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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF  
(APPLICANT) BANK OF MONTREAL

DEFENDANT  
(RESPONDENT) **LADACOR AMS LTD.,  
NOMADS PIPELINES CONSULTING LTD.,  
2367147 ONTARIO INC., and  
DONALD KLISOWSKY**

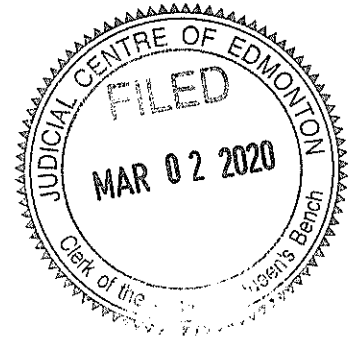
DOCUMENT **SIXTH REPORT OF THE RECEIVER**

**March 2, 2020**

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## **LISTING OF APPENDICES TO THE SIXTH REPORT OF THE RECEIVER**

APPENDIX A	Decision of Mr. Justice Robert A. Graesser
APPENDIX B	Receiver's fees and disbursements
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APPENDIX D	Affidavit Confirming Discharge of the Receiver

## INTRODUCTION

1. On May 18, 2018 (the “**Receivership Date**”), pursuant to an order (the “**Receivership Order**”) of the Court of Queen’s Bench of Alberta (the “**Court**”) granted in these proceedings (the “**Receivership Proceedings**”), Alvarez & Marsal Canada Inc. (“**A&M**”) was appointed receiver and manager (the “**Receiver**”), without security, of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the “**Property**”), of Ladacor AMS Ltd. (“**Ladacor**”), Nomads Pipelines Consulting Ltd. (“**Nomads**”) and 2367147 Ontario Inc. (“**236 Inc.**”) (collectively, the “**Debtors**” and each individually a “**Debtor**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”), section 13(2) of the *Judicature Act*, RSA 2000, c J-2 and 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (“**PPSA**”).
2. The Receivership Order empowers and authorizes, but does not obligate, the Receiver to, among other things, (i) manage, operate and carry on the business of the Debtors, (ii) take possession and control of the Property (as defined in the Receivership Order) of Debtors any and all proceeds, receipts and disbursements arising out of or from the Debtors, and (iii) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business.
3. The purpose of this sixth report of the Receiver (the “**Sixth Report**” or this “**Report**”) is to report to this Honourable Court on:
  - a) the Receiver's application for costs for responding to the Klisowsky Application (defined below);
  - b) the actions and conduct of the Receiver since the Fifth Report dated October 25, 2019 (the “**Fifth Report**”);
  - c) the final statement of receipts and disbursements (the “**Final Statements of Receipts and Disbursements**”) of Ladacor, Nomads

and 236 Inc. for the period from May 18, 2018 to February 28, 2020 (the “**Reporting Period**”);

- d) the Forecast Receipts and Payments (as defined below);
  - e) the Receiver’s and its counsel’s fees and expenditures in the Receivership Proceedings; and
  - f) the proposed discharge of the Receiver (the “**Receiver’s Discharge**”).
4. Capitalized words or terms not defined or ascribed a meaning in this Sixth Report are as defined or ascribed a meaning in the Receivership Order or the other reports of the Receiver filed in these Receivership Proceedings (the “**Prior Reports**”).
5. All references to dollars are in Canadian currency unless otherwise noted.

#### **TERMS OF REFERENCE**

6. In preparing this Sixth Report, the Receiver has relied upon information obtained prior to the Receivership Proceedings by Alvarez & Marsal Canada ULC in its role as financial advisor (as discussed in the Prior Reports), representations of certain former management and former employees of the Debtors and financial and other information contained in the Debtors’ books and records, which were produced and maintained principally by the Debtors. The Receiver has not performed an audit, review or other verification of such information.

#### **BACKGROUND**

7. Nomads’ principal business is investments and the manufacturing and production of advanced modular buildings and structures. These advanced modular buildings and structures were constructed from sea cans. Nomads is owned by Mr. Donald Klisowsky (97.28%) and Mr. Sam Klisowsky (2.72%) through the issuance of Class A common shares.

8. Ladacor is a wholly-owned subsidiary of Nomads and is also in the business of manufacturing and production of advanced modular buildings and structures. For accounting and financial reporting purposes, the Receiver understands that Nomads and Ladacor combined their financial records and did not separate their assets and liabilities but were in the process of doing so prior to the Receivership Date.
9. Ladacor was the borrower of funds from the Bank of Montreal (“**BMO**”) of approximately \$4.7 million (the “**BMO Loan**”) as at the Receivership Date and each of Nomads, 236 Inc. and Donald Klisowsky have guaranteed to BMO the indebtedness of Ladacor. The BMO Loan, along with the Receiver’s Certificate of approximately \$800,000 borrowed by the Receiver in these Receivership Proceedings, was paid in full by the Receiver as permitted by previous orders granted by this Honourable Court.
10. 236 Inc. is a corporation registered to do business in the Province of Ontario. 236 Inc.’s principal business activity was operating a hotel in Sioux Lookout, Ontario, which was part of the Days Inn franchise (the “**Hotel**”). Nomads owns 90% of the Class A common shares of 236 Inc. and the remaining 10% is owned by J. Steenhof & Associates Ltd. The sale of the Hotel in these Receivership Proceedings was approved by the Court pursuant to an order dated October 24, 2019.
11. Further background to each of the Debtors and their operations are contained in the materials filed in support of the Receivership Order and the Prior Reports. These documents and other publicly filed Court materials in these Receivership Proceedings have been posted on the Receiver’s website at: [www.alvarezandmarsal.com/ladacor](http://www.alvarezandmarsal.com/ladacor) (the “**Receiver’s Website**”).

## **THE KLISOWSKY APPLICATION**

12. On September 4, 2019, the Receiver filed an application returnable September 13, 2019 (the “**Receiver's Original Discharge Application**”) and filed its Fourth Report in support of the application. The Receiver's Original Discharge Application was for, amongst other things: approval of the Receiver's actions and conduct in the

Receivership Proceedings, approval of the Receiver assigning the Debtors into bankruptcy; and seeking the discharge of the Receiver.

13. The Receiver's Original Discharge Application was opposed by Mr. Don Klisowsky, a director of the Debtors and majority shareholder of Nomads, and Mr. Klisowsky filed his own cross-application (the "**Klisowsky Application**") challenging a number of the Receiver's recommendations and raising a number of issues, namely:
  - a) The validity of the Liberty Mutual claims under the Indemnity Agreement;
  - b) The identification and allocation of unsecured debt as between Ladacor and Nomads;
  - c) The identification of employees of Nomads and any claims (CRA and WEPP);
  - d) The validity of the Alberta Treasury Board and Finance claims against Nomads;
  - e) The proposed subrogation of funds from Nomads and Ladacor to 236 Inc.;
  - f) The claim of J. Steenhof against 236; and
  - g) The conduct of the Receiver.
14. As a result, this Honourable Court adjourned the Receiver's Original Discharge Application and ordered parties to set down the matters of hearings. This Court heard the Klisowsky Application and the Receiver's Original Discharge Application on November 27, 2019.
15. On December 19, 2019, Mr. Justice Robert A. Graesser rendered his decision dismissing the Klisowsky Application in its entirety, and granting the relief sought

by the Receiver in the Receiver's Original Discharge Application, with the exception of the discharge.

16. A copy of the Reasons for Decision of Mr. Justice Robert A. Graesser dated December 19, 2019 is attached as Appendix “A” to this Report.
17. Further to the Reasons for Decision in respect of the Klisowsky Application, the Court granted an Order, allowing parties to speak to costs associated with the Klisowsky Application and the Receiver's Original Discharge Application prior to the discharge of the Receiver from these Receivership Proceedings. As a result of the Receiver's success in respect of responding to the Klisowsky Application, the Receiver is seeking its Schedule "C" costs against Mr. Klisowsky.

## **ACTIVITIES OF THE RECEIVER**

18. Since the Fifth Report, the Receiver's activities with respect to the Debtors are as follows:
  - a) entered into an asset purchase agreement (the “**Westcan APA**”) with Westcan Recyclers Ltd. (“**Westcan**”) on February 2, 2020 to sell 23 Hythe Pioneer Homes Modular Units (the “**HPH Modular Units**”) for an amount payable to Westcan of approximately \$27,000. A further discussion on the sale of the HPH Modular Units is discussed below;
  - b) finalized the post-receivership source deduction audit with the Canada Revenue Agency (“**CRA**”). A further discussion of the source deduction audit is discussed below;
  - c) continued communication with the CRA with respect to finalizing the GST audits for 236 Inc. and Nomads;
  - d) assigned the Debtors into bankruptcy. A further discussion of the bankruptcy of the Debtors is discussed below; and

- e) monitoring the cash flow of the Debtors and ensuring any remaining suppliers were paid on a timely basis.

### ***Sale of HPH Modular Units***

- 19. Prior to executing the Westcan APA, the Receiver sought advice from auctioning companies and other interested parties as to the value of the HPH Modular Units and if there was an ability to sell these units for the benefit of the Nomads estate. The Receiver concluded that there was no opportunity to sell these units that would create a recovery to the estate (i.e. they were a liability to the estate). The Receiver determined that the best alternative to limit the cost (liability) to the estate was to transfer these units through the Westcan APA, in which the Receiver paid Westcan \$27,000 to dispose of and remove these units. The Receiver was provided an estimate from an independent third party that it would cost the estate approximately \$200,000 to dispose of the HPH Modular Units if no party could be found to take these assets.

### ***Post-Receivership Source Deductions Audit***

- 20. As set out in the Prior Reports, the CRA had conducted a review of the contractors the Receiver engaged in these Receivership Proceedings and determined that certain of these independent contractors were considered “employees”. As a result, the Receiver was required to pay certain source deductions to the CRA.
- 21. On January 17, 2020, the CRA completed its source deduction audit and assessed the amount payable by Nomads/Ladacor at approximately \$65,000. The Receiver considered appealing the decision of the CRA to the Tax Court of Canada; however, the Receiver, in consultation with its legal counsel, determined not to proceed with any appeal as a result of the uncertainty of any appeal, as well as the significant cost and the length of time of an appeal process.
- 22. Once the Receiver obtains confirmation from the CRA that it can pay this outstanding amount (as of the date of this Report, the amount had not posted in

CRA's system), the Receiver will pay these assessed amounts. The Receiver anticipates this payment should be made in the next two to four weeks.

### ***Bankruptcy of the Debtors***

23. On January 24, 2020, Nomads, and subsequently on January 27, 2020, Ladacor and 236 Inc., were assigned into bankruptcy by the Receiver, as permitted pursuant to the Receivership Order, section 49 of the BIA, and the order pronounced by this Honourable Court on December 19, 2019.
24. On February 10, 2020, the Trustee held the First Meeting of Creditors (the "FMOC") for each of the Debtors at the Bow Valley Square Conference Centre in the City of Calgary. At the FMOC, A&M's appointment as the licensed insolvency trustee (the "Trustee") of the Debtors was affirmed.
25. The Receiver has left the \$53,236.34 previously paid into Court to remove the lien of Hawk Electric (Northern) Inc. with the Trustee of Nomads to deal with in the bankruptcy.

