COURT FILE NUMBER **Q.B. No. 1884 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE **SASKATOON**

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED (the "*CCAA*")

AND

IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF 101098672 SASKATCHEWAN LTD., MORRIS INDUSTRIES LTD., MORRIS SALES AND SERVICE LTD., CONTOUR REALTY INC., and MORRIS INDUSTRIES (USA) INC.

BRIEF OF LAW
OF 1742009 ALBERTA INC. (DBA AGRITERRA EQUIPMENT)
("AGRITERRA")

I. INTRODUCTION

1. AgriTerra is a creditor of Morris Industries Ltd. ("**MIL**") and the second largest dealer of MIL's agricultural equipment. AgriTerra's is concerned with the situation it now faces due to the actions of MIL. After almost seven years of consistent past practice, MIL has now refused to return money which AgriTerra believed it had set aside for its benefit. The outstanding sum at issue stands at $303,801.00. AgriTerra now applies for a constructive trust to be declared relation to such unpaid sums.

2. This Brief of Law sets out the legal bases for AgriTerra's application in these proceedings. The relief sought includes:

(a) Leave for AgriTerra to file its application and have it heard; and

(b) An Order that $303,801.00 of funds now in the hands of MIL are impressed with a trust in favour of AgriTerra and hence do not form part of the estate of MIL or the Morris Group and are immediately repayable to AgriTerra.

II. FACTS

Background

3. The Affidavit of Brian Taschuk, President of AgriTerra, sworn May 4, 2020 (the "**Taschuk Affidavit**") sets out the basic facts on which AgriTerra relies in this application.

Background to AgriTerra's Claim

4. The basis for AgriTerra's claim lies in the Volume Bonus program for dealers which are administered by MIL.

5. The Volume Bonuses program saw a bonus paid to AgriTerra based on its volume of purchases of MIL equipment in a fiscal year (September 1 to August 31). AgriTerra would be entitled to an incentive payment from MIL upon achieving certain purchase targets as well as certain targets for Customer Service Achievement Levels. These bonus structures were set for each fiscal year by MIL (the "**Volume Bonuses**").[1]

6. In addition, three other programs including Program Discounts, Parts Credits and Warranty Credits, were administered in a similar way to the Volume Bonuses, however, it appears that the Monitor is honouring the pre-filing amounts for these other programs by means of offsets with deliveries of equipment. As such, they are excluded from the scope of AgriTerra's application.

7. All of these programs have been a constant in the relationship between MIL and AgriTerra until now.

8. At the time of the filing of the Proof of Claim, the outstanding amount for the all of these programs was $485,021.58. Pursuant to the February 18, 2020 Order of the

[1] Taschuk Affidavit, paras 15-17

Honorable Mr. Justice Elson (the "**February 18 Order**"), the Monitor has been authorized to honour certain pre-filing amounts including by the delivery of parts to dealers. As such, due to setoff of amounts owing against the Program Discount, Parts Credits, and Warrant Credits programs, as of April 16, 2020, the total outstanding amount was $332,099.37, including:

Volume Bonus:	$303,801.00
Program Discounts, Parts Credits and Warranty Credits:	$28,298.37
Total:	**$332,099.37**

9. However, as of April 16, 2020, the total outstanding balance owing to AgriTerra for the Program Discounts, Parts Credits, and Warranty Work is $28,298.37 based on offsets applied by AgriTerra following receipt of items including MIL parts received by AgriTerra. AgriTerra anticipates these amounts will be soon satisfied by MIL.

