COURT FILE NUMBER **QB 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

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 THE BANK OF MONTREAL

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I. INTRODUCTION

1. This is the Brief of Law of the Bank of Montreal ("**BMO**" or the "**Lender**"), in support of its application (the "**Bankruptcy Application**"), pursuant to section 43 of the *Bankruptcy and Insolvency Act* (the "**BIA**")[1] seeking a bankruptcy order (the "**Bankruptcy Order**") in respect of one or all of the following entities:

(a) Morris Industries Ltd. ("**Morris Industries**");

(b) 101098672 Saskatchewan Ltd. ("**672**");

(c) Morris Sales and Service Ltd. ("**S&S**");

(d) Morris Industries (USA) Inc. ("**Morris USA**"); and

(e) Contour Realty Inc. ("**Contour**"),

(collectively, the "**Morris Group**").

2. The Morris Group is in default of its obligations to BMO and, following BMO's demands, has failed to repay the amounts owing under the Loan Agreements and Guarantees. BMO therefore seeks to petition one or more members of the Morris Group into bankruptcy.

II. THE PARTIES

3. The facts in support of BMO's application are set out in the affidavits sworn by Sandy Hayer on February 13, 2020 (the "**Initial Hayer Affidavit**") and July 23, 2020 (the "**Bankruptcy Hayer Affidavit**").[2] Further relevant facts are set forth in the Reports of Alvarez & Marsal Canada Inc., LIT ("**A&M**") in its capacity as the court-appointed Monitor in these proceedings (the "**Monitor**"), including but not limited to the Thirteenth Report.

4. The Morris Group, through its subsidiaries, operates as a farm equipment manufacturer, dealer and retailer across Canada, the Unites States and other jurisdictions. Further details on the Morris Group's assets and organizational structure are detailed in the First Report of the Monitor.

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") **[Book of Authorities ("Authorities"), Tab 1]**.
[2] Unless otherwise indicated, capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Initial Hayer Affidavit, the Bankruptcy Hayer Affidavit, the Application filed July 24, 2020, the Initial Order granted in these proceedings on January 8, 2020 as amended (the "**Initial Order**"), or the filed reports of the Monitor (each a "**Monitor's Report**")

5. BMO is the senior secured lender of the Morris Group and the Interim Lender in these CCAA Proceedings.[3]

6. A&M is the Monitor these CCAA Proceedings and, pursuant to a February 18, 2020 Order, had its powers with respect to the Morris Group enhanced (the "**Super-Monitor Order**").

III. BACKGROUND

A. The Indebtedness

7. As at January 2, 2020, the members of the Morris Group were indebted to BMO under the respective Loan Agreements as follows:

(a) Morris Industries was indebted to BMO in the amount of $22,455,856.64;

(b) S&S was indebted to BMO in the amount of $18,948,450.41;

(c) Contour was indebted to BMO in the amount of $2,319,999.72; and

(d) Morris USA, 672, S&S, and Contour have guaranteed some or all of the foregoing amounts and are indebted to BMO in the amounts guaranteed,

(collectively, the "**Indebtedness**").[4]

8. In addition, BMO is the interim lender in these CCAA Proceedings, and is owed an additional $5,900,000.00 plus interest in that capacity.[5]

B. The Security

9. Each member of the Morris Group granted security in favour of BMO over all of its present and after acquired personal property and real property pursuant to a number of security agreements and mortgages.[6]

[3] Initial Hayer Affidavit, at para 6.
[4] Bankruptcy Hayer Affidavit, at para 7.
[5] Bankruptcy Hayer Affidavit, at para 11.
[6] Bankruptcy Hayer Affidavit, at para 12.

10. BMO's personal property security is registered at the personal property security registries of Alberta, Saskatchewan and Manitoba and BMO's real property security is registered against the land titles to the real property owned by the Morris Group.[7]

C. Demands and Failure to Make Payment

11. On January 4, 2020, BMO demanded repayment of the Indebtedness and provided notice of the foregoing defaults and notices of intention to enforce its Security pursuant to section 244(1) of the BIA (the "**Demands**").[8]

12. Notwithstanding receipt of the Demands by the individual members of the Morris Group, either in their capacity as direct borrowers or as guarantors, each of those parties has failed, neglected or refused to pay the Indebtedness to BMO.[9]

D. The CCAA Proceedings

13. On or about December 30, 2019, the Morris Group initiated the within CCAA Proceedings under the CCAA and obtained the Initial Order on January 8, 2020. The Initial Order contains, among other things, a stay of proceedings (a "**Stay**"), which was most recently extended to January 31, 2021.[10]

14. As of the date of the Bankruptcy Application, the Morris Group has not presented, and BMO understands that it will not be presenting, a plan of compromise or arrangement to its creditors pursuant to the provisions of the CCAA (a "**Plan**").

