

COURT FILE NUMBER 24-3356741

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE *BANKRUPTCY
AND INSOLVENCY ACT*, R.S.C. 1985, C.
B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF
INTENTION TO MAKE A PROPOSAL OF
ENDRUM ENERGY CORP.

Clerk's Stamp

DOCUMENT **BRIEF OF LAW OF THE APPLICANTS**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
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Commercial List Chambers Application
scheduled for the 15th day of June, 2026
before the Honourable Justice Mah

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicant, Endrum Energy Corp. (the “Applicant” or “Endrum”).
2. The Applicant seeks an order (the “Order”) which will, among other things, extend the 45-day period within which the Applicant is required to file a proposal (the “Stay Period”) by an additional forty-five (45) days to August 5, 2026, pursuant to section 50.4(9) of the BIA.¹
3. The Order is necessary to allow the Applicant time to put forward a viable proposal to its creditors and stakeholders with the assistance of the Proposal Trustee and its legal counsel.

II. FACTS

4. On February 5, 2026, Harmonica Oil and Gas Ltd. operating under the trade name Triumph Well Services (“Triumph”) obtained a default judgment in the amount of \$262,471.28 against the Applicant.² On March 31, 2026, Triumph caused a garnishee summons (the “Garnishee Summons”) to be issued for \$206,522.50 directed to ACME Energy Marketing Ltd. and Canadian Imperial Bank of Commerce in respect of amounts owed to it by the Applicant, resulting in a bank hold of \$206,523.00.³
5. On April 7, 2026 Endrum filed a Notice of Intention to Make a Proposal (the “NOI”) pursuant to section 50.4 of the BIA. ⁴ G. Chan & Associates was appointed as the proposal trustee of Endrum (the “Proposal Trustee”).⁵
6. As a result of the NOI, pursuant to section 69(1) of the BIA:⁶
 - (a) creditors were stayed from taking enforcement steps against Endrum or pursuing claims in Court; and
 - (b) the Garnishee Summons was stayed and the hold on the Applicant’s bank account was released.⁷
7. On May 6, 2026, this Honourable Court, pursuant to section 50.4(9) of the BIA,⁸ granted an order which, among other things, extended the Stay Period by an additional 45 days to June 21, 2026 (the “First Extension Order”).⁹

¹ The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, (the “**BIA**”) section 50.4(9) [**Tab 1**]

² First Affidavit of Norman Morales, sworn April 24, 2026 (the “**First Morales Affidavit**”) at para 15

³ The First Morales Affidavit at para 19

⁴ The Second Affidavit of Norman Antonio Morales, sworn June 8, 2026 (the “**Second Morales Affidavit**”) at para 6

⁵ The First Morales Affidavit at para 9

⁶ *BIA*, s.69(1) [**Tab 1**]

⁷ The First Morales Affidavit at para 20

⁸ *BIA*, s.50.4(9) [**Tab 1**]

⁹ The Second Morales Affidavit at para 3 and Exhibit “A”

8. Since the filing of the NOI and the granting of the First Extension Order, the Applicant has been diligently working with its legal counsel and the Proposal Trustee to formulate a viable proposal to present to its creditors.¹⁰

Pre-NOI Obligations

9. During the period following the filing of the NOI, a number of the Applicant's critical service providers threatened to cease providing essential services to the Applicant, or refused to continue supplying services, unless amounts owing in respect of services provided prior to the NOI filing date (the "Pre-NOI Obligations") were paid.¹¹
10. In order to preserve the Applicant's ability to continue operating and to support the prospects of a viable proposal, the Applicant made payments totalling approximately \$78,486.35 to certain of these service providers in respect of Pre-NOI Obligations during the period from approximately April 1, 2026 to May 29, 2026.¹²
11. Each payment was made only after the relevant service provider had either refused to continue providing services, cancelled services, or threatened litigation if Pre-NOI Obligations were not paid.¹³
12. The services at issue were essential to the Applicant's operations: they included the Applicant's accounting and electronic operating system, energy supply, line locating services required for spring operations, and other field and production services without which the Applicant could not safely or effectively continue its operations.¹⁴
13. These payments represent only approximately 3.2% of the Applicant's total pre-NOI accounts payable balance of approximately \$2,474,028.00.¹⁵
14. The modest proportion of these payments relative to the Applicant's overall indebtedness confirms that they were targeted, limited, and made only where operationally necessary.