### **UPDATE ON THE DEBTORS' PROPERTY**

#### ***Nomads***

26. As at February 28, 2020, Nomads maintained a cash balance of approximately \$20,000 and a net GST refund not yet collected from CRA of approximately \$44,000, subject to the Receiver's Charge.
27. As outlined in the Fourth Report, there were three remaining assets that could potentially be realized upon and these assets have now been transferred to the Trustee to consider and address for the benefit of the estates of 236 Inc. and Nomads.

#### ***Ladacor***

28. As at February 28, 2020, Ladacor maintained approximately \$420,000 of cash and a net GST refund it has yet to collect from CRA of approximately \$76,000, subject to the Receiver's Charge.
29. Other than the cash on hand and anticipated net GST refund, there are no other known assets of Ladacor to be realized upon.

***236 Inc.***

30. As at February 28, 2020, 236 Inc. maintained a cash balance of approximately \$470,000, subject to the Receiver's Charge.
31. 236 Inc. is entitled to receive the cash on hand from Nomads and Ladacor, and any recoveries from the remaining assets of Nomads as a result of the approved allocation of funds (the "**Subrogation Allocation**") described in the Fourth Report and approved pursuant to the order pronounced December 19, 2019. The Receiver is not aware of any other remaining assets existing of 236 Inc.

**FINAL STATEMENTS OF RECEIPTS AND DISBURSEMENTS – MAY 18, 2018  
TO FEBRUARY 28, 2020**

***Ladacor and Nomads***

32. The table below provides a summary of the final cash receipts and disbursements ("**R&D**") relating to Ladacor and Nomads during the Reporting Period. The Receiver, consistent with the Debtors' accounting of these two entities prior to the Receivership Proceedings, administered Ladacor and Nomads from one bank account. The Receiver has kept track of all receipts and disbursements relating to Nomads and Ladacor separately and the Receiver has allocated it's and the Receiver's Counsel's fees to the appropriate entity.
33. The Receiver's analysis of the final receipts and disbursements for Ladacor and Nomads is discussed below on a consolidated basis.

<b>Nomads/Ladacor</b>			
<b>Actual Receipts and Disbursements</b>			
<b>(May 18, 2018 - February 28, 2020)</b>			
	<b>Nomads</b>	<b>Ladacor</b>	<b>Total</b>
<b>Opening cash balance on May 18, 2018</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>
<b>Receiver's Borrowings</b>	-	800,000	800,000
<b>Receipts</b>			
Banff Module Settlement	-	500,000	500,000
Banff Project Funding	-	892,000	892,000
Banff Lien Fund Settlement	-	176,609	176,609
Westgate Project Collections	2,700,000	-	2,700,000
Auction Proceeds re materials and equipment	451,450	154,407	605,858
Other Collections re inventory	45,757	30,691	76,448
Interest income on cash balances	9,516	5,219	14,735
	<u>3,206,723</u>	<u>1,758,927</u>	<u>4,965,650</u>
<b>Total Receipts</b>	<b>\$ 3,206,723</b>	<b>\$ 2,558,927</b>	<b>\$ 5,765,650</b>
<b>Disbursements</b>			
Field Staff Contractors	65,599	44,081	109,680
Accounting & Contractors	71,858	79,512	151,370
Facility & Apartment Rent	140,531	97,224	237,755
Utilities & Facility Repairs	80,535	53,216	133,751
Sale of HPH Modular Units	14,286	-	14,286
Banff Project Completion Costs	-	862,268	862,268
Cash Security - Hawk Electric	53,236	-	53,236
Bank charges	33	33	66
Office & Misc.	7,760	7,760	15,520
Insurance	35,017	157	35,174
Pre-receivership wages (hourly staff)	49,785	47,062	96,847
WEPP Payment	18,056	8,949	27,005
CRA Priority (Payroll) Payment	165,861	156,792	322,652
Pre-Receiver'ship (A&M) fees and costs	17,879	17,879	35,758
Receiver Fees (A&M)	305,933	458,899	764,832
Receiver's Legal Counsel (Blakes)	231,744	204,679	436,423
Trustee and Trustee's Counsel Fees (Retainer)	50,000	25,000	75,000
Net GST/HST	44,170	75,711	119,881
<b>Total Disbursements</b>	<b>\$ 1,352,281</b>	<b>\$ 2,139,223</b>	<b>\$ 3,491,504</b>
<b>Net receipts and disbursements</b>	<b>\$ 1,854,442</b>	<b>\$ 419,704</b>	<b>\$ 2,274,146</b>
<b>Distribution to Secured Creditor (BMO)</b>	(1,834,882)	-	(1,834,882)
<b>Ending Cash before forecast R&amp;D</b>	<b>\$ 19,560</b>	<b>\$ 419,704</b>	<b>\$ 439,265</b>

34. There was no opening cash available as at the Receivership Date. The Receiver froze Ladacor's and Nomads' operating bank accounts and other bank accounts on the Receivership Date and opened a new Receiver's trust bank account.

35. The Receiver has collected approximately \$5.76 million, which primarily relates to:

- a) Receiver's borrowings of \$800,000 during the Reporting Period. The Receiver was authorized to borrow up to \$1.2 million pursuant to the Receivership Order;
- b) Banff Project receipts of approximately \$1.6 million relating to module receipts collections, a settlement of \$676,000 and approximately \$892,000 relating to funding received from the Banff Project Owners to complete the Banff Project, respectively, pursuant to the Amended Accommodation Agreement (as discussed in the First Report);
- c) Westgate Project collections of \$2.7 million pursuant to the Settlement and Release Agreement;
- d) proceeds from the sale of Nomads and Ladacor non-core assets and inventory pursuant to the Auction Agreement (as discussed in the Second Report) totaling approximately \$606,000;
- e) sale of miscellaneous inventory and other receipts of approximately \$76,000; and
- f) interest collected on cash balances of approximately \$15,000.

36. Over the course of the Reporting Period, the Receiver had disbursements of approximately \$3.5 million, which primarily relate to:

- a) operating costs of approximately \$632,000 relating to: independent contractor fees and costs of approximately \$261,000, occupancy rent paid relating to the Facility (as discussed in the First Report) and other locations for housing staff at project sites of approximately \$238,000, and utilities and facility maintenance costs of approximately \$133,000;

- b) payment relating to the sale (removal) of the HPH Modular Units of approximately \$14,000 to Westcan;
- c) Banff Project operating costs of approximately \$862,000 for: independent contractor fees, costs and subtrade, materials and permit costs of approximately \$238,000 and \$624,000, respectively;
- d) general & administrative costs of approximately \$51,000 relating to office supplies, insurance, and IT costs;
- e) pre-receivership wages of approximately \$97,000 to the former employees of Ladacor and Nomads;
- f) CRA priority payments (payroll source deductions) of approximately \$322,000;
- g) WEPP priority payments of approximately \$27,000;
- h) pre-receivership advisor fees and costs paid to Alvarez & Marsal Canada ULC of approximately \$36,000 for consulting services provided to BMO as permitted by BMO's credit agreement and as agreed to by Nomads and Ladacor;
- i) post-receivership GST payments of approximately \$120,000;
- j) payment into Court by the Receiver of \$53,236 as security for the Hawk Electric lien claim and costs, which is to be held by the Clerk of the Court pending further Order of the Court;
- k) payment of a retainer for the Trustee and the Trustee's Counsel fees of \$75,000;
- l) professional fees and costs of the Receiver of approximately \$765,000, up to and including February 28, 2020; and

m) professional fees and costs of the Receiver's Counsel of approximately \$436,000 up to and including January 31, 2020.

37. In respect of the professional fees and costs of the Receiver and the Receiver's Counsel, the Receiver and the Receiver's Counsel allocated their fees and costs between Ladacor and Nomads in a manner that reflects the time incurred while administering the Receivership activities of each Debtor.
38. Total consolidated Nomads and Ladacor ending cash as at February 28, 2020 was approximately \$440,000.

**236 Inc.**

39. The table below provides a summary of the actual receipts and disbursements of 236 Inc. for the Reporting Period:

<b>236 Inc. Actual Receipts and Disbursements (May 18, 2018 - February 28, 2020)</b>	
	<b>236 Inc.</b>
<b>Opening cash balance on May 18, 2018</b>	<b>\$ 119,499</b>
<b>Receiver's Borrowings</b>	<b>-</b>
<b>Receipts</b>	
Sale of Hotel	5,000,000
Hotel Receipts	879,224
Other Collections re inventory	5,920
Interest income on cash balances	16,392
	<u>5,901,536</u>
<b>Total Receipts</b>	<b>\$ 6,021,035</b>
<b>Disbursements</b>	
Hotel Payroll	296,571
Hotel Operating Costs	207,406
Utilities & Facility Repairs	17,002
Marketing fee paid to JLL	104,498
Bank charges	464
Hotel General and Administrative Charges	290,920
WEPP Payment	2,742
Receiver Fees (A&M)	338,424
Receiver's Legal Counsel (Blakes)	192,856
Trustee and Trustee's Counsel Fees (Retainer)	85,000
Net GST/HST	15,026
<b>Total Disbursements</b>	<b>\$ 1,550,910</b>
<b>Net receipts and disbursements</b>	<b>\$ 4,470,125</b>
<b>Distribution to Secured Creditor (BMO)</b>	<b>(4,000,000)</b>
<b>Ending Cash before forecast R&amp;D</b>	<b>\$ 470,125</b>

40. There was approximately \$120,000 of opening cash available as at the Receivership Date. The Receiver froze 236 Inc.'s operating bank accounts (for deposit only) on the Receivership Date and opened a new Receiver's trust bank account.
41. The Receiver has not been required to borrow any funds in relation to the operation of the Hotel, as the cashflow from operations has been able to cover both the operational costs and professional fees and costs of the Receiver to date.
42. Hotel receipts of approximately \$879,000 were collected during the Reporting Period.
43. Disbursements of approximately \$1.6 million have been paid during the Reporting Period, which primarily relates to:
  - a) operating costs of approximately \$207,000;
  - b) general & administrative costs of approximately \$291,000 relating mainly to accounting services fees and costs, corporate insurance payments, appraisal fees and costs, municipal tax payments and royalties to the Days Inn franchisor;
  - c) building maintenance and other capital costs of approximately \$17,000;
  - d) payroll of approximately \$297,000 for 29 independent contractors (former staff);
  - n) WEPP priority payments of approximately \$3,000;
  - e) net GST/HST paid of approximately \$15,000;
  - f) marketing fee of approximately \$104,000 paid to JLL upon closing of the sale of the Hotel;
  - o) payment of a retainer for the Trustee and the Trustee's Counsel fees of \$85,000;

- g) professional fees and costs of the Receiver totalling approximately \$338,000 for the period up to and including February 28, 2019; and
  - h) professional fees and costs of the Receiver's Counsel totalling approximately \$192,000 up to and including January 31, 2020.
44. The Receiver sold the Hotel for net proceeds of \$5.0 million and then paid \$4.0 million in partial payment of the BMO Loan.
45. Total ending cash as at February 28, 2020 was approximately \$470,000.