15. Pursuant to a December 18, 2020 of this Honourable Court (the "**SAVO**"), the sale of the Morris Group's assets (defined in the SAVO as the "**Purchased Assets**") was approved. Pursuant the SAVO and the December 18 Stay Extension Order, the Purchase Price (as defined in the SAVO) for the Purchased Assets remains sealed on the Court Record. However, the Purchase Price will not result in the Indebtedness being repaid in full and BMO will suffer a shortfall owing by each member of the Morris Group well in excess of $1,000.[11]

[7] Bankruptcy Hayer Affidavit, at para 13.
[8] BIA, s. 244(1) **[Authorities, Tab 1]**; Bankruptcy Hayer Affidavit, at para 8.
[9] Bankruptcy Hayer Affidavit, at para 9.
[10] December 18, 2020 Order of Justice R.S. Smith (the "**December 18 Stay Extension Order**")
[11] Bankruptcy Hayer Affidavit, at para 18.

IV. ISSUES

V. The only issue before the Court in this Application is whether or not this Honourable Court should grant the Bankruptcy Order.

VI. LAW AND ARGUMENT

A. The Stay Has Been Lifted

16. Pursuant to a December 18, 2020 Order of this Honourable Court (the "**Lift Stay Order**"), BMO received the authorization of this Honourable Court to lift the Stay for the express and limited purpose of bringing the within Bankruptcy Application.

B. The Bankruptcy Application

17. Under s.43 of the BIA, any creditor may bring an application for a Bankruptcy Order once it establishes the debt owing to the creditor amounts to at least $1000 and the debtor has committed an "act of bankruptcy", as defined in s.42, within the six months preceding the filing of the application.[12]

18. In *Ivaco,* Justice Farley considered when a bankruptcy order ought to be granted. He noted the following:

> …Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc.*… A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted.[13] (citations omitted)

19. BMO estimates that the value of its security at the Purchase Price. Given that the Indebtedness exceeds $20,000,000, in addition to those amounts owed to BMO in its capacity as the Interim Lender, and continues to accrue, BMO has an unsecured claim against each member of the Morris Group in an amount in exceeding $1,000, who have generally ceased to meet their liabilities as they become due. As such, the members of the Morris Group have each committed an act of bankruptcy within the six months preceding the filing of this Application.

20. BMO is not seeking the Bankruptcy Application for an improper purpose and has satisfied the requirements of s.42 of the BIA.

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[12] BIA, s.43 **[Authorities, Tab 1]**.
[13] *Ivaco Inc., Re*, [2005] O.J. No. 3337 (ONSC) ("***Ivaco***") at para 13 **[Authorities, Tab 2]**.

21. Accordingly, BMO has established a *prima facie* case and its Bankruptcy Application should succeed.

C. No Improper Purpose

22. If successful, the priority scheme of the funds available for distribution to the creditors of the Morris Group will be altered in BMO's favour as a result of the Bankruptcy Application. However, courts have held that "reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings."[14]

23. The applicants in *Ivaco* sought to lift the Stay in order to proceed with a bankruptcy application "for the reason that such a bankruptcy [would] enhance their position."[15] Justice Farley found this to be a valid purpose and, citing his own decision in *Toronto Dominion Bank v. Usarco Ltd.*, he noted:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the [BIA] which may enhance their position by giving them certain priorities which they would not otherwise enjoy…[16]

24. Similarly, in *Grant Forest*, the Ontario Superior Court of Justice allowed a creditor to lift a stay under the CCAA in order to file an application under the BIA. The Court explained:

> This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the CCAA process be utilized for the sale of assets rather than the BIA process.
>
> I am of the view that in the absence of provisions in a Plan under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if that creditor's position may be better advanced under the BIA.
>
> The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the BIA be allowed to proceed.[17] [emphasis added]

25. On appeal, the Ontario Court of Appeal confirmed:

> As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been the creditor's motivation, it does not disentitle the creditor from being granted the relief it

[14] *Grant Forest Products Inc. v GE Canada Leasing Services Co.*, 2013 ONSC 5933 ("***GE Canada***") at para 63 **[Authorities, Tab 3]**.
[15] *Ivaco* at para 13 [**Authorities, Tab 2]**.
[16] *Ivaco*, at para 13 **[Authorities, Tab 2]**; citing *Toronto Dominion Bank v Usarco Ltd.*, (1991), 42 ETR 235 (Ont. Gen. Div.) at para 11.
[17] *GE Canada* at paras 120-122 **[Authorities, Tab 3]**.

> sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour.[18] [citations removed; emphasis added]

26. Pursuant to s. 43(7), the Court shall dismiss the Bankruptcy Application if is of the opinion that "for other sufficient cause no order ought to be made."[19] Courts have held that an exercise of this discretion is typically warranted if an application was filed for an improper purpose or if there is nothing to be gained from the bankruptcy as the proceedings would be of no benefit to the creditors.[20]

27. By enhancing its position under the BIA, BMO is not bringing this Application within the meaning of 43(7) of the BIA. Rather, doing so is a legitimate and recognized right of creditors, as confirmed by the case law.

28. The federal legislative regime under the CCAA and the BIA determine the claims of creditors of an insolvent company.[21] BMO merely seeks recovery of its Indebtedness through parliament's chosen avenue—the BIA. As noted in *Ivaco,* "if the rights of pension claimants [or another group of creditors] are to be given greater priority, Parliament, not the courts, must do so."[22]

D. Only the Debtor May Oppose the Application

29. In *Ristimaki,* a creditor sought intervenor status by claiming it had an interest in the subject matter of the proceedings and that it would be adversely affected by a judgment (i.e., that it would lose its preferred priority if the bankruptcy application succeeded). The Court disallowed the application, noting that the creditor could not refer to any case in which the Bankruptcy Court granted leave to a party to intervene in a petition which the debtor had not opposed.[23] It subsequently concluded that there is nothing in the BIA or the *Bankruptcy and Insolvency General Rules* that confers upon courts the jurisdiction to grant intervenor status to a creditor on a bankruptcy petition.[24]

30. Pursuant to the Super Monitor Order, the Monitor had its powers with respect to the Morris Group enhanced. To BMO's knowledge, neither the Monitor nor any member of the Morris Group, not oppose the Application and no other party is entitled to do so.

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[18] *Grant Forest Products Inc. v Toronto Dominion Bank,* 2015 ONCA 570 at para 118. **[Authorities, Tab 4]**.
[19] BIA, at s. 43(7) **[Authorities, Tab 1]**.
[20] *Ivaco,* at para 14 **[Authorities, Tab 2]**.
[21] *Ivaco Appeal* at para 69 **[Authorities, Tab 5]**.
[22] *Ivaco Appeal* at para 69 **[Authorities, Tab 5]**.
[23] *Ristimaki, Re,* [2000] O.J. No. 2945 (ONSC) ("***Ristimaki***") at para 11 **[Authorities, Tab 6]**.
[24] *Ristimaki,* at para 12 **[Authorities, Tab 6]**.

VII. CONCLUSION

31. For the reasons set forth above, this Honourable Court ought to grant the Bankruptcy Application in its entirety, as:

(a) BMO has previously obtained authorization to lift the Stay for the purposes of bringing the Bankruptcy Application;

(b) the Application meets the requirements of s.42 of the BIA, namely the members of the Morris Group have committed an act of bankruptcy in the six months preceding the Application and BMO is owed an unsecured debt exceeding $1000;

(c) seeking the Bankruptcy Order is a legitimate right of a creditor, confirmed by case law, and not the type of relief contemplated by s.43(7); and

(d) only the Monitor or the Morris Group can oppose the Application and they have not done so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF JANUARY, 2021

W LAW LLP

Per: _____

Mike Russell
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BOOK OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended.
2.	*Ivaco Inc., Re*, [2005] O.J. No. 3337 (ONSC).
3.	*Grant Forest Products Inc. v GE Canada Leasing Services Co.*, 2013 ONSC 5933.
4.	*Grant Forest Products Inc. v Toronto Dominion Bank*, 2015 ONCA 570.
5.	*Ivaco Inc., Re*, [2006] O.J. No. 4152 (ONCA).
6.	*Ristimaki, Re*, [2000] O.J. No. 2945 (ONSC)

TAB 1

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TAB 3

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TAB 7

TAB 8