

ENTERED



COURT FILE NO. 2201-01016

COURT COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND
INSOLVENCY

JUDICIAL CENTRE CALGARY

COM
Jan 18 2023

*IN THE MATTER OF THE RECEIVERSHIP OF ROBUS
RESOURCES INC.*

APPLICANT PAMOCO RESOURCES LTD.

RESPONDENT ALVAREZ & MARSAL CANADA INC., in its capacity as Court-
appointed Receiver of ROBUS RESOURCES INC.

DOCUMENT **BENCH BRIEF OF ALVAREZ & MARSAL CANADA INC., in its
capacity as Court-appointed Receiver of ROBUS RESOURCES
INC.**

ADDRESS FOR SERVICE AND CONTACT
INFORMATION OF PERSON FILING THIS DOCUMENT
Cassels Brock & Blackwell LLP
Suite 3810 Bankers Hall West
888 3rd St SW
Calgary, AB T2P 5C5

Attention: Jeffrey Oliver/Danielle Marechal

Tel: 403 351 2921 / 403 351 2922

Email: joliver@cassels.com / dmarechal@cassels.com

File: 57100-1

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	FACTS	3
	A Background	3
	(i) The Parties	3
	(ii) Appointment of Receiver and approval of sale process with stalking horse bid.....	4
	(iii) The Enerplus Transaction	4
	B The O'Connor Group Loans and Alleged Conveyance of Tangibles to Pamoco	5
	C RSLLC Loan and Repayment of the O'Connor Loans	7
	D Security Interests in the Property of the Debtor	8
	E Competing Claims to the Tangibles.....	9
III.	ISSUES.....	10
IV.	LAW & ANALYSIS.....	11
	A The Conveyance of Tangibles is not enforceable due to a lack of consideration	11
	B If the Conveyance of Tangibles was a valid agreement for consideration, it granted a security interest not a transfer of ownership	14
	(i) Indicia of a Security Interest	14
	C Section 26 of the <i>Sale of Goods Act</i>	17
	(i) Introduction.....	17
	(ii) Application of Section 26 to Conveyance of Tangibles where Legal Interest held by Robus.....	17
	(iii) Policy and History	18
	(iv) RSLLC's Security Interest Falls within Section 26(1).....	19
	(a) <i>Robus Retained Possession of the Tangibles</i>	20
	(b) <i>RSLLC Acted in Good Faith and Without Notice of Pamoco's Interest</i>	20
	(c) <i>Delivery or Transfer Requirement</i>	21
	(v) Section 26(2) does not save Pamoco.....	21
V.	RELIEF SOUGHT	21
VI.	AUTHORITIES	23

I. INTRODUCTION

1. This brief is provided by Alvarez & Marsal Canada Inc. (“**A&M**”) in its capacity as receiver (in such capacity, the “**Receiver**”) of all the current and future assets, undertakings and properties (the “**Property**”) of Robus Resources Inc. (“**Robus**” or the “**Debtor**”), in response to the application (the “**Application**”) filed by Pamoco Resources Ltd. (“**Pamoco**”), with a returnable date of January 18, 2023.
2. Pamoco seeks, *inter alia*, the following relief in the Application:
 - (a) a declaration that the Tangibles (defined herein) were properly purchased by Pamoco from the Debtor;
 - (b) a declaration that the Tangibles are the property of Pamoco, are not subject to the interests of the Debtor’s creditors and that the Tangibles do not form part of the estate of the Debtor; and
 - (c) in the alternative, a declaration that Pamoco is entitled to be repaid amounts alleged to have been advanced for or on behalf of the Debtor as consideration for the Tangibles in the amount of \$103,800 from the estate of the Debtor, and in priority to any other creditor including RSLLC (defined herein).
3. The Receiver respectfully opposes the foregoing relief for the reasons set out below.
4. Capitalized terms not otherwise defined herein have the meaning ascribed to such terms in the First Report of the Receiver, filed December 9, 2022 (the “**First Report**”) and the Second Report of the Receiver, filed January 12, 2023 (the “**Second Report**”), as applicable.

II. FACTS

A Background

(i) The Parties

5. The Debtor is a private junior oil and gas company with property and operations east of Edmonton, in the Joarcam and Joe Lake fields.¹ As at the Receivership Date, Ernest Methot (“**Methot**”) was President and in control of day-to-day operations at Robus.²
6. Robus Services LLC (“**RSLLC**”) is the senior lender of the Debtor.
7. Pamoco is a wholly-owned subsidiary of Androco Holdings Ltd. (“**Androco**”).³ Anna O’Connor (“**Ms. O’Connor**”) is the sole director and voting shareholder of Androco and the sole director of Pamoco.⁴ Terrance (also known as Terry) O’Connor (“**Mr. O’Connor**”) is the general manager of Pamoco⁵ and is the sole director of Terroco Industries Inc. (“**Terroco**”),⁶ a “sister company” of Pamoco.⁷ Pamoco, Androco, Terroco, Mr. O’Connor, and Ms. O’Connor are related parties (collectively, the “**O’Connor Group**”).

¹ First Report of the Receiver dated December 8, 2022 (the “**First Report**”) at para 8.

² First Report at para 9.

³ Second Report, Appendix B.

⁴ Affidavit of Terry O’Connor, sworn January 9, 2023 (the “**O’Connor Affidavit**”), Exhibit “A”; Second Report at Appendix B.

⁵ O’Connor Affidavit at para 1.

⁶ Second Report at para 32.

⁷ O’Connor Affidavit at para 31.

8. As detailed below, the O'Connor Group advanced various loans to Robus in or around the period of March 2017 through June 2019.⁸

(ii) Appointment of Receiver and approval of sale process with stalking horse bid

9. On April 12, 2022 (the "**Receivership Date**"), upon application by Robus Services LLC ("**RSLLC**"), the Alberta Court of King's Bench (the "**Court**") granted a consent receivership order (the "**Receivership Order**") in the within proceedings (the "**Receivership Proceedings**"), pursuant to which, among other things, A&M was appointed as receiver of all of the Property.
10. On December 14, 2022, upon application by the Receiver (the "**December Hearing**"), the Court granted, among other things, orders approving a sale process with a stalking horse bid (the "**Sale Process Order**"), reverse vesting order and other related relief.
11. In response to representations made by Pamoco's counsel at the December Hearing that the Tangibles were the property of Pamoco and not the Debtor, this Honourable Court granted Pamoco leave to bring an application for determination of a claim relating to the Conveyance of Tangibles (defined herein) returnable for hearing by no later than January 20, 2023.⁹

(iii) The Enerplus Transaction

12. In December 2016, the Debtor entered into an agreement (the "**Original Enerplus PSA**") with Enerplus Corp. ("**Enerplus**"), to purchase various oil and gas wells, facilities, pipelines and related assets (the "**Enerplus Assets**"), which agreement was amended in April 2017 and again in November 2017 (collectively with the amendments, the "**Enerplus Agreement**") as a result of the Alberta Energy Regulator's denial of applications by the Debtor to have certain licenses transferred to it.¹⁰
13. The Enerplus Assets included the Tangibles.¹¹
14. Pursuant to the Enerplus PSA, Enerplus retained a 1% working interest, the licenses and operatorship of the Enerplus Assets (including the Tangibles) until such time as certain conditions were met and the remaining 99% ownership was transferred to the Debtor but held in trust by Enerplus for the benefit of the Debtor.¹²
15. The Enerplus PSA includes an allocation of the Purchase Price to the Tangibles in the amount of \$20,000.¹³
16. The Tangibles are required for the operations of Robus' PNG assets and each of the Tangibles function as a piece of a larger system that enables the operation of Robus' PNG Assets.¹⁴
17. The Purchase Price under the Enerplus PSA was \$1.0 million, consisting of a cash component of \$100,000 and \$900,000 of pre-paid expenditures. However, the allocation of \$20,000 of value to the Tangibles was likely arrived at through the application of a market standard allocation of 20%, based upon the cash purchase price of \$100,000. By comparison, the Tangibles are valued at approximately \$1,559,034.67 in the books and records of Robus. Further, although an allocation has not yet been agreed to under the Stalking Horse Bid, using the standard industry split of 80:20, approximately \$1.68 million of value would be allocated to the Tangibles thereunder.¹⁵ Considering

⁸ Affidavit of Robert Brantman, sworn January 27, 2022 (the "**Brantman Affidavit**"), Exhibit "C" at Art 1.1.

