENT

A. Should this Honourable Court exercise its discretion to give effect to the Consent Order duly executed by the Defendants?

18. On April 15, 2013 the Defendants and its counsel executed the Consent Order to appoint a Receiver of the Defendants' undertaking, property and assets.

19. RBC respectfully submits that the Consent Order is valid and enforceable and that this Honourable Court ought to exercise its discretion to give effect to the Consent Order.

20. The general judicial approach towards consent orders is set out in *Brooks v. Brooks*, 2012 NBCA 50, 390 N.B.R. (2d) 94 (C.A.), where the Court held:

> The Consent Order was the result of settlement discussions between the parties and their respective counsel, as both were represented at the time. It is not the role of the judge to go behind any compromise reached by the parties and their counsel, where the judge considers the Order to be appropriate in the circumstances.

- *Brooks v. Brooks*, 2012 NBCA 50, 390 N.B.R. (2d) 94 (C.A.) ("*Brooks*") at para. 11 [Tab 1]

21. The Consent Order formed part of the Forbearance Agreement which was finalized after much negotiation between RBC, the Defendants and their respective counsel. Not only were the Defendants represented by counsel at the time of executing the Consent Order, the Consent Order is also executed by their counsel.

22. In *620637 Ontario Ltd. v. Axton*, 1993 CarswellOnt 2071 (Gen. Div.), Justice J. Macdonald held:

> The order is based on the exercise of judicial discretion. An application for leave to appeal such an order contests the way in which judicial discretion was exercised. A consent order is different since generally, it is not based on any substantial exercise of judicial discretion. <u>While circumstances may arise in which the Court refuses an order to which the parties have consented, it remains accurate to state that consent orders are more the product of consensus amongst litigants, a state of affairs deserving of encouragement</u>, than they are the product of the judicial mind.
>
> [emphasis added]

- *620637 Ontario Ltd. v. Axton*, 1993 CarswellOnt 2071 (Gen. Div.) ("*Axton*") at para. 12 [Tab 2]

23. In terms of grounds to set aside, challenge or reject consent orders, the courts have consistently considered consent orders to effectively be agreements or contracts, or perhaps more appropriately evidence of contracts or agreements, between the parties set out in the form of an order. As a result, it is widely considered that normal principles of contract law apply to setting aside a consent order, and the grounds on which a contract may be unenforceable apply to consent orders.

24. In *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565, 506 A.R. 50, Justice A. Park held:

> 66 An order is granted on the merits after the court has considered the strength of each side's case. A consent order has been described as a contract, although it has also been said that it is more accurate to describe it as evidence of a contract. A consent order sets out, in the form of an order, the agreement which the consenting parties have made: *155569 Canada Ltd. v. 248524 Alberta Ltd.*, 126 A.R. 396, [1992] A.J. No. 135 (Alta. Q.B.).
>
> 67 Since a consent order is a contract or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order, can generally only be varied on grounds of common mistake, misrepresentation or fraud: *155569 Can.* In *155569 Can.*, the court set aside a prior consent order appointing a receiver and providing for the collection and payment of rent to the plaintiff on the basis that the defendants would not have consented to the order if they had been aware of a prior agreement to do otherwise. The court found that the consent order could be vacated on grounds of unilateral mistake since the defendant consented to the order on the basis of a mistaken understanding on a crucial point, and the plaintiff knew the defendant was mistaken. [emphasis added]

- *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565, 506 A.R. 50 (*"Simonelli"*) at paras. 66-67 [Tab 3]

25. Justice Park further held:

> 73 The Order was a consent order and thus sets out the agreement between the consenting parties. The issue is whether they agreed that clause two of the Order was to have effect until the underlying issues had been determined or only for an interim period until the merits of the application could be argued and determined by this Court.
>
> 74 Since the Order is to be viewed as a contract, the rules of contract interpretation apply. These rules require that a contract be interpreted so as to discover and give effect to the intentions of the parties at the time that the contract was made. The Court looks for the reasonable objective intent of the parties, not their subjective intent.

> This intent is determined by considering both the express terms of the contract and the surrounding circumstance[...]