10. Thus, the total outstanding balance AgriTerra now claims back from MIL is $303,801.00 for the 2018-19 Volume Bonuses (the "**Outstanding Claim**").[2]

Representations of MIL with respect to the Claim

11. At no point during the course of 2019 did MIL's directors, officers or employees ever disclose that MIL was in financial difficulty, or was on the verge of insolvency or insolvent. AgriTerra continued with the understanding its relationship with MIL was "business as usual".[3]

12. Based on those expectations, AgriTerra continued to pay full invoiced amounts to MIL and to discount sale prices to its customers believing that the Volume Bonuses from MIL would continue as in the past. Consequently, AgriTerra could not take actions to mitigate its financial risk and damage such as:

---

2 Taschuk Affidavit, paras 23-24

3 Taschuk Affidavit, para 26

(a) Reducing the invoiced amounts to MIL net of the any outstanding amounts;

(b) Charging its customers a higher price at least initially for MIL equipment to compensate for the lack of rebate repayments;

(c) Discontinuing the MIL line of equipment or its relationship with MIL; or

(d) Any combination of (a) to (c) above.[4]

13. In fact, in December 12, 2019, Cam Sylvester, a Corporate Credit Manager for MIL, provided its Volume Bonus calculations to AgriTerra for the 2018-19 fiscal year.[5]

14. MIL was well aware of its financial constraints and impending or real insolvency at the time it agreed to the Volume Bonuses in December, 2019.

Timelines within the *CCAA* Proceeding

15. Following receipt of notice of these proceedings from the Monitor, AgriTerra took the following steps in these proceedings pursuant to the Claims Process Order issued January 16, 2020 (the "**Claims Process Order**"):

(a) AgriTerra filed its Proof of Claim evidencing its secured claim of $485,021.58 (including the Rebates and Warranty Credits) with the Monitor on or about February 27, 2020;

(b) AgriTerra received the NORD on or about March 9, 2020 from the Monitor, Alvarez & Marsal Canada Inc. (the "**Monitor**"); and

(c) AgriTerra filed its Notice of Dispute with the Monitor on or about March 18, 2020.

16. Following the filing of the Notice of Dispute, AgriTerra ran into significant issues in retaining Saskatchewan counsel due to the COVID-19 pandemic.

---

4 Taschuk Affidavit, para 27

5 Taschuk Affidavit, Exhibit "I"

Issues Locating Counsel due to COVID-19

17. AgriTerra to attempted to retain local counsel in a timely manner, however doing so proved to be a challenge. The following timeline sets out such efforts:

(a) From March 9 to March 18, 2020, John McClure (AgriTerra's Alberta counsel) attempted to contact their previous Saskatchewan counsel;

(b) In addition, after March 18, 2020, Brian Taschuk also made attempts to contact that same previous counsel;

(c) On March 20, 2020, John McClure requested an extension from the Monitor's counsel, Paul Olfert, due to "extraordinary circumstances" (of the COVID-19 pandemic). Mr. Olfert responded by saying the Monitor would not oppose a late-filed application challenging the NORD;[6]

(d) On March 22, 2020, Mr. McClure contacted Brian Taschuk to advise his efforts to retain Saskatchewan counsel were not successful;

(e) On March 24, 2020, Brian Taschuk instructed Mr. McClure to retain alternative counsel as he had not heard back from the previous counsel; and

(f) Kanuka Thuringer LLP was contacted by Mr. McClure on March 26, 2020 with the formal retainer being completed on April 8, 2020.[7]

18. Given that the Provincial State of Emergency came into force on March 18, 2020 and the general chaos that the pandemic unleashed, Mr. Taschuk believes that the COVID-19 pandemic was a significant obstacle to retaining Saskatchewan counsel.[8] It is also important to note that AgriTerra did not hesitate in its efforts to respond to any requisite efforts inside of the *CCAA* process and acted in a timely and diligent manner in its efforts to retain counsel.

---

6 Taschuk Affidavit, Exhibit "G"
7 Taschuk Affidavit, paras 11-14
8 Taschuk Affidavit, para 12

III. ISSUES

19. There are two issues before the court:

(a) Can and should this court grant leave to AgriTerra to file its application and have it heard?

(b) Should the court order that the $303,801.00 of funds now in the hands of MIL shall be and are hereby impressed with a trust in favour of AgriTerra and hence do not form part of the estate?

IV. ARGUMENT

(a) Can and should this court grant leave to AgriTerra to file its application and have it heard?