⁹ Sale Process Order at para 14.

¹⁰ First Report at paras 18-20.

¹¹ Second Report at para 13.

¹² First Report at paras 18-20.

¹³ Second Report, Appendix A at art. 2.10.

¹⁴ Second Report at para 19.

¹⁵ Second Report at para 20.

the importance of the Tangibles to the operation of the PNG assets and the potential value attributed to the Tangibles under the Stalking Horse Bid, the Receiver believes that the book value of the Tangibles may be a more appropriate indicator of the value of the Tangibles.¹⁶

18. In July 2019, Enerplus purchased certain of the Enerplus Assets back from the Debtor, including various interests in oil and gas wells, facilities, pipelines and related assets, the majority of which relate to the Unit Wells.¹⁷
19. At present, Enerplus continues to hold the 1% working interest, the licenses and operatorship of the Enerplus Assets, including legal title to the Tangibles.¹⁸

B The O'Connor Group Loans and Alleged Conveyance of Tangibles to Pamoco

20. Between March 2017 and June 2019, the O'Connor Group allegedly made various advances to Robus totaling \$2,933,113.09 (the "**Advances**").¹⁹ Some of the Advances were undocumented and others were made pursuant to a bridge loan agreement dated December 9, 2016 (the "**Bridge Loan Agreement**") and certain promissory notes.
21. The O'Connor Group registered certain security registrations at the Alberta Personal Property Registry (the "**PPR**") in relation to security granted by Robus in exchange for certain of the O'Connor Loans (the "**O'Connor Registrations**").²⁰
22. On or about April 16, 2019, Ms. O'Connor and Methot executed an agreement on behalf of Pamoco and Robus, respectively (the "**General Conveyance**").²¹ The General Conveyance provided, among other things, that:
 - (a) Robus transferred all of its right, title estate and interest in certain of the Enerplus Assets including the Petroleum and Natural Gas Rights (as defined in the Enerplus Agreement), the Tangibles and the Miscellaneous Interests (as defined in the Enerplus Agreement), as well as its choses in action with respect to the Enerplus Agreement; and
 - (b) Pamoco paid consideration for that in the sum of \$90,000.00, the receipt of which was acknowledged by Robus.²²
23. Pursuant to the Enerplus Agreement, the Petroleum and Natural Gas Rights and Tangibles were defined as follows:

"**Petroleum and Natural Gas Rights**" means the entire right, title, estate and interest of Vendor in and to the Leased Substances and the Title Documents (but only to the extent that the Title Documents pertain to the Lands), including without limitation:

- a) rights to explore for, drill for, extract, win, produce, take, save or market Leased Substances;
- b) rights to a share of the production of Leased Substances from the Lands;
- c) rights to Leased Substances injected into but not produced from the Lands;

¹⁶ Second Report at para 21.

¹⁷ First Report at para 23.

¹⁸ First Report at para 20; Second Report, Appendix A.

¹⁹ Second Report at para 25.

²⁰ Second Report at para 45.

²¹ Second Report, Appendix F, May 11, 2022 Letter from Chris Forgues.

²² Second Report, Appendix E.

- d) rights to acquire any of the foregoing; and
- e) all interests and rights known as working interests, leasehold interests and royalty interests as any of them pertain to the Lands, including those interests set forth in Schedule "A" and fractional or undivided interests in any of the foregoing.

[...]

"Tangibles" means the Facilities and the Pipeline and any and all tangible depreciable property and assets other than the Facilities which are located within, upon or in the vicinity of the Lands and which were used, are used or are intended to be used to produce, process, gather, treat, measure, make marketable or inject the Leased Substances or any of them in connection with water injection or removal operations that pertain to the Petroleum and Natural Gas Rights, including without limitation any and all gas plants, oil batteries, buildings, production equipment, pipelines, pipeline connections, meters, generators, motors, compressors, treaters, dehydrators, scrubbers, separators, pumps, tanks, boilers and communication equipment but excluding all motorized vehicles.²³

- 24. The day after the General Conveyance was executed, Pamoco alleges Mr. O'Connor and Methot agreed that it incorrectly included Petroleum and Natural Gas Rights and sought to replace it with a second agreement.²⁴
- 25. The second agreement provides for the transfer of the Tangibles and Miscellaneous Interests related to the Tangibles (as defined in the Enerplus Agreement), but not the Petroleum and Natural Gas Rights (the **"Conveyance of Tangibles"**). The Conveyance of Tangibles is otherwise identical to the General Conveyance (together, the **"Alleged Conveyances"**).²⁵
- 26. Although the Alleged Conveyances are both dated January 4, 2019, the General Conveyance was not executed until April 16, 2019, and the Conveyance of Tangibles was not executed until April 17, 2019.²⁶
- 27. There is no evidence, or any suggestion, that a \$90,000 payment was made to Robus by Pamoco at any time between January and April of 2019. Instead, the affidavit of Terry O'Connor alleges that consideration was paid by Pamoco to Robus with respect to the Conveyance of Tangibles in the form of the following six payments totalling \$103,800:
 - (a) Three acquisition advances totalling \$36,000 made in 2018 (the **"Acquisition Advances"**):
 - (i) \$12,000 payment advanced to a payee listed as "HXE" in May 2018;
 - (ii) \$22,000 payment advanced to a payee listed as "Manitoc" in August 2018; and
 - (iii) \$2,000 payment advanced to a payee listed as "Private" in August 2018; and
 - (b) Three payments made between January 2019 and April 2019 (the **"Robus AP Payments"**):
 - (i) \$10,000 payment advanced to a payee listed as "Pandell Technology" (**"Pandell"**) on January 24, 2019;

²³ Brantman Affidavit, Exhibit "C" at art 1.1; Second Report, Appendix A.

²⁴ Second Report, Appendix F, May 11, 2022 Letter from Chris Forgues; O'Connor Affidavit, paras 36-37.

²⁵ Second Report, Appendix E; O'Connor Affidavit, Exhibit "R".

²⁶ Second Report at paras 39-40 and Appendix F.