- *Simonelli, supra*, at paras. 73-74 [Tab 3]

26. The test for setting aside a consent order in Alberta may be less onerous when dealing with strictly procedural issues.

- See for example *Young West Oil & Gas Ltd. v. Erehwon Inc.*, 2001 ABCA 115 at paras.11-12 [Tab 4]

27. In *Burhoe v. Burhoe*, 2012 NBQB 241, 391 N.B.R. (2d) 270, the Court, after rejecting the applicant's contention that a consent order was invalid because the applicant had not read the consent order drafted and approved by the parties' lawyers prior to endorsements by the Court, noted at paragraph 12:

> The decision comes down to contractual interpretation. A consent order is in essence a judicially approved domestic contract/separation agreement between the parties:
>
> ... It is useful to remember that a consent order is really the formal expression of an agreement between the parties and that it must be interpreted and dealt with as if it were a contract ...

- *Burhoe v. Burhoe*, 2012 NBQB 241, 391 N.B.R. (2d) 270 at para. 12 [Tab 5]

28. The decisions in *Royal Bank v. Lukezic*, 2010 ONSC 4236, 2010 CarswellOnt 6025, aff'd 2011 ONCA 314, 2011 CarswellOnt 8970 ("*Lukezic*") and *Pax Management Ltd. V. Canadian Imperial Bank of Commerce*, [1992] 2 S.C.R. 998 ("*Pax Management*") both involved consent receivership orders. In both cases, the debtor sought to set aside the consent orders on allegations of deceit or fraud on the part of the creditor in obtaining the consent receivership order. In *Lukezic*, Justice Morawetz found that there was no evidential support for the allegation of fraudulent conduct resulting in the consent order and dismissed the debtor's challenge. Conversely, in *Pax Management* the Court found that the creditor only obtained the debtor's consent by way of deceitful conduct and set aside the consent receivership order. The principles expressed in those cases were in accordance with the principles set out in the above authorities.

- *Royal Bank v. Lukezic*, 2010 ONSC 4236, 2010 CarswellOnt 6025, aff'd 2011 ONCA 314, 2011 CarswellOnt 8970 [Tab 6]

- *Pax Management Ltd. V. Canadian Imperial Bank of Commerce*, [1992] 2 S.C.R. 998 [Tab 7]

29. RBC respectfully submits that while the above authorities deal with setting aside previously granted consent orders, the principles in those authorities are applicable to

when a consent order may properly be challenged at first instance. No decision was located where a court considered when to reject a consent order at first instance.

30. There is no basis for any suggestion of fraud or deceit in this case, nor is there any suggestion of mistake, misrepresentation or other grounds on which a contract may be set aside. As a result, RBC respectfully submits that this Honourable Court ought to exercise its discretion as to give effect to the agreement between the parties and appoint a Receiver of the Defendants' undertaking, property and assets.

B. Should a Receiver be appointed by the Court in the present circumstances?

31. Each of section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 13(2) of the *Judicature Act*, 2000 c. J-2 vest in this Honourable Court, authority to appoint a Receiver where it is just and convenient to do so.

32. RBC respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver in that the Defendants granted the Consent Order and by reason of it being just, convenient and otherwise appropriate that a Receiver of the undertaking, property and assets of the Defendants be appointed.

33. If this Honourable Court determines that the delivery of the Consent Order is not sufficient basis alone for it to exercise its discretion to appoint a Receiver, RBC respectfully submits that the usual factors which a Court considers strongly indicate that the appointment of a Receiver would be appropriate in the present circumstances. In *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, Justice Romaine held:

> 27 The factors a court may consider in determining whether it is appropriate to appoint a Receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;

> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

- *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*("*Paragon*"), 2002 ABQB 430 at para. 27 [Tab 8].

