

Court File No. S1-GS-

**SUPREME COURT OF PRINCE EDWARD ISLAND  
(GENERAL SECTION)**

**BETWEEN:**

**ROYAL BANK OF CANADA**

**Applicant**

**DME LIMITED PARTNERSHIP, DME GENERAL PARTNERS INC., ATLANTIC SYSTEMS  
MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC.  
and DME US HOLDCO INC.**

**Respondents**

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**NOTICE OF APPLICATION**

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(902) 628-1033  
File No. 20028317-00002**

## FACTUM

### PART I - FACTS

1. The Royal Bank of Canada ("Bank") has provided financing to DME LIMITED PARTNERSHIP ("Borrower"), which was guaranteed by DME GENERAL PARTNERS INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC. ("DME") (collectively the "Corporate Guarantors" and together with the Borrower, the "Debtors") pursuant to a Credit Agreement dated November 17, 2015, with amendments on September 20, 2016; July 14, 2017; and, February 14, 2018, referred to herein as the "Credit Agreement."
2. Pursuant to the Credit Agreement, the Debtors provided various security as set out in detail in the Affidavit of Gary Ivany, Senior Director in the Special Loans and Advisory Services Department of the Royal Bank of Canada.
3. The Borrower has breached the terms of the Credit Agreement and defaulted on payment.
4. The Bank has demanded payment from the Debtors and provided formal notice pursuant to section 241 of the *Bankruptcy and Insolvency Act* by respective letters to the Borrower and Corporate Guarantors dated November 13, 2018.
5. The Bank has brought the application as it is in the best interest of the Bank and all other interested parties that a receiver and manager be appointed by the Court so that the receiver and manager can take steps as permitted to preserve the Banker's collateral and the Respondent's assets overall.

## **PART II – ISSUE**

5. The facts of this application give rise to the following issues:
- (a) Should this Court grant an order for the abridgement of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicant's record on application?
  - (b) Should this Court appoint a receiver and receiver manager (the "Receiver") over all real and personal property of DME?
  - (c) Should the Receiver be granted a charge against the property subject to the receivership?

## **PART III - THE LAW AND ARGUMENT**

### **A – ABRIDGEMENT OF TIME**

6. This Court has the discretion to abridge the time for service of this application, to excuse the lack of service of the application, or to excuse the lack of service of the Applicant's record on application.

#### **EFFECT OF NON-COMPLIANCE**

- 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

#### **COURT MAY DISPENSE WITH COMPLIANCE**

- 2.03 The Court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time

#### **EXTENSION OR ABRIDGMENT**

##### **General Powers of Court**

- 3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
- (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.
7. The Court's discretion under Rules 2 and 3 [Tab 1] to abridge the time for service, if necessary, is wide and permits the Court to dispense with strict adherence to any rule in appropriate circumstances.

*In Re Integrity Wind Systems Inc.*, 2009 PEISC 25 (CANLII) [Tab 2]

8. It is submitted that the Respondent has not been prejudiced as a result of the notice period provided.

#### **B – APPOINTMENT OF RECEIVER**

9. The Applicant seeks an order appointing Alvarez & Marsal Canada Inc. (“A & M”) as the Receiver, as is more particularly set out in the draft order attached to the Notice of Application (the “Draft Order”). The Applicant relies on:
- a. Section 44 of the *Judicature Act*, R.S.P.E.I. 1988, Cap. J-2.1, (the “Judicature Act”);
  - b. Rule 41 of the *Rules of Court*;
  - c. Section 243 of the BIA.
10. A & M has consented to act as the Receiver.

#### ***Judicature Act***

##### **Section 44 of the Judicature Act**

11. The Court has the authority under section 44 of the *Judicature Act* [Tab 3] to appoint a receiver where it considers it to be just and convenient:

44.(1) A court may

- (a) by interlocutory order,
  - (i) grant an injunction, or
  - (ii) appoint a receiver or receiver and manager; and
- (b) make a mandatory interlocutory order,

where it appears to the court to be just or convenient to do so.

12. Bennett on Receiverships states:

A court appointment may become necessary where the privately appointed receiver encounters problems in taking possession of the debtor’s property or where there are numerous creditors exercising their remedies simultaneously against the debtor. Alternatively, where the security holder anticipates difficulties of this nature, it may proceed directly for a court appointment. The

court appointment in these situations ensures that the protection of the assets is sanctioned by the formal authority of the court.

F. Bennett, *Receiverships*, (Toronto: Carswell, 1985), p.14 [Tab 4]

13. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Justice Blair of the Ontario Court of Justice, General Division, Commercial List stated at paragraph 10:

The Court has the power to appoint a receiver or receiver and manager where it is “just or convenient” to do so: the *Courts of Justice Act*, R.S.O., 1990 c. 43, s.101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...

*Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ON S.C.) [Tab 5]

14. In this matter, it is just and convenient to appoint the Receiver. An appointment by the Court is necessary to enable the Receiver to carry out its work and duties more efficiently and to balance the competing interests of various parties.

Rule 41 of the Rules of Court

15. This Honourable Court has jurisdiction to appoint a receiver under Rule 41 of the *Rules of Court* [Tab 6] which states:

**41 APPOINTMENT OF RECEIVER**

**DEFINITION**

**41.01** In Rules 41.02 to 41.06, “receiver” means a receiver or receiver and manager.

**HOW OBTAINED**

**41.02** The appointment of a receiver under section 44 of the *Judicature Act* may be obtained on motion to a judge in a pending or intended proceeding.

