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COURT COURT OF KINGS BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE RECEIVERSHIP OF ROBUS RESOURCES INC.

APPLICANT PAMOCO RESOURCES LTD.

RESPONDENT ROBUS SERVICES LLC

DOCUMENT **BRIEF OF ARGUMENT OF ROBUS SERVICES LLC**

Application scheduled to be heard on January 18, 2023, at 10:00 am, before the Honourable Justice M.E. on the Commercial List

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Burnet, Duckworth & Palmer LLP
2400, 525—8 Avenue SW
Calgary, Alberta T2P 1G1
Lawyer: David LeGeyt / Ryan Algar
Phone Number: 403-260-0210 /0126
Fax Number: 403-260-0332
Email Address: dlegeyt@bdplaw.com / ralgar@bdplaw.com
File. No.: 77883-1

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I. INTRODUCTION

1. This is the Brief of Law of Robus Services LLC ("**Robus Services**") in response to the application (the "**Application**") by Pamoco Resources Ltd. ("**Pamoco**") seeking a declaration, among other things:
 - (a) that the Tangibles (as defined below) were properly purchased by Pamoco from the Defendant, Robus Resources Inc. (the "**Debtor**"); and
 - (b) 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 Debtor's estate for sale or distribution in these proceedings; or, in the alternative
 - (c) that Pamoco is entitled to be repaid the amounts advanced for or on behalf of the Debtor as consideration for the Tangibles in the amount of CAD \$103,800 from the Debtor's estate, in priority to any other creditor, including Robus Services.¹
2. Pamoco, as a member of the O'Connor Group, was a former secured lender of the Debtor who had the amounts owing to it repaid by Robus Services when Robus Services refinanced the Debtor. Robus Services relied upon Pamoco's representations when advancing the Loan, including a payout statement.
3. For those reasons, as well as those set forth below, Robus Services opposes the relief sought by Pamoco or any other relief in favour of Pamoco that would see it compensated for an interest in the Debtor's property over and above that of an ordinary unsecured creditor.
4. Further, as is demonstrated by the evidence before this Court and Pamoco's conduct, pursuant to this Court's discretionary powers under section 4(2) of the *Bankruptcy and Insolvency Act* (Canada)² Robus Services is seeking enhanced costs against Pamoco.

¹ Capitalized terms not otherwise defined herein have the meaning set in the Affidavit of David Kittay, sworn January 12, 2023 (the "**Kittay Affidavit**") or the Second Report of Alvarez & Marsal Canada Inc. (the "**Receiver**") dated January 12, 2023 (the "**Second Report**").

² *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (the "**BIA**"), at s.4 [**Tab 1**]

II. BACKGROUND

A. Parties

5. The Debtor is a private junior oil and gas company and, prior to the Receiver's appointment, Ernest Methot was the President of the Debtor.
6. It is not disputed that Robus Services is the senior-secured lender of the Debtor.³ It is also not disputed that when Robus Services advanced the Loan, a material portion of those proceeds were utilized to pay the amounts then owing by the Debtor to the O'Connor Group (defined below), namely the "**O'Connor Loans**" and the "**Pamoco Loans**" (collectively referred to in the Loan Agreement as the "**Bridge Loan**").
7. As far as is understood by Robus Services, Pamoco, Mr. O'Connor and the related corporations, Androco Industries Ltd. and Teroco Industries Ltd. ("**Teroco**" and collectively, the "**O'Connor Group**") were, collectively, the prior secured lenders of the Debtor, who advanced the Bridge Loan.⁴
8. On April 12, 2022, Robus Services sought and obtained the appointment of the Receiver over all of the current and future assets, undertakings and properties of the Debtor.

III. FACTS

9. The facts relevant to Robus Services' response to the Application are set out in the Kittay Affidavit. However, there are a number of additional considerations that are relevant when scrutinising Pamoco's conduct and the relief that it is seeking.
10. Robus Services has concerns with the veracity of certain of the events as set forth by Pamoco and there are clearly a number of questions surrounding the Conveyance of Tangibles, even when taking Pamoco's own evidence at face value. However, for the purposes of this Brief, Robus Services has largely relied upon the evidence as submitted by Pamoco in the Affidavit of Terry O'Connor sworn January 9, 2023 (the "**O'Connor Affidavit**").
11. To the greatest extent possible, and in contrast to the O'Connor Affidavit, Robus Services has presented the facts in chronological order in an effort to provide a clear timeline to this Court.