34. Having regard to the factors listed by Justice Romaine, RBC notes that:

(a) each of the mortgages and GSAs granted by the Defendants authorize the appointment of a Receiver;

(b) the risk to RBC is significant and measured in the tens of millions of dollars. Many of the contracts are in dispute. Two of the Defendants were intending to apply under the *CCAA* which may only be sought if the companies are admittedly

insolvent. There is no readily apparent equity in the assets. Further, the assets are scattered in various parts of Canada, including but possibly not limited to British Columbia, Alberta, Saskatchewan, Northwest Territories and Nunavut;

(c) the nature of the property is such that judicial assistance will be required to maximize the value of the assets. Realization of real property requires judicial assistance by way of an application for a Vesting Order or a Foreclosure Order. Further it will be helpful to the secured creditors and to this Honourable Court to have a Receiver assist with dealing with all of the equipment;

(d) there is actual waste of the Defendants' property. A large portion of the property of Contracting constitutes equipment utilized in the construction industry. The equipment is scattered across numerous job sites in various parts of Canada and Alaska. As it continues to be utilized by the Defendants it will depreciate in value;

(e) the appointment of a Receiver is necessary for the preservation and protection of the property. Much of the personal property is located in remote areas of northern Canada. Similarly, some of the real property of the Defendants is located in remote areas;

(f) the balance of convenience is clearly in favour of RBC. The Defendants admit there is no defence to the claims of RBC and that there is no right of set-off. The Defendants did not honour the terms of the Forbearance Agreement, demands, notices, supplemental demands and supplemental notices were sent by RBC to the Defendants. The demands were not satisfied and the terms of the Forbearance Agreement were not honoured;

(g) as noted above, the RBC has the right under its security documentation to appoint a Receiver;

(h) RBC anticipates that it may encounter difficulty with some of the subcontractors and employees of the Defendants in the enforcement of its security. The exact location of all of the security is not known, it is located throughout various parts of Canada and possibly Alaska and as such it will be difficult for RBC to enforce its security;

(i) while the appointment of a Receiver is extraordinary relief and should be granted cautiously and sparingly, Justice Romaine notes at paragraph 28 of *Paragon* that this factor is less essential to the inquiry where the security documentation provides for the appointment of a Receiver;

(j) a court appointment is necessary to enable the Receiver to carry out its duties more efficiently. A privately appointed Receiver cannot deal effectively with the assets as land cannot be sold by a privately appointed Receiver;

(k) a Receivership Order would place all creditors and stakeholders of the Defendants on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

(l) RBC respectfully submits that the conduct of the parties is supportive of the granting of the Order requested. The Defendants cannot sustain their current operations on an ongoing basis absent a material injection of capital or refinancing and they are facing material cash flow difficulties;

(m) the duration of the appointment of a Receiver is at this juncture incapable of being determined with specificity;

(n) while there is a cost of appointing a Receiver, all indications to date indicate that the cost will not be borne by the Defendants as RBC and other creditors face significant shortfalls;

(o) it is likely that the value of the property of the Defendants will be maximized by establishing a level and transparent process administered by this Honourable Court; and

(p) having regard to the nature and location of the property that will be under the administration of the Receiver, a Receivership Order is necessary to facilitate the duties of the Receiver.

35. It would appear that where there is no security in favour of a party applying for a Receivership Order, the Court has imposed a stricter test.

36. In *MTM Commercial Trust v. Statesman and Riverside Quays Ltd.*, 2010 ABQB 647, a case concerning a receivership application under section 13(2) of the *Judicature Act* where the applicant did not have security authorizing the appointment of a receiver, Justice Romaine noted:

> 11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

- *MTM Commercial Trust v. Statesman and Riverside Quays Ltd.*, 2010 ABQB 647 ("*MTM Commercial*") at para. 11 [Tab 9]

37. Similarly in *BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127, an application for a receivership was made under section 13(2) of the *Judicature Act* by an application who did not have authority to appoint a receiver pursuant to security documents. The Alberta Court of Appeal discussed the test to appoint a Receiver under the *Judicature Act,* the Court held:

> 17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

- *BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127, at para. 17 [Tab 10]

38. More recently, an application to appoint a Receiver was made before the Alberta Court of Queen's Bench in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63. The application was made by a creditor who had authority to appoint a Receiver under a GSA. This Honourable Court applied a modified and less onerous version of the interlocutory test and held:

> 20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of

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

- *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63 at paras. 20 and 21 [Tab 11]

39. In the *Paragon* decision, Justice Romaine clearly set out that where security documents provide for the appointment of a Receiver, the extraordinary nature of the remedy sought is less essential to the inquiry:

> 28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.