## FORECAST RECEIPTS AND DISBURSEMENTS

### *Forecast Nomads and Ladacor R&D*

46. The tables below provide a summary of the remaining estimated forecast receipts and disbursements to be collected and paid by the Receiver with respect to Nomads and Ladacor (the “**Forecast Nomads/Ladacor R&D**”):

Nomads/Ladacor Forecast Receipts and Disbursements February 29, 2020 - Discharge)			
	Nomads	Ladacor	Total
<b>Reallocated Cash before forecast R&amp;D</b>	<b>\$ 19,560</b>	<b>\$ 419,704</b>	<b>\$ 439,265</b>
<b>Forecast Estimated Receipts</b>			
GST/HST Refund	44,170	75,711	119,881
<b>Total Estimated Receipts</b>	<b>\$ 44,170</b>	<b>\$ 75,711</b>	<b>\$ 119,881</b>
<b>Forecast Estimated Disbursements</b>			
File storage and IT costs	1,000	1,000	2,000
Contingency	25,000	5,000	30,000
Receiver's Fees (A&M)	6,000	6,000	12,000
Receiver's Counsel Fees (Blakes)	8,000	8,000	16,000
Sale of HPH Modular Units	11,985	-	11,985
CRA source deductions payable	-	65,000	65,000
<b>Total Estimated Disbursements</b>	<b>\$ 51,985</b>	<b>\$ 85,000</b>	<b>\$ 136,985</b>
<b>Ending Estimated cash prior to subrogation</b>	<b>\$ 11,745</b>	<b>\$ 410,415</b>	<b>\$ 422,160</b>
Subrogation Allocation to 236 Inc.	(11,745)	(410,415)	(422,160)
<b>Ending Estimated Cash available to Trustee</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>

47. The Ladacor and Nomads estates are owed approximately \$120,000 from CRA in ITC credits. The Receiver was recently advised from CRA that CRA applied approximately \$22,000 of post-Receivership ITC credits against pre-Receivership GST owing by Nomads. The pre-Receivership GST owing by Nomads is considered an unsecured claim and the Receiver is contesting this application of post-receivership amounts outstanding against pre-receivership GST balances and has advised CRA accordingly. The Receiver will continue to work with CRA to resolve this wrongful application of post-receivership credits to pre-GST amounts. Any recoveries/refunds from these ITC credits will be delivered, net of the fees and costs of the Receiver, to the Trustee.
48. Total remaining disbursements of approximately \$137,000 to be made by the Receiver in the Receivership Proceedings primarily consist of:
- a) final payment to Westcan for the sale (removal) of the HPH Modular Units of approximately \$12,000 by the end of March 2020;
  - b) outstanding and anticipated remaining professional fees for the Receiver and the Receiver's Counsel to conclude the Receivership Proceedings of approximately \$28,000;
  - c) storage and IT costs of approximately \$2,000;
  - d) payment of approximately \$65,000 relating to CRA for its payroll audit (as discussed above) on the Receiver's independent contractors;
  - e) a contingency holdback for any unknown and unanticipated costs of approximately \$30,000, which may include additional costs of the Receiver to collect upon funds applied by the CRA to their unsecured GST claim. Should the Receiver not use any of these contingency 'holdbacks', the Receiver will deliver all remaining amounts to the Trustee; and

- f) allocation of any remaining funds to 236 Inc., which is currently estimated at \$422,000, which are subject to actual final receipts and disbursements to be made in the estate (the “**Revised Subrogation Allocation**”).

49. Due to the Revised Subrogation Allocation to 236 Inc., there will not be any funds available or delivered to the Trustee of the Bankrupt estates of Nomads and Ladacor.

**236 Inc.**

50. The table below provides a summary of the remaining estimated forecast receipts and disbursements to be collected and paid by the Receiver with respect to 236 Inc (the “**Forecast 236 Inc. R&D**” and together with the Forecast Nomads/Ladacor R&D, the “**Forecast R&D**”):

<b>236 Inc. Forecast Receipts and Disbursements February 29, 2020 - Discharge)</b>	
	<b>236 Inc.</b>
<b>Reallocated Cash before forecast R&amp;D</b>	<b>\$ 470,125</b>
<b>Forecast Estimated Receipts</b>	
Subrogation of Funds from Nomads/Ladacor	422,160
<b>Total Estimated Receipts</b>	<b>\$ 422,160</b>
<b>Forecast Estimated Disbursements</b>	
File storage and IT costs	1,000
Contingency	5,000
Receiver's Fees (A&M)	5,000
Receiver's Counsel Fees (Blakes)	7,000
GST/HST Payable	25,000
<b>Total Estimated Disbursements</b>	<b>\$ 43,000</b>
<b>Ending Estimated cash prior to subrogation</b>	<b>\$ 849,285</b>
Subrogation Allocation to 236 Inc.	-
<b>Ending Estimated Cash available to Trustee</b>	<b>\$ 849,285</b>

51. The Receiver estimates collections of approximately \$422,000 from Nomads and Ladacor as a result of the Revised Subrogation Allocation, which amount is subject to the actual receipts and disbursements collected and paid, respectively, by the Receiver pursuant to the Forecast Nomads/Ladacor R&D
52. The Receiver estimates that the remaining forecast disbursements to be made are approximately \$43,000 as follows:
- a) File storage and IT costs of approximately \$1,000;
  - b) professional fees of the Receiver and its counsel of approximately \$12,000 to complete the Receivership Proceedings;
  - c) GST/HST payable of approximately \$25,000; and
  - d) a contingency for any unknown and unanticipated costs of \$5,000. Should the Receiver not require any or all of the contingency amount, this will be delivered to the Trustee of 236 Inc.
53. The Receiver estimates that there will be approximately \$849,000 available to transfer to the Trustee of 236 Inc.

#### **RECEIVER'S AND RECEIVER'S COUNSEL'S FEES AND DISBURSEMENTS**

54. The Receiver seeks approval from this Court of its fees and disbursements from October 1, 2019 to February 28, 2020, and those of the Receiver's Counsel from the October 1, 2019 to January 31, 2020 (the **"Final Taxation Period Billings"**), pursuant to the Receivership Order. On September 13, 2019, and subsequently on December 19, 2020, orders were granted by the Court approving the Receiver's and the Receiver's Counsel's fees and disbursements from the Receivership Date to September 30, 2019.
55. A&M's Final Taxation Period Billings in its capacity as Receiver total \$94,386 (excluding GST). A summary of the Receiver's fees and disbursements are attached as Appendix **"B"** to this Report.

56. The Receiver's Counsel's Final Taxation Period Billings total \$168,343 (excluding GST). A summary of the Receiver's Counsel's fees and disbursements are attached as Appendix "C" to this Report.
57. The Receiver's and the Receiver's Counsel's fee accounts outline the date of the work completed, the description of the work completed, the length of time taken to complete the work and the name of the individual who completed the work. Copies of the Receiver's Counsel's invoices will be brought to the Receiver's application before this Honourable Court set for March 11, 2020 and made available to the Court, if requested.
58. An Affidavit of Fees was sworn on March 2, 2020, by Mr. Orest Konowalchuk, a Senior Vice President of Alvarez & Marsal Canada Inc., LIT, with respect to the Receiver's Final Taxation Billing Period and it has been filed with this Court.
59. The Receiver and the Receiver's Counsel's estimated fees and costs to complete this engagement are approximately \$40,000 ("**Forecast Fees and Costs**"), which include fees and costs incurred but not paid.
60. The Receiver is respectfully of the view that its fees and the Receiver's Counsel's fees are fair and reasonable in the circumstances and respectfully requests that this Court approve the Final Taxation Period Billings of the Receiver and the Receiver's Counsel and the Forecast Fees and Costs.

#### **APPROVING CONDUCT AND DISCHARGE OF THE RECEIVER**

61. The Receiver respectfully requests that this Honourable Court grant an Order (the "**Discharge Order**") which, among other things, and subject to the filing of a certificate (the "**Discharge Certificate**") confirms the Receiver has satisfied its obligations under the Receivership Order, absolutely, forever and unconditionally discharges the Receiver from any claims against the Receiver arising from, relating to, or in connection with, the performance of the Receiver's duties and obligations as Receiver, save and except for claims based on gross negligence.

62. The Receiver is respectfully of the view that it has conducted itself appropriately in these Receivership Proceedings and respectfully requests that this Court approve the actions and conduct of the Receiver since the Fifth Report and throughout the Receivership Proceedings.
63. The Receiver's administration of the estate is substantially complete, subject to the forecast receipts to be collected and payments to be made respecting the Debtors as described herein. In addition, the Receiver will have some miscellaneous administrative items to attend to post discharge, including the filing of GST returns with the CRA, receiving the forecast receipts and paying the forecast disbursements, final reconciliation of accounts and addressing various other CRA matters. The Receiver is of the view these items are administrative in nature and should not prevent this Court from granting an unconditional discharge.
64. The Receiver's next steps include, but are not limited to:
- a) Collecting the remaining receipts and disbursing funds as described in the Forecast Nomads/Ladacor R&D and Forecast 236 Inc. R&D noted herein;
  - b) filing, packaging and storing all relevant books and records of Nomads, Ladacor and 236 Inc. in accordance with the Receiver's responsibilities under the BIA;
  - c) arranging for the collection of the GST ITC's owing by CRA to the Debtors; and
  - d) completing administrative tasks in accordance with Receivership discharge requirements under the BIA.
65. Upon completion, the Receiver will file an affidavit with the Court confirming that all outstanding matters reported in this Report have been completed. Upon filing the discharge affidavit, the Receiver will be automatically discharged without

further order of the Court. A copy of the draft Discharge Affidavit is attached as Appendix “D” to this Report.

## **CONCLUSION AND RECOMMENDATIONS**

66. The Receiver is of the view that it has made commercially reasonable efforts to obtain the highest and most efficient realizations of the assets of 236 Inc., Ladacor and Nomads. The Receiver is satisfied that the interests of the financial stakeholders of 236 Inc., Ladacor and Nomads have been considered during the course of the realization processes and these Receivership Proceedings.
67. Accordingly, the Receiver respectfully recommends this Honourable Court:
- a) approve the action, conduct and activities of the Receiver and the Receiver’s Counsel as described in this Report and throughout these Receivership Proceedings;
  - b) approve the Receiver’s Final Statement of Receipts and Disbursements from the Receivership Date, May 18, 2018, to February 28, 2020;
  - c) approve the Receiver’s Forecast Nomads/Ladacor R&D and the Forecast 236 Inc. R&D;
  - d) approve the fees and costs of the Receiver and the Receiver’s Counsel as set out in the Final Taxation Period Billings and the Forecast Fees and Costs; and
  - e) approve the discharge of the Receiver.

All of which is respectfully submitted this 2<sup>nd</sup> day of March, 2020.

**ALVAREZ & MARSAL CANADA INC.,  
in its capacity as Receiver of the Debtors and not in  
its personal or corporate capacity**

A handwritten signature in blue ink, appearing to be 'Orest Konowalchuk', with a stylized, flowing script.

Orest Konowalchuk, CPA, CA, CIRP, LIT  
Senior Vice President

A handwritten signature in blue ink, appearing to be 'David Williams', with a stylized, flowing script.