³ O'Connor Affidavit, at para 6.

⁴ Kittay Affidavit, at para 7.

A. Acquisition from Enerplus and Advances by the O'Connor Group

The Enerplus PSA

12. In November 2017, after a series of amendments, the Debtor acquired its existing assets from Enerplus Corporation ("**Enerplus**") pursuant to the terms of an Agreement of Purchase and Sale (the "**Enerplus PSA**"), which included the "**Tangibles**", defined as:

... 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.⁵

The O'Connor Loans

13. During March of 2017, and prior to the closing of the Enerplus PSA, the Debtor and Mr. O'Connor entered into the Bridge Loan Agreement, pursuant to which Mr. O'Connor advanced the O'Connor Loans.⁶
14. The O'Connor Loans were advanced in two tranches: approximately CAD \$2.06 million on March 24, 2017, and approximately \$14,000 on January 28, 2019.⁷

The Acquisition Advances

15. During the period of May through August of 2018, Pamoco claims that it advanced \$36,000 for the purpose of permitting the Debtor to "acquire share interests in certain other petroleum and natural gas producer companies (the "**Acquisition Advances**")".⁸ Pamoco lists the Acquisition Advances as approximate figures in statement dated April 12, 2021:

⁵ O'Connor Affidavit, at Exhibit "C".

⁶ O'Connor Affidavit, at paras 19-20.

⁷ O'Connor Affidavit, at para 8; Exhibit "H", "I".

⁸ O'Connor Affidavit, at para 24-25; Exhibit "M".

Payee	Approx Dates	Estimated Amounts	Comments
HXE	May-18	\$12,000.00	Robus acquires interest
Manitoc [sic]	Aug-18	\$22,000	Robus acquires interest
Private	Aug-18	\$2,000	Robus acquires interest
		\$36,000	

16. As far as is known to Robus Services, Pamoco has provided no other evidence in support of the Acquisition Advances.

The Pamoco Loans

17. Following the Acquisition Advances, between November of 2018 and June of 2019, Pamoco advanced the Pamoco Loans, a series of four loans to the Debtor in the approximate cumulative amount of CAD \$754,000.⁹

The Tangibles Transaction & the Robus AP Payments

18. Commencing in January 2019, during the term of both the Pamoco Loans and the O'Connor Loans, Mr. O'Connor states that "neither [he] nor Pamoco, was willing to extend any more credit to the Debtor to make the Robus AP Payments."¹⁰
19. In contrast to Mr. O'Connor's statements, Pamoco's evidence is that Mr. O'Connor made at least 1 additional advance under the O'Connor Loan and Pamoco made at least 2 more advances under the Pamoco Loans, the stated purpose of the latter of which was to "provide funds for the Debtor to pay for its ongoing operations at that time."¹¹
20. Accordingly, Pamoco alleges that, as a result of this refusal, it acquired the Tangibles from the Debtor (the "**Tangibles Transaction**"), and relies on the consideration stated in the January 4, 2019 General Conveyance (and subsequently the Conveyance of Tangibles) of CAD \$90,000 "now paid by the Purchaser to the Vendor, the receipt of which is hereby acknowledged by the Vendor" (the "**Tangibles Consideration**").

⁹ O'Connor Affidavit, at para 17.

¹⁰ O'Connor Affidavit, at para 26.

¹¹ O'Connor Affidavit, at para 17.

21. Mr. O'Connor states that the Tangibles Consideration was comprised of (i) the Acquisition Advances of \$36,000 (made between May and August of 2018) and (ii) the Robus AP Payments. Pamoco's evidence is that, as at the date of the alleged Conveyance – January 4, 2019 – none of the Robus AP Payments had actually been advanced:

Payees	Dates	Cheque #	Amount
Pandell Technology	24-Jan-19	324	\$10,000
1092401 Alberta Ltd.	25-Jan-19	325	\$37,800
Ernie Methot	17-April-19	334	\$20,000
			\$67,000