- *Paragon, supra,* at para. 28 [Tab 8]

40. RBC respectfully submits that there are no other remedies short of the appointment of a Receiver available to RBC that will adequately protect its interest. Pursuant to the Forbearance Agreement, Alvarez & Marsal had been appointed as Monitor. Any attempts by the Defendants to work through their financial difficulties have failed. Further, the Defendants have not been able to make payments to RBC or follow through on the cash flow provided by the Defendants that is appended as Schedule "F" to the Forbearance Agreement. In addition, the Defendants have no further financing to continue the daily operations of their businesses. The balancing of the interests of the parties favours RBC and the appointment of a Receiver.

C. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed Receiver?

41. In an application for a Court appointed Receiver, the Court is faced with the task of deciding the appropriate person or firm to be appointed.

42. Notwithstanding that the discretion to select the Receiver is that of this Honourable Court, RBC respectfully submits that consideration ought to be given to the appointment as Receiver of the firm put forward by the primary creditor, in this case, RBC.

43. The proposition that significant consideration ought to be given to the applicant creditor's proposed appointment Receiver is supported by *Confederation Trust Co. v. Dentbram Developments Ltd.*, 9 C.P.C. (3d) 399, Ontario Court of Justice (General Division) Commercial List, wherein Justice Borins held:

> The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

- *Confederation Trust Co. v. Dentbram Developments Ltd.*(" *Confederation Trust*"), 9 C.P.C. (3d) 399, at para. 2[Tab 12]

44. Alvarez & Marsal is a well-recognized and respected insolvency firm. It is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner.

45. In *Royal Oak* Mines, Re, 11 C.B.R. (4th) 122, Justice Farley applied the *Confederation Trust* case and further held:

> 9 In any event PricewaterhouseCoopers has the edge over Deloitte+Touche in this particular contest since it has had experience in the case for several months and established a working relationship with the operational and financial persons at the Applicant's mines. While it appears that PricewaterhouseCoopers would be somewhat further along as to the marketing aspect of 10 days versus up to 4 weeks. It appears as well that PricewaterhouseCoopers has a leg up as to valuation, work and sale models and Deloitte + Touche has not had the advantage of working on the file to date. Trilon submits PricewaterhouseCoopers has spent more time with the others in reviewing its recommendations than it has spent with Trilon. I do not see this quantitative measure as indicative of anything qualitative since Trilon has been consistently opposed to any tax loss model for some time.

- *Royal Oak Mines, Re*, 11 C.B.R. (4th) 122, at para 9 [Tab 13]

46. Alvarez & Marsal was appointed as Monitor pursuant to the Forbearance Agreement and has consented to act as Receiver in these proceedings. Alvarez & Marsal is familiar with the Defendant's financial circumstances, has been working with the Defendants for a number of weeks, and is up to date with the current situation in which the Defendants find themselves.

D. Should this Honourable Court exercise its jurisdiction to appoint a Receiver of the property of Construction, having regard to Construction being a company incorporated pursuant to the laws of the State of Alaska?

47. RBC states that this Honourable Court has jurisdiction to grant the relief sought by RBC against Construction on the basis that Construction voluntarily attorned to the jurisdiction of the courts of the Province of Alberta, and in any event, Alberta is the proper forum.

48. A litigant can voluntarily attorn to the jurisdiction of the court by submitting himself or herself to the jurisdiction of the court. A litigant can also be deemed to have accepted and acknowledged the jurisdiction of the court by taking actions that are inconsistent with a denial of that jurisdiction. For example, a litigant who enters an unconditional appearance, who seeks relief from the court, or otherwise takes advantage of the procedures and protections of the court will be deemed to have attorned to the jurisdiction of the court:

- *Trylinski-Branson v. Branson*, 2010 ABCA 322, 493 A.R. 156 at para. 26 [Tab 14]

49. The agreement that forms the basis for Construction's liability to RBC is the Guarantee and Postponement of Claim granted by Construction to RBC on April 15, 2013 (the "Construction Guarantee"). Section 16 of that Construction Guarantee expressly states that the guarantee is governed by the law of Alberta and that Construction "irrevocably submits" to the courts of Alberta in any action or proceeding arising out of or in relation to the Guarantee. It further expressly states that Construction "irrevocably waives, to the fullest extent possible" the defence of an inconvenient forum.