David Williams, CPA  
Manager

## **APPENDIX “A”**

# Court of Queen's Bench of Alberta

Citation: Bank of Montreal v Ladacor AMS Ltd, 2019 ABQB 985



**Date:**

**Docket:** 1803 09581

**Registry:** Edmonton

Between:

**Bank of Montreal**

Plaintiff

- and -

**Ladacor AMS Ltd, Nomads Pipeline Consulting Ltd, 2367147 Ontario Inc, and Donald  
Klisowsky**

Defendants

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**Reasons for Decision  
of the  
Honourable Mr. Justice Robert A. Graesser**

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## Introduction

[1] Alvarez & Marsal Canada Inc. LIT (the “Receiver”) is the Receiver and Manager of Ladacor AMS Ltd. (“Ladacor”), Nomads Pipeline Consulting Ltd. (“Nomads”) and 2367147 Ontario Inc. (“236”). It was appointed receiver and manager of these entities by Court order dated May 18, 2018 (the “Receivership Order”). It now applies for a number of orders:

1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver’s Fourth Report to the Court dated

September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings;

2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report;
3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application;
4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report;
5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order;
6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors;
7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver;
8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise; and
9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.

[2] The application was initially heard by Topolniski J on September 13. She approved the Receiver's accounts as set out in the Fourth Report and the Affidavit of Fees, as well as the accounts of the Receiver's counsel, Blake, Cassels & Graydon LLP.

[3] Mr. Klisowsky was directed to provide the Receiver's counsel with a list of issues or questions pertaining to the Receiver's findings as reported in the Fourth Report and the Supplemental Report dated September 12, 2019.

[4] An application by Hythe & District Pioneer Homes (Advisory Committee) ("Hythe") seeking to lift the stay of proceedings against Ladacor was adjourned to a later date. Hythe was attempting to file an amended statement of defence and counterclaim. It alleges that the work by Nomads was so deficient and defective that the entire project has to be demolished and Hythe will have to start again with a new contractor.

[5] Mr. Klisowsky's application in relation to Nomad's potential liability on performance bonds with Liberty Mutual Insurance Company, and Mr. Klisowsky's concerns about Nomad's potential liability to the Government of Canada under the Employment and Social Development Canada Wage Earner Protection Program ("WEPP"), were also adjourned to a later date. The Receiver's discharge application was adjourned as well.

[6] The adjourned applications were set down before me on November 27. The Hythe matter had been resolved directly between its counsel and counsel for the Receiver. That still left a number of issues that required resolution. Following submissions and argument, I reserved on all of the issues left to me to decide.

[7] I received written submissions from counsel for the Receiver (3 in total), from counsel for Mr. Klisowsky, and from counsel for J. Steenhof & Associates Ltd and 1459428 Ontario Inc. I heard submissions from those counsel as well as from counsel for Liberty Mutual Insurance Company ("Liberty Mutual").

[8] There was a significant volume of material put before me. The Receiver had prepared four reports over the course of the receivership, and added a supplement to the Fourth Report and provided a Fifth Report filed October 25, 2019 for the purposes of this application. The Supplement and Fifth Report mainly responded to the issues raised by Mr. Klisowsky.

[9] There was an affidavit of fees from Orest Konowalchuk, a senior vice president of the Receiver. There were also were affidavits from John Hermann, from the Bank of Montreal ("BMO"), sworn May 18, 2018, from Mr. Klisowsky sworn September 7, 2019, September 11, 2019, and October 5, 2019, from Larry Slywka, a former employee of Ladacor, sworn October 13, 2019, from Bonnie Erin Richard, another former employee of Ladacor, filed October 25, 2019, and a "secretarial affidavit" from Lindsay Farr, sworn November 20, 2019. There was also an affidavit from Jacob Steenhof, from J. Steenhof & Associates Ltd ("J. Steenhof") and 1459428 Ontario Inc ("145"), sworn October 25, 2019.

[10] Each of Mr. Klisowsky, Mr. Slywka, Ms. Richard and Mr. Steenhof were cross-examined on their affidavits and I have the transcripts from their cross-examinations.

## **Background**

[11] Most of the background facts are not in dispute. Mr. Klisowsky is the majority shareholder in Nomads (97.28%). His son owns the remaining 2.72% of the shares. Nomads was a Calgary based company whose principal business was the manufacture and production of advanced modular buildings and structures. These structures were generally constructed of sea cans. Part of Nomads' business was investing in other assets. One of those investments is its 90% interest in 236. 236 is an Ontario corporation whose business was the ownership and operation of a Days Inn hotel in Sioux Lookout, Ontario. The remaining 10% of the shares in 236 are owned by J. Steenhof, an Ontario corporation.

[12] Ladacor is a wholly owned subsidiary of Nomads. Ladacor came into existence in 2017 and carried on the same advanced modular home business as did Nomads. It appears that the incorporation of Ladacor coincided with a banking change by Nomads.

[13] In the latter part of 2017, Nomads began a banking relationship with BMO. Mr. Klisowsky injected some \$4,000,000 of capital into Nomads/Ladacor. BMO loaned approximately \$4,000,000 to Nomads/Ladacor. Ladacor was the principal debtor. BMO took typical security from Ladacor. Guarantees of the Ladacor debt to BMO were provided by Nomads, 236 and Mr. Klisowsky.

[14] After Ladacor was incorporated, all new work was directed to it, while Nomads completed the work it already had under contract. The work contracted by Nomads was,

however, performed for it by Ladacor. Payments, whether from Nomads customers or Ladacor customers, were deposited into Ladacor's bank account with BMO

[15] The accounting records and the evidence of Mr. Klisowsky, Mr. Slywka and Ms. Richard show that Nomads and Ladacor essentially operated as one entity. All bills were paid from the Ladacor bank account with BMO, and all of the enterprise employees (but for Mr. Klisowsky, his wife, and his son, were paid by Ladacor.

[16] Ladacor entered into a bonding relationship with Liberty Mutual. Ladacor's indemnification obligations to Liberty Mutual were guaranteed by Nomads, 236, and by Mr. Klisowsky.

[17] The months following the incorporation of Ladacor were not financially successful. Nomads had a major contract with Hythe that was ongoing and far from completion. Nomads had a large receivable (\$2,700,000) owed to it by 1507811 Alberta Ltd on a project in Edmonton known as "Westgate". That project had been completed, but there were ongoing discussions about the outstanding payment.

[18] Ladacor was performing the work on ongoing projects that were in various stages of completion, including a project in Banff. The Receiver completed these obligations over the course of the receivership.

[19] In May 2018, shortly before the Receivership Order, Ladacor was awarded a sub-contract for work on the new court house in Chateh, Alberta. From the information before me, it is likely that Liberty Mutual had previously provided a bid bond, and subsequently provided a surety bond in favour of the general contractor, Kor Alta Construction Ltd ("Kor Alta"). Physical work on the project had not begun at the time of the Receivership Order, and the Receiver disclaimed the contract. That led to a bond claim by Kor Alta against Liberty Mutual. The claim in favour of Kor Alta is tentatively valued at over \$1,000,000. Liberty Mutual seeks indemnification for that amount from each of Ladacor, Nomads, 236, and Mr. Klisowsky.

[20] Following the Receivership Order, Hawke Electric, a subcontractor to Nomads, made a bond claim on a labour and material payment bond on the Westgate project against Liberty Mutual. Kor-Alta, the general contractor on the Chateh courthouse project, claimed in excess of \$1,000,000 as a result of the termination of the subcontract by the Receiver. Liberty Mutual seeks indemnification for those amounts from each of Ladacor, Nomads, 236 and Mr. Klisowsky.

[21] Liberty Mutual values these claims at a total of approximately \$1,100,000.

[22] The Receiver has reported throughout the receivership on its activities and realizations. A sale of the physical assets of Nomads and Ladacor was conducted in the late fall of 2018. The auction sale netted \$606,000. Further physical assets (miscellaneous inventory) netted a further \$76,000.

[23] The Receiver was successful in collecting most if not all of the \$2,700,000 receivable owed to Nomads on the Westgate project. The Receiver collected \$1,568,609 owed to Ladacor on the Banff project.

[24] Since 236 was also put into receivership, the Receiver took steps to sell 236's main asset, the Days Inn Hotel in Sioux Lookout. Of the roughly \$5,000,000 sale proceeds, \$4,000,000 were paid by the Receiver to BMO.

[25] Ultimately, the time of the Fourth Report, the Receiver had paid off the secured debt to BMO, the Receiver's borrowings from BMO to enable it to carry on the Receivership, the WEPP claims, CRA and Service Canada trust/priority claims, along with its and its lawyer's fees and disbursements.

[26] The supplemental report and Fifth Report update the figures. As at the time of that report, October 25, the Receiver was holding \$10,398 for Nomads, \$722,661 for Ladacor, and \$637,241 for 236. The Receiver proposes to allocate all of the available proceeds currently in Ladacor's and Nomads' accounts to 236.

[27] All three corporations would then be placed in bankruptcy.

[28] Because Nomads and Ladacor had intermingled their physical assets, it was not possible for the Receiver to determine with any degree of certainty what assets belonged to Nomads and what assets belonged to Ladacor. For BMO, the secured creditor, it did not matter. It had reportedly good security against all of the assets regardless of which corporation owned them. For the purposes of the Fourth Report, which was from the date of the Receivership Order to August 31, 2019, the Receiver apportioned the auction proceeds \$451,450 to Nomads and \$154,407 to Ladacor. Ongoing expenses were apportioned between the two corporations based on the contracting party for the contract being worked on. Employee withholding claims by CRA and WEPP claims were broken down between the two corporations as well.

[29] Following receipt of Mr. Klisowsky's cross application and the concerns he expressed over the apportionments in the Fourth Report, the Receiver retained Erin Richard to explain the financial situation and accounting of Nomads and Ladacor while she was comptroller for the final year of their operations. She had worked with the Receiver during the course of the receivership. Ms. Richard outlined in her affidavit how employees and assets had been apportioned between the two entities. She attempted to determine from the available records what assets had been owned before Ladacor was incorporated. Those would have been Nomads. Because Ladacor had become the main operating entity after the fall of 2017, anything acquired since then was attributed to Ladacor.

[30] The same analysis was performed with respect to employees. For the purposes of payroll, withholdings and other employment related issues, the Receiver treated employees who had been employed with Nomads and who stayed on after Ladacor began operating as Nomads employees. Employees hired after Ladacor began operating were treated as Ladacor employees, even though they may have been working on Nomads projects.

[31] For accounts payable and monies owed to trade creditors, the Receiver looked at which entity an invoice was addressed to, or which project it related to. If it was addressed to Nomads, or was in relation to a Nomads project, it was attributed to Nomads. And vice versa for Ladacor.

[32] There does not appear to be any dispute that the Nomads/Ladacor records did not provide the Receiver with much guidance. There was no written agreement between Nomads and Ladacor when Ladacor assumed all of the operations of the two corporations. There was no asset transfer agreement. There was no agreement transferring Nomads' rights under any of its ongoing contracts to Ladacor. There was no agreement relating to employees.

[33] According to Mr. Slywka, when Ladacor assumed the operations, employees at the time were simply told they were now working for Ladacor. It is unclear whether any of the parties

Nomads had contracted with were ever told that Ladacor had taken over Nomads' operations, or that Nomads had assigned any rights to Ladacor.

[34] Mr. Klisowsky takes issue with the amount of the asset sale proceeds attributed to Ladacor versus Nomads. He challenges Ms. Richard's assessment, noting that she was a relatively new employee at Ladacor. He also takes issue with the allocation of employees between the companies, and says that only his wife and son were Nomads employees, as all other workers worked for Ladacor. That impacts wages paid to the employees (their WEPP claims) as well as claims by the government for employee deductions and other trust claims made by the Government of Canada.