Inventory of Tangibles & Conveyance Amendment

22. There is no evidence before this Court that, following the purported Conveyance on January 4, 2019, Pamoco took any steps to amend its Alberta Personal Property Registry ("**PPR**") registration to reflect its acquisition of the Tangibles. Rather, Pamoco states that it "took inventory of the purchased Tangibles" after it acquired them, during the months of February and March of 2019.¹²
23. On April 16, 2019, Mr. O'Connor states that Mr. Methot informed him of the over-broad description of the collateral in the General Conveyance and as such the parties entered into the Conveyance of Tangibles in its place. This apparently occurred one day prior to the final Robus AP Payment, a \$20,000 payment made directly to Mr. Methot.
24. Pamoco has placed no evidence before this Court which would demonstrate that Pamoco behaved as one would expect from an owner of the Tangibles. For example, Pamoco never sought any Lease or Rental Agreement in respect of the Tangibles following its purported acquisition of the Tangibles, and Pamoco did not demand any compensation for their use. Instead Pamoco has allowed the Debtor to continue to use the Tangibles in its day-to-day operations gratuitously. This is commercially unreasonable behaviour which the Court ought to consider, as detailed below in the Law and Analysis section of this Brief.

¹² O'Connor Affidavit, at para 31.

B. Robus Services Loan Agreement

25. In February of 2020, approximately one year after Pamoco claims it acquired the Tangibles, Robus Services advanced the Loan pursuant to the terms of the Loan Agreement, which included, among other things, the repayment of the Bridge Loan in the amount of nearly CAD \$3.6 million. Despite being advanced over the same time period, Pamoco now claims that the Tangibles Consideration (approximately CAD \$104,000) was separate and apart from the Bridge Loan.¹³
26. As the Bridge Loan was repaid by Robus Services' advances under the Loan Agreement, the PPR registrations in favour of the O'Connor Group in respect of the same were discharged.¹⁴
27. Although not cited in its own evidence, it has become clear that Pamoco did not in fact view itself as the owner of the Tangibles immediately following the Bridge Loan being repaid. On February 26, 2020, John Amundson, the President of Teroco wrote, among other things, the following in an email to Mr. Methot:

Ernie;

I was informed this morning of three advances made directly by Pamoco that were not included in our payout amounts and they are as follows:

- (1) payment direct to Derek Woods - \$37,800
- (2) payment direct to Pandell - \$10,000
- (3) payment to Ernie Methot - \$20,000

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.¹⁵ **[emphasis added]**

28. The payments referenced by Mr. Admundson match the Robus AP Payments which Pamoco now claims formed part of the consideration for the Tangibles. Clearly, as of February 2020, it was the O'Connor Group's intention that these amounts constituted a Loan and would need to be repaid by the Debtor.

¹³ O'Connor Affidavit, at para. 24-26.

¹⁴ O'Connor Affidavit, at para. 23; Exhibit "L".

¹⁵ Second Report, at Appendix D.

C. Pamoco PPR Registration and Cease and Desist

29. In January 2021, nearly a year after Robus Services advanced the Loan, Pamoco states that it became aware that the Debtor was trying to market the Tangibles. Accordingly, Pamoco registered an All Present and After Acquired Property (an "**All-PAAP**") registration in the PPR against the Debtor subsequent to the registration in favour of Robus Services.
30. Also in January 2021, and in spite of agreeing in April 2019 that the Conveyance of Tangibles replaced the General Conveyance, Pamoco instructed its counsel to draft a demand to the Debtor (without copy to Robus Services, who it knew to be the Debtor's senior-secured lender) stating, among other things:

You will recall that all Assets, as were at one time acquired from Enerplus Corporation by [the Debtor], were sold by [the Debtor] Robus Resources Inc. to my client. Attached is a copy of the General Conveyance dated January 4, 2019 executed by [the Debtor] in this regard.

We therefore demand that both [Mr. Methot] and [the Debtor], immediately cease and desist from any endeavour to sell equipment and petroleum and natural gas rights which are the property of [Pamoco].¹⁶

31. Subsequently, on March 25, 2021, Pamoco instructed its counsel to revise the collateral description at the PPR to reflect on its alleged interest in the Tangibles.¹⁷

D. Summary of Facts

32. Accordingly, the following can be distilled from the facts as presented in Pamoco's own evidence:
- (a) the O'Connor Group advanced the Bridge Loans between March 2017 and June 2019;
 - (b) during that same time frame, and after funding the Acquisition Advances, the O'Connor Group advised the Debtor it was unwilling to extend any further credit to the Debtor under the Bridge Loans for the Robus AP Payments;
 - (c) in January 2019, Pamoco allegedly acquired the Tangibles (which it then had security over) from the Debtor for \$90,000, \$36,000 of which was funded over 4 months earlier via the Acquisition Advances and the balance of which would be paid directly to third parties on the Debtor's behalf over the next 3 months by way of the AP Advances;

¹⁶ O'Connor Affidavit, at Exhibit "T".