- (ii) \$37,800 payment advanced to a payee listed as “1092401 Alberta Ltd.” on January 25, 2019; and
- (iii) \$20,000 payment advanced to a payee listed as “Ernie Methot” on April 17, 2019.²⁷

C RSLLC Loan and Repayment of the O’Connor Loans

- 28. In or around early 2020, Robus secured new funding from RSLLC to replace the O’Connor Loans (the “**RSLLC Financing**”).
- 29. On February 11, 2020, Pamoco and O’Connor issued a statement of indebtedness to RSLLC and Robus for a payout of the O’Connor Loans (the “**Statement of Indebtedness**”), indicating that a total of \$3,586,306.05 was owing and comprised of the following amounts:
 - (a) \$2,061,518.88 advanced through the Bridge Loan, as well as \$420,000 advanced in addition to the Bridge Loan;
 - (b) a principal amount of \$637,100 advanced on November 22, 2018;
 - (c) a principal amount of \$59,325 advanced on December 10, 2018;
 - (d) a principal amount of \$18,112.50 advanced on April 24, 2019;
 - (e) a principal amount of \$39,396.17 advanced on June 11, 2019; and
 - (f) a total of \$336,993.85 in interest on the above payments.²⁸
- 30. Pursuant to a loan agreement dated February 21, 2020 as amended, RSLLC agreed to advance to Robus US\$7,000,000 to, among other things, refinance indebtedness owing by Robus including the O’Connor Loans (the “**RSLLC Loan**”). As a condition of the RSLLC Loan, encumbrances other than certain permitted encumbrances were to be discharged.²⁹
- 31. On or about February 21, 2020, at the direction of Robus, RSLLC paid certain amounts to the O’Connor Group totalling approximately USD\$2,392,705, in satisfaction of all amounts owing to the O’Connor Group³⁰ and the O’Connor Registrations were discharged pursuant to a release dated February 14, 2020 (the “**Release**”).³¹ The Release states, in part, the following:

Each of the undersigned [Mr. O’Connor, Androco and Pamoco] DOES HEREBY CERTIFY that:

- 1. it has received from the Debtor all amounts required to enable the undersigned to release and discharge the Security Interests and the Financing Statements that have been granted and registered in its favour;
- 2. it has not assigned, in whole or in any part, the Security Interests and the Financing Statements that have been granted and registered in its favour and is the party entitled to receive the amounts referred to above;
- 3. the Security Interests and the Financing Statements that have been granted and registered in its favour are therefore hereby released and discharged in full;

²⁷ Affidavit of Terry O’Connor, sworn January 9, 2023 (the “**O’Connor Affidavit**”) at paras 24, 33, and 34, and Exhibits “M” and “Q”.

²⁸ Second Report at para 47 and Appendix H.

²⁹ Brantman Affidavit at paras 6-8, Exhibit “C”.

³⁰ Second Report at para 50 and Appendix A.

³¹ Second Report at paras 48-49.

4. the Bridge Loan Agreement made between Robus Resources Inc. and Terrance O'Connor, dated March 23, 2017 (the "**Bridge Loan**") and all security granted thereunder and pursuant thereto is hereby released and discharged in full.³²

32. After the transaction had closed, on February 26, 2020, John Amundson, president of Terroco advised Methot by email that the Robus AP Payments advanced by Pamoco were missing from the Statement of Indebtedness.³³

33. Mr. Amundson also stated to Methot in that email:

I was not aware of these payments out of the Pamoco account so never prepared promissory notes for them. Unfortunately these did not come to my attention until this morning when we were going over some of the Pamoco accounts as part of the Pamoco year end review. I am most concerned about the first two, as we should have asked that these be repaid at the same time as the other loans. I have asked for copies of the cancelled cheques and will forward those in due course for your reference.

I will bring this up with Terry when I see him this morning and I would prefer to be able to tell him these first two items will not be an issue and will be looked after by Robus within a reasonable period of time. Please let me know your view on handling these. Thanks. [emphasis added]³⁴

34. In line with Mr. Amundson's email, it was also RSLLC's understanding and intention that the O'Connor Group was being repaid in full through the USD\$2,392,705 payment by RSLLC, thereby allowing RSLLC to become the senior-ranking secured creditor of Robus.³⁵

D Security Interests in the Property of the Debtor

35. As stated above, RSLLC is the current senior secured lender to Robus.³⁶

36. As a condition to the RSLLC Financing, Robus executed the following documents:

(a) a demand debenture constituting a lien over all of the present and after acquired property of Robus and its subsidiaries including a floating charge over all property and a fixed charge over all petroleum property; and

(b) fixed charges against petroleum property

(collectively, the "**RSLLC Security Documents**").³⁷

37. On February 13, 2020, RSLLC registered financing statements in the PPR against all personal and after acquired property of the Debtor, as well as a land charge (the "**Robus Registrations**").³⁸

38. On January 8, 2021, Pamoco registered a financing statement in the PPR (the "**Conveyance Registration**") against all of the Debtor's present and after acquired property and proceeds.³⁹

³² Second Report, Appendix I.

³³ Second Report at para 52.

³⁴ Second Report at para 52.

³⁵ Affidavit No. 1 of David Kittay, sworn January 12, 2023 (the "**Kittay Affidavit**") at para 21.

³⁶ Second Report at para 22.

³⁷ Brantman Affidavit at para 7.

³⁸ Second Report, Appendix K at pg 3-5 of 41.

³⁹ Second Report, Appendix K at pg 6 of 41.

39. On or around January 14, 2021, counsel for Pamoco sent a letter to Robus demanding that Methot and Robus immediately cease and desist from endeavouring to sell equipment and petroleum and natural gas rights which, on the basis of the General Conveyance, he asserted were the property of Pamoco.⁴⁰
40. On or about February 25, 2021, Robus issued a demand under section 50(3) of the *Personal Property Security Act*⁴¹ to have the Conveyance Registration discharged (the “**PPSA Demand**”).⁴²
41. On March 19, 2021, in response to the PPSA Demand, Pamoco commenced an action against Robus by way of originating application seeking, among other things, an order “confirming to the Registrar of the Personal Property that the registration (of the Financing Statement) need not be amended or discharged; alternatively, an order that the registration may be maintained on condition of amendment as directed by the Court”. (the “**Conveyance Registration Application**”).⁴³
42. On March 25, 2021, Pamoco amended the Conveyance Registration to revise the description of the collateral to limit it to the Debtor’s interest in equipment presently or once situate at the Debtor’s operations land in Townships 47-50, Ranges 20-23, west of the 4th Meridian, including but not limited to pumpjacks, tanks, wellheads, compressors, separators, fuel gas scrubbers, flowlines, flare stacks, treaters, mobile and movable buildings and shacks, and proceeds thereof (the “**First Amendment**”).⁴⁴
43. On April 6, 2021, an order was granted by Master J.T. Prowse, Q.C. in respect of the Conveyance Registration Application that provided, among other things:
 - (a) with reference to paragraph 50(4)(b) of the PPSA, that Pamoco’s Conveyance Registration as amended by the First Amendment may be maintained and need not be further amended or discharged until further order of the Court;
 - (b) the final hearing of the Conveyance Registration Application was adjourned *sine die* (the “**Conveyance Registration Order**”).⁴⁵
44. The Receiver has obtained a security opinion, which provides, among other things and subject to various assumptions and qualifications, that the RSLLC Security Documents create a security interest in favour of RSLLC (the “**RSLLC Security**”) in and to the PPSA Collateral (as defined in the First Report) to which the PPSA applies.⁴⁶
45. A PPR search report dated December 2, 2022 depicts that the Robus Registrations remain current and were registered ahead of the Conveyance Registration.⁴⁷

E Competing Claims to the Tangibles

46. On May 4, 2022, shortly after the Receivership Order was granted, the Receiver met with Mr. O’Connor and other interested parties. At this meeting, Mr. O’Connor asserted that Robus had

⁴⁰ O’Connor Affidavit, Exhibit T.

⁴¹ *Personal Property Security Act*, [RSA 2000, c P-7](#) (the “**PPSA**”), [s 50\(4\)](#).

⁴² Second Report at para 58.

⁴³ Second Report at para 59.

⁴⁴ Second Report, Appendix K at pg 6 of 41.

⁴⁵ Order of Master J.T. Prowse, Q.C., filed April 6, 2021 in Court file no. 2110-00289 at paras 4-5, Second Report, Appendix P.

⁴⁶ First Report at para 50.

