

PP



2401 02438

COURT FILE NUMBER

COURT

JUDICIAL CENTRE

APPLICANT

RESPONDENTS

DOCUMENT

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS  
DOCUMENT

COURT OF KING'S BENCH OF ALBERTA  
CALGARY

O20196

BANK OF MONTREAL

AMC&F PROPERTIES LTD. and  
LYNCORP MANUFACTURING LTD.

**BRIEF OF LAW OF THE APPLICANT,  
BANK OF MONTREAL**

BLAKE, CASSELS & GRAYDON LLP  
3500, 855 – 2nd Street S.W.  
Calgary, Alberta T2P 4J8

Attention: Christopher Keliher

Telephone: 403-260-9760

Email: [christopher.keliher@blakes.com](mailto:christopher.keliher@blakes.com)

**TABLE OF CONTENTS**

PART I – INTRODUCTION .....	3
PART II – FACTS.....	3
PART III – ISSUES .....	8
PART IV – LAW AND ANALYSIS.....	8
A. It is just and convenient for the Court to appoint a Receiver .....	8
B. The Sealing Order should be granted in respect of the Confidential Exhibits .....	11
PART V – CONCLUSION .....	12

## PART I – INTRODUCTION

1. This Brief of Law is filed in support of an application (the "**Application**") before the Court of King's Bench of Alberta (the "**Court**"), made by Bank of Montreal ("**BMO**"), in its capacity as the senior secured lender of AMC&F Properties Ltd. (the "**Borrower**") and Lyncorp Manufacturing Ltd. (the "**Guarantor**", and together with the Borrower, the "**Debtors**").
2. The Application is for, among other things,
  - a. an order (the "**Receivership Order**") appointing Alvarez & Marsal Canada Inc. ("**A&M**") as receiver (the "**Receiver**") pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), over the current and future assets, undertakings and properties of the Debtors; and
  - b. an order, sealing the confidential exhibits (the "**Confidential Exhibits**") to the Affidavit of Trevor Bauer affirmed on February 15, 2024 (the "**Affidavit**").
3. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Affidavit.

## PART II – FACTS

4. The facts relevant to the Application are set out in detail the Affidavit. A summary of the key facts as they relate to the relief requested in the Application is set out below.
  - a. The Borrower is a privately owned Alberta corporation. Its primary asset is real property situated at 402086 81 Street East, Aldersyde, Alberta, T0L 0A0 (the "**Property**").<sup>1</sup>
  - b. The Guarantor is a privately owned Alberta corporation that manufactures and fabricates structural, platework, piping and machined components. The Guarantor has operated out of the Property, which it leases from the Borrower, since mid-2018.<sup>2</sup>
  - c. BMO made certain loan facilities available to the Borrower in December 2016, pursuant to a Commitment Letter and two fixed rate term loan agreements (together,

---

<sup>1</sup> Affidavit at para 6.

<sup>2</sup> Affidavit at para 7.

the “**Loan Documents**”). The maximum principal amount authorized under the Loan Documents is \$13,000,000 (the “**Credit Facility**”).<sup>3</sup>

- d. BMO obtained security for amounts advanced pursuant to the Loan Documents. This security consists of security agreements executed in favour of BMO by each of the Borrower (the “**AMC&F Security Agreement**”) and the Guarantor (the “**Lyncorp Security Agreement**”), a mortgage of land between the Borrower, as mortgagor, and BMO as mortgagee, which mortgaged and charged the Property (the “**BMO Mortgage**”), and a general assignment of rents from the Borrower to BMO (together with the AMC&F Security Agreement, the Lyncorp Security Agreement, and the BMO Mortgage, the “**Security Documents**”). The Guarantor also provided a guarantee for amounts owing by the Borrower to BMO, limited to the aggregate amount of \$11,300,000.<sup>4</sup>
- e. The AMC&F Security Agreement, the Lyncorp Security Agreement, and the BMO Mortgage each provide for, among other things, the appointment of a receiver in the event of Default under the Loan Documents.<sup>5</sup> For example, the BMO Mortgage provides at Section K, paragraph 1:<sup>6</sup>
1. *Appointment.* Upon the occurrence of a Default, in addition to any other remedies available to the Mortgagee, the Mortgagee may by instrument in writing appoint a Receiver of all or any part of the Mortgaged Land and all rents, incomes, profits and other amounts now or hereafter arising therefrom. The Mortgagee may also apply to any court of competent jurisdiction for the appointment of a Receiver.
- f. Amounts advanced to the Borrower are also guaranteed by: (a) a limited guarantee from David Mullen (“**Mullen**”), the sole director of the Borrower and the Guarantor, and a previous director of the Borrower, and (b) an unlimited guarantee from Advanced Metal Concepts and Fabrication Ltd.<sup>7</sup>

---

<sup>3</sup> Affidavit at para 8.

