

COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER 2101-0117AC

TRIAL COURT FILE NUMBER 1401-12431

REGISTRY OFFICE CALGARY

APPLICANT ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED

STATUS ON APPEAL NOT A PARTY TO THE APPEAL
STATUS ON APPLICATION NOT A PARTY TO THE APPLICATION

RESPONDENT ARRES CAPITAL INC.

STATUS ON APPEAL RESPONDENT
STATUS ON APPLICATION APPLICANT

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STATUS ON APPEAL APPELLANTS
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DOCUMENT **MEMORANDUM OF ARGUMENT**

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I. INTRODUCTION

1. This Memorandum of Argument is submitted by the Receiver in support of its application to dismiss the Appellants' appeal (the "**Appeal**"). Capitalized terms not defined have the meaning ascribed to them in the Sixth Report of the Receiver, dated July 29, 2021 (the "**Sixth Report**").

2. The Appellants claim entitlement to a sum of \$235,000 plus accumulated interest (the "**Court Funds**") that were paid to the Receiver pursuant to the order of the Honourable Madam Justice B.E.C. Romaine issued on June 4, 2018 (the "**Romaine Order**"). The Appellants' Civil Notice of Appeal omits material facts that are fatal to the Appeal, most notably the order of the Honourable Madam Justice K.M. Eidsvik issued on August 13, 2019 (the "**Eidsvik Order**"). The Eidsvik Order, which was issued on notice to the Appellants (with their own counsel present in the courtroom), approved the Receiver's actions and conduct, approved the Receiver's fees, the Receiver's counsel fees and a cost allocation of professional fees. As a result, a significant amount of funds (including a large portion of the Court Funds) were disbursed by the Receiver and are no longer recoverable. The Appellants have not appealed the Eidsvik Order.

3. All of the remaining funds held by the Receiver are subject to priority charges created by the Romaine Order which the Appellants have not appealed. As was correctly recognized by the learned Chambers Justice in her reasons, the practical result of the Eidsvik Order and the Romaine Order is that, even if the Appellants are entirely successful

on the Appeal, they will not receive any distributions from the Receiver.¹ This case is on all fours with the recent decision of this Honourable Court in *Bellatrix*² and is moot.

II. FACTS

4. In July 2013, certain Appellants were granted a partial summary judgment amount of \$223,768.79 plus costs and interests against Arres. Arres paid the Court Funds into Court pursuant to the Order of Justice Wilkins granted on February 11, 2014, while it appealed. The Romaine Order (which authorized the transfer of the Court Funds from the Court to the Receiver) was issued on June 4, 2018 and expressly confirmed that the Court Funds are subject to each of the Receiver's Charge and the Receiver's Borrowing Charge and that such charges rank in priority to all other claims (including trust claims):

The Graybriar Funds and the Court Funds (collectively, the “**Funds**”) are subject to each of the Receiver's Charge and the Receiver's Borrowings Charge. Each of the Receiver's Charge and the Receiver's Borrowing Charge shall form a first charge on the Funds in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person but subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the Bankruptcy and Insolvency Act (Canada), and the Receiver is authorized and empowered to apply the Funds against current or future indebtedness owing on either the Receiver's Charge or the Receiver's Borrowing Charge, as applicable.³

5. The Appellants were present at the application when the Romaine Order was granted and have not appealed the Romaine Order. The Receiver then obtained the Eidsvik Order. The Receiver has always administered two classes of assets in order to segregate professional fee charges due to separate classes of creditors: (a) the

¹ The Sixth Report of the Receiver, dated July 29, 2021 [the “**Sixth Report**”] at Appendix “B”; the Order of the Honourable Madam Justice B.E.C. Romaine, June 4, 2018 [the “**Romaine Order**”]; *Access Mortgage Investment Corporation v Arres Capital Inc.*, [2021 ABQB 307](#) at para 49 [“**Access Mortgage**”].

² *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, [2021 ABCA 148](#) [*Bellatrix*].

³ The Romaine Order, *supra* at para 6.

“Graybriar Funds” (not relevant to this appeal); and (b) the “General Funds” (relevant to this appeal). The Receiver has always included the Court Funds within, and allocated professional fees and costs in respect of the Court Funds as part of, the “General Funds”.