⁴⁷ Second Report, Appendix K at pg 6 of 41.

transferred the Tangibles to Pamoco, so they were no longer part of the Debtor's assets as of the date of the Receiver's appointment.⁴⁸

47. On May 4, 2022, the Receiver's counsel wrote to former counsel for Pamoco posing various questions in relation to these assertions.⁴⁹
48. On May 11, 2022, former counsel to Pamoco responded to the questions posed by the Receiver's counsel and provided certain documentation. In his correspondence, Pamoco's counsel advised of Pamoco's position that the Conveyance of Tangibles, not the General Conveyance, was the enforceable conveyance document between Pamoco and Robus. Pamoco's counsel also advised that the General Conveyance had been executed on April 16, 2019 but that, on April 17, 2019, O'Connor and Methot agreed that it should not have included any petroleum or natural gas rights. Robus and Pamoco then executed the Conveyance of Tangibles.⁵⁰
49. Counsel to Pamoco also provided the Receiver with a copy of an email from former counsel to Robus dated April 5, 2021, which stated Robus' position with respect to the Alleged Conveyances, which can be summarized as follows:
 - (a) the conveyance was signed by Robus to provide Pamoco with further security in relation to the O'Connor Loans;
 - (b) it was not an actual "conveyance", which is why Pamoco did not pay the consideration set out therein;
 - (c) the O'Connor Loans were fully repaid by Robus by February 2020 and the O'Connor group released from all security interests pursuant to the Release; and
 - (d) accordingly, Robus' position is that Pamoco has no interest in the assets described in the Alleged Conveyances and any security interest Pamoco might have had upon executing those documents was extinguished by the Release.⁵¹
50. On June 17, 2022, after reviewing the responses and documents provided by counsel to Pamoco, the Receiver's counsel wrote to counsel for Pamoco and advised him of the Receiver's position that:
 - (a) the Conveyance of Tangibles did not transfer title in the Tangibles from Robus to Pamoco due to, among other things, a lack of consideration; and
 - (b) in the event the Conveyance of Tangibles did transfer title in the Tangibles from Robus to Pamoco, the Tangibles remain subject to the security interest taken by RSLLC in and to the Tangibles as a result of section 26 of the *Sale of Goods Act* (Alberta).⁵²
51. At the December Hearing, Pamoco objected to the inclusion of the Tangibles in the proposed Sale Process and Stalking Horse Term Sheet.

III. ISSUES

52. The Receiver respectfully submits that the Application raises the following issues for determination by this Honourable Court:
 - (a) Is the Conveyance of Tangibles enforceable due to a lack of consideration?

⁴⁸ First Report at para 68.

⁴⁹ Second Report, Appendix F.

⁵⁰ Second Report, Appendix F.

⁵¹ Second Report, Appendix F.

⁵² *Sale of Goods Act*, [RSA 2000, c S-2](#).

- (b) If the Conveyance of Tangibles is enforceable, did it validly transfer Robus' ownership interest in the Tangibles to Pamoco or did it only grant Pamoco a security interest?
- (c) If the Conveyance of Tangibles only granted Pamoco a security interest in the Tangibles, does RSLLC's registered security interest take priority over Pamoco's?
- (d) If the Conveyance of Tangibles validly transferred Robus' ownership interest in the tangibles to Pamoco, is Pamoco's ownership interest subject to RSLLC's registered security interest in the Tangibles due to the operation of section 26 of the *Sale of Goods Act*?

IV. LAW & ANALYSIS

A The Conveyance of Tangibles is not enforceable due to a lack of consideration

- 53. For an agreement to be enforceable, consideration must consist "either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."⁵³ Consideration must be given by the promisee,⁵⁴ it must have some value,⁵⁵ and it must not be past consideration.⁵⁶
- 54. The concept of past consideration is discussed in the *The Law of Contract*, G.H.L. Fridman, Sixth Edition, Thomson Reuters Canada Limited at pp. 108-110:

Consideration is said to be executory when it consists of a promise to do, pay, or give something in the future as, for example, if A agrees that he will pay B in return for something from B. Consideration is said to be executed when it consists of the performance of some act by a party, for example, when there is a promise which is given in consideration of A's services to B. From these, valid kinds consideration must be distinguished past consideration which will not suffice to support a promise and create an enforceable contract. Hence, executed consideration must be differentiated from past consideration (although the two appear to resemble each other). The test would seem to be whether the act, which is the consideration, and the promise dependent upon such act are part and parcel of the same transaction. Thus, if A promises to pay B if and when B produces A's lost dog, the consideration, namely, the production of the dog by B, is executed; but if B first produces the dog and then A promises to pay B in consideration of B's having already produced the dog, the consideration is past.

The point at issue here is that, if there is to be a valid, enforceable contract, the promises, or the promise and the act, must have been exchanged in return for each other. If something is done first and then there is a promise relating to such act or performance, the two are not tied together by the notion of agreement. One thing has not necessarily been done in consideration of the other. In consequence, anything promised as a result of the past performance of the act in question is simply promised gratuitously not in a binding contractual way. There is no mutuality between the act of performance of the subsequent promise from the recipient of the benefit of the act of performance.⁵⁷

⁵³ *Yellowhead Regional Library Board v Spruce Grove (Town)*, [1982 ABCA 369 \(CanLII\)](#), citing *Currie v Misa* (1875), LR 10 Ex 153.

⁵⁴ *TDL Group Corp v MRMA Holdings Ltd*, [2017 ABQB 713](#) at [para 30](#), citing *Bank of Montreal v Danial*, 1983 Carswell Alta 388 (ABQB), [1983] AWLD 582 at paras 19-20.

⁵⁵ *Canadian Western Bank v MCM Inc*, [2011 ABQB 150](#) at paras 5-7.

⁵⁶ *Ohlson v Canadian Imperial Bank of Commerce*, [1997 ABCA 413 \(CanLII\)](#) at [para 39](#).

⁵⁷ *The Law of Contract*, G.H.L. Fridman, Sixth Edition, Thomson Reuters Canada Limited at pp 108-110.

55. Notwithstanding that the Conveyance of Tangibles was prepared by its own counsel, Pamoco is requesting that the Receiver and this Honourable Court ignore the express language of the Conveyance of Tangibles, and substitute other consideration in place of the \$90,000 set out in the Conveyance of Tangibles. It is unclear to the Receiver why a \$90,000 payment was not made; why the Conveyance of Tangibles was not drafted in a transparent fashion to acknowledge the alleged consideration was the Robus AP Payments and the Acquisition Advances; or why the \$90,000 figure was not adjusted to \$103,800. Pamoco has been represented by counsel throughout these proceedings and counsel to the Receiver has specifically asked for evidence to support the validity of the Conveyance of Tangibles,⁵⁸ yet no evidence has been provided explaining the consideration discrepancy.
56. On the face of the Conveyance of Tangibles, the stated consideration was "...the sum of Ninety Thousand (\$90,000) now paid by the Purchaser to the Vendor."⁵⁹ However, it is undisputed that an amount of \$90,000 was not in fact paid to Robus. Therefore, on the face of the Conveyance of Tangibles itself, the Conveyance of Tangibles is unenforceable due to a lack of consideration.
57. Pamoco alleges in its evidence that the amount of consideration payable was the Robus AP Payments and the Acquisition Advances, totalling \$103,800. This evidence seeks to add, vary or contradict the terms of the Conveyance of Tangibles. As a result, this evidence is inadmissible pursuant to the parol evidence rule.
58. In *Sattva Capital Corp. v Creston Moly Corp.*⁶⁰ the Supreme Court of Canada commented on the parol evidence rule as follows in paras. 59 to 60:

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998 CanLII 791 \(SCC\)](#), [1998] 2 S.C.R. 129, at paras. [54-59](#), per Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993 CanLII 88 \(SCC\)](#), [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.). [emphasis added]

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

59. This matter demonstrates the risk to contracting parties of not respecting the parol evidence rule. For example, in a letter from Pamoco's former counsel to the Receiver's counsel dated May 11, 2022, Pamoco's former counsel asserted that the consideration for the Conveyances of Tangibles totalled \$172,800, comprised of the Acquisition Advances, the Robus AP Payments, and a further \$69,000 advanced to Ernie Methot personally by Terroco Industries and a company called Tubing

⁵⁸ Second Report, Appendix F; First Report at paras 68-70.