[35] Mr. Klisowsky's view is that as at the beginning of 2018, Nomads was essentially a holding company. All of its projects, employees and assets had been transferred to Ladacor. Ladacor performed all of the work on all of the projects contracted to either Nomads or Ladacor. Ladacor paid all of the employee wages, regardless of what project they were working on. Ladacor paid all of the bills whether they were invoiced to Ladacor or to Nomads, as Ladacor had taken over all of the work on all of the ongoing projects.

[36] Whatever the arrangement between Nomads and Ladacor was, it was not reduced to writing. There is some suggestion that the merging of operations and the creation of Ladacor was linked to collection activities undertaken against Nomads by Alberta Treasury Board and Finance in relation to a reassessment of tax credits Nomads had been given under a government tax incentive program. A review by the Tax and Revenue Administration revisited the credits given to Nomads for 2012, 2013 and 2014 and assessed Nomads some \$769,000. The Provincial government had apparently garnisheed Nomads' former bank, leading to Nomads setting up a new banking relationship with BMO.

[37] The best that can be said of the operations of Nomads and Ladacor once Ladacor came into existence is that they operated under Mr. Klisowsky's control as "owner" of both entities. Daryl Nimchuk was the chief operating officer for some time. Ms. Richard was comptroller, and Larry Slywka was Ladacor's production manager. The operations of both Nomads and Ladacor were merged so that all receipts went into the Ladacor bank account and all bills were paid out of that account. There was no internal attempt to separate assets, projects, employee functions, bills or receivables. The reporting to BMO and any financial statements produced were "consolidated", although the two corporations were never consolidated under the *Business Corporations Act*. The joint operation is frequently described internally and on contracts as "Nomads Pipelines Consulting Ltd o/a Ladacor". The internal treatment of the two entities' operations does not reflect either entity's legal rights or obligations.

[38] According to the brief filed on behalf of Mr. Klisowsky, and his affidavit evidence, he believes that despite all of the various claims being advanced against it, Nomads remains a solvent entity and that Nomads should not be put into bankruptcy. He points to the large receivable of \$2,800,000 secured by a builder's lien against the Hythe project. He claims that there is a good defence to Liberty Mutual's claim against Nomads on the indemnity and guarantee agreement on the bond issued in favour of Kor Alta.

[39] Mr. Klisowsky points to the wording of the indemnity agreement and argues that the agreement gave Nomads (or the Receiver when it took over control of Nomads following the Receivership Order) their right to cancel the bond in favour of Kor Alta. The Receiver failed to

do so. The Receiver's failure should not be visited on Nomads, such that Nomads should not ultimately have to pay anything to the bonding company.

[40] He refers to paragraph 45 of the Indemnity agreement that provides:

45. *Termination of the present agreement and its effect upon outstanding Bonds* – The present agreement shall only be terminated by any Indemnitor, upon prior written notice to the Surety by registered mail and at its head office, at least thirty days prior to its effective date; however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date, the present agreement will remain in full force and effect as regards the other Indemnitors without any obligation on the part of the Surety to advise such other Indemnitors of such termination.

[41] This argument affects Ladacor as well, as it is the primary obligee on the bond and it is required to indemnify Liberty Mutual. The Indemnity Agreement in favour of Liberty Mutual executed by Ladacor, Nomads and 236 by Mr. Klisowsky signing the same. Mr. Klisowsky signed a personal indemnification in favour of Liberty Mutual and there is a *Guarantees Acknowledgement Act* certificate dated January 4, 2018.

### Issues

[42] The Receiver raises a number of issues and seeks the Court's direction on the following:

1. Should the Receiver's apportionment of funds be approved, including its treatment of the contribution and subrogation obligations and rights of the guarantors?
2. Is there a valid defence on Liberty Mutual's indemnification claims on the bond claims against it?
3. Has the Receiver erred in apportioning employees, assets and debts?
4. Should all or any of the entities be put into bankruptcy? and
5. Should the Receiver's actions be approved?

[43] Mr. Klisowsky's application challenges a number of the Receiver's recommendations and conclusions and raises a number of issues:

1. The validity of the Liberty Mutual claims under the Indemnity Agreement;
2. The identification and allocation of unsecured debt as between Ladacor and Nomads;
3. The identification and allocation of the auction proceeds between Ladacor and Nomads;
4. The identification of employees of Nomads and any claims (CRA and WEPP);

5. The validity of the Alberta Treasury Board and Finance claim against Nomads;
6. The proposed subrogation from Nomads and Ladacor to 236;
7. The claim of J. Steenhof against 236; and
8. The conduct of the Receiver.

[44] I will deal with subrogation first as my decision on it will impact a number of the other issues. I will then deal with Mr. Klisowsky's concerns and claims, before dealing with the relief sought by the Receiver.

### **Subrogation**

[45] BMO has been paid in full. It received \$5,834,882. That included repayment of amounts loaned by BMO to fund the receivership. Most if not all of the funds that were paid to BMO resulted from the sale of 236's hotel in Sioux Lookout and the collection of the \$2,600,000 receivable on the Westgate contract owed to Nomads. The principal debtor to BMO was Ladacor. It was the entity that borrowed and received the funds from BMO. The funds that resulted from collections on other Nomads and Ladacor projects and the sale of Nomads' and Ladacor's physical assets were mainly used to pay the ongoing costs of the receivership, including completion of some of the project work, and the Receiver's fees and disbursements.

[46] BMO was a secured creditor, subject only to the superior WEPP claims and CRA source deduction claims, and the costs of the receivership. The Receiver argues on this application that guarantors (such as Nomads and 236) are entitled to be subrogated to the claims they have paid out on behalf of the principal debtor, Ladacor.

[47] In this case, Nomads and 236 have paid off BMO's claims against Ladacor. Nomads and 236 are entitled to be subrogated to BMO's claim, and to stand in BMO's shoes with respect to any security BMO held against Ladacor. That means, according to the Receiver, that Nomads and 236 are now the primary secured creditors on any of Ladacor's remaining assets.

[48] Additionally, as between guarantors who have paid out on their guarantees, Nomads and 236 are entitled to be treated proportionately, so the debt paid off should be apportioned between them. Where guarantors are equally liable to the obligee, the guarantors are considered to be responsible for equal shares of the debt.

[49] Here, that would mean that each of Nomads and 236 should have paid off half of the debt owed to BMO. Since 236 paid more than half of the BMO debt, there should be an adjustment as between Nomads and 236, in 236's favor.

[50] The way the Receiver has accounted for this is that the excess of collections over required payments has left a surplus, some of which now stands to the credit of Ladacor. Because 236 paid more than its half of the obligation, 236 is entitled to recover that excess from Ladacor.

[51] Of the \$5,834,882 paid to satisfy BMO's claims, \$4,000,000 came from 236. The remainder came from Nomads. Because of contribution principles between guarantors, each of the guarantors should have paid \$2,917,441. 236 overcontributed by \$1,082,559. That amount is owed to it by Nomads.

[52] The Receiver proposes to pay the funds remaining in the Nomads account and the Ladacor account (after holdbacks for further administration costs) in the approximate amount of \$465,000 (Receiver's Fifth Report). 236 is expected to have approximately \$517,000 in its account, so it will recover \$982,001. It will be short by approximately \$100,559. Because of its standing into BMO's security, it will be Nomads' only secured creditor to that extent.

[53] This analysis and position is well supported by the Receiver's first brief for this application. The Receiver cites:

*Gerrow v Dorais*, 2010 ABQB 560;

*Mercantile Law Amendment Act 1856*, 19 & 20 Vict, c 97;

*Karen Matticks v B & M Construction Inc (Trustee of)*, 1992 CarswellOnt 193 (ONCJGD);

Andrews & Millett, *Law of Guarantees*, 7<sup>th</sup> Ed (London: Sweet & Maxwell, 2015) at para 11-017;

*Re Windham Sales Ltd*, 1979 CarswellOnt 227 (ONSC in bankruptcy);

*Wong v Field*, 2012 BCSC 1141;

*EC&M Electric Ltd v Medicine Hat General & Auxiliary Hospital & Nursing Home District N 69*, 1987 CarswellAlta 25 (ABQB); and

*Abaklhan v Halpen*, 2006 BCSC 1979, aff'd 2008 BCCA 29.

[54] J. Steenhof, as an unsecured creditor of 236, and 145 as an unsecured creditor of Nomads on the Hythe project, agree with this analysis, as does Liberty Mutual. Mr. Klisowsky raises no specific objection to this proposal on the part of the Receiver, but suggests that it is premature. He says that the proper contribution between Nomads and 236 can only be calculated once the assets and liabilities of Nomads and Ladacor (as between those entities) have been properly allocated.

[55] I am satisfied that for the purposes of finalizing the Receivership accounts, the monies the Receiver holds to the account of Ladacor and Nomads should be transferred to 236's account as a function of a guarantor's right to subrogation and to contribution rights and obligations as between co-guarantors.

## **Assets and Liabilities of the Debtors**

### **Ladacor**

[56] There is no doubt that Ladacor is insolvent under any interpretation of "insolvency". It has no remaining assets, other than a contingent interest in the funds proposed to be held back by the Receiver to deal with CRA's post-receivership withholdings claims (discussed below), and a \$57,000 GST refund apparently owed to it by CRA. All physical assets have been disposed of. All of Ladacor's projects have been abandoned, completed or wound down. Its receivables have been collected. There are still claims by CRA relating to pre-receivership GST. These claims total \$33,446. While these claims presently enjoy priority status, they will drop down to unsecured status in the event of Ladacor's bankruptcy.

[57] There is a post-receivership claim relating to source deductions assessed against the Receiver's independent contractors used to complete project work and for other receivership purposes. CRA's position is that these contractors should be treated as employees subject to employment insurance and Canada Pension Plan deductions. While the presently-advanced claim is approximately \$10,000, the Receiver anticipates that there are a number of other claims that CRA will advance, depending on its success on the claims already made. The Receiver proposes to withhold \$125,000 as a contingency to deal with those funds. It is possible that not all of those funds will be required, and some might ultimately be released back to Ladacor. Conversely, it is possible that the claims and costs of defending Ladacor against them will use up most or all of the contingency amount.

[58] The Receiver's records list Ladacor's unsecured creditors. The present list totals approximately \$3,500,000 in unsecured claims. That does not include over \$1,100,000 from Liberty Mutual under the Indemnity Agreement in favour of Liberty Mutual.

[59] The priority claims of CRA have been accounted for in the holdback of \$125,000 discussed above. Ladacor's only remaining secured creditors are 236 and Nomads, because they are able to step into BMO's secured position because of their subrogation rights. Since 236's and Nomads' assets were used to pay off BMO, 236 and Nomads have a secured claim against Ladacor for up to \$5,834,882, less the approximately \$465,000 that will be paid to 236 as a result of this application.

[60] It appears from this analysis that Ladacor's unsecured creditors are unlikely to make any recovery at all, as any remaining funds will go to or be attributed to 236 and Nomads, with 236 being able to recover all of any anticipated or hoped-for funds because of its contribution rights against Nomads.

[61] It is obvious that Ladacor should be placed into bankruptcy, although it is difficult to see any advantage to that for Ladacor's unsecured creditors. The bankruptcy would appear to benefit only the creditors of 236, as discussed below.