<sup>4</sup> Affidavit at para 12.

<sup>5</sup> Affidavit, Exhibit “J” s10; Affidavit, Exhibit “K”, Section K, paras 1-6; Affidavit, Exhibit “N” s10.

<sup>6</sup> Affidavit, Exhibit “K” at para 1.

<sup>7</sup> Affidavit at para 13.

- g. BMO has registered its security interests.<sup>8</sup>
- h. In early 2019, the Borrower failed to maintain a debt service coverage ratio specified under the Loan Documents. On April 16, 2019, the Borrower's accounts were transferred internally by BMO to its Special Accounts Management Unit ("**SAMU**") group.<sup>9</sup>
- i. The Debtors' subsequently undertook an extensive sales and investment process to sell the Property, to sell the Debtors' business generally, or to obtain refinancing sufficient to repay amounts owing under the Credit Facility. This process lasted approximately four years, and included the Borrower listing the Property for sale with Cushman & Wakefield ("**Cushman**"), a commercial realtor.<sup>10</sup>
- j. On April 24, 2023, four years after the Borrower's accounts were transferred to BMO's SAMU group, BMO advised the Debtors that it intended to exit its banking relationship with the Debtors on or before June 30, 2023 (the "**Sunset Date**").<sup>11</sup>
- k. The Debtors' subsequently retained Core Capital Inc., a firm specializing in, among other things, debt restructuring, to expedite a potential transaction for the Debtors' business, the sale of the Property, or a refinancing of amounts outstanding under the Credit Facility.<sup>12</sup>
- l. Notwithstanding what appeared to be the rapid financial deterioration of the Debtors, the Sunset Date was extended by BMO to provide additional time for the Debtors to conclude a transaction.<sup>13</sup>
- m. No transaction materialized and, on October 31, 2023, the Debtors did not pay their regularly scheduled principal or interest payments required under the Loan Documents.<sup>14</sup>
- n. On November 3, 2023, BMO sent letters and notices of intention to enforce security in accordance with section 244 of the BIA (the "**Demands**") to the Debtors demanding

---

<sup>8</sup> Affidavit at paras 14-17.

<sup>9</sup> Affidavit at paras 18-19.

<sup>10</sup> Affidavit at paras 30-32.

<sup>11</sup> Affidavit at para 29.

<sup>12</sup> Affidavit at para 34.

<sup>13</sup> Affidavit at para 38.

<sup>14</sup> Affidavit at para 40.

- full payment of amounts owing under the Credit Facility.<sup>15</sup> The Demands identified various events of default under the Loan Documents.
- o. The Debtors and BMO subsequently entered into a forbearance agreement on December 18, 2023 (the “**Forbearance Agreement**”) to provide additional time for the Debtors to seek out and facilitate a transaction. The Forbearance Agreement was conditional upon, among other things, (a) obtaining a new appraisal on the Property, and (b) appointing a financial advisor to assess the operating and financial affairs of the Debtors.<sup>16</sup>
- p. As set out in the Forbearance Agreement<sup>17</sup>:
- i. the Debtors acknowledged, among other things, that various events of default had occurred under the Loan Documents, amounts owing under the Credit Facility were owing and payable, that BMO was entitled to repayment on demand, and that the Security had not been discharged, waived, or varied, was binding on the Debtors, and was enforceable against the Debtors according to its terms;
  - ii. BMO agreed to forbear from taking steps to enforce under the Loan Documents or the Security until the earlier of (a) the occurrence of a Forbearance Terminating Event (as defined therein), or (b) January 26th, 2024 (the “**Forbearance Term**”); and
  - iii. A&M would be engaged as a financial advisor and, in that capacity, would work with and obtain financial and operating records from the Debtors.
- q. On December 5, 2023, the Debtors provided BMO an appraisal of the Property completed by Cushman (the “**Cushman Appraisal**”). The Cushman Appraisal showed a fair market value materially in excess of both the amounts owing under the Credit Facility and the then current list price of the Property (which was also listed by Cushman).<sup>18</sup>

---

<sup>15</sup> Affidavit at para 41.

<sup>16</sup> Affidavit at para 45.

<sup>17</sup> Affidavit at para 50. See also Exhibit “X”.

<sup>18</sup> Affidavit at para 49; Confidential Exhibit “1”.