- Affidavit of Gary Ivany, at Exhibit "CC," s. 16

50. In the Forbearance Agreement, Construction similarly agreed and represented that:

(a) any action, directly or indirectly, related to the indebtedness or security referenced within the Forbearance Agreement shall be properly commenced and continued in the Judicial Centre of Edmonton;

(b) any action by RBC, directly or indirectly, related to the Forbearance Agreement, the indebtedness of Construction or the security granted to RBC by Construction would be categorized as "standard case" in accordance with the *Alberta Rules of Court*;

(c) the forbearance Agreement would be governed by the laws of the Province of Alberta and, at least as far as the forbearance Agreement was concerned, the parties attorned to the non-exclusive jurisdiction of the courts of the Province of Alberta;

(d) provided the Consent Order that would be granted and entered in and by the Court of Queen's Bench of Alberta; and

(e) indicated any notice or demand under the Forbearance Agreement could be validly delivered to Construction at an address located in Edmonton, Alberta.

- Affidavit of Gary Ivany, at Exhibit "E," ss. 21.2, 21.3, 21.5, 21.19 and Schedule G

51. Thus, it is clear that Construction voluntarily submitted to the jurisdiction of the courts of Alberta with respect to the relief sought by RBC in this action and in this application.

52. Moreover, and as is indicated above, Construction executed and provided to RBC the Consent Order to be granted and entered in the Court of Queen's Bench of Alberta. Providing the Consent Order is clearly a voluntary submission by Construction to the jurisdiction of this Honorable Court, or at absolute minimum, an action taken that is inconsistent with a denial of that jurisdiction.

53. In any event, it is clear that Alberta is the proper forum, or at least a proper forum. The Construction Guarantee and the Forbearance Agreement contained choice of forum clauses. Courts have encouraged the use of these clauses since they represent the reasonable expectations of the parties to a contract.

- *Morrison v. Society of Lloyd's* (2000), 224 N.B.R. (2d) 1 at para. 14(C.A.) [Tab 15]

54. The jurisprudence is consistent that while choice of forum clauses found in agreements are not determinative, they will generally be given effect by the court unless the balance of convenience massively favours an opposite conclusion. The party asserting a different forum has the heavy onus of establishing that the balance of convenience massively favours another forum. In *Volkswagen Canada Inc. v. Auto Haus Frohlich* Ltd., (1985), 65 A.R. 271 (C.A.), the Court held:

> 6 In our view, the court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion. We essentially agree with the approach taken by the English court in *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. Eleftheria Owners; The Eleftheria*, [1970] P. 94, [1969] 2 W.L.R. 1073, [1969] 2 All E.R. 641.
>
> 7 We have therefore heard argument on the question of balance of convenience, remembering always that the onus of showing that the balance of convenience does not favour Ontario rests with the plaintiff, and that it is a heavy onus. [emphasis added]

- *Volkswagen Canada Inc. v. Auto Haus Frohlich* Ltd., (1985), 65 A.R. 271 at para. 6-7 (C.A.) [Tab 16]

55. Even if this Honourable Court were to determine that choice of forum clauses in this case a level of deference less than that of an exclusive jurisdiction clause, the parties choice of forum here is deserving of significant weight from the court. In *TR Technologies Inc. v. Verizon Communications Inc.*, 2011 ABQB 390, 525 A.R. 279 [*TR Technologies*], the defendant sought a stay of the Alberta proceedings in favour of proceedings in the State of New Jersey. The relevant clause in that case said that the agreement "... the parties hereby submit to the nonexclusive jurisdiction of the courts of the Province of Alberta and the courts having jurisdiction on appeal from such courts" (at para. 12). Justice Hillier considered numerous factors in determining the application, including the choice of forum clause, during which he held:

> 30 Generally, the burden lies on the moving party to establish that there is another more appropriate jurisdiction than the domestic forum chosen by the plaintiff. In this case if Alberta possesses jurisdiction over Verizon as of right, Verizon has the higher onus of showing that there is another available forum which is clearly or distinctly more suitable: *United Oilseed Products Ltd. v. Royal Bank*, [1988] 5 W.W.R. 181, [1988] A.J. No. 467 (Alta. C.A.). ...
>
> ...
>
> 33 The parties have referred to a number of decisions regarding non-exclusive jurisdiction clauses. ...
>
> ...
>
> 38 These cases generally stand for the common sense proposition that a non-exclusive jurisdiction clause must be given weight, but will not necessarily be determinative. *Sugar* suggests the first to file in the non-exclusive jurisdiction secures that forum. However, even exclusive jurisdiction clauses cannot oust jurisdiction. ... [emphasis added]

- *TR Technologies Inc. v. Verizon Communications Inc.*, 2011 ABQB 390, 525 A.R. 279 at paras. 30-38 [*TR Technologies*] [Tab 17]

56. Construction has not put forward sufficient, or at the date of preparing this brief, any evidence sufficient to displace the strong onus on it to show why this Court should not hold Construction to the terms of its agreements with RBC.

57. As is clear from the above, Construction is properly before this Honourable Court and it may grant the relief sought by RBC against Construction in this matter.

58. RBC acknowledges that the Receivership of Construction may, depending on what assets are located in Alaska, require the recognition of any order granted by this Honourable Court in Alaska, as well as the aid of the Alaska courts. To the extent that it is determined to be necessary and appropriate by the Receiver, RBC assumes that the proposed Receiver intends to seek such recognition and assistance from the Alaska

courts pursuant to the cross-border assistance provisions located in Title 11-Bankruptcy of the United States Code, which are mechanisms for dealing with cases of cross-border insolvencies that are designed to promote cooperation between jurisdictions.

E. If this Honourable Court exercises its discretion to grant a Receivership Order should any of the Defendants' property, assets or undertakings be excluded from the administration of the Receiver pursuant to a Receivership Order?

59. RBC respectfully submits that if this Honourable Court exercises its discretion to grant a Receivership Order in relation to the property of the Defendants, all of the Defendants property should be subject to a Receivership Order and administered by the Receiver. Specifically, RBC respectfully submits that this Honourable Court ought not to exercise its discretion to exclude any of the projects which are bonded, or any contracts underlying those projects, from the scope any Receivership Order granted in these proceedings.

60. In court appointed receiverships, the Court, to protect the interests of the security holder and other creditors, directs the Receiver to take possession of all of the debtor's assets and property, even if all of the assets are not charged under the security instrument or instruments.

- Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at p. 240 [*Bennett on Receiverships*] [Tab 18]

61. RBC submits that the usual provision in a receivership order is for the Receiver to take control of the entirety of the undertaking, property and assets of the debtor. The Court in *Hamilton Wentworth Credit Union Ltd. (liquidator of) v. Courtcliffe Parks Ltd.* (1995) 23 O.R. (3d) 781 (Gen Div.) held:

> 18 The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors...The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with whatever happens to the property that comes under its administration. ...
>
> 19 All of the assets, property, and undertaking of the debtor come under its administration. ...

- *Hamilton Wentworth Credit Union Ltd. (liquidator of) v. Courtcliffe Parks Ltd.* (1995) 23 O.R. (3d) 781 at paras. 18-19 (Gen Div.) [Tab 19]

62. The bonded projects, and the contracts underlying them, are assets of the Defendants.

63. Notwithstanding the general practice of making all assets and property subject to the receivership order, as set out above in *Bennett on Receiverships, supra*, the most common ground for excluding property or assets from a receivership order, where the court exercises its discretion to do so, is where the specific property is not secured under the creditors' security. That is not the case in the present situation. The bonded projects, and the contracts underlying them, are secured in favour of RBC.