Payments to PrairieSky Royalty Ltd.

15. One component of the payments described above is the sum of \$8,109.56 paid to PrairieSky Royalty Ltd. ("PrairieSky") in respect of outstanding royalty and lease rental obligations.¹⁶
16. PrairieSky has issued several demand notices and default notices addressed to "Endrum Holdings Corp." in respect of outstanding royalty and lease rental payments under various Overriding Royalty Agreements and Petroleum Lease agreements.¹⁷ These demands and notices sought, in aggregate, the sum of \$8,109.56, referencing production periods from September 1, 2025 through February 28, 2026.¹⁸

¹⁰ The Second Morales Affidavit at para 7

¹¹ The Second Morales Affidavit at para 8

¹² The Second Morales Affidavit at paras 9, 10 and Exhibit "B"

¹³ The Second Morales Affidavit at para 10

¹⁴ *Ibid.*

¹⁵ The Second Morales Affidavit at para 11

¹⁶ The Second Morales Affidavit at para 12

¹⁷ The Second Morales Affidavit at para 19

¹⁸ The Second Morales Affidavit at para 19

17. Endrum is of the view that the PrairieSky demands were issued to the wrong entity and constitute claims provable in bankruptcy, and that the error is likely the result of confusion related to a corporate renaming.¹⁹
18. Endrum Holdings Corp. (formerly named Endrum Energy Corp.) acquired Westdrum Energy Ltd. (which subsequently adopted the name Endrum Energy Corp.). Below is a summary:²⁰
 - (a) Endrum Holdings Corp. (Alberta Corporate Access Number 2025813706) was incorporated on January 22, 2024, originally under the name “Endrum Energy Corp.” and changed its name to “Endrum Holdings Corp.” effective February 2, 2024;
 - (b) Endrum Energy Corp. (Alberta Corporate Access Number 203032040) was originally registered on February 3, 1984, as “Westdrum Energy Ltd.” and changed its name to “Endrum Energy Corp.” effective February 2, 2024;²¹ and
 - (c) Critically, both name changes took effect on the same date—February 2, 2024—as part of a single coordinated transaction in which Endrum Holdings Corp. acquired Westdrum Energy Ltd.²²
19. Endrum Holdings Corp. is the parent company and holds 100% of the voting shares of Endrum Energy Corp.²³
20. Endrum Energy Corp. is the operating entity within the corporate group. It holds all operating assets, including the approximately 165 gas wells and 15 oil wells situated across approximately 35,000 acres, as well as its field facilities and a natural gas processing plant.²⁴
21. The royalty and lease obligations arising under the relevant Overriding Royalty Agreements and Petroleum Lease agreements are properly those of Endrum Energy Corp., not Endrum Holdings Corp.²⁵
22. Each of the PrairieSky demands and notices was incorrectly addressed to “Endrum Holdings Corp.” as the party responsible for royalty and lease payments under the relevant agreements.²⁶
23. The Applicant has confirmed that it is the operator and the entity holding the working interest in the wells referenced in the PrairieSky demands and notices, based on its review of those wells and lands against the company’s records.²⁷ Endrum Holdings Corp. does not appear as an owner or working interest participant in any of the wells referenced in those demands and notices. Accordingly, it is the Applicant’s view that Endrum Energy Corp.—not Endrum Holdings Corp.—is the proper contracting party under the relevant agreements.²⁸

¹⁹ The Second Morales Affidavit at para 20 and Exhibit “C”