6. As part of the Eidsvik Order, \$310,708 of priority professional fees were allocated to the “General Funds” and \$295,612 of priority professional fees to the “Graybriar Funds”.⁴ Both the Appellants and the Graybriar Fund creditors were satisfied with the cost allocation in August 2019 and did not raise any concerns. As a result of the issuance of the Eidsvik Order, various disbursements from the “General Funds” (including the Court Funds) were made or approved. Following the issuance of the Eidsvik Order, the Receiver had \$44,702 remaining as “General Funds”.⁵ The Receiver also sought specific approval of its actions and conduct in the Eidsvik Order which was granted:

The actions and conduct of the Receiver, as reported in the Fourth Receiver’s Report are hereby approved and ratified as of and up to the date of the Fourth Receiver’s Report.⁶

7. Even if the entirety of this amount is accepted as being the residual “Court Funds”, this amount remained subject to future fees owing on the Receiver’s Charge and future fees and expenses owing on the Receiver’s Borrowing Charge. The subject orders creating the Receiver’s Charge and the Receiver’s Borrowing Charge and confirming their attachment to the Court Funds have not been appealed. The Appeal was moot as of August 2019 and there is no jurisdiction or ability for this Court to change this.

⁴ The Sixth Report, *supra* at Appendix “C”, the Order of the Honourable Madam Justice K.M. Eidsvik, August 13, 2019 [the “**Eidsvik Order**”] at para 8.

⁵ The Sixth Report, *supra* at para 24.

⁶ The Eidsvik Order, *supra* at para 2.

III. ISSUES

8. Should this Honourable Court dismiss this Appeal on the basis of mootness?

IV. LAW

9. A panel of the Court of Appeal may dismiss all or part of an appeal and may make any order that the circumstances require if the appeal is moot, pursuant to Rule 14.74(b) of the *Alberta Rules of Court*.⁷

10. This Honourable Court recently dealt with the issue of mootness in *Bellatrix*, wherein this Honourable Court cited *Borowski* in stating that a matter is moot when:⁸

... [] the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties... This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

11. This Honourable Court in *Bellatrix* also stated that a court has the discretion to hear a matter that is moot if it is appropriate in the circumstances, considering the following factors: the presence of an adversarial relationship; concerns relating to judicial economy; the importance of the question; whether the issue is “capable of repetition, yet evasive of review” (*Borowski* at p 345); and the court’s proper law-making function.⁹

V. ARGUMENT

12. The Receiver respectfully submits that the Appeal should be dismissed on the basis of mootness. A large portion of the Court Funds have been disbursed and any

⁷ *Alberta Rules of Court*, [Alta Reg 124/2010](#), r 14.74(b).

⁸ *Bellatrix*, *supra* at para 10, citing *Borowski v Canada (Attorney General)*, [\[1989\] 1 SCR 342](#) at p 353 [“*Borowski*”].

⁹ *Bellatrix*, *ibid* at para 11; *Borowski*, *ibid* at p 345.

remaining amounts are subject to priority charges pursuant to the Romaine Order. As stated by the learned Chambers Justice in her reasons for decision, “the Court Funds... have been, and will be, subsumed by the Receiver’s Charge and the Receiver’s Borrowing Charge.”¹⁰ Additionally, the learned Chambers Justice stated that “nothing can be done to claw-back distributions from the Graybriar investors, or the payment of their litigation costs.”¹¹ The Appellants did not appeal either the Eidsvik Order or the Romaine Order. Therefore, this matter is no longer a live controversy and is moot.

13. The Court should decline to exercise its discretion to hear the matter on its merits due to concerns for judicial economy. This matter does not justify the application of already scarce judicial resources as the decision will not have a practical effect on the parties. The Court Funds cannot be re-allocated as they have been subsumed by fees and expenses approved by the Court at the August 2019 Hearing.

VI. RELIEF SOUGHT

14. Arres Capital Inc. respectfully requests that this Honourable Court dismiss the Appeal on the basis of mootness. In addition, Arres seeks costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of July, 2021.

McCarthy Tétrault LLP

Per: “McCarthy Tétrault LLP”
Walker W. MacLeod / Pantelis Kyriakakis
Counsel for Alvarez & Marsal Canada Inc.

¹⁰ *Access Mortgage*, *supra* at para 49.

¹¹ *Access Mortgage*, *ibid* at para 40.

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010 , r 14.74(b)
2.	<i>Bellatrix Exploration Ltd v BP Canada Energy Group ULC</i> , 2021 ABCA 148
3.	<i>Borowski v Canada (Attorney General)</i> , [1989] 1 SCR 342
4.	<i>Access Mortgage Investment Corporation v Arres Capital Inc</i> , 2021 ABQB 307