20. AgriTerra submits that this court should grant it leave to file and have its application set down for hearing.

21. Sections 11 and 12 of the *CCAA* give courts broad discretion to make any orders they see fit in the circumstances and the ability to fix deadlines for the purposes of voting and distributions:

> **General power of court**
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> **Fixing deadlines**
> 12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

22. In addition, Rules 1-5 and 1-6 of *The Queen's Bench Rules* give the court broad authority to both decide its own procedure and to make remedial orders in the case of non-compliance with strict requirements.

23. The criteria used when making a decision to accept the late filing of a proof of claim in *CCAA* proceedings was set out by the Alberta Court of Appeal in *Blue Range Resource Corp., Re,* 2000 ABCA 285, 193 DLR (4th) 314 [***Blue Range***], and has since been widely cited. The *Blue Range* criteria are:

(a) Was the delay caused by inadvertence, and if so, did the claimant act in good faith?

(b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(c) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

24. The court in *Blue Range* viewed the decision to permit a late filing to be predominantly "...an equitable consideration, taking into account the specific circumstances of each case" (*Blue Range,* para 34).

25. Although dealing with a case of a late-filed Proof of Claim, the *Blue Range* factors have been applied to other situations including amendments to a claim after a claims bar deadline (see *ScoZinc Ltd., Re*, 2009 NSSC 136, 53 CBR (5th) 96, and *BA Energy Inc., Re*, 2010 ABQB 507, 70 CBR (5th) 24).

26. In the present case, the major intervening factor was the COVID-19 pandemic. Until that occurred, AgriTerra and its Alberta counsel acted swiftly and within the Claims Process Order deadlines. When it became apparent locating counsel would prove a challenge, AgriTerra's counsel notified counsel for the Monitor before the expiration of its deadline to file and serve its application following receipt of the NORD. The inadvertence of

AgriTerra is not even a factor in the case at bar and AgriTerra's actions have been characterized by good faith at all times.

27. Related to AgriTerra's due diligence in alerting the Monitor, it submits that the Monitor has stated they would not oppose the filing of an application by AgriTerra outside of the tight timelines of the Claims process order. In addition, given that the Monitor is now a "super monitor" (pursuant to the February 18 Order), such statements may be inferred also that the Morris Group itself also does not oppose the late filing.

28. AgriTerra submits that its application is relatively straightforward and would not derail the already established court process. Because of the summary nature of its application, it would not therefore jeopardize the position of any creditors, the Monitor or the Morris Group themselves. As such, it should be granted leave to file and argue its application.

(b) Should the court order that the $303,801.00 of funds now in the hands of MIL shall be and are hereby impressed with a trust in favour of AgriTerra and hence do not form part of the estate?

29. AgriTerra submits that an equitable constructive trust on the Outstanding Claim held by MIL should be imposed by this court. This is so because in AgriTerra's view, MIL benefitted through unjust enrichment or and the imposition of a constructive trust is appropriate in the circumstances.

30. AgriTerra submits that this court has the jurisdiction to administer equitable remedies pursuant to section 52(1) of *The Queen's Bench Act* (Saskatchewan).

Unjust Enrichment

31. The test for unjust enrichment set out in *Peter v Beblow*, [1993] 1 SCR 980 (SCC)[9] [***Beblow***], at para 3 is as follows:

(a) An enrichment;

(b) A corresponding deprivation; and

(c) The absence of a juristic reason for the enrichment.[10]

32. With respect to the third part of the test, the Supreme Court of Canada in *Garland v Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629, stated that once a plaintiff establishes an absence of a juristic reason to deny recovery, the defendant then has the opportunity to rebut such absence with regard to two factors: the reasonable expectations of the parties and public policy considerations.

33. As the establishment of a constructive trust is a remedy after finding unjust enrichment, additional considerations must be made. First, monetary damages must be inadequate and secondly, there must be a link between the contribution and the property over which the constructive trust is claimed (*Servus* (*obiter dicta*) at para 191 citing the Supreme Court of Canada in *Beblow* at para 25).

34. In the case at bar, there is no question that there was an enrichment by MIL withholding the Rebates and Warranty Credits from AgriTerra. Consequently, there was a corresponding deprivation felt by AgriTerra at the hands of MIL.