[62] In any event, there needs to be an orderly resolution to the massive amount of unsecured debt owed to Ladacor's creditors and the only way of achieving that is through bankruptcy

### **236**

[63] 236 has no remaining assets, other than its subrogated claim against Ladacor and its claim against Nomads for contribution so that its and Nomads' contributions to BMO will be equalized. 236's creditors are all unsecured. The major claims are Liberty Mutual's claim for indemnity for bond claims against Ladacor (\$1,100,000) and a claim from J. Steenhof for approximately \$444,000. It too has a GST claim by CRA (\$33,000), which is presently a priority claim but which will become unsecured on bankruptcy. There are only a few other unsecured claims totaling about \$40,000.

[64] Through its subrogation rights and contribution rights arising out of 236's payments to BMO, 236 will receive all of the remaining cash in the three debtor accounts. There is the possibility that some further funds might come to 236 from Ladacor (any surplus from the CRA holdback discussed above and the GST refund). Any such funds may be available for 236's creditors.

[65] It is unlikely that 236 will receive any more than the amount presently suggested by the Receiver. That will not satisfy Liberty Mutual's claim, if the claim is valid and anywhere close to

the current amount claimed. If J. Steenhof's claim has any validity, it and Liberty Mutual will recover only a fraction of their claims.

### **Nomads**

[66] In his submissions, Mr. Klisowsky emphasizes the \$2,800,000 receivable and builder's lien claim Nomads has against Hythe. As discussed below, that claim is hotly disputed by Hythe. Hythe is attempting to amend its statement of defence and counterclaim to advance a claim against Nomads for damages significantly higher than the Nomads claim against Hythe.

[67] There are two investments owned by Nomads. The first is 27.5% of the common shares in a private corporation, Testalta Corporation Ltd. Nomads is also owed a shareholder's loan of \$220,500. The Receiver has no information on the value of this investment. It says that Mr. Klisowsky has not provided any relevant information that would assist it in valuing this asset. As a result, the Receiver places no value on Nomads' investment in Testalta and the Receiver has no information as to whether the shareholders' loan is recoverable.

[68] The second of these investments is a 50% interest in 1878826 Alberta Ltd. This private corporation owns a Studio 6 Hotel in Bruderheim, Alberta. The Receiver's information is that the hotel is presently producing "minimal positive cash flow" and is subject to a mortgage of approximately \$3,000,000. Because of the lack of information, the Receiver is unable to place any value on this investment.

[69] Nomads has a contingent claim to the \$54,236 the Receiver paid into Court to discharge a builder's lien in favour of Hawk Electric, filed against the Westgate project. Those funds are in Court as security for the lien and will remain there until further Court order. It is possible that some of those funds might come back to Nomads.

[70] Nomads owns 23 modular storage units which were earmarked for the Hythe project. They remain in storage. Unless the Hythe project can use them, they have little residual value. No information was put before me as to the potential value of these storage units. The main value appears to be the ability to use them for completion of the Hythe project. It seems highly unlikely Nomads or the Receiver will have any further involvement with Hythe, other than in the litigation that has ensued.

[71] Nomads is entitled to be indemnified for its payments to BMO by Ladacor and in that regard is a secured creditor, being entitled to step into BMO's security position. There is a possibility that Ladacor may not need all of the CRA contingency it has set up, and that it might recover a pre-receivership GST refund. However, since 236 is entitled to contribution from Nomads to equalize their payments to BMO to pay off Ladacor's debts to BMO, 236 will be entitled to recover any of the required contribution from Nomads as a secured creditor.

[72] Having regard to the roughly \$100,000 contribution owed to 236 and 236's security position, it appears highly unlikely that any funds will remain for the benefit of any of Nomads' unsecured creditors.

[73] By way of liabilities, CRA is a priority creditor in the amount of \$152,742 in pre-receivership GST. As with Ladacor, this claim will drop down to unsecured status in the event of Nomads' bankruptcy.

[74] Nomads is liable to indemnify Liberty Mutual for both of the bond claims Liberty Mutual is liable for. Those claims total approximately \$1,100,000.

[75] Alberta Treasury Board and Finance Tax and Revenue Administration has a claim (presumably unsecured) against Nomads following a reassessment of tax credits for 2012, 2013 and 2014 totaling \$769,245.68. This claim has been outstanding since some time in 2017. Mr. Klisowsky professes to know nothing about this claim.

[76] 236 has a claim against Nomads to equalize what the two entities paid out to satisfy Ladacor's debts to BMO in the approximate amount of \$100,000, assuming all available funds from Ladacor and Nomads are paid over to 236 as a result of this application.

[77] Hythe has recently provided information to the Receiver that the work done by Nomads should be demolished because of defects and mold infestation. The expert report provided states that the cost of repairing the existing work and completing it is likely to be significantly more expensive than demolishing the existing work and starting over again. The intended counterclaim will greatly exceed the amount of Nomads' builder's lien and claim for the value of work it claims to have done. While the relative merits of the positions of Nomads and Hythe are unknown, it seems clear that it will be a long and difficult fight for Nomads to collect anything from Hythe. It is not known what was agreed between the Receiver and Hythe with respect to this application such that Hythe's application to lift the stay of proceedings to allow it to file an amended statement of defence and counterclaim. However, the information presented by the Receiver casts doubt on the recoverability of the claimed receivable.

[78] Nomads also has approximately \$1,900,000 in debts to creditors, after deducting the Liberty Mutual and Alberta Treasury Board claims. One of the J. Steenhof companies, 145, has a claim against Nomads for work done on the Hythe project, but its hopes of collection are likely tied to its builder's lien.

[79] It appears, following this analysis, that anything that Nomads may be able to recover from its few debtors will ultimately go to 236 until its and 236's payments to BMO have been equalized. The absence of information as to the potential value of Nomads' investments in Testalta and 1878826 Alberta Ltd makes it impossible to determine if there is any chance of recovery on either of those investments, or in what amount. The first \$100,000 is likely to go to 236 and there are \$4,700,000 in other creditors, so even if Nomads' present claim against Hythe were given full value (ignoring Hythe's counterclaim), Nomads would be unable to pay off its unsecured creditors. In my view, the suggestion that Nomads is solvent and should be able to resolve outstanding issues with its creditors is fanciful.

[80] Any remaining assets of Ladacor and Nomads will likely end up with 236 and be distributed to its creditors and not to any other creditors of Nomads or Ladacor. The resulting beneficiaries of that scenario are Liberty Mutual and J. Steenhof.

[81] 236 has no remaining assets other than its subrogated claim against Ladacor and the contribution claim against Nomads. The Receiver proposes to pay Ladacor's remaining funds in the amount of \$799,000 less holdbacks and estimated administration costs to 236. Its claim against Ladacor is secured because of its rights to subrogation. However, claims will not satisfy the \$4,000,000 236 paid to BMO.

### **Positions of Liberty Mutual, J. Steenhof and 145**

[82] Both Liberty Mutual and the Steenhof parties support the Receiver's application. They support the proposal to put all three of the debtor corporations into bankruptcy. They do not oppose any of the other relief sought by the Receiver.

### **Position of Mr. Klisowsky**

[83] The foundation of Mr. Klisowsky's disputes with the Receiver's reports and recommendations is that Mr. Klisowsky believes that Nomads remains solvent. Because of its assets, and in particular the Hythe receivable and builder's lien claim, the mis-allocation of debt between Nomads and Ladacor, the invalidity of the Alberta Treasury Board claim and the invalidity of the Liberty Mutual indemnification claims, there is no need to put Nomads into bankruptcy. He argues that Nomads essentially shut down and transferred all of its business to Ladacor. After late 2017, when the transfer took place, all rights and all obligations under existing contracts were assumed by Ladacor. As a result, almost all of the claims against Nomads and Ladacor should be Ladacor's responsibility. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to attribute a significant portion of the creditors to Nomads.

[84] Mr. Klisowsky makes the same argument with respect to the physical assets of the enterprise. Effective late 2017, the assets that were eventually auctioned off by the Receiver were mainly assets of Ladacor and not Nomads. Mr. Klisowsky claims that the Receiver did not accurately identify equipment owned by Nomads such that it should be given credit for more of the proceeds of the physical asset sale than it was. The total proceeds of sale were \$605,858, of which \$451,450 was allocated to Nomads and \$154,407 was allocated to Ladacor. Mr. Klisowsky says that most of this should have been allocated to Ladacor.

[85] The same holds true for employee claims and the Receiver's treatment of WEPP claims and CRA withholding claims. After the assignment of the business to Ladacor, all employees (but for Mr. Klisowsky's wife and son) became Ladacor employees. Thus none, or almost none, of Nomads' real assets should have been used to pay off the BMO claims. Any remaining claims should be to Ladacor's account, and all the allocation of debt as between Nomads and Ladacor should be attributed to Ladacor.

[86] According to Mr. Klisowsky, the Receiver overpaid the WEPP claims and CRA preferred/secured claims because of failing to properly identify what employees worked for Nomads and for Ladacor. From the Receiver's accounting, CRA source deductions for Nomads and Ladacor totaled \$322,652. These do not appear to have been broken down between Nomads and Ladacor by the Receiver. The WEPP claims totaled \$25,005 (attributed \$18,056 to Nomads and \$8949 to Ladacor).

[87] Mr. Klisowsky says the manner of apportionment of employees was not commercially reasonable.

[88] Ultimately, Mr. Klisowsky says that more work needs to be done by the Receiver to properly analyzed and the results amended.

[89] Mr. Klisowsky's position with respect to the Liberty Mutual indemnification claims is that if Ladacor had any outstanding bonds, and if there are any valid bond claims, the indemnity agreement should have been terminated by the Receiver immediately on their appointment thus

avoiding liability on the bonds. Mr. Klisowsky also takes the position that the Receiver should not have terminated the subcontract with Kor-Alta because that triggered the performance bond claims. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to cancel the contract.

[90] Mr. Klisowsky argues that the work done by the Receiver to analyze and quantify the Alberta Finance claim relating to the reversed tax credits is deficient and needs further investigation as to whether the amount claimed is legitimate, whether it can be negotiated, and whether there is a process to appeal the reassessment. Mr. Klisowsky notes that the Alberta Finance claim is the most significant claim against Nomads other than the Liberty Mutual claim and suggests that the Receiver has not yet reached the point of commercial reasonableness in its work on this claim.

[91] Mr. Klisowsky also argues that the 145 claim against Nomads on the Hythe project is not valid. It is a claim for \$603,000. Additionally, he disputes J. Steenhof's claim for \$444,000 against 236. He says there is an issue for trial regarding that claim, as he says that amount represents part of J. Steenhof's investment in 236 and not a debt owed by 236 to J. Steenhof.

[92] Mr. Klisowsky argues that assigning any of the debtors into bankruptcy should only be done after the Receiver has completed a proper investigation and analysis of the assets and debts of the debtor corporations. Such a step should only occur when it is commercially reasonable to do so and that point has not been reached.

[93] Other issues raised include the reasonableness of the Receiver's actions when heavy rains damaged the roof and other parts of the under-construction Hythe project and its response to the theft of some property from that site.