- See for example *Bank of Montreal v. 0740103 B.C. Ltd.*, 2012 BCSC 806, 98 C.B.R. (5th) 111 at paras. 2-3

64. RBC is not aware at this time of any decision where bonded projects were excluded from a receivership order. RBC submits that this makes sense in light of the role of the Receiver and purpose of a receivership.

65. A court appointed receiver is the court's officer and owes a fiduciary duty to the court and all parties connected with the debtor's assets, including the debtor.

- *RoyNat Inc. v. Allan* (1989), 99 A.R. 370 at para. 17 (Q.B.) [Tab 20]

66. The primary purpose of a court appointed receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors. Put another way, the Receiver manages the affairs of the debtor in a manner that is to the benefit of all parties.

- *Bennett on Receiverships* at p. 6 [Tab*] and *Gastra Canada Investments Inc. v. Lhndorff United Properties (Canada)* (1995), 169 A.R. 138 at para. 10 (C.A.) [Tab 21]

67. To allow some assets to be the subject of the Receivership Order, while omitting others (in this case the bonded projects), would not serve the interests of all parties. Given the early stage of this matter, RBC respectfully agrees with the sentiment expressed in *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 24, where the Court, in the context of an application by one creditor to lift the stay of proceedings under a receivership order against certain assets, held:

> The scheme of the receivership is to allow for the orderly disposition of the assets of the company in receivership. To allow one secured creditor to have the stay lifted would be unfair to the remaining creditors. If the assets were removed, it would make it virtually impossible to have a sale *en bloc*. In my view, the situation is not dissimilar to that in the *Ford Credit, supra*, case where Justice Thomas, said in para. 28:

> That evidence of prejudice must be weighed against the interest of all of the other parties and creditors who assert that an *en bloc* sale should be conducted to maximize recovery. Clearly, that opportunity would be gone if the inventory claimed by Ford Credit is removed from the *en bloc* sale.

- *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 24 at para. 27 [Tab 22]

68. The Receiver, having a duty to all parties, requires possession of all of the assets.

69. Additionally, there are other considerations which RBC respectfully submits militate against this Honourable Court exercising its discretion to exclude the bonded projects from the scope of any Receivership Order granted by it at this time.

70. The evidence set out in the Affidavit of Luis Copat, sworn April 30, 2013 (the "Copat Affidavit"), on behalf Intact Insurance Company ("Intact"), concerning whether or not there is any equity in the projects bonded by is very sparse. RBC does not accept, based on the evidence before the court, that there is no equity in the projects bonded by Intact. In any event, RBC respectfully submits that it is the Receiver's role, as the Court's officer acting for the benefit of all the interested parties, to determine if there is any equity in these bonded projects, and what course of action should be taken with respect to such projects.

71. Further, and notwithstanding certain statements in the Copat Affidavit that indicate Intact has priority with respect to the bonded projects, RBC does not concede priority to Intact, or to any other creditor, nor is there any evidence that Intact's Labour and Material or Performance Bonds will result in a first charge priority. In fact, it is not clear of the extent to which Intact is even a creditor of the Defendants at this time.

72. There may also be other creditors of the Defendants which are not currently before the Court. Canada Revenue Agency may have a claim against one or more of the Defendants, and there could be other third parties with deemed statutory trust claims against the property in question.

73. Another significant consideration is that if this Honourable Court exercises its discretion to grant a receivership order over the Defendants, the utilization of any employees, materials and equipment of the Defendants will be under the control of the Receiver, and Intact (and others) could not utilize such employees, materials and equipment without the consent of the Receiver. As such, it makes little sense to exclude these projects from the scope of the receivership.

74. In further answer to Intact's concerns over timing and delay, RBC respectfully submits that the Receiver proposed by RBC, Alvarez & Marsal, is expert in these areas. It is also familiar with the Defendants financial circumstances and operations, and the urgency

required by the circumstances, given its prior history of acting as Monitor under the Forbearance Agreement. This ought to lessen any concern about timing and delay.

75. Moreover, and notwithstanding the comments contained in the Copat Affidavit, it is not clear to RBC how the appointment of the Receiver and subjecting the bonded projects to any receivership order granted by this Honourable Court would impact Intact's ability to continue its investigations, ensure the bonded projects are carried on in an orderly manner, or work with the Obligees and subtrades. The only difference, to RBC's knowledge, is that Intact will be dealing with the Receiver, as opposed to the current management of the Defendants.