35. As noted in the comments of Justice Graesser in *Servus* at para 195 (citing *Beblow* at para 96), a contractual remedy between parties may constitute a juristic reason for the deprivation. In the case at bar, the Dealer Agreement, corresponding Credit Terms, and

---

[9] Summarizing the previous Supreme Court of Canada jurisprudence in *Becker v Pettkus*, [1980] 2 SCR 834 (SCC), and *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 (SCC).

[10] See also *Moore v Sweet*, 2018 SCC 52, [2018] 3 SCR 303, at para 30.

the regular communications from AgriTerra setting the parameters of the Volume Bonus program[11] are evidence of such a contract.

36. AgriTerra submits that the following factors undermine a juristic reason which the Monitor and MIL say exists:

(a) the reasonable expectations of the parties;

(b) MIL's status as an "involuntary creditor", to use David Paciocco's concept; and

(c) the deceit and falsehood leading to AgriTerra's deprivation.

37. The case of *General Motors Corp. v Peco Inc.*, (2006) 15 BLR (4th) 282 [***Peco***], saw the imposition of a constructive trust on a commission payable to a contractor, Mantum, to assist a company, PECO, to receive Workers' Compensation refunds for work mostly completed before the secured creditor sought a receivership order for PECO.

38. Justice Cumming of the Ontario Superior Court of Justice in discussing the "juristic reason" as part of the unjust enrichment analysis stated as follows in *Peco*:

> 22 **However, the literal contractual arrangements must be considered within the context of the overall circumstances.**
>
> 23 **Mantum and PECO had agreed to a contractual arrangement which in substance was a contingency agreement whereby there was to be a sharing on a fixed formula of whatever quantum resulted from the successful venture.**
>
> 24 **Contracts ultimately are bundles of reciprocal reasonable expectations, created by the exchange of promises. Such reasonable expectations are determined on an objective test.** Turning to the instant situation, on an objective test the reasonable expectations of the parties were that if Mantum was successful there would be a sharing of the Refund. The parties had as reasonable expectations that PECO had a 65% interest in the Refund fund and Mantum had a 35% interest in that fund. **Indeed, as seen from the evidentiary record, on a subjective test these were the reasonable expectations held by both Mantum and PECO, with each party knowing full well the reasonable expectation of the other.**

---

[11] Taschuk Affidavit, paras 7-8, 17 and 21

> **25 PECO clearly did not have any expectation of retaining the 35% interest of Mantum in the Refund. GMC and the Receiver, standing in PECO's shoes, can have no such expectation. [e**mphasis added]

39. Although *Peco* was partially decided by considering some factors different than found in the situation at bar (traceable funds and a single creditor), the type of contractual arrangement found in *Peco* is similar to the Volume Bonus agreement between MIL and AgriTerra. In *Peco*, Mantum would receive a portion of the rebates collected, while here, MIL would return a portion of the purchase price paid by AgriTerra to it based on certain sales achievement benchmarks. The reciprocal expectations of the parties, created by promises informed the court's view that there as an absence of a juristic reason for the receiver to keep Mantum's commission.

40. Nothing about the agreement between AgriTerra and MIL would have or could have led AgriTerra to believe it would be relegated to the status of an unsecured creditor because MIL had decided to keep the funds it which as a matter of course always remitted to AgriTerra.

Involuntary Creditor

41. In AgriTerra's view, it is an involuntary creditor because it did not accept the risk of MIL's insolvency in the face of MIL's promises to it. It, in fact, was led to believe otherwise: AgriTerra had continued to operate under the assumption the years long *status quo* of its relationship with MIL would continue and the Volume Bonus program would be honoured. Without any indication from MIL of its financial condition, the ground suddenly shifted and AgriTerra could not take remedial or preventative action. As stated by Brian Taschuk:[12]

> Consequently, AgriTerra could not take actions to mitigate its financial risk and damage such as:
>
> (a) Reducing the invoiced amounts to MIL net of the outstanding amounts;
> (b) Charging its customers a higher price for MIL equipment to compensate for the lack of a Rebate payment;
> (c) Discontinuing the MIL line of equipment or its relationship with MIL; or

[12] Taschuk Affidavit, para 27

(d) Any combination of (a) to (c) above.