[94] Mr. Klisowsky cites *Royal Bank of Canada v Melvax Properties Inc.*, 2011 ABQB 167 in support of his submissions. At the hearing, his counsel also referred to section 66(1) of the *Personal Property Security Act*, RSA 2000 c P-7, and *Bank of Montreal v Tolo-Pacific Consolidated Industries Corp.*, 2012 BCSC 1785.

## Analysis

### 1. The validity of the Liberty Mutual claims under the Indemnity Agreement

[95] I cannot make any determination as to the validity of the Liberty Mutual claims as I have no documentation supporting the claims against the various bonds. In particular, none of the underlying contracts or subcontracts by Ladacor are in evidence. Mr. Klisowsky suggests that there was no signed contract between Ladacor and Kor-Alta. That may be so. However, that does not answer the matter, as there may well have been a bid bond issued in favour of Kor-Alta during the tendering process. A bid bond secures the successful tenderer's obligation to enter into a contract to perform the work and to provide a performance bond.

[96] Mr. Klisowsky's brief seems to suggest that a performance bond and labour and material payment bond were issued, which suggest that there were underlying contracts in existence. But it is premature to try to assess these issues. Liberty Mutual has indemnification agreements from each of Ladacor, Nomads, 236 and Mr. Klisowsky. It does not appear that any of the bond claims have been finalized.

[97] Liberty Mutual claims that it is or will be owed approximately \$1,100,000 on account of the labour and material payment bond claim by Hawke Electric and the performance bond claim by Kor-Alta. Those claims may be valid and if they are valid, the indemnification agreements appear valid on their face.

[98] The defence raised by Mr. Klisowsky: that the Receiver should have terminated the indemnity agreements thereby avoiding liability for the indemnitors, is entirely without merit. His reference to paragraph 45 of the Indemnity Agreement might provide an argument in his favour, if the paragraph ended after the first part of the first sentence. The sentence continues:

...however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date...

[99] It would make no sense at all for the indemnitors to be able to avoid their liability to indemnify the bonding company for bonds issued before the termination becomes effective. The essence of paragraph 45 is that the indemnitors can avoid liability for future bonds or bonding obligations by giving a 30-day notice. Existing arrangements are not affected.

[100] Standard form performance bonds, labour and material payment bonds and bid bonds do not have unilateral termination provisions or cancellation provisions on the part of either party. Once the bonding company is on the hook for a bonded obligation, the indemnitors are likewise on the same risk.

[101] This is so elementary in the bonding world that no authorities need be cited. Mr. Klisowsky's argument here is without merit. If Liberty Mutual is liable on any of the bonds it issued for Ladacor, the indemnitors are almost certainly liable to indemnify Liberty Mutual (subject to the usual types of defences available to guarantors).

[102] There is no basis to reject the Liberty Mutual claims from consideration of the merits of putting the debtor corporations into bankruptcy. Undoubtedly there may be litigation as to whether Liberty Mutual has properly paid out any of the claims against it and whether they have acted reasonably. But someone will have to carefully monitor the claims and Liberty Mutual's responses, and in doing so will be a costly venture for whomever is tasked with that.

## **2. The identification and allocation of unsecured debt as between Ladacor and Nomads**

[103] This is another area where Mr. Klisowsky's arguments are without merit. A debtor cannot unilaterally pass its debts on to someone else and avoid further liability. Subject to the terms of the contract between the creditor and the debtor, a creditor can assign its rights (like its receivables or benefits accruing under a contract) to a third party. Sometimes that requires the consent or agreement of the debtor or other contracting party, and sometimes not. Nomads might have been able to assign its rights under the contract with Hythe and others to Ladacor, and it might not have been.

[104] While Nomads could by contract require another party to satisfy its obligations (such as Ladacor) that is not binding on the creditor. Someone cannot simply go to a creditor and say "I don't owe that to you any more, I assigned my obligations to someone else". If that were possible, every debtor would rush to assign its obligations to a shell company or insolvent entity. Creditors are entitled to look to their debtor for payment or performance and they do not have to

try to collect from someone else, unless they have specifically agreed to do that through some valid contractual mechanism.

[105] There is no evidence here that any of the Nomads creditors ever agreed to release Nomads and substitute Ladacor is its debtor. As a result, the method used by the Receiver with the assistance of Ms. Richard and others, was commercially reasonable. There were no written agreements between Nomads and Ladacor. Claims on contracts Nomads entered into are likely still Nomads' responsibility. Suppliers who supplied things on Nomads projects are likely still Nomads' creditors.

[106] I see no error in principle as to how the Receiver characterized the creditors. The Receiver has made no binding determinations; that would result from a claims process in the receivership, or the normal claims processes in bankruptcy. No one has suggested that it would be more efficient or effective to have a claims process within the existing Receivership.

[107] I do not see that the Receiver's actions in this area have been unreasonable in any way. It was faced with an undocumented mess and the Receiver has done its best to make sense of the disorganization created by the do-it-yourself creation of Ladacor by Mr. Klisowsky.

### **3. The identification and allocation of the auction proceeds between Ladacor and Nomads**

[108] There were no transfer documents in evidence as to any transfers of assets between Nomads and Ladacor. No purchase documents were in evidence showing which entity actually purchased an asset in the first place. In the absence of documentation, the approach taken by the Receiver appears to be reasonable. Where an asset appears to have been in Nomads' possession at the time Ladacor came into existence, it remained Nomads'. Anything acquired after Ladacor began operations was attributed to Ladacor.

[109] I see nothing in this approach that is unreasonable. Again, any potential errors on the part of the Receiver were caused by the absence of appropriate documentation at the commencement of the receivership.

[110] In any event, arguments of this nature do not get Nomads anywhere. The fewer assets Nomads had, the less it contributed to paying off the BMO debt, and the more it would owe to 236's contribution claim.

### **4. The identification of employees of Nomads and any claims (CRA and WEPP)**

[111] It does not appear that existing Nomads employees were properly transferred over to Ladacor's employment. Ladacor may well have been making all of the payroll payments once it took over as the operating company. For employment insurance, Canada Pension purposes, and employment standards purposes, the existing employees should have been terminated from Nomads and hired by Ladacor. Records of Employment should have been prepared and filed; accrued vacation pay should have been paid out.

[112] The failure to take those steps, however, does not invalidate a successor employer's employment or liability to the workers it has taken on. It creates liabilities for the former employer (in this case Nomads).

[113] This is one area where the Receiver may have been incorrect in its treatment of employees and liability for wages and withholdings. I only say "may", as in the circumstances the Receiver faced, it is possible that any unpaid employee (and CRA) could have chosen which

entity to pursue. It would have been possible for Ladacor employees to work on Nomads projects. Nomads could have subcontracted its obligations to Ladacor such that as between Nomads and Ladacor, Ladacor would have all future responsibilities.

[114] The absence of any agreement between Nomads and Ladacor makes it virtually impossible to determine what enforceable arrangements between Nomads and Ladacor were made. Consolidated financial statements were prepared. There is no evidence that Nomads and Ladacor had their own financial statements or books once Ladacor came into the picture.

[115] There is no evidence that Nomads was ever paid anything by Ladacor for Nomads assets or its ongoing contracts. There is no evidence that Ladacor ever indemnified Nomads against claims from any of Nomads' creditors or contracting parties. Nevertheless, it is possible that most of the employee claims were Ladacor obligations.

[116] That being said, the amounts of the claims really makes this a *de minimus* area of concern. Mr. Klisowsky complains of \$18,056 of WEPP claims already paid out by the Receiver from Nomads, and disputes the estimated \$84,300 in unsecured WEPP claims remaining against Nomads. Charging \$18,056 to Ladacor instead of Nomads changes nothing of significance with respect to the results of the receivership and indeed would increase the amount of contribution Nomads would owe to 236. The less attributed to Nomads means the more attributed to 236 such that 236 would itself be a larger creditor of Nomads. That takes on even more significance when 236's status as a secured creditor is factored in, along with the unlikelihood of recovery for any of Nomads' unsecured creditors.

[117] While Mr. Klisowsky makes a valid theoretical point, there is no merit to it in substance, as the amounts are too small to make any difference in the overall results.

#### **5. The validity of the Alberta Treasury Board and Finance claim against Nomads**

[118] The Alberta Finance claim will have to be dealt with whether in the receivership or in a bankruptcy. This is not a claim that was made after the receivership began; it was made against Nomads sometime in 2017. If an appeal period with respect to the reassessment of taxes was missed, it was likely missed long before the Receivership. The Receiver can hardly be faulted for not spending a lot of time investigating an unsecured claim that Nomads appeared to be ignoring and restructuring its affairs to avoid paying.

[119] There is nothing unreasonable in the Receiver's approach to this claim. The Receiver did nothing with respect to investigating the validity of any of the unsecured claims, let alone trying to negotiate settlements on them. The main task of the Receiver was to identify secured and preferred claims, and pay out BMO, CRA, Service Canada, and WEPP, so that anything remaining could be properly divided amongst the unsecured creditors.

[120] The latter process has yet to occur, and is one of the reasons bankruptcy is a necessary process.

[121] I find no fault on the part of the Receiver in this area, and certainly no lack of commercial reasonableness.

#### **6. The claim of J. Steenhof against 236**

[122] There is little information about the validity of J. Steenhof's claims against 236. Mr. Klisowsky acknowledges that there is a triable issue between 236 and J. Steenhof as to whether

the claim is a debt owed to a shareholder or whether the claim relates to the shareholder's investment in the corporation for the purchase of its shares. That needs to be decided in some binding manner. Absent a claims process, the Receiver is not in a position to make any determination. At the end of the day, however, that is really a question for the unsecured creditors of 236. Mr. Klisowsky does not claim to be a creditor of 236, let alone a secured creditor. He claims to be a shareholder. The information suggests that the shareholders of 236 are likely to receive nothing for any shareholders' loans, let alone any equity they may have in that corporation.

[123] It is certainly not an issue that can be decided summarily and will likely be a time consuming and expensive exercise.

[124] The Receiver cannot be criticized for its approach to this claim and there is nothing commercially unreasonable about maintaining the J. Steenhof claims in the list of unsecured creditors.

### **Relief sought by Receiver**

[125] This takes us to the Receiver's requested relief, which I can now deal with having regard to the facts as I have found them.

#### **1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver's Fourth Report to the Court dated September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings**

[126] Whether the Receiver should have taken different action after the rain damage to the Hythe project, and whether the Receiver should have taken different action after thefts of equipment or tools from that project, are arguable issues.

[127] However, Mr. Klisowsky has not raised any issues or arguments that require further evidence or a trial.

[128] In response to Mr. Klisowsky's criticisms of the Receiver, counsel says that it is too late for Mr. Klisowsky to raise these arguments. The Receiver has been transparent throughout; Mr. Klisowsky has been represented throughout and has been present at most if not all of the court appearances. The allocations of assets and employees and payment of secured and preferred claims have been dealt with in the Receiver's various reports and on the court applications approving payments and transactions. Mr. Klisowsky has been silent throughout the proceedings and took no appeals from any of the orders made. Counsel argues that any suggestion that the Receiver has not acted in a commercially reasonable manner is without foundation.

[129] Additionally, counsel for the Receiver points out that no expert evidence has been put forward as to what should have been done regarding any of these issues to achieve commercial reasonableness.