- r. A&M on behalf of BMO subsequently commissioned a separate appraisal, completed by Colliers International Realty Advisors Inc. (the “**Colliers Appraisal**”), of the Property. The Colliers Appraisal, dated effective January 15, 2024, appraised the fair market value of the Property at a value that was materially less than the appraised market value outlined in the Cushman Appraisal.<sup>19</sup>
- s. In connection with A&M’s review, the Borrower and Guarantor forwarded copies of their unconsolidated financial statements to A&M. These financial statements show material net operating losses in 2022 and 2023 and that the total liabilities of the Debtors exceed their total assets.<sup>20</sup>
- t. Based on A&M’s review of the books and records of the Debtors, it appears that:
- i. the Debtors are likely to run out of cash in the near term and intend to rely on existing accounts receivables collections to fund ongoing operations (which includes ongoing payroll obligations for 27 employees); and
  - ii. the assets of the Debtors include, among other things, accounts receivable, inventory, and the Property.<sup>21</sup>
- u. On January 24, 2024, two days prior to the expiration of the Forbearance Term, the Debtors advised BMO, among other things, that the Debtors efforts to obtain refinancing had stalled, and that the Borrower would not be in a position to pay out BMO until the Property sold.<sup>22</sup> The Debtors subsequently advised BMO that it did not intend to make any further payments to BMO in connection with the Credit Facility.<sup>23</sup>
- v. On January 29, 2024, following the expiration of the Forbearance Term, BMO’s legal counsel advised the Debtors’ legal counsel that BMO intended to proceed with a receivership application and that court time has been booked on February 26, 2024, to advance same.<sup>24</sup>

---

<sup>19</sup> Affidavit at paras 56, 58; Confidential Exhibit “4”.  
<sup>20</sup> Affidavit at para 54; Confidential Exhibits “2” - “3”.  
<sup>21</sup> Affidavit at para 55.  
<sup>22</sup> Affidavit at para 60.  
<sup>23</sup> Affidavit at para 63.  
<sup>24</sup> Affidavit at para 64.

- w. As of January 29, 2024, the Outstanding Indebtedness owing by the Debtors to BMO under the Credit Facility was \$7,575,626, exclusive of accrued interest and other fees owing under the Loan Documents.<sup>25</sup>
- x. Defaults under the Loan Documents are continuing, and the Credit Facility has matured.<sup>26</sup> Further, the Debtors have advised that they have no plan in place to pay the Outstanding Indebtedness.<sup>27</sup>
- y. A&M is a qualified licensed insolvency trustee and has consented to act as the Receiver should the court appoint it.<sup>28</sup>

### **PART III – ISSUES**

5. The following issues are before the Court:

- A. Is it just and convenient for the Court to grant the Receivership Order and appoint A&M as Receiver?
- B. Should the Court exercise its discretion to grant the sealing order in respect of the Confidential Exhibits?

### **PART IV – LAW AND ANALYSIS**

#### **A. It is just and convenient for the Court to appoint a Receiver**

- 6. A secured creditor is entitled to elect the means by which its security will be enforced, subject to the Court granting any relief sought from such creditor.<sup>29</sup>
- 7. A court may appoint a receiver pursuant to section 243 of the BIA where it is just or convenient to do so. In determining whether it is just or convenient to appoint a receiver, the Court should have regard to all the circumstances of the case, the nature of the property and the rights and interests of all parties in relation to the property.<sup>30</sup>

---

<sup>25</sup> Affidavit at para 69.

<sup>26</sup> Affidavit at para 70.

<sup>27</sup> Affidavit at para 71.

<sup>28</sup> Affidavit at paras 76-79.

<sup>29</sup> *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 at para 95 [TAB 1].

<sup>30</sup> *Elleway Acquisitions Limited v The Cruise Professionals Limited*, 2013 ONSC 6866 at para 26 [TAB 2].

8. The factors to consider in determining whether to appoint a receiver are set out in the *Paragon* decision.<sup>31</sup> At paragraph 27 of *Paragon*, the Court highlighted the following relevant factors:

[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; and
- p) the goal of facilitating the duties of the receiver.

---

<sup>31</sup> *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Company*, 2002 ABQB 430 at paras 27-28 [*Paragon*] [TAB 3].

9. Where the security documentation provides for the appointment of a receiver, the extraordinary nature of the remedy sought is less essential to the inquiry.<sup>32</sup>
10. In this case, it is just and convenient to grant the Receivership Order and appoint A&M as Receiver, including for the following reasons:
- a. the Security Documents provide BMO with the right to seek the appointment of a receiver in the event of default under the Loan Documents.<sup>33</sup> The fact that a security agreement acknowledges the right of the creditor to make an application for a receiver is strong support for the imposition of a receiver;<sup>34</sup>
  - b. the assets of the business include, among other things, accounts receivable, inventory, and the Property.<sup>35</sup> The appointment of a receiver will provide a streamlined process to facilitate a realization on *all* of the Debtors' assets;
  - c. the Debtors' have and continue to suffer material operating losses and are likely to run out of cash in the near term.<sup>36</sup> The appointment of a Receiver will stabilize operations and will avoid waste of the Debtors' assets;
  - d. the Debtors' have been unable to facilitate a transaction for the Property or their business generally for over four years.<sup>37</sup> A receiver empowered to sell the assets of the Debtors will ensure an efficient sales process and will maximize recoveries to estate creditors; and
  - e. the receivership proceedings provide the optimal court-supervised realization vehicle to preserve value for stakeholders and mitigate the most deleterious effects of the Debtors' insolvency.
11. In the circumstances, it is both just and convenient for the Court to grant the Receivership Order and appoint A&M as Receiver.