¹⁷ O'Connor Affidavit, at para. 39; Exhibit "S".

- (d) the O'Connor Group would in fact continue to advance funds under the Bridge Loans until June 2019;
- (e) in February of 2020, when presented with the Robus Services Loan Agreement and furnishing a payout statement, Pamoco made no representations, warranties or statements to Robus Services with respect to its prior acquisition of the Tangibles and accepted Robus Services repaying the Bridge Loan in its entirety; and
- (f) ultimately, in January of 2021, Pamoco would proceed to register an All-PAAP and issue a cease-and-desist letter to the Debtor, asserting that it was the true owner of not only the Tangibles, but all assets that the Debtor acquired from Enerplus.

33. Additionally, it has become clear that Pamoco considered the Robus AP Payments to be a loan as recently as February 2020.

IV. ISSUES

34. There are 5 issues in this application, namely:

- (a) is there a commercial rationale underlying Tangibles Transaction;
- (b) did Pamoco advance adequate consideration for the Tangibles under the Conveyance of Tangibles;
- (c) did Pamoco take possession of the Tangibles?
- (d) If Pamoco did not take possession of the Tangibles, what is the impact of the *Sale of Goods Act* (Alberta); and
- (e) has Pamoco acted in good faith?

V. LAW AND ARGUMENT

A. There is no Commercial Rationale Underlying the Tangibles Transaction

35. Robus Services respectfully submits that, in making the Application, Pamoco is, at a fundamental level, asking this Court to accept a commercially absurd situation as reality. In considering this situation, Robus Services submits this Court ought to ask itself two series of simple questions regarding the conduct of the Debtor and Pamoco in connection with the alleged Tangibles

Transaction, and consider, in light of those questions, whether the Tangibles Transaction bears scrutiny and represents a valid commercial transaction.

36. The first set of questions is: why would the Debtor, a fully integrated oil and gas company with monthly production, sell all of its Tangibles for less than a tenth of their book value? How could the Debtor operate its business without the Tangibles, being the well heads, facilities, pipelines, and other personal property needed to extract the oil and gas? If the Tangibles were sold but the parties' intention was to allow them to be retained and operated by the Debtor, why is there no Lease or Rental Agreement allowing the Debtor to possess and use the Tangibles?
37. Robus Services respectfully submits that it makes no commercial sense for the Debtor to completely jeopardize its business by transferring all its Tangibles and impairing its ability to operate. This becomes even more difficult to believe when the alleged consideration described in the evidence is partially comprised of forgiveness of old, unsecured debt, which would not generate any new proceeds and or other benefit to the Debtor. In essence, this Court is being asked to believe the Debtor jeopardized its entire business for nothing. Robus Services respectfully submits that it should not do so.
38. This Court is also being asked to accept that if there was a transfer and an agreement to allow the Debtor to use the Tangibles, the Debtor did nothing to protect its position, such as entering into a lease or rental agreement for the Tangibles, again completely jeopardizing its business.
39. Similarly, if Pamoco became the owner of the Tangibles, why did it allow them to remain in the possession of the Debtor without compensation? Why did it delay in making any PPR registration in respect of its interest for approximately two years?
40. Again, the Court is being asked to believe that Pamoco acted in a commercially unreasonable manner in that it allowed its property to be used by the Debtor for free for years, and did nothing to protect its position, or obtain compensation. As can be seen by the Application and evidence before this Court, the O'Connor Group is highly motivated to recover the debts owing the by Debtor, and they are commercially motivated. Yet, the Court is also being asked to believe that Pamoco allowed its property to be used gratuitously by the Debtor.
41. This Court is being asked to accept these commercial absurdities, and it should not do so.
42. It is respectfully submitted that the Court may draw inferences from Pamoco's evidence and the above analysis and that this Court should infer that the alleged Conveyance of Tangibles does not

accurately reflect the commercial realities of the dealings between Pamoco and the Debtor, casting further doubt on whether it is in fact a valid document.