⁵⁹ Second Report, Appendix D.

⁶⁰ *Sattva Capital Corp v Creston Moly Corp.*, [2014 SCC 53 \(CanLII\)](#).

Technology, for payments allegedly occurring in 2016, 2018 and 2019.⁶¹ This is the third different consideration amount Pamoco has alleged, and demonstrates the risks noted in *Satva* about the use of unreliable or other inappropriate evidence to attack a written contract.

60. Should this Honourable Court agree that such evidence is inadmissible, it is clear that the Conveyance of Tangibles fails due to lack of consideration. A \$90,000 payment was not paid by Pamoco or received by Robus.
61. Alternatively, if there is ambiguity in relation to the consideration language contained in the Conveyance of Tangibles, based upon principles of *contra proferentum* the Conveyance of Tangibles should be construed against the party that drafted it, which is Pamoco.⁶²
62. Even if Pamoco's evidence is admissible, its position that valid consideration was paid under the Conveyance of Tangibles is untenable. As noted below, there is insufficient reliable evidence that the Robus AP Payments and Acquisition Advances were advanced or otherwise provided in exchange for the Conveyance of Tangibles. The Robus AP Payments and Acquisition Advances are thus "past consideration" and cannot be valid consideration for the Conveyance of Tangibles.
63. While the Alleged Conveyances are both dated January 4, 2019, they were executed between April 16-17, 2019. Meanwhile, the Acquisition Advances were made between May 2018 and August 2018, approximately 9 to 11 months prior to the execution of the Alleged Conveyances. Two of the Robus AP Payments (totalling \$47,800) were made in January of 2019, approximately 4 months prior to the execution of the Alleged Conveyances.⁶³ Therefore, other than a \$20,000 payment to Methot that occurred on April 17, 2019 (to be addressed), the alleged consideration for the Conveyance of Tangibles had already been paid prior to the Alleged Conveyances being executed.
64. Courts are often wary of backdating documents such as the Alleged Conveyances.⁶⁴ Though generally permissible, backdating is not acceptable where it violates the law or prejudices the rights of third parties.⁶⁵ In this case, the backdating of the Alleged Conveyances appears to have been done to account for the fact that all of the Acquisition Advances and most of the Robus AP Payments had already been paid to Robus by the time the Alleged Conveyances were executed. In this instance, the backdating of the Alleged Conveyances was prejudicial to Robus and its creditors.
65. Notwithstanding any vague assertions in Mr. O'Connor's evidence about when Methot and Mr. O'Connor agreed upon the Alleged Conveyances, the most reliable evidence available of the date of such agreement comes from Pamoco's former counsel, who advised the Receiver's counsel that the Alleged Conveyances were executed on April 16-17, 2019.⁶⁶
66. With respect to the Acquisition Advances, Mr. O'Connor's evidence on such advances is scant. In particular:
 - (a) Mr. O'Connor baldly asserts that the Acquisition Advances were made, but tenders no documents in support of such advances (such as cheques, invoices, etc). The Receiver has been unable to independently verify whether the Acquisition Advances have been made;⁶⁷

⁶¹ Second Report, Appendix F, May 11, 2022 Letter from Chris Forgues.

⁶² *McClelland v Stewart Ltd. v Mutual Life Assurance Co.*, [1981 2 SCR 6 \(SCC\)](#) at para 14.

⁶³ Second Report at para 63.

⁶⁴ *Spicer v Gambell*, [2005 ABQB 464](#) at [para 65](#); *Yang v Zhang*, [2017 BCSC 524](#) at [para 88](#).

⁶⁵ *Saint John Recycling v Ferodominion, Etal*, [2020 NBQB 127](#) at para 39, citing Jeffrey Kwall, "Backdating" (2008) Business Lawyer.

⁶⁶ Second Report, Appendix F.

⁶⁷ Second Report at para 31.

- (b) There is no evidence from Mr. O'Connor about whether the Acquisition Advances were to be treated as debt, equity or something else; and
- (c) In paragraph 27 of Mr. O'Connor's Affidavit, he appears to suggest or imply that there was an oral agreement to forgive the Acquisition Advances as partial consideration for the Conveyance of Tangibles. However, there are also no documents affixed to his Affidavit to actually evidence this alleged set off or forgive the Acquisition Advances. Further, the timing of such meeting, if it occurred, is also not clearly addressed by Mr. O'Connor. The concept of a potential set off or forgiveness also appears to be contrary to the Conveyance of Tangibles, which states that the "sum" of \$90,000 of consideration was "now paid" in April 2019.

- 67. In short, the evidence tendered by Mr. O'Connor in support of the Acquisition Advances is insufficient and unreliable. This Honourable Court is entitled to give it no weight in light of the totality of the other evidence before it.
- 68. With respect to the Robus AP Payments, two of the three payments totalling \$47,800 were paid by Pamoco in January of 2019, which is almost three months before the Alleged Conveyances were signed. These payments therefore clearly constitute past consideration.
- 69. Only the \$20,000 amount advanced to Methot appears to have been made concurrently with the Alleged Conveyances. However, that in and of itself does not assist Pamoco. Methot was the director, shareholder and operating mind of Robus, and other parties controlled by Mr. O'Connor had advanced funds personally to Methot in the past. Mr. O'Connor has not provided any evidence about why a payment to Methot in his personal capacity constitutes valid consideration to Robus, how such payment is actually a valid Robus payment, or how Robus would have benefited from that payment.
- 70. It is normal for an insolvency court, in considering Pamoco's Application, to take note of the vast difference between the alleged consideration and the book value of the Tangibles. This needs to be weighed in conjunction with a variety of other unusual elements of Pamoco's position. If Pamoco's position is accepted, Pamoco will acquire the Tangibles, which have a book value in excess of \$1.5 million for \$103,800. This would be an absurd commercial outcome that puts Robus, its creditors, this proceeding and the Stalking Horse Bid in jeopardy.

B If the Conveyance of Tangibles was a valid agreement for consideration, it granted a security interest not a transfer of ownership

- 71. In the alternative, if the Conveyance of Tangibles is enforceable, the circumstances surrounding the entering into of the Conveyance of Tangibles clearly indicate it was never intended to transfer Robus' ownership interest in the Tangibles to Pamoco. Rather, the Conveyance of Tangibles was intended to grant Pamoco a security interest in the Tangibles as additional security for the advances made by Pamoco to Robus.

(i) Indicia of a Security Interest

- 72. Section 1(1)(tt) of the PPSA defines a "security interest" as:
 - (i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than an interest in goods, chattel, investment property that secures the payment or performance of an obligation [...].⁶⁸

- 73. A valid (and enforceable) security interest arises under the PPSA when it:

⁶⁸ PPSA, [s 1\(1\)\(tt\)](#).