[130] The Receiver cites *Jaycap Financial Ltd v Snowden Block Inc*, 2019 ABCA 47 on the subject of commercial reasonableness and a receiver's obligation to:

... exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is

that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking (at paragraph 28).

[131] The Receiver says that here, it satisfied those obligations and acted in a fully transparent manner having regard to its various reports and court applications.

[132] The Receiver cites *Western Union Petro International Co Ltd v Anterra Energy Inc*, 2019 ABQB 165 and argues that the record before me is sufficient to enable me to make a fair and just determination of the issues without requiring more evidence, or a trial.

[133] Counsel also refers to the decision in *Royal Bank of Canada v Melvax Properties Inc*, 2011 ABQB 167 where Veit J referred to the weight to be given to the business judgments of others involved in the matter. Here, counsel points to the support the receiver has from Nomads', Ladacor's and 236's largest creditors, Liberty Mutual and the Steenhof parties. The other large creditor, Alberta Finance, has taken no position.

[134] The value of the theft was not significant in the overall scheme of things, and the Receiver's actions following the rain damage were aimed towards having Hythe continue on with some aspects of the construction contract. The objective there was to recover the amounts owed to date, and be able to make valuable use of the containers that still remain in storage. While those efforts ultimately proved unsuccessful, and the benefit of hindsight gives rise to the efficacy of those actions, the Receiver's actions do not appear to be outside the scope of commercial reasonableness. Nor do they approach the gross negligence or willful misconduct level required to have the Receiver liable for any loss resulting from those actions.

[135] To the extent that the Receiver's actions have not otherwise been approved in previous orders, I am satisfied that relief should be granted to the Receiver

**2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report**

[136] With the exception of Mr. Klisowsky's concerns addressed above, no one challenged the appropriateness of the Receiver's final statement of receipts and disbursements for this period. Mr. Klisowsky took no objection to the time spent or the hourly rates, but objected to the completeness of the Receiver's work.

[137] I am satisfied that it is appropriate to approve these accounts, and do so (to the extent not already covered by Topolniski J's Order of September 13).

**3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application**

[138] While I do not see any problem with the anticipated accounts, fees and disbursements in connection with the completion of the receivership proceedings, I think it is more appropriate to approve these accounts, fees and disbursements when they have been incurred. Hopefully they can be completed within the budgeted amounts.

**4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report**

[139] I acknowledge that the Receiver's work in allocating assets and employees between Ladacor and Nomads may not have resulted in a perfect allocation. That is not because the

Receiver's work was deficient or flawed. Rather, it was because of the corporate mess that existed at the time of the Receivership Order. The Receiver had to try to make sense of an undocumented and ill-conceived "takeover" of Nomads by Ladacor. The proposed method of allocation by Mr. Klisowsky is unworkable, especially as it is founded on the incorrect assumption that Nomads could assign its obligations to Ladacor in a manner that would be binding on its creditors.

[140] The reality is that any reallocation of assets would be moot. Putting more assets and liabilities into Ladacor would result in Nomads making a smaller contribution to paying off the BMO debt. That would simply increase the amount of 236's secured claim for contribution from Nomads. While it might leave fewer unsecured creditors for Nomads to have to deal with, the above analysis indicates that Nomads' unsecured creditors are unlikely to make any recovery at all.

[141] As such, my conclusion is that no creditor is prejudiced by the allocations that were made by the Receiver between Nomads and Ladacor.

[142] The Receiver has, in my view, correctly applied the applicable principles of subrogation and contribution, such that it is appropriate to allocate all of the remaining cash of Ladacor and Nomads to 236.

**5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order**

[143] What is left with the three debtor corporations is a paucity of assets and a mountain of claims against them. Only the Liberty Mutual claim involves all three corporations. Total claims (counting Liberty Mutual only once) exceed \$7,000,000. None of the claims have been proven. There may be defences to some or many of the claims, and some of the claims may be excessive in amount.

[144] Getting to the bottom of all of this will be time consuming and very expensive. Litigation with Hythe has already commenced. Its result is uncertain. Success on that litigation would appear to be the only real chance of any collection for Nomads' unsecured creditors. The only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy. While there are possible ways of dealing with claims in a receivership, no one other than Mr. Klisowsky is recommending that the receivership continue. The Receiver's recommendation is to use the bankruptcy process to deal with the few remaining assets and myriad of claims.

[145] I agree with the Receiver's recommendation and accordingly approve its proposal to assign the three debtor corporations into bankruptcy.

**6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors**

[146] Having approved the assignments into bankruptcy, it flows that any funds and property remaining after the administration of the receivership has been completed should be transferred into the respective bankruptcy proceedings.

**7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver**

[147] There is no valid objection to this relief being granted, to the date of this decision and insofar as the Receiver carries out the orders herein.

**8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise**

[148] This order appears to be premature, as there is still work to be done to carry out the terms of this order. To date, this relief appears appropriate but this relief should be applied for after the Receiver has completed its work and not in advance.

**9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.**

[149] Having approved the assignments into bankruptcy, this relief flows from that order and is granted.

Heard on the 26<sup>th</sup> day of November, 2019.

**Dated** at the City of Edmonton, Alberta this 19<sup>th</sup> day of December, 2019.



Robert A. Graesser  
J.C.Q.B.A.

**Appearances:**

Dean A. Hitesman  
Dentons Canada LLP  
for the BMO

James Reid and Keith D. Marlowe  
Blake, Cassels & Graydon LLP  
for the Receiver

Shaun D. Wetmore  
McCuaig Desrochers LLP  
for the Steenhof entities

Norman D. Anderson  
Anderson James McCall Barristers  
for the Donald Klisowsky

## **APPENDIX “B”**

**Ladacor AMS Ltd., Nomads Pipeline Consulting Ltd., and 2367147 Ontario Inc. - In Receivership**  
Summary of Receiver's Fees and Disbursements ("2019 and 2020 Billings")  
October 1, 2019 to February 28, 2020

**Appendix B**

**Invoices subject to Court Approval**

Inv. No.	Period	Fees	Disbursements	Total Fees & Disbursements	GST	Total
Ladacor/Nomads - 13	October 1, 2019 to October 31, 2019	30,497.50	997.04	31,494.54	1,574.73	33,069.27
Ladacor/Nomads - 14	November 1, 2019 to December 31, 2019	28,900.00	304.95	29,204.95	1,460.25	30,665.20
Ladacor/Nomads - 15	January 1, 2020 to February 28, 2020	30,692.50	0.00	30,692.50	1,534.63	32,227.13
<b>LADACOR/NOMADS TOTAL</b>		<b>90,090.00</b>	<b>1,301.99</b>	<b>91,391.99</b>	<b>4,569.61</b>	<b>95,961.60</b>

Inv. No.	Period	Fees	Disbursements	Total Fees & Disbursements	GST	Total
236 - 11	October 1, 2019 to February 28, 2020	1,635.00	1,358.71	2,993.71	149.69	3,143.40
<b>236 TOTAL</b>		<b>1,635.00</b>	<b>1,358.71</b>	<b>2,993.71</b>	<b>149.69</b>	<b>3,143.40</b>
<b>TOTAL INVOICES SUBJECT TO COURT APPROVAL</b>		<b>\$ 91,725.00</b>	<b>\$ 2,660.70</b>	<b>\$ 94,385.70</b>	<b>\$ 4,719.30</b>	<b>\$ 99,105.00</b>

## **APPENDIX “C”**

**Ladacor AMS Ltd., Nomads Pipeline Consulting Ltd., and 2367147 Ontario Inc. - In Receivership****Appendix C**

Summary of the Receiver's counsel (Blakes) Fees and Disbursements ("2019 and 2020 Billings")

October 1, 2019 to January 31, 2020

**Invoices subject to Court Approval**

Inv. No.	Period	Fees	Disbursements	Total Fees & Disbursements	GST	Total
2149686	October 1, 2019 to October 31, 2019	61,438.00	1,418.49	62,856.49	3,142.82	65,999.31
2151829	November 1, 2019 to November 30, 2019	73,135.00	4,757.14	77,892.14	3,894.61	81,786.75
2160620	December 1, 2019 to December 31, 2019	6,161.00	368.44	6,529.44	326.47	6,855.91
2167782	January 1, 2020 to January 31, 2020	20,999.00	66.00	21,065.00	1,052.75	22,117.75
<b>TOTAL INVOICES SUBJECT TO COURT APPROVAL</b>		<b>\$ 161,733.00</b>	<b>\$ 6,610.07</b>	<b>\$ 168,343.07</b>	<b>\$ 8,416.65</b>	<b>\$ 176,759.72</b>

## **APPENDIX “D”**

COURT FILE NUMBER 1803 - 09581  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE EDMONTON  
PLAINTIFF BANK OF MONTREAL  
DEFENDANT LADACOR AMS LTD., NOMADS PIPELINE CONSULTING LTD., 2367147 ONTARIO INC., and DONALD KLISOWSKY  
DOCUMENT **AFFIDAVIT (Confirming Discharge of Receiver)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BLAKE, CASSELS & GRAYDON LLP  
3500, 855 – 2<sup>nd</sup> Street S.W.  
Calgary, AB T2P 4J8

Attn: Kelly Bourassa / James Reid  
Telephone: 403-260-9697 / 403-260-9731  
Facsimile: 403-260-9700  
Email: kelly.bourassa@blakes.com  
james.reid@blakes.com

File Ref.: 99766/12

**AFFIDAVIT OF OREST KONOWALCHUK**  
**Sworn on March \_\_, 2020**

I, Orest Konowalchuk, of the City of Calgary, in the Province of Alberta, **MAKE OATH AND SAY THAT:**

1. I am a Licenced Insolvency Trustee, and a Senior Vice President with Alvarez & Marsal Canada Inc., which is the Court-appointed receiver and manager (the "**Receiver**") of the undertaking, property and assets of Ladacor AMS Ltd., Nomads Pipeline Consulting Ltd. and 2367147 Ontario Inc. (collectively, the "**Debtors**").

2. Pursuant to the Order granted by the Honourable Justice J.E. Topolniski of the Court of Queen's Bench of Alberta (the "**Court**") dated May 18, 2018, Alvarez & Marsal Canada Inc. was appointed as the Receiver over the Debtors.

3. Pursuant to an Order (Approval of Receiver's and Receiver's Counsel's Final Taxation Period Billings, Forecast R&D, Forecast Fees and Costs and Discharge of Receiver, Among Other Relief) granted by the Honourable Justice R.A. Graesser dated March 11, 2020 (the "**Discharge**")

**Order"**), the Court approved the discharge of the Receiver, subject to the filing an Affidavit in the within form confirming that the Receiver had completed all other administrative activities required to complete its administration of the Debtors' receivership proceedings.

4. This will confirm that the Receiver has completed all other activities required to complete its administration of the Debtors' receivership proceedings.

5. I make this Affidavit further to the requirements of the Discharge Order, and understand that upon the filing of this Affidavit, Alvarez & Marsal Canada Inc. will be fully and finally discharged from its capacity as the Receiver of the Debtors.

6. I make this Affidavit for no other or improper purpose.

**SWORN BEFORE ME** at Calgary, Alberta, )  
this \_\_\_\_ day of \_\_\_\_\_, 2020. )  
)  
)

\_\_\_\_\_  
Commissioner for Oaths in and for the  
Province of Alberta

\_\_\_\_\_  
**OREST KONOWALCHUK**