B. Pamoco Did Not Advance Sufficient Consideration for the Tangibles

43. As stated in *Halsbury's Laws of Canada*:¹⁸

Notwithstanding that a strict chronological reading of the rules of consideration would lead to absurd results by denying enforcement in any situation where an offer precedes its acceptance, **it is well accepted that past consideration does not make a promise enforceable**. The clearest case of past consideration arises when a seller offers a buyer a warranty about the quality of goods that have already been delivered by the seller and paid for by the buyer. The insufficiency of past consideration flows directly from the concept of a bargain that postulates that A's payment (consideration) bought B's performance or promise, thereby causally linking the consideration and the performance or promise: the provision of the consideration was the cause of the performance or the giving of the promise. Past consideration, so called because of its temporally antecedent occurrence to any promise, simply lacks that causal link to any subsequently given promise. [emphasis added /citations omitted]

44. It is Pamoco's own evidence that, of the total the alleged consideration in support of the Tangibles Transaction:

- (a) the Acquisition Advances were made between 4 and 7 months prior to the Tangibles Transaction; and
- (b) the Robus AP Payments only commenced 3 weeks following the alleged date of the Tangibles Transaction and would continue for another 3 months.

45. Absent questions surrounding the book value of the Tangibles, the Acquisition Advances are unquestionably past consideration and as such would not form part of the consideration to acquire the Tangibles. As such, even if the AP Payments that Pamoco previously considered to be a loan are attributed to the Tangibles Transaction, the \$90,000 consideration on the face of the Conveyances was never paid as stated on the document(s).

C. Pamoco Did Not Take Possession of the Tangibles

46. Pamoco states that it took possession of the Tangibles as a purchaser by placing stickers on them.¹⁹

¹⁸ Angela Swan and Jakub Adamski, *Contracts (2021 Reissue)*, Halsbury's Laws of Canada (Markham, ON: LexisNexis, 2021) ("*Halsbury's*") at HCO-47 [Tab 2].

¹⁹ Brief of Law of Pamoco ("**Pamoco Brief**"), at para. 20.

47. Pamoco draws an analogy to section 24 of the *Personal Property Security Act* (Alberta)²⁰, stating that "a secured party may perfect its security interest pursuant to the [PPSA] by taking possession of the property subject to a security interest".²¹ Pamoco also cites *Benett on Creditors' and Debtors' Rights and Remedies* and draws another analogy to seizure by a bailiff, where "[a]ll the bailiff need do is show some positive act of distress such as posting a notice on all doors and tagging the goods with the fact that the bailiff has seized the property and is thereby controlling the disposition of the goods".²²
48. There are fundamental issues with Pamoco drawing the above analogies:
- (a) when Pamoco claims that it acquired the Tangibles, it was a secured creditor of the Debtor, seemingly acquiring them subject to its own security and without forgiving any of the amounts outstanding thereunder;
 - (b) section 24(1) specifically states that perfection by possession only applies while the collateral is held as collateral and "not while it is held as a result of a seizure or repossession"; and
 - (c) section 24(2) of the PPSA confirms that for the purposes of subsection 24(1), a secured party does not have possession of collateral that is in the *actual or apparent* possession or control of the debtor or the debtor's agent, which the Tangibles clearly were.
49. Not only were the Tangibles at all times in the possession of the Debtor, by the time Pamoco made its existing registration in the PPR, it no longer had security left to rely on.
50. Pamoco also cites *Kallis*,²³ which is not applicable to the case at bar. Notably, *Kallis* involved the Court's analysis of the *Securities Transfer Act* and, as acknowledged by Pamoco, the parties in *Kallis* "accepted that FCM has always maintained and acknowledged that it was physically holding the pledged shares on behalf of both Applicants".²⁴ There is no such acknowledgement in the case at bar.

²⁰ *Personal Property Security Act*, RSA 2000, c P-7 (the "PPSA") at s.24 [Tab 3].

²¹ Pamoco Brief, at para 60.

²² Pamoco Brief, para 63, Tab 9.

²³ *Kallis v First Capital Management Ltd*, 2011 ABQB 60 ("*Kallis*") [Pamoco Authorities, Tab 8].

²⁴ *Kallis*, at para 18 [Pamoco Authorities, Tab 8].