42. AgriTerra's status as an involuntary creditor of MIL gives rise to its claim of unjust enrichment, as well as its view that it should take priority over other creditors of the Morris Group. As Paciocco states in David Paciocco, "The Remedial Constructive Trust: a Principled Basis for Priorities Over Creditors" (1989) 68 Canadian Bar Review at page 324 [**Paciocco**]:

> It is sometimes said that the defendant's general creditors have accepted the risk of the defendant's insolvency by dealing with the defendant without taking security. By contrast, it is said, persons who are beneficiaries of a trust do not accept that risk. As a result, it is appropriate to protect beneficiaries in situations of insolvency, while permitting general creditors to bear the burden. Indeed, it has been argued that this is particularly so given that the general creditors could have gained priority over the constructive trust beneficiaries by taking security in that property as *bona fide* purchasers for value.

Commercial Wrongdoing

43. In addition, AgriTerra submits that "commercial wrongdoing" or fraudulent misrepresentation could serve to negate a conclusion that a valid juristic reason exists in an unjust enrichment analysis.[13] In *Credifinance Securities Ltd., Re*, 2011 ONCA 160, 74 CBR (5th) 161 [***Credifinance***], the Ontario Court of Appeal upheld a decision which overturned a Trustee's disallowance of a claim relating to a loan which was made on the basis of a fraudulent misrepresentation by the borrower. No fraud is alleged here, but the vigilance of the court to achieve equitable results underlies the decision.

44. Although the *Credifinance* decision had few creditors to consider and the ability to trace most of the funds in question, it does stand for the proposition that insolvency courts will use equity to prevent a "commercial immorality" in some circumstances. Justice LaForme writing for the court found:

> 36 An example of commercial immorality is described in *Ascent* as being where a bankrupt and its creditors benefit from misconduct by the bankrupt which was the basis upon which the property was obtained. The Registrar held that to permit an estate to retain the property in such circumstances amounts to an unjust enrichment, and the court can impose a constructive

---

[13] See Anthony Duggan "Constructive Trusts in Insolvency: A Canadian Perspective" (2016) Canadian Bar Review 94 at page 24.

> trust on an estate's assets to remedy the injustice. Furthermore, "it matters not which assets are consumed to remedy this": para. 18.
>
> 37 **Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.**
>
> 38 A Trustee in bankruptcy is an officer of the court and must act in an equitable manner. **Enriching creditors with a windfall and depriving another of its interest in property, has been held to be an offence to natural justice.** As Karakatsanis J. (as she then was) held at para. 14 in *Elez, Re* (2010), 54 E.T.R. (3d) 31 (Ont. S.C.J.), "The court will not allow the trustee, as an officer of the court, to stand on his legal rights if to do so would offend natural justice" (citations omitted). [emphasis added]

45. AgriTerra argues that MIL had led it to believe that its Volume Bonuses would be honoured and repaid as they always had been. They did not warn AgriTerra of their impending insolvency and in fact, directly provided the numbers to AgriTerra which it assumed would be paid shortly before the *CCAA* filing.[14] The effect of the situation which transpired was to, in effect, allow the secured creditors to benefit from MIL's own deception of AgriTerra.

Potential Rebuttal by MIL

46. At the last stage of the unjust enrichment analysis, in rebuttal, MIL can point to the reasonable expectations of the parties or reasons of public policy.

47. The expectations of the parties were very clear:

> AgriTerra relied on the promise of MIL to repay the Rebates and Warranty Credits at the end of each fiscal year and did so for the fiscal 2018-19 and 2019-20 years. AgriTerra further relied on the expectation its dealings with MIL were done transparently and in good faith.[15]

48. In addition, MIL themselves provided the final calculations for the Volume Bonuses in December, 2019.[16]

---

14 Taschuk Affidavit, para 21
15 Taschuk Affidavit, para 20
16 Taschuk Affidavit, para 24

49. With respect to public policy considerations, AgriTerra believes that MIL was unjustly enriched and that a constructive trust is an appropriate remedy in the circumstances. Preventing such practices in the future is a sound public policy reason to AgriTerra. In addition, when considering the impact of a potential finding of unjust enrichment in the present case on the administration of insolvency law generally, AgriTerra views any such finding to be a highly fact specific exercise. Allowing for AgriTerra to get the relief it asks for here will not drown bankruptcy courts in a sea of endless litigation any more than the previous cases cited by AgriTerra providing similar relief did. Likewise, its impact on the general scheme of distribution in future insolvency decisions will be minimal.