- (a) attaches to the assets; and
 - (b) is perfected.
74. A security interest will generally be found to exist where the following elements are present (i.e. the security interest will attach when):
- (a) value has been given by the lender to the borrower;
 - (b) the borrower has rights in or the power to transfer the assets being pledged as collateral; and
 - (c) the borrower has either:
 - (i) executed an agreement containing an identifiable description of the pledged assets, or
 - (ii) the lender takes possession of the collateral.⁶⁹
75. In determining whether a transaction creates a security interest, a transaction must be considered as a whole in substance, rather than in form.⁷⁰ This included looking at the intention of the parties to the transaction, with a “common-sense” view of all of the evidence.⁷¹
76. When considering whether an agreement creates a conveyance or a security interest, courts look to ascertain the parties’ intent.⁷² Though the intent can be explicitly included in written terms of the agreement,⁷³ the existence of a verbal agreement indicating intent to create a security agreement can also be inferred.⁷⁴
77. The Alberta Court of King’s Bench has previously found an alleged purchase of equipment created a security interest as opposed to an ownership interest where the surrounding circumstances indicated the “purchaser” had in substance, loaned the debtor money and attempted to secure the loan by having the debtor provide the “purchaser” with bills of sale of the vehicles in question; and the parties never intended that possession of the vehicles would pass to the “purchaser” unless the debtor was unable to pay the full amount owing to the “purchaser”.⁷⁵
78. Upon considering the Conveyance of Tangibles as a whole, the intention of the parties with a “common-sense” view toward the evidence, the Conveyance of Tangibles was seemingly intended to create a security interest rather than to convey ownership. In particular:
- (a) the Conveyance of Tangibles is capable of satisfying all of the requirements of a security interest for the purposes of the PPSA;
 - (b) as stated in his affidavit, Mr. O’Connor had a longstanding business relationship with Methot and at various times had either personally or through companies he owned or managed, provided loans and financing to business ventures of Methot or companies he was involved in;⁷⁶
 - (c) at no time did Pamoco take possession of the Tangibles;

⁶⁹ PPSA, [ss 10](#) and [12](#).

⁷⁰ *Kawartha Consumers Co-Operative Inc. v Debenture Holders of Kawartha Consumers Co-Operative Inc.*, [1999 CanLII 15020](#) (ONSC) (“*Kawartha*”).

⁷¹ *Kawartha* at [para 29](#).

⁷² *First City Trust Co v Pintye*, [1986 CanLII 1797](#) (ABKB) at [para 15](#).

⁷³ See for example, *Welsh v Popham*, [\[1925\] SCR 549](#) (SCC).

⁷⁴ *Smith v Sugarman*, [1909 CanLII 359](#) (ABKB).

⁷⁵ *547592 Alberta Ltd., Re*, [1995 CanLII 18111](#) (ABKB) (“*547 Ltd.*”) at para 11.

⁷⁶ O’Connor Affidavit at para 15.

- (d) Robus required the use of and continued to use the Tangibles in its operations after entering into the Conveyance of Tangibles through Enerplus;⁷⁷
- (e) Mr. O'Connor's evidence indicates that he refused to extend further credit to Methot, which implies that Robus was facing liquidity issues at the time of entering into the Conveyance of Tangibles;⁷⁸
- (f) Mr. O'Connor advised Methot that "he would agree to sell back the equipment to Robus if things improved for Robus, for a price";⁷⁹
- (g) Through the ongoing changing amounts of consideration alleged by Pamoco, it appears that Pamoco's primary concern is to be paid rather than owning the assets;
- (h) Pamoco has never exercised any traditional rights of ownership over the Tangibles. It allowed Robus to retain possession and utilize the equipment for an unlimited duration of time. It has never required Robus to enter into a lease, pay rent, obtain liability insurance, agree to conduct regular maintenance on the Tangibles or be subject to inspections by Pamoco, etc.;
- (i) Pamoco's steps of affixing a label or QR code to the Tangibles is also consistent with a lender taking steps to inspect and identify collateral;⁸⁰
- (j) At the time of payout of the O'Connor Loans, the O'Connor Group admitted that it neglected to issue promissory notes for certain payments Pamoco advanced to Robus and Pamoco. Pamoco is now claiming these payments form part of the consideration paid under the Conveyance of Tangibles.⁸¹ A promissory note is an "unconditional promise to pay" and is granted in relation to amounts loaned by a lender. The O'Connor Group's actions suggest that Pamoco's intention was that these amounts were advanced as a loan to Robus, and Pamoco has now changed its position; and
- (k) a purchase price of \$90,000 in the Conveyance of Tangibles (or \$103,800⁸²) is a fraction of the \$1,559,034.67 value assigned to the Tangibles in the books and records of Robus. If the parties had actually intended for Pamoco to purchase the Tangibles outright, it is unlikely that Robus would have agreed to accept such a small amount for the Tangibles, especially given the significance to its ongoing operations and ability to generate revenue.

79. For these reasons, Pamoco's conduct does not align with conduct traditionally associated with ownership, and the Receiver respectfully submits that the Conveyance of Tangibles only granted a security interest. In light of the foregoing, and the need to perfect such registrations in the PPR, Pamoco's security interest (if valid) is subordinate to the registered security interest of RSLLC.

80. Additionally, because Pamoco's security interest (if valid) is subordinate to the registration of RSLLC, the alternative relief sought by Pamoco, in which they seek the payment of \$103,800 in priority to the claims of all creditors, is without merit. Such a payment would be contrary to the priority regime prescribed by the PPSA, as it would repay a subordinate creditor when RSLLC (the priority creditor) remains unpaid in full.

⁷⁷ O'Connor Affidavit at para 31.

⁷⁸ Second Report at para 41.

⁷⁹ Second Report, Appendix K, May 11, 2022 Letter from Chris Forgues.

⁸⁰ O'Connor Affidavit at para 32.

⁸¹ Second Report, Appendix D.

⁸² O'Connor Affidavit at para 35.

C Section 26 of the Sale of Goods Act.

(i) Introduction

81. The Receiver has also considered whether Pamoco's interest in the Tangibles would be subject to the registered security interest granted by the Debtor to RSLLC pursuant to section 26 of the *Sale of Goods Act*.
82. Section 26 of the *Sale of Goods Act* deals with situations where a seller of "goods" remains in possession of those goods or a document of title in the goods post-sale. To summarize, under section 26(1) of the *Sale of Goods Act*, where a seller (A) sells goods to buyer (B) but A remains in possession of the goods or a document of title to the goods and subsequently sells, pledges or otherwise disposes of those goods to another person (C), who receives the goods/document of title to the goods in good faith and without notice of the previous sale, A's sale, pledge or disposition of the goods to C has the same effect as if it was authorized by B. Section 26(2) of the *Sale of Goods Act* provides an exception to the operation of section 26(1) and states that section 26(1) does not apply where the sale, pledge or disposition to C was out of the ordinary course of business and the interest of B is registered in the Personal Property Registry.
83. Although section 26 of the *Sale of Goods Act* appears on its face to apply to the facts of this matter, under the Enerplus PSA, Enerplus retained legal title to the Tangibles and only transferred a beneficial interest in the Tangibles to Robus.⁸³ In light of the forgoing, the Receiver considered whether Section 26 of the *Sale of Goods Act* would apply to a beneficial interest in the Tangibles.
84. "Goods" are defined under the *Sale of Goods Act* as including "all chattels personal other than things in action or money" [emphasis added].⁸⁴ A chose in action (or a thing in action) is a category of personal property that, by definition, can't be reduced to possession. It "has no physical matter whatsoever" and is enforceable solely by court action.⁸⁵ Based on this definition of a chose in action, Robus' beneficial interest in the Tangibles may constitute a chose in action, suggesting that Robus' beneficial interest in the Tangibles would not fall within the definition of "goods" under the *Sale of Goods Act*. As a result, the Receiver is of the view that section 26 of the *Sale of Goods Act* may not apply to the determination of whether or not Pamoco's alleged interest in the Tangibles would be subject to the registered security interest granted by the Debtor to RSLLC.
85. However, because section 26 of the *Sale of Goods Act* would be directly applicable to the present situation but for Robus' beneficial interest in the Tangibles, an analysis of section 26 of the *Sale of Goods Act* (as it would apply if there was no difference between a legal and beneficial interest in the Tangibles) remains of assistance to demonstrate the legal effect of section 26 and the impact of its application on Pamoco's alleged claim. The analysis also results in a balanced commercial outcome in very similar circumstances.