²⁰ The Second Morales Affidavit at para 13

²¹ The Second Morales Affidavit at para 14

²² The Second Morales Affidavit at para 15

²³ The Second Morales Affidavit at para 16

²⁴ The Second Morales Affidavit at para 17

²⁵ The Second Morales Affidavit at para 18

²⁶ The Second Morales Affidavit at para 20

²⁷ The Second Morales Affidavit at para 21

²⁸ The Second Morales Affidavit at para 22

24. The Applicant acknowledges that the collection of the amounts demanded by PrairieSky is believed to be stayed pursuant to section 69(1) of the BIA by reason of the filing of the NOI on April 7, 2026. The payment of \$8,109.56 was nevertheless made to PrairieSky to prevent the underlying agreements from being terminated while the correct contracting party is clarified with PrairieSky.²⁹
25. PrairieSky's default notices expressly threatened termination of the relevant interests if the amounts owing were not remitted by specified dates.³⁰
26. The underlying petroleum leases are critical to the Applicant's continued operations. The payment was made on a protective basis to preserve the Applicant's rights under those agreements pending resolution of the entity identification issue with PrairieSky.³¹
27. The Applicant intends to work with its counsel to clarify with PrairieSky that Endrum Energy Corp. is the correct contracting party and to ensure that future invoices and correspondence are directed to the appropriate legal entity.³²
28. The Applicant acknowledges, following consultation with counsel and the Proposal Trustee, that the payments to critical service providers in respect of Pre-NOI Obligations may constitute reviewable transactions under the BIA and other applicable legislation.³³
29. The Applicant, together with counsel and the Proposal Trustee, is assessing these payments and will take such steps as may be appropriate, including seeking recovery of amounts paid if that is determined to be in the best interests of creditors as a whole.³⁴
30. These payments were made in good faith and, with the exception of the payment to Stealth Oilfield Inspections Ltd. ("Stealth Oilfield"), were commercially necessary to preserve the Applicant's operations as a going concern. Without these payments, critical service providers may have ceased providing essential services, impairing the Applicant's ability to continue operating and formulate a viable proposal.³⁵
31. Included within the payments to critical service providers is the sum of \$1,421.95 paid to Stealth Oilfield in respect of pre-NOI obligations.³⁶
32. The Applicant acknowledges that amounts owing to Stealth Oilfield are stayed pursuant to section 69(1) of the BIA.³⁷ This payment was made in error and should not have been made during the proposal proceedings.³⁸ The Applicant, counsel and the Proposal Trustee, is assessing whether recovery of this amount is appropriate and in the best interests of creditors as a whole.³⁹

²⁹ The Second Morales Affidavit at para 23

³⁰ The Second Morales Affidavit at para 24

³¹ *Ibid.*

³² The Second Morales Affidavit at para 25

³³ The Second Morales Affidavit at para 26

³⁴ The Second Morales Affidavit at para 26

³⁵ The Second Morales Affidavit at para 27

³⁶ The Second Morales Affidavit at para 28

³⁷ *Ibid.*

³⁸ The Second Morales Affidavit at para 29

³⁹ The Second Morales Affidavit at para 30

33. A revised cashflow statement covering the period from June 6, 2026 to August 30, 2026 is being prepared by the Applicant in coordination with the Proposal Trustee. The revised cashflow statement will reflect updated projections of receipts and disbursements over that period, taking into account the Applicant's current operations and financial position.⁴⁰
34. It is anticipated that the revised cashflow statement will be appended to the Proposal Trustee's Second Report to this Honourable Court.⁴¹

III. ISSUE

35. The issue before this Honourable Court is:

- (a) Should the Applicant's Stay Period be extended to August 5, 2026?