D. Impact of the *Sale of Goods Act*

51. As Pamoco did not obtain possession of the Tangibles, the only conclusion is that they remained in the Debtor's possession after they were allegedly conveyed to Pamoco and at the time they were pledged in favour of Robus Services as part of the refinancing under the Loan Agreement. Section 26 of Alberta's *Sale of Goods Act*²⁵ provides that:

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.

52. Pamoco states that Robus Services is not a purchaser, yet ignores the inclusion of "pledge".²⁶
53. Reliance on section 26 the *SGA* requires proof of three elements:
- (a) the seller must have retained possession of the goods or of the documents of title to the goods;
 - (b) the purchaser must have acted in good faith; and
 - (c) the purchaser must have acted without notice of the initial buyer's interest.²⁷
54. Accordingly, when applied to the Tangibles Transaction and the Loan Agreement:
- (a) **Possession:** the Debtor retained possession of the Tangibles until they were pledged in favour of Robus Services (and remains in possession to this day);
 - (b) **Good Faith:** Robus Services acted in good faith, and in reliance on Pamoco, in advancing the Loan and repaying the Bridge Loan; and
 - (c) **Notice:** Pamoco did not disclose its alleged interest in the Tangibles during the Loan transaction. Rather, to the extent it had the interest at the time, Pamoco deliberately withheld notice of its interest.²⁸

²⁵ *Sale of Goods Act*, RSA 2000 c S-2 (the "**SGA**") [Tab 4].

²⁶ Pamoco Brief, at para 51.

²⁷ Bank of Montreal v. Mason, 2018 ABQB 161 at para. 16 [**Pamoco Authorities, Tab 4**].

²⁸ Kittay Affidavit, at para. 13.

E. Pamoco did not act in Good Faith

55. Based on Pamoco's own evidence, if Pamoco truly held the belief that it was the owner of the Tangibles at the time of the Loan Agreement, it unquestionably misled Robus Services and the Debtor. If it formed that belief subsequent to the Loan Agreement, it has been dishonest in its dealings with the Debtor, the Debtor's stakeholders, and this Honourable Court.

The O'Connor Group Did Not Act in Good Faith When Robus Services Advanced the Loan

56. Good faith has been considered by the courts in the context of performance of contracts, most notably by the Supreme Court of Canada in *Bhasin v Hyynew*.²⁹ In *Bhasin*, the Court held that there is a common law duty that applies to all contracts that requires the parties to act honestly in the performance of their contractual obligations:

Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, **even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties** ...

...

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

...

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest ... Doing so is not necessarily contrary to good faith

²⁹ *Bhasin v Hrynew*, 2014 SCC 71 ("*Bhasin*") [Tab 5].

and in some cases has actually been encouraged by the courts on the basis of economic efficiency ... The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

...

... I would hold that there is a general duty of honesty in contractual performance. **This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.**³⁰ [emphasis added / citations omitted]

57. While Pamoco is not a party to the Loan Agreement, it is also not a stranger to the transaction contemplated by it.
58. If Pamoco is now to be believed, it deliberately mislead Robus Services when it agreed to the repayment of the O'Connor Loans, discharging the PPR interests in its favour and subsequently making the within Application to be declared the owner of the Tangibles.
59. Pamoco knew, or ought to have known, that Robus Services would have anticipated the Tangibles to be subject to the Security granted pursuant to the Loan Agreement. If Pamoco's evidence is to be believed, it either (i) refused to make its ownership interest known at the time at the time of the Loan Agreement and simply accepted repayment of the Bridge Loans while believing itself to be the owner of the Tangibles, or (ii) it brings this application now as a last-ditch effort without regard to the evidence that it has filed.
60. Pamoco alleges in its Brief that had Robus Services "conducted any cursory inventory, inspection or due diligence on the Tangibles, it would have been apparent that Pamoco made on [the Tangibles], that title to [the Tangibles] was not with the Debtor." This ignores, among other things (i) the fact that Pamoco itself states it only conducted due diligence on the Tangibles *after* it acquired them, (ii) that Robus Services acted as a prudent and commercially reasonable lender in reviewing the PPR registrations and ensuring that any prior registrations were discharged in connection with advancing the Loan and (iii) that it was Pamoco itself that concealed its supposed interest in the Tangibles.

³⁰ *Bhasin* at paras 60, 65, 70, 73 [Tab 5].