(ii) Application of Section 26 to Conveyance of Tangibles where Legal Interest held by Robus

86. As noted previously, the analysis below assumes that that a legal or beneficial interest is treated the same with respect to the Tangibles. In this instance, a vendor (Robus) has allegedly sold its interest in the Tangibles to a purchaser (Pamoco) and yet possession of the Tangibles remains with Robus.
87. The *Sale of Goods Act* is specifically designed to address a seller in possession scenario, and expressly allocates the risk of loss in a transparent fashion. Even if Pamoco's position is correct and all facts as asserted by them are accepted, section 26 of the *Sale of Goods Act* subordinates

⁸³ Second Report, Appendix A.

⁸⁴ *Sale of Goods Act*, [s 1\(h\)](#).

⁸⁵ Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2018) at 90, 91 and 110.

Pamoco's position to RSLLC's security because Pamoco did not register its alleged ownership interest in the Tangibles in the Alberta Personal Property Registry (the "PPR") until January 8, 2021, over 11 months after RSLLC's Security was registered in the PPR on February 13, 2020.

88. Pamoco argues that Robus could not have granted RSLLC's Security after the Conveyance of Tangibles because the common law principle of *nemo dat quod non habet* ("**Nemo Dat**") provides that a vendor cannot sell what they do not have.⁸⁶ While section 23 of the *Sale of Goods Act* codifies Nemo Dat into the *Sale of Goods Act*, its application is limited as it only applies "...Subject to this Act...". Section 26 of the *Sale of Goods Act* provides one such exception.⁸⁷
89. However, prior to examining section 26, it is important to understand the commercial policy goals behind the section and its history, as both inform the appropriate disposition of this matter.

(iii) Policy and History

90. There is important policy and history behind the limitation of the principle of Nemo Dat in the *Sale of Goods Act*. As noted by Lord Denning in *Bishopsgate Motor Finance Corporation, Limited v Transport Brakes, Limited*:⁸⁸

In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.

91. In *ABCD Remoteness Problems: Nemo Dat & Its Exceptions Under Subsection 26(1.2) of Saskatchewan's The Sale of Goods Act*, Clayton Bangsund describes the history behind the introduction of the section 26(1) exception to Nemo Dat.⁸⁹ Of note is the fact that the exception arose out of the same facts as the case at bar, in which a lender advanced credit to a party without knowledge of the interest of another owner.⁹⁰
92. In that same article, Mr. Bangsund also notes:

To be sure, *nemo dat* retains significance in modern property law, but in Saskatchewan the maxim has been modified or supplanted by legislation that resolves priority competitions on the basis of time of registration in the PPR—a clear factual signpost. The PPSA and SGA, along with their accompanying PPR infrastructure, have embraced a philosophical shift in the law of property through their recognition of registration as an alternative to, or pre-condition of, *nemo dat*. These statutes set out clear and predictable priority rules which hinge, chiefly, on objective evidence that is easily and inexpensively produced. The PPR, and the statutory framework within which it operates, is designed to (i) facilitate registration and perfection of non-possessory interests in personal property, and (ii) furnish objective evidence of fact and time of registration for the efficient resolution of priority disputes. The PPR principally serves these purposes. However, section 26 of the *Sale of Goods Act* provides a statutory exception to this principle. Subsection

⁸⁶ *Ostiguy v Allie*, [2017 SCC 22](#) at para 99.

⁸⁷ *Sale of Goods Act*, [ss 23](#) and [26](#).

⁸⁸ *Bartin Pipe and Piling Supply Ltd v Epscan Industries Ltd*, [2004 ABCA 52](#) at [para 17](#) ("**Bartin**"), citing *Bishopsgate Motor Finance Corporation, Limited v Transport Brakes, Limited*, [1949] 1 KB 323 at 336-7.

⁸⁹ Clayton Bangsund, *ABCD Remoteness Problems: Nemo Dat & Its Exceptions Under Subsection 26(1.2) of Saskatchewan's The Sale of Goods Act*, (2018) 81:2 Saskatchewan Law Review 133, [2018 CanLII Docs 365](#) ("**ABCD Remoteness Problems**").

⁹⁰ In the fact scenario noted, "A" is the original vendor of the goods; "B" is the "purchaser", and "C" is the subsequent purchaser or acquiror.

26(1) provides that, when goods have been sold but remain in the possession of the seller, subsequent delivery or transfer of goods or documents of title under any sale, pledge, or other disposition to a person receiving them in good faith without notice of the previous sale has the same effect as if it were authorized by the owner. Subsection 26(2) limits this exception where the purchase was outside the regular course of business and the owner has registered its interest under the *Personal Property Security Act*.

(iv) RSLLC's Security Interest Falls within Section 26(1)

93. As referenced above, section 26 of the *Sale of Goods Act* provides a specific exception to the application of Nemo Dat in order to balance the various competing commercial interests noted above, and the historical development of the section. Subsections 26(1) and (2) of the *Sale of Goods Act* read as follows:

Possession of goods after sale

26(1) When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.

(2) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the Personal Property Security Act, and Part 4 of that Act applies, with the necessary modifications, to that registration.

94. When applied to the language of section 26(1), consistent with the policy objectives and history of this section noted above, the Receiver submits that RSLLC is exempted from the application of Nemo Dat in relation to its security interest, and as a result RSLLC's security interest is in priority to any claim of Pamoco. If one applies the applicable facts of this matter to the language in section 26(1), the appropriate interpretation is as follows:

...where a person [Robus] who has sold goods continues or is in possession of the goods [Tangibles] ...the transfer by that person...of the goods under any sale, pledge or other disposition thereof [grant of a security interest], to any person receiving them in good faith and without notice of the previous sale [RSLLC] has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods [Pamoco] to make it. [emphasis added]

95. Reliance on section 26 requires proof of three elements, all of which are present with relation to the Tangibles:
- (a) The seller [Robus] retained possession of the goods or of the documents of title to the goods [Tangibles or Conveyance of Tangibles];
 - (b) The purchaser [RSLLC] acted in good faith; and

(c) The purchaser [RSLLC] acted without notice of the initial buyer's [Pamoco's] interest.⁹¹

(a) *Robus Retained Possession of the Tangibles*

96. As the Tangibles have been continuously used in operations since the Conveyance of Tangibles was executed, common sense dictates that Robus remains in effective possession of the Tangibles.
97. In its brief, Pamoco argues that through the application of stickers or QR codes on certain of the Tangibles, constructive possession of the Tangibles transferred to Pamoco and that Robus is therefore not "in possession" of the Tangibles. There are several issues with this assertion:
98. The photographs affixed to the O'Connor Affidavit do not actually demonstrate that stickers containing any identifying information have been applied to the Tangibles. The stickers in the photographs cannot be viewed/read, do not appear to identify either Pamoco or Terroco as the owner of the Tangibles and do not appear to expressly indicate that Pamoco is the owner of the Tangibles.
99. Registration of a *Sale of Goods Act* interest in the PPR is the statutory approved notice mechanism, rather than self help remedies taken in remote parts of Alberta.
100. Additionally, case law that has considered the issue of whether a vendor is "in possession states that section 26 of the *Sale of Goods Act* is intended to apply in situations where the vendor has possession of the goods and situations where the vendor of the goods has the documents of title to the goods but not actual possession.⁹² The language of section 26 requires that the vendor "continues or is in possession of the goods or of the documents of title to the goods" [emphasis added].⁹³ As such, even if Pamoco's constructive possession argument were successful, the requirements of section 26 can still be satisfied where the vendor remains in possession of the document of title to the goods. In this case, Robus is in possession of a fully executed version of the Conveyance of Tangibles⁹⁴ and Pamoco is not⁹⁵, suggesting that in addition to being in possession of the goods, Robus is also in possession of the documents of title to the goods.