IV. LAW AND ARGUMENT

A. The Stay Period Should be Extended to August 5, 2026

36. The Stay Period expires on June 21, 2026.⁴² Without a Court-ordered extension, the Applicant must file a proposal by that date or face automatic bankruptcy.⁴³
37. Section 50.4(9) of the BIA authorizes the Court to extend the Stay Period where the applicant acts in good faith and with due diligence, and no creditor would be materially prejudiced. The Applicant satisfies each criterion.⁴⁴
- (a) The Applicant has acted in good faith and with due diligence. Since the First Extension Order, it has:
- (b) worked cooperatively with the Proposal Trustee to manage cashflow and prepare a draft projected five-year budget;
- (c) hired a Chief Executive Officer in Alberta to manage operations and assist in formulating a proposal;
- (d) completed a detailed analysis of contracts and service providers to identify those critical to operations;
- (e) continued to operate the business;
- (f) disclosed to the Proposal Trustee payments made by the Applicant during the NOI proceedings to certain critical service providers in respect of Pre-NOI Obligations, and is working with counsel and the Proposal Trustee to assess whether any recovery steps are

⁴⁰ The Second Morales Affidavit at para 31

⁴¹ The Second Morales Affidavit at para 32

⁴² The Second Morales Affidavit at para 6

⁴³ The Second Morales Affidavit at para 36

⁴⁴ The Second Morales Affidavit at para 37

appropriate; and

(g) prepared a revised cashflow analysis that will be appended to the Proposal Trustee's Second Report to the Court.⁴⁵

38. These actions demonstrate the Applicant's commitment to advancing the proposal in a timely and transparent manner consistent with the good faith and due diligence requirement under section 50.4(9)(a) of the BIA.

39. The requested 45-day extension to August 5, 2026 is necessary for the Applicant to:

(a) continue working with the Proposal Trustee on the projected five-year budget;

(b) negotiate proposal terms with creditors and stakeholders; and

(c) formulate and present a viable proposal to its creditors.⁴⁶

40. A 45-day extension to August 5, 2026 will provide sufficient time to materially advance these objectives.⁴⁷

41. No creditor will be materially prejudiced by this extension.⁴⁸ To the contrary, the stay protects value by enabling an orderly restructuring. If the Stay Period is not extended, the Applicant will be deemed to have made an assignment into bankruptcy, and its operations would cease, almost certainly leading to significant destruction of value to the detriment of all creditors. There would likely be insufficient working capital to abandon, reclaim and remediate the Applicant's licensed wells which would result in the Applicant's property having to be surrendered to the Orphan Well Association.⁴⁹

42. The Applicant respectfully submits that the requested extension to August 5, 2026 is both reasonable and necessary and should be granted.

B. Pre-Filing Payments to Critical Suppliers

43. The Applicant does not seek an order at this time authorizing the pre-filing payments to critical service providers described above. The Proposal Trustee and the Applicant are continuing to review those payments to assess whether they were reasonable and necessary to secure the ongoing cooperation of the relevant suppliers for the continuation of essential goods and services.

44. The Applicant notes, however, that Canadian courts have recognized that payment of pre-filing obligations to critical suppliers can be authorized in appropriate circumstances. In *1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947, the Ontario Court of Appeal held that parties may enter into legitimate agreements for the payment of past debts in order to secure future supply, and that to hold otherwise "would undermine the first stage of the *BIA*

⁴⁵ The Second Morales Affidavit at para 7

⁴⁶ The Second Morales Affidavit at para 34

⁴⁷ The Second Morales Affidavit at para 35

⁴⁸ The Second Morales Affidavit at para 39

⁴⁹ The Second Morales Affidavit at para 36

process that serves to encourage a debtor’s successful reorganization as a going concern.”⁵⁰ The Court emphasized that “[l]egitimate agreements with key suppliers also form a vital part of that process”.⁵¹

45. Similarly, in *Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893, this Honourable Court considered whether a post-NOI payment to a supplier violated the stay under section 69(1) of the BIA. The Court observed that there may be circumstances in which such payments are valid, including where the payment was authorized by a court order governing the proposal process or where it was made to secure future supply of critical product as part of the process of putting forward a viable proposal.⁵² The Court declined to find that the payment violated the stay in the absence of evidence establishing otherwise.
46. The Applicant submits that the payments to critical service providers, as set out in Exhibit “B” to the Second Morales Affidavit, were made in a good faith effort to advance its restructuring, in the bona fide belief that such payments were necessary to secure supplier cooperation and support the Applicant’s continued operations. The Applicant does not seek authorization of these payments at this time, but respectfully brings them to the attention of this Honourable Court as a matter of full transparency, consistent with the principles recognized in the foregoing authorities.