50. Although MIL or the Monitor may argue that the scheme classifying creditors into different classes ought not to be disturbed, sound reasons exist to honour the commitments MIL themselves made, and even provided calculations for on the eve of their *CCAA* filing. It is very likely that most, if not all, the secured creditors were aware of MIL's line of business and its critical relationships with its dealer network. As such, it is doubtful that any of the secured creditors would have ever viewed their security rights as covering assets which AgriTerra believes were always their own, which were held for their benefit, and which MIL regularly repaid after the close of each fiscal year.

51. Put another way, should the secured creditors of MIL be allowed to benefit from MIL withholding what AgriTerra had a reasonable expectation to believe were its property?

52. Overall, the Volume Bonus claim of AgriTerra (and the other dealers) is small when compared to the overall debt levels of the Morris Group. Although providing this remedy in effect gives AgriTerra priority for the amount of its Volume Bonus claim, its overall impact on the restructuring process and the other creditors is minimal due to its size. On the other hand, as the Monitor has stated in its Second Report dated February 14, 2020,

preserving the relationship with its dealers is important.[17] This is based in the fact that dealers like AgriTerra are critical in continuing to generate revenues for the estate and keeping its dealers happy and productive will also be key to any post-restructuring future for the Morris Group.

A Constructive Trust is an Appropriate Remedy

53. Finally, AgriTerra believes that a constructive trust is an appropriate remedy in this situation as (a) monetary damages are an inadequate remedy, and (b) there can be a linkage with the property claimed back by AgriTerra (*Beblow,* para 25).

54. At this remedial stage of the analysis, should a claim for unjust enrichment be made out, which AgriTerra suggests is, then the court must look at the adequacy of a remedy of monetary damages. AgriTerra submits that is very clearly not. What benefit would it have substituting one unsecured claim for another? Particularly when the prospect of pay out for either is poor.

55. With respect to the potential linkage between its claim and the property now claimed back from MIL, AgriTerra concedes this is more challenging. However, the rule in *Re Hallett's Estate* (1880), 13 Ch D 696 (CA) [***Hallett's Estate***], does provide the basis for a court to find that legal tracing is unnecessary. The general rule in *Hallet's Estate* is that in the case of comingled trust funds, a trustee is deemed to withdraw his or her own money first. The remedy in *Hallett's Estate* has been extended from simply declaring an equitable lien on the property in question to allow for constructive trusts be found over such property (*Foskett v McKeown* [2001], 1 AC 102).

56. *Hallett's Estate* should be applied to avoid injustice to AgriTerra arising from MIL's failure to keep the rebates set aside and to pay them in a timely way.

---

[17] Second Report of the Monitor dated February 14, 2020, para 20

Wrongful Acts

57. In addition to unjust enrichment, a wrongful act may allow the courts to impose the remedy of a constructive trust.[18] AgriTerra does not intend to argue this point at length, however it is illustrative of what courts 'doing equity' consider when trying to creatively 'right' a clear 'wrong'.

Other Potential Remedies

58. In addition, another option for courts is to allow unpaid suppliers to seek justice may involve lifting the stay of proceedings imposed by section 11.02 of the *CCAA* and initial orders stemming therefrom.

59. In *Puratone Corp., Re*, 2013 MBQB 171, 295 Man R (2d) 55 [***Puratone***], leave to appeal allowed by *Puratone Corp., Re,* 2014 MBCA 13, 303 Man R (2d) 15 (on the issue of the holdback) the Manitoba Court of Queen's Bench granted leave to a group of suppliers of pig feed (the "**ITB Claimants**") to pursue an action against the Puratone group of companies as well as their directors and officers, and their secured creditors relating to the supply of pig feed two weeks before Puratone's *CCAA* filing.