(b) *RSLLC Acted in Good Faith and Without Notice of Pamoco's Interest*

101. With respect to the requirement that the purchaser or lender acted in good faith, section 2(1) of the *Sale of Goods Act* states that "[a] thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly whether it is done negligently or not."⁹⁶ As there is no credible evidence that RSLLC did not act honestly, the good faith requirement is clearly met.
102. No evidence has been adduced to suggest that: (i) RSLLC had any knowledge of Pamoco's alleged ownership claim in the Tangibles at the time RSLLC obtained a security interest in the Tangibles; and (ii) RSLLC had any knowledge of any other amounts owing to Pamoco following payment to Pamoco and O'Connor pursuant to the Direction to Pay and the discharge of the O'Connor Group PPR Registrations.
103. As evidenced by the foregoing, RSLLC acted in good faith and without notice of Pamoco's alleged security interest.

⁹¹ *Bartin* at [para 7](#).

⁹² *Bartin* at [para 18](#).

⁹³ *Sale of Goods Act*, [s 26](#).

⁹⁴ Second Report, Appendix E.

⁹⁵ O'Connor Affidavit at para 37.

⁹⁶ *Sale of Goods Act*, [s 2](#).

(c) *Delivery or Transfer Requirement*

104. In its brief, Pamoco argues that the *Sale of Goods Act* is not applicable due to the fact that there was no sale of property to RSLLC, rather there was a loan in which RSLLC took security in the Tangibles. With respect, this argument does not consider the express language of section 26 of the *Sale of Goods Act*, which clearly states that section 26 applies to a “transfer” (which here was of a security interest) pursuant to a “pledge”. Further, as noted above, the historical purpose of section 26 was, *inter alia*, to protect the rights of lenders. Finally, various commentators have noted in passing that lenders are clearly potential beneficiaries of the protection of section 26.⁹⁷

(v) **Section 26(2) does not save Pamoco**

105. Subsection 26(2) expressly limits subsection (1) where there is a sale, pledge, or other disposition “that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest in the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*.”

106. To rely on this exception, Pamoco must establish that (1) the sale, pledge, or disposition was out of the ordinary course of business of the vendor; and (2) that the interest was registered in the PPR. Pamoco fails on the second point.

107. Pamoco’s registration occurred after RSLLC’s Security was registered. Accordingly, at the time of the pledge to RSLLC, there was no PPR registration, and Pamoco is not entitled to rely on subsection 26(2) to assert it is the rightful owner of the Tangibles.

108. In *ABCD Remoteness Problems: Nemo Dat & Its Exceptions Under Subsection 26(1.2) of Saskatchewan’s The Sale of Goods Act*, Clayton Bangsund notes that the predictability and certainty provided for by provincial PPR registration systems, as incorporated into Saskatchewan (and by analogy Alberta) Sales of Goods legislation, effectively replaces the concept of Nemo Dat with the simple concept of timing of registration.⁹⁸

109. Pamoco, who could have protected, for a very low cost, its alleged ownership interest by simply registering its alleged interest in the PPR prior to the registration of RSLLC, did not do so. Instead, Pamoco did not disclose the Conveyance of Tangibles to RSLLC, released its prior PPR registrations in order to receive \$USD617,339.26⁹⁹ from RSLLC in satisfaction of its debt, and then re-registered its alleged ownership interest subordinate to RSLLC’s security interest registration. RSLLC would undoubtedly not have paid Pamoco such loan proceeds if RSLLC did not believe it was receiving first in priority security.

V. RELIEF SOUGHT

110. The Receiver understands that RSLLC is seeking an enhanced costs award against Pamoco in favour of the Debtor’s estate.¹⁰⁰ While cost award are rare in a receivership proceeding, they are not unheard of. The Pamoco Application has put the Receiver and stakeholders to considerable time and expense to defend against it. Should this Honourable Court dismiss the Application and make a finding that the Conveyance of Tangibles is invalid, the Receiver respectfully agrees that a costs award would be appropriate in the circumstances to account for the costs incurred by the Debtor’s estate in responding to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2023.

⁹⁷ Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 3rd ed (Toronto: Irwin Law, 2022) at 288.

⁹⁸ *ABCD Remoteness Problems*, [2018 CanLIIDocs 365](#).

⁹⁹ Second Report at para 50.

¹⁰⁰ Kittay Affidavit at para 27.

Cassels Brock & Blackwell, LLP

Per:



Jeffrey Oliver / Danielle Marechal
Counsel for the Applicant, ALVAREZ & MARSAL
CANADA INC., in its capacity as Receiver of
ROBUS RESOURCES INC.

VI. AUTHORITIES

TAB DOCUMENT

LEGISLATION

1. [Personal Property Security Act, RSA 2000, c P-7](#)
2. [Sale of Goods Act, RSA 2000, c S-2](#)
3. [547592 Alta. Ltd., Re \(1995\), 1995 CanLII 18111 \(ABKB\).](#)

JURISPRUDENCE

4. [Bank of Montreal v Danial, 1983 CarswellAlta 388](#)
5. [Bartin Pipe and Piling Supply Ltd v Epscan Industries Ltd, 2004 ABCA 52](#)
6. [Canadian Western Bank v MCMM Inc, 2011 ABQB 150](#)
7. [First City Trust Co v Pintye, 1986 CanLII 1797 \(ABQB\)](#)
8. [Kawartha Consumers Co-Operative Inc v Debenture Holders of Kawartha Consumers Co-Operative Inc, 1999 CanLII 15020 \(ON SC\).](#)
9. [McClelland & Stewart Ltd v Mutual Life, \[1981\] 2 SCR 6](#)
10. [Ohlson v Canadian Imperial Bank of Commerce, 1997 ABCA 413](#)
11. [Ostiguy v Allie, 2017 SCC 22](#)
12. [Saint John Recycling v Ferodominion, Etal, 2020 NBQB 127](#)
13. [Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53](#)
14. [Smith v Sugarman, 1909 CanLII 359 \(ABQB\)](#)
15. [Spicer v Gambell, 2005 ABQB 464](#)
16. [TDL Group Corp v MRMA Holdings Ltd, 2017 ABQB 713](#)
17. [Welsh v Popham, \[1925\] SCR 549](#)
18. [Yang v Zhang, 2017 BCSC 524](#)
19. [Yellowhead Regional Library Board v Spruce Grove \(Town\), 1982 ABCA 369](#)

SECONDARY SOURCES

20. [Clayton Bangsund, "ABCD Remoteness Problems: Nemo Dat & Its Exceptions Under Subsection 26\(1.2\) of Saskatchewan's The Sale of Goods Act" \(2018\) 81:2 Saskatchewan Law Review 365, 2018 CanLIIDocs 365](#)

21. Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 3rd ed (Toronto: Irwin Law, 2022)
22. GHL Fridman, *The Law of Contract*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2011)
23. Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2018)