76. While RBC understands Intact's desire to protect its interests and minimize the amount it will have to expend to comply with its obligations under its bonds, RBC respectfully submits that it is just and convenient that all of the assets and property of the Defendants be brought into the receivership to ensure the orderly preservation and realization of the assets until at least all facts become known and priorities are established. It is premature at this time to conclude that these bonded projects should not be subjected to a receivership order granted by this Honourable Court.

F. If the Defendants are applying for an Initial Order under the *CCAA*, is such an Order appropriate under the circumstances?

77. Section 11.02(3) of the *CCAA* sets out the burden of proof relating to the Initial Order:

> 11.02(3) The court shall not make the order unless
>
> (*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

78. If the debtor has discharged the burden of proof imposed pursuant to section 11.02(3) of the *CCAA*, the Court has a broad discretion to grant the Initial Order and a stay. In *Timminco Ltd., Re*:, 2012 ONSC 106, Justice Morawetz stated:

> 12 On an initial application in respect of a debtor company, s. 11.02(3) of the *CCAA* provides authority for the court to make an order on any terms that it may impose where the applicant satisfies the court that circumstances exist that make the order appropriate.

- *Timminco Ltd., Re*:, 2012 ONSC 106, at para. 12 [Tab 23]

79. RBC respectfully submits that the Defendants have not discharged the burden of proof imposed upon them by section 11.02(3) of the *CCAA*. RBC submits that the circumstances do not make the granting of a *CCAA* Initial Order appropriate. On April 15, 2013 the Defendants executed the Forbearance Agreement and Consent Order. The Defendants by executing the Consent Order agreed to allow RBC to appoint a Receiver.

80. RBC, the primary creditor has lost confidence in management and the affidavits of Mr. Ivany, Mr. McGuinness and Mr. Copat all suggest the Defendants must liquidate their property. Given the lack of confidence in management and the lack of financial interest of the Defendants in these proceedings, RBC respectfully submits that the interests of the stakeholders would be best served by placing the property under the administration of a Receiver being an officer of the Court.

81. The Forbearance Agreement was the result of much discussion and negotiation between RBC and the Defendants. Notwithstanding all of the discussion and negotiation to conclude the Forbearance Agreement, the Defendants were in default of the Forbearance Agreement within a week of executing the Forbearance Agreement.

82. Having regard to:

    (a) the defaults under the Forbearance Agreement; and

    (b) the execution of the Consent Order by the Defendants;

    RBC respectfully submits that an application for an Initial Order under the *CCAA* and opposition of a Consent Order is not consistent with the principles of good faith.

83. Although no such application is before this Honourable Court at the present time, if the Defendants apply for an Initial Order under the *CCAA* and if such an order contains a provision for interim financing with a super-priority, RBC would oppose such an application and would intend to provide supplemental authorities to this Honourable Court in opposition of such application.

VI. CONCLUSION

84. RBC respectfully submits:

    (a) this Honourable Court ought to exercise its discretion to give effect to the Consent Order;

    (b) having regard to the circumstances it is just and convenient to appoint a Receiver of the undertakings and property of the Defendants;

    (c) Alvarez & Marsal be appointed as Receiver as it is familiar with the Defendants financial circumstances, is a well-recognized and respected insolvency firm and

is able to deal with the rights of all interested parties in a fair and evenhanded manner;

(d) this Honourable Court has jurisdiction over Construction as it has attorned to the jurisdiction of Alberta, and in any event, Alberta is the proper forum. Any recognition and assistance required of the Alaska courts in carrying out the terms of the Consent Order may be properly sought and obtained by the Receiver;

(e) all of the Defendants property and undertakings should be subject to a Receivership Order and administered by the Receiver; and

(f) the Defendants have not shown that circumstances exist which make the granting of an Initial Order under the *CCAA* appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2013.

DENTONS CANADA LLP

Per: _____

RAY C. RUTMAN
SOLICITORS FOR ROYAL BANK OF CANADA