60. Justice Dewar in *Puratone* granted the application by the ITB Claimants to lift the stay against the Puratone Group, to allow the ITB Claimants to bring a claim for, *inter alia*: fraudulent misrepresentation, oppression, a declaration of a constructive trust in favour of the ITB Claimants and that Puratone and its secured creditors were unjustly enriched,

---

[18] The conditions which must be satisfied according to the Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, para 45:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

subordination of the secured claims, and various declarations against the directors and officers of Puratone. [19]

61. *Puratone* saw a liquidating *CCAA* where the assets of the group were sold on a going concern basis to the Maple Leaf conglomerate. The transaction for Puratone's assets closed three months after the Initial Order was granted by the court.

62. Justice Dewar, in applying the applicable test,[20] found that dismissal of such potential actions in such a situation was not a foregone conclusion and that "sound reasons" existed to lift the stay of proceedings.

63. On top of showing the options courts have, the *Puratone* decision also shows what type of behaviour may warrant and equitable remedy.

V. CONCLUSION

64. AgriTerra therefore submits that it should be entitled to file this application, have it heard, and that the court should declare a constructive trust over the amount of the Outstanding Claim currently held by the Morris Group (and managed by the Monitor).

65. After almost seven years of past practice and communicating no plan to depart from past practice, MIL has gone back on its word. In addition, the honouring of certain pre-filing amounts including Warranty Credits by the Monitor now speaks to what AgriTerra view as the differential and unfair treatment of AgriTerra in the present situation.

---

19 It is important to note that leave to appeal was granted on the issue of the holdback, however, the matter was never decided by either the Court of Queen's Bench or the Court of Appeal for Manitoba. Following an extension of the filing deadline for the claims to February 28, 2014 by the court in *Puratone Corp., Re*, 2014 MBQB 32, the ITB Claimants never pursued their claims.

20 *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.,* 2007 SKCA 72, 299 Sask R 194

66. If dealers are really key to a successful restructuring of the Morris Group, should the Monitor not honour Volume Bonuses based on sales and should the court not use its equitable discretion to both correct a wrong and to improve the prospects for a successful restructuring?

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 4th day of May, 2020.

KANUKA THURINGER LLP

Per: _____
Solicitors for 1742009 Alberta Inc. (dba AgriTerra Equipment)

CONTACT INFORMATION AND ADDRESS FOR SERVICE

KANUKA THURINGER LLP
Barristers and Solicitors
1400 - 2500 Victoria Avenue
Regina, Saskatchewan
S4P 3X2

Address for Service: Same as above
Telephone: (306) 525-7200
Fax: (306) 359-0590
Email address: jehmann@ktllp.ca
Lawyer in Charge of File: James S. Ehmann, Q.C.
41500-0001/jfh
DM 2505647 v1

AUTHORITIES

BA Energy Inc., Re, 2010 ABQB 507, 70 CBR (5th) 24)

Blue Range Resource Corp., Re, 2000 ABCA 285, 193 DLR (4th) 314

Credifinance Securities Ltd., Re, 2011 ONCA 160, 74 CBR (5th) 161

Foskett v McKeown [2001], 1 AC 102

Garland v Consumers' Gas Co., 2004 SCC 25, [2004] 1 SCR 629

General Motors Corp. v Peco Inc., (2006) 15 BLR (4th) 282

ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd., 2007 SKCA 72, 299 Sask R 194

Peter v Beblow, [1993] 1 SCR 980 (SCC)

Puratone Corp., Re, 2013 MBQB 171, 295 Man R (2d) 55

Puratone Corp., Re, 2014 MBCA 13, 303 Man R (2d) 15

Re Hallett's Estate (1880), 13 Ch D 696 (CA)

ScoZinc Ltd., Re, 2009 NSSC 136, 53 CBR (5th) 96

Soulos v Korkontzilas, [1997] 2 SCR 217