Pamoco is not Entitled to Relief in these Proceedings

61. Effective November 1, 2019, the *Bankruptcy and Insolvency Act* (the "**BIA**"), together with the *Companies Creditors Arrangement Act* (the "**CCAA**"), was amended to include section 4.2, which codifies the obligation of interested persons to act in good faith in BIA proceedings:

Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

62. "Good faith" is not defined in the CCAA or the BIA. However, the Supreme Court of Canada provided guidance in *Callidus*:

The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations", which the applicant bears the burden of demonstrating: **(1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence** (para. 69).

The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA...

The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, **the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage**... The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights ... A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more

generally, the effective functioning of the CCAA regime...³¹
[citations omitted / emphasis added]

63. Accordingly, Pamoco must satisfy this Court that:

- (a) an Order granting it ownership of the Tangibles (or being compensated for the same) is appropriate in the circumstances and advances the policy objectives of the BIA;
- (b) it has been acting in good faith; and
- (c) it has acted with due diligence.

The Order is not Appropriate in the Circumstances

64. To the extent that it is owed any funds by the Debtor, Pamoco is an unsecured creditor and ought to share in distributions, if any, on a *pro rata* basis with all other unsecured creditors. To hold otherwise would be to elevate Pamoco's position vis-à-vis all other unsecured creditors.
65. The Order sought by Pamoco does not advance the objectives of the BIA and flies in the face of commercial certainty. To reach such a result would unfairly prejudice Robus Services, who acted in good faith and relied on the PPR and the payout statement provided by Pamoco in repaying the Bridge Loans.

Pamoco has not acted in good faith

66. Justice Romaine adopted the following description of bad faith (or the lack of good faith) in a proceeding under the CCAA:

The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.³²

67. As is clear, when Pamoco's evidence with respect to its acquisition of the Tangibles, Pamoco has clearly not acted candidly, honestly or reasonably and has mislead Robus Services.

³¹ 9354-9186 *Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*") at paras 49-51 [Tab 6].

³² *Re Bellatrix Exploration*, 2020 ABQB 809, para 105, leave to appeal refused, 2021 ABCA 85 [Tab 7]

Due Diligence

68. The Receiver was appointed on April 12, 2022. Pamoco was served with the Receivership Application and did not attend to put its position on the record.³³
69. While Pamoco engaged in discussions with the Receiver in May and June 2022, it was not until the Receiver sought approval of the sales process that Pamoco was forced by way of Court Order to file this application and assert its proprietary claim.
70. While Pamoco may have engaged in discussions with the Receiver, it was incumbent on Pamoco to bring an application assert its propriety interest in the Debtor's Property rather than wait on the sidelines until the receiver was attempting to initiate a sales process for the benefit of all of Pamoco's stakeholders.
71. Pamoco's actions have had a deleterious effect on the Receiver's efforts to commence the SISP and to administer the Debtor's estate in an efficient manner. Further, Robus Services' affiliate, Blue Fin is continuing to fund these proceedings and is prejudiced by the additional costs associated with responding to Pamoco's frivolous application.

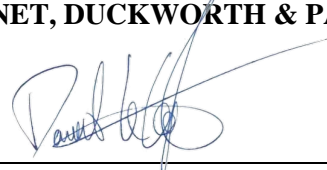
VI. CONCLUSION

72. For the reasons set out above, Robus Services requests that this Court:
- (a) dismiss the Application and declare that the O'Connor Group has no interest in and to the Tangibles; and
 - (b) exercise its discretion pursuant to s.4(2) of the BIA in granting enhanced costs in favour of Robus Services.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF JANUARY, 2023.

BURNET, DUCKWORTH & PALMER LLP

Per:



 David LeGeyt

³³ Kittay Affidavit, at para 25.

BOOK OF AUTHORITIES

Tab	Document
1.	<i>Bankruptcy and Insolvency Act</i>, RSC 1985 c B-3
2.	Angela Swan and Jakub Adamski, <i>Contracts (2021 Reissue)</i> , Halsbury's Laws of Canada (Markham, ON: LexisNexis, 2021) at HCO-47
3.	<i>Personal Property Security Act</i>, RSA 2000, c P-7
4.	<i>Sale of Goods Act</i>, RSA 2000 c S-2
5.	<i>Bhasin v Hrynew</i>, 2014 SCC 71
6.	<i>9354-9186 Québec Inc. v Callidus Capital Corp.</i>, 2020 SCC 10
7.	<i>Re Bellatrix Exploration</i>, 2020 ABQB 809