#### **FORM OF ORDER**

- 41.03** An order appointing a receiver shall,
- (a) name the person appointed or refer that issue in accordance with Rule 54;
  - (b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of his duties, or refer that issue in accordance with Rule 54;
  - (c) state whether the receiver is also appointed as manager and, if necessary define the scope of his managerial powers; and
  - (d) contain such directions and impose such terms as are just.

#### **REFERENCE OF CONDUCT OF RECEIVERSHIP**

- 41.04** An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.

#### **DIRECTIONS**

- 41.05** A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.

#### **DISCHARGE**

- 41.06** A receiver may be discharged only by the order of a judge.

16. For the reasons set out herein, the appointment of the Receiver is appropriate in the circumstances.

#### ***Bankruptcy & Insolvency Act***

17. The *BIA* provides further authority for the appointment of a receiver by application in section 243 which provides:

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
  - (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
  - (c) take any other action that the court considers advisable.
- (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
  - (b) the court considers it appropriate to appoint a receiver before then.
- (2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who
- (a) is appointed under subsection (1); or
  - (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
    - (i) an agreement under which property becomes subject to a



security (in this Part referred to as a “security agreement”), or

- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

- (3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

***BIA, s. 243 [Tab 7]***

- 18. The Applicant provided the Respondent with its Notice of Intention to Enforce Security pursuant to section 244(1) of the *BIA*. Pursuant to section 243(1.1), the Court may appoint a receiver in accordance with section 243(1) of the *BIA*.

***Summary***

- 19. This Court has the authority to grant the relief sought under section 44 of the *Judicature Act*, Rule 41 of the Prince Edward Island Rules of Court and section 243 of the *BIA*. The Applicant submits that the facts outlined in the Affidavit, particularly the significant amount of money outstanding make the court appointment of a Receiver just and convenient for the resolution of the affairs of DME and its Guarantors in an orderly and efficient manner.

**C – RECEIVER’S CHARGE ON RECEIVERSHIP PROPERTY FOR FEES AND DISBURSEMENTS**

- 20. This Court has the authority to grant its receiver a charge against the property of DME and its Guarantors for its fees and disbursements in priority to all other secured creditors.
- 21. The *BIA* provides:

- 243. (6) If a receiver is appointed under subsection (1), the court may make any order respecting the

payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations. [emphasis added]

BIA, s. 243.

22. In the circumstances, the interested parties have been given such notice as the exigent circumstances permit.
23. A judicially appointed receiver may generally charge its fees and expenditures against the estate it administers. Writing for the Ontario Court of Appeal in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.*, Dickson J.A. (as he then was) held:

... a receiver appointed by the court is the receiver of the court, not the receiver of the parties who sought the appointment: *Boehm v. Goodall* (1911) 1 Cr. 155 followed by the British Columbia Court of Appeal in *Johnston v. Courtney*, [1920] 2 W.W.R. 459. In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such

remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B. 67. [emphasis added]

*Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305 at para. 1 (Man. C.A.). [Tab 8]

24. Generally, a charge for a receiver's fees and expenses against the property it administers is in relation to property that is not subject to the claims of secured creditors. The Receiver is entitled to priority over the interests of secured creditors in certain circumstances, including in the following circumstance:

- (a) if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;
- (b) if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him, provided the secured creditors have notice of the proceedings; and
- (c) if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors.

*Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 at paras. 13-14, 17, 20-21 (Ont. C.A.). [Tab 9]

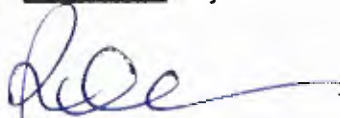
25. In the instant case, the Receiver should be granted a priority charge over the claims of the creditors, including secured creditors, on the assets of DME. The Applicant is the largest secured creditor of DME, and the Receiver will be charged with the task of preserving and realizing assets for the benefit of all interested parties. The proposed receivership will benefit all of the creditors of DME and their interests as a Receiver will have the necessary authority to ensure all assets of DME are managed in an orderly manner.

26. The Receiver should also be granted a charge because it may need to expend money for the necessary preservation or improvement of the property subject to the proceedings.
27. Further, the draft order provides at paragraph 25 that the costs incurred and represented by the charges against the assets of DME are to be satisfied from the proceeds from any realization of assets associated with the costs giving rise to the applicable charge. This will ensure that the interests of any one creditor are not unfairly burdened with costs associated with assets in which they do not have an interest.
30. In the absence of the appointment of the Receiver by the court, the administration of the estate may be disrupted. Accordingly, should this Honourable Court appoint the Receiver pursuant to the Applicant's request, it will be under the supervision and control of the Court and the Receiver should be granted a charge over all of the assets of the debtor for its fees and expenses in priority to the claims of all creditors, including the secured creditors.

#### PART IV – RELIEF SOUGHT

31. Given the nature of DME's assets a court-appointed receiver is just and convenient in the circumstances.
32. The Applicant therefore applies to this Honourable Court for the following relief:
- (a) an Order, if necessary, for the abridgment of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicant's record on application pursuant to Rules 2 and 3 of the Rules of Court;
  - (b) an Order, substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application (the "Draft Receivership Order"), appointing Alvarez & Marsal Canada Inc.. as receiver and receiver manager over all real and personal property of DME, pursuant to Rule 41 of the Prince Edward Island *Rules of Court*, section 44 of the *Judicature Act*, R.S.P.E.I., Cap. J-2.1 and section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, with power to do such acts and deeds set out in the Draft Receivership Order; and
  - (c) such further and other relief as the Applicant may advise and this Honourable Court may permit.

All of which is respectfully submitted this 25 day of November, 2018.



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