V. CONCLUSION AND RELIEF SOUGHT

47. For the foregoing reasons, the Applicant respectfully submits that this Honourable Court grant an order extending the Stay Period to August 5, 2026.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JUNE, 2026

OGILVIE LLP



**Per: Susy Trace
Counsel for the Applicant**

OGILVIE LLP



**Per: Leah Macklin
Counsel for the Applicant**

⁵⁰ *1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947 at para 13 [Tab 2]

⁵¹ *Ibid*

⁵² *Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893 at paras 20-27 [Tab 3]

TABLE OF AUTHORITIES

Tab

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3,
2. *1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947
3. *Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to March 17, 2026

À jour au 17 mars 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to March 17, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of March 17, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité – lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 17 mars 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 17 mars 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

Property included for enforcement purposes

(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

When obligation to pay ceases

(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.

R.S., 1985, c. B-3, s. 68; 1992, c. 27, s. 34; 1997, c. 12, s. 60; 2005, c. 47, s. 58; 2007, c. 36, s. 33.

Assignment of wages

68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

1992, c. 27, s. 35; 1997, c. 12, s. 61; 2005, c. 47, s. 59.

Stay of Proceedings

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

Biens pouvant faire l'objet d'une exécution

(15) Pour l'application du présent article, la somme à verser à l'actif de la faillite peut être recouvrée par voie d'exécution contre le revenu total du failli.

Cessation des versements

(16) L'obligation du failli qui est une personne physique de faire des versements à l'actif de la faillite au titre du présent article cesse, en cas d'opposition à sa libération d'office, le jour où il aurait été libéré n'eût été l'avis d'opposition, rien n'empêchant toutefois le tribunal de reconduire l'obligation pour la somme qu'il estime indiquée.

L.R. (1985), ch. B-3, art. 68; 1992, ch. 27, art. 34; 1997, ch. 12, art. 60; 2005, ch. 47, art. 58; 2007, ch. 36, art. 33.

Cession de salaire

68.1 (1) La cession de salaires présents ou futurs faite par le débiteur avant qu'il ne devienne un failli est sans effet sur les salaires gagnés après sa faillite.

Cession de créances comptables

(2) La cession de sommes — échues ou à percevoir — à titre de paiement, de commission ou d'honoraires professionnels pour la prestation de services, faite par un débiteur qui est une personne physique avant qu'il ne fasse faillite, est sans effet sur les sommes de même provenance qui sont gagnées après sa faillite.

1992, ch. 27, art. 35; 1997, ch. 12, art. 61; 2005, ch. 47, art. 59.

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

69 (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

a) les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent tenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) est sans effet toute disposition d'un contrat de garantie conclu entre la personne insolvable et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'elle

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

dépose un avis d'intention aux termes de l'article 50.4, est déchu des droits qu'elle aurait normalement de se servir des avoirs visés par le contrat de garantie ou de faire d'autres opérations à leur égard;

c) est suspendu l'exercice par Sa Majesté du chef du Canada des droits que lui confère l'une des dispositions suivantes à l'égard de la personne insolvable, lorsque celle-ci est un débiteur fiscal visé à cette disposition :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui, à la fois :

(A) renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(B) prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un **régime provincial de pensions** au sens de ce paragraphe.

KeyCite treatment

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Proposition d'Amram](#) | 2025 QCCS 780, 2025 CarswellQue 7555, EYB 2025-565690 | (C.S. Qué., Mar 11, 2025)

2019 ONCA 947

Ontario Court of Appeal

1732427 Ontario Inc. v. 1787930 Ontario Inc.

2019 CarswellOnt 20100, 2019 ONCA 947, 313 A.C.W.S. (3d) 242, 74 C.B.R. (6th) 273

In the Matter of Notices of Intention to make a proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc. both of the City of St. Thomas, in the Province of Ontario

Paul Rouleau, L.B. Roberts, A. Harvison Young JJ.A.