---

<sup>32</sup> *Paragon* at para 28 [TAB 3], citing *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (Ont Gen Div [Commercial List]) at para 12 [TAB 4].

<sup>33</sup> Affidavit at para 74.

<sup>34</sup> *Paragon* at para 28 [TAB 3]; *Textron Financial Canada Ltd v Chetwynd Motels Ltd.*, 2010 BCSC 477 at para 75 [TAB 5]; *Maple Trade Financial Inc v CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para 26 [TAB 6].

<sup>35</sup> Affidavit at para 55.

<sup>36</sup> Affidavit at para 55.

<sup>37</sup> Affidavit at paras 30-32.

## B. The Sealing Order should be granted in respect of the Confidential Exhibits

12. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada (the "SCC") held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.<sup>38</sup>
13. In *Sherman Estate*, the SCC applied the test from *Sierra Club* differently, without altering its essence. According to *Sherman Estate*, a person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
- a. court openness poses a serious risk to an important public interest;
  - b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
  - c. as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>39</sup>
14. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term "important interest" can capture a broad array of public objectives including commercial interests.<sup>40</sup>
15. The Confidential Exhibits, consisting of financial statements and appraisals, contain information about the ongoing financial and operating affairs of the Debtors, information about the value of the Property and the other assets of the Debtors, and the length of time the Property may need to be marketed to obtain a purchase price at fair market value.
16. If the Confidential Exhibits are not temporarily sealed, the disclosure of this information could influence any sale process undertaken by the receiver (if appointed) and could negatively impact recoveries to estate creditors.<sup>41</sup>
17. No parties will be prejudiced if the information is sealed, and BMO intends to provide the Notice to Media of Application to Restrict Access in accordance with the Notice to the Profession issued May 7, 2018, confirmation of which will be filed with the Court.

<sup>38</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [TAB 7].

<sup>39</sup> *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 [*Sherman*] [TAB 8].

<sup>40</sup> *Sherman* at para 41 [TAB 8].

<sup>41</sup> Affidavit at para 81.

18. In the circumstances, the temporary sealing of the Confidential Exhibits is the least restrictive means to maintain the confidentiality of this commercially sensitive and confidential information. The salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Exhibits. Moreover, the scope of the sealing order is limited to the earlier of the closing of a sale of all or substantially all of the assets of the Debtors, the conclusion of the receivership proceedings, or further order of the Court, and any party affected by the sealing order will be entitled to apply to this Honourable Court to vacate, substitute, modify, or vary the terms of the order on seven (7) days' notice.

#### **PART V – CONCLUSION**

19. For the reasons set out above, BMO requests that this Honourable Court grant the relief requested in the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of February, 2024.

**Blake, Cassels & Graydon LLP**



---

Christopher Keliher  
Counsel for Bank of Montreal

## TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	<a href="#"><u><i>Bank of Montreal v Haro-Thurlow Street Project Limited Partnership</i>, 2024 BCSC 47</u></a>
2.	<a href="#"><u><i>Elleway Acquisitions Limited v the Cruise Professionals Limited</i>, 2013 ONSC 6866</u></a>
3.	<a href="#"><u><i>Paragon Capital Corporation Ltd. v Merchants &amp; Traders Assurance Company</i>, 2002 ABQB 430</u></a>
4.	<a href="#"><u><i>Bank of Nova Scotia v. Freure Village of Clair Creek</i>, 1996 CanLII 8258 (ON SC)</u></a>
5.	<a href="#"><u><i>Textron Financial Canada Ltd v Chetwynd Motels Ltd.</i>, 2010 BCSC 477</u></a>
6.	<a href="#"><u><i>Maple Trade Financial Inc v CY Oriental Holdings Ltd.</i>, 2009 BCSC 1527</u></a>
7.	<a href="#"><u><i>Sierra Club of Canada v Canada (Minister of Finance)</i>, 2002 SCC 41</u></a>
8.	<a href="#"><u><i>Sherman Estate v Donovan</i>, 2021 SCC 25</u></a>