Heard: November 15, 2019

Judgment: December 3, 2019

Docket: CA C66803, C66871

Proceedings: reversing in part *1787930 Ontario Inc. v. Transit Petroleum* (2019), [2019 CarswellOnt 1120](#), [2019 ONSC 716](#), R. Raikes J. (Ont. S.C.J.)

Counsel: Sherry Kettle, for Appellant, Transit Petroleum Inc.

Paul Neil Feldman, Oscar Strawczynski, for Respondent, 1787930 Ontario Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[VI Proposal](#)

[VI.3 Effect of proposal](#)

Headnote

Bankruptcy and insolvency --- Proposal — Effect of proposal — As binding on creditors

Parties entered into negotiations to conclude agreement governing payment of past and future fuel purchases — Motion judge allowed in part debtor's motion to recover monies paid to creditor after it had filed notice of intention to file proposal in bankruptcy ("NOI") — Motion judge found that pre-authorized debit payment of \$83,734.05 ("PAD") made to creditor post-NOI, under payment plan concluded pre-NOI, related to pre-NOI debts — Motion judge found that, contrary to [s. 69\(1\)\(a\) of Bankruptcy and Insolvency Act \("BIA"\)](#), PAD represented prohibited remedy — Motion judge concluded that creditor should return PAD to debtor, net of \$48,434.30 owing to creditor for post-NOI fuel purchases — Creditor appealed — Appeal allowed; matter remitted for rehearing on all issues except for creditor's entitlement to payment of \$43,434.30, which was not disputed on appeal — Motion judge erred by failing to consider whether parties entered into legitimate agreement to pay past debts in order to secure future supply of fuel — In determining whether PAD was remedy, motion judge was required to consider all relevant surrounding circumstances — Submission that parties could not enter into agreement for payment of past debts in order to secure future fuel supplies was not accepted — To accept this submission would undermine first stage of BIA process that served to encourage debtor's successful reorganization as going concern — Determination of issue of PAD and alleged agreement could affect motion judge's characterization of PAD as prohibited remedy under [s. 69\(1\) of BIA](#).

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 69 — considered

s. 69(1) — considered

s. 69(1)(a) — considered

s. 95 — considered

s. 96 — considered

s. 97 — considered

s. 97(1) — considered

APPEAL by creditor from judgment reported at *1787930 Ontario Inc. v. Transit Petroleum* (2019), 2019 ONSC 716, 2019 CarswellOnt 1120, 74 C.B.R. (6th) 258 (Ont. S.C.J.), allowing in part motion by debtor to recover monies paid to creditor after filing notice of intention to file proposal in bankruptcy.

Per curiam:

1 The appellant appeals from the motion judge's order requiring it to pay to the respondent the sum of \$35,299.75, plus pre-judgment interest, and costs in the sum of \$31,767.52.

2 The motion judge allowed in part the respondent's motion to recover monies paid to the appellant after it had filed a notice of intention to file a proposal in bankruptcy ("NOI") on July 2, 2018. The motion judge found that the pre-authorized debit payment in the amount of \$83,734.05 ("the PAD") made to the appellant post-NOI, under a payment plan concluded pre-NOI, related to pre-NOI debts. As a result, contrary to s. 69(1)(a) of the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA")*, the PAD represented a prohibited "remedy against the insolvent person or the insolvent person's property". The motion judge concluded that the appellant should return the PAD to the respondent, net of the \$48,434.30 owing to the appellant for post-NOI fuel purchases. The appellant's entitlement to the latter is not disputed on appeal.

3 The appellant submits that the motion judge erred in characterizing the payment as the prohibited exercise of a creditor's remedy when it represented a *bona fide* agreement concluded on July 5, 2018 to satisfy past debts in order to continue a vital fuel supply to assist in the respondent's restructuring.

4 The respondent argues that the motion judge correctly determined that the July 5th PAD was a prohibited self-help creditor's remedy because it was payment for past fuel purchases. Moreover, once he determined that the PAD was a prohibited remedy, the motion judge was not required to consider any alleged agreements because the parties could not ratify what was otherwise prohibited. In any event, the respondent maintains that the appellant did not raise an alleged July 5th agreement before the motion judge but confined its argument to the impact of a pre-NOI agreement.

5 In our view, the motion judge erred by failing to consider whether the parties had entered into a legitimate agreement to pay past debts in order to secure the future supply of fuel. As a result, the matter should be remitted to him for a new hearing.

6 In determining whether the July 5th PAD was a remedy, the motion judge was required to consider all the relevant surrounding circumstances in which it occurred. Accordingly, it is useful to set out a brief synopsis of the relevant context leading up to and concerning the July 5th PAD and the alleged agreement between the parties.

7 Up until July 11, 2018, the appellant supplied fuel to the respondent, a trucking company. The respondent was experiencing serious financial difficulties and had fallen into arrears in payments to the appellant for fuel supplied. In June 2018, the parties entered into negotiations to conclude an agreement governing payment of past and future fuel purchases.

8 While the motion judge declined to determine whether the parties had reached an agreement prior to the filing of the NOI on July 2nd, the appellant submits that pursuant to the agreement that it says was reached on June 28th, on notice to and without objection from the respondent, it submitted the PAD for payment on July 3rd, which was processed and paid to the appellant on July 5th.

9 The appellant did not learn of the NOI until its meeting with the respondent on July 5, 2018. As noted at para. 21 of the motion judge's reasons, at that meeting, the respondent's owner, Louise Vonk, accompanied by its general manager, Blaine Skirtschak, informed the appellant's representatives, Monique Paul and Trevor Chambers, that the respondent "had filed a NOI on July 2, 2018 to restrict further action by CRA and to give [the respondent] some time to reorganize financially to carry on business".

10 In para. 22 of his reasons, the motion judge summarized the appellant's evidence concerning the respondent's representations which the appellant says formed the July 5th agreement between the parties:

During the July 5 meeting, Vonk indicated that [the respondent] needed [the appellant's] support to keep operating and she was willing to do whatever was necessary to keep [the appellant] as its fuel supplier. She did not request return of the monies received by [the appellant] from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a 'vital vendor' necessary for [the respondent] to remain in business.

11 The appellant insists that the issue of a July 5th agreement was raised before the motion judge. Paragraph 30 of the motion judge's reasons provide some support for the appellant's submission that it had advanced the argument that it was a key supplier who, subsequent to the NOI, was permitted to keep the July 5 PAD for past debts in furtherance of an agreement to maintain supply to the respondent as it restructured its business. Similarly, the appellant points to para. 31 of the affidavit of Trevor Chambers in which he deposes that:

Transit specifically relied on the representations of [the respondent], including Louise, Blaine and Nathan, that all purchases would be paid for by [the respondent] and that the Agreed Payment had been allowed to go through so that [the respondent] could continue in business. Transit continued to supply fuel to [the respondent] post-NOI at [the respondent's] request and continued to do business with [the respondent] in good faith and based on [the respondent's] representations.

12 To be fair to the motion judge, it is not entirely clear to what extent in argument on the motion the appellant characterized the July 5th exchanges as constituting an agreement. However, it seems common ground that the motion judge did not squarely consider whether, in context, that exchange represented a *bona fide* agreement with a key supplier to pay past debts in order to secure a vital future supply of fuel for the respondent's continued operations.

13 We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the *BIA* process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

14 Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the proposal proceedings. Instead, the *BIA* provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. ... In the context of proposals, section 97 [of the *BIA*]¹ arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid.

[Emphasis added.]

2021 ABQB 893

Alberta Court of Queen's Bench

Schendel Mechanical Contracting Ltd (Re),

2021 CarswellAlta 2828, 2021 ABQB 893, [2021] A.W.L.D. 4847, 338 A.C.W.S. (3d) 414, 38 Alta. L.R. (7th) 406

In the Matter of the Bankruptcy of Schendel Mechanical Contracting Ltd.

PricewaterhouseCoopers, Court Appointed Receiver of Schendel Mechanical Contracting Ltd., Schendel Management Ltd. and 687772 Alberta Ltd. (Applicant) and C & G Hatch Associates (Hatch Company) (Respondent)

Douglas R. Mah J.

Heard: September 22, 2021

Judgment: November 9, 2021

Docket: Edmonton B203 489860, BK03 155990, BK03 155991

Counsel: Sander Lekas, for Receiver, PricewaterhouseCoopers Inc
Ryan Quinlan, for C & G Hatch Associates Ltd

Subject: Contracts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XI Avoidance of transactions prior to bankruptcy

XI.1 Fraudulent preferences

XI.1.d Miscellaneous

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Onus of proof

Bankrupt filed notice of intention (NOI) to file proposal and received several extensions — Recipient supplied bankrupt with HVAC equipment on construction project and bankrupt was indebted to recipient for \$175,860.35, with \$34,476.75 incurring after NOI — Bankrupt paid \$40,000 to recipient after filing NOI; recipient indicated payment came out of blue, bankrupt was arm's length company and recipient took no steps to collect — Bankrupt's proposal was found likely to be rejected, resulting in deemed bankruptcy and receivership order, made on same day that cheque to recipient cleared — Receiver brought application for return of payment to recipient to estate of bankrupt — Application dismissed — After filing NOI, bankrupt was trying to make proposal with creditors but continued to do business with recipient, as evidenced by invoices issued — There was no evidence of what bankrupt was trying to achieve by making \$40,000 payment, which receiver applied to bankrupt's indebtedness — Stay did not apply to indebtedness arising from goods and services supplied after date of filing as this would not be claim provable in bankruptcy — There was no evidence as to whether payment was authorized by order or intended to secure future supply of product, as part of process of putting forth viable proposal — Receiver did not meet onus of proving payment violated stay — Two further stays came into effect when bankruptcy was deemed, but that order did not take effect until it was pronounced, and receiver did not establish that occurred before payment to recipient was complete — Receiver did not bring application to set transaction aside under [Fraudulent Conveyances Act](#) until after one-year limitation period passed so it was unnecessary to consider bona fides of transaction — Receiver could not succeed under Statute of Elizabeth as there was no evidence on intent [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 71\(1\)](#).

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

DGS v. HAS (2019), 2019 ABQB 887, 2019 CarswellAlta 2467, 6 Alta. L.R. (7th) 343 (Alta. Q.B.) — referred to

Gingrich v. Gingrich (2012), 2012 ABCA 371, 2012 CarswellAlta 2073, 30 R.F.L. (7th) 81 (Alta. C.A.) — considered

Jones, Re (2003), 2003 CarswellOnt 3184, (sub nom. *Jones v. R.*) 2003 D.T.C. 5663, 175 O.A.C. 263, [2004] 1 C.T.C. 65, 45 C.B.R. (4th) 263, 66 O.R. (3d) 674, 66 O.R. (3d) 683 (Ont. C.A.) — referred to

Krumm v. McKay (2003), 2003 ABQB 437, 2003 CarswellAlta 961, [2003] 9 W.W.R. 442, 17 Alta. L.R. (4th) 103, 47 C.B.R. (4th) 38, 342 A.R. 169 (Alta. Q.B.) — considered

Palechuk v. Fahrlander (2006), 2006 ABCA 242, 2006 CarswellAlta 1062, 61 Alta. L.R. (4th) 71, [2006] 10 W.W.R. 68, 28 R.F.L. (6th) 294, 26 E.T.R. (3d) 79, 273 D.L.R. (4th) 332, 397 A.R. 151, 384 W.A.C. 151 (Alta. C.A.) — followed

Phoenix Land Ventures Ltd. v. FIC Real Estate Fund Ltd. (2015), 2015 ABCA 245, 2015 CarswellAlta 1323, 77 C.P.C. (7th) 268, (sub nom. *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.*) 602 A.R. 394, (sub nom. *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.*) 647 W.A.C. 394, 27 Alta. L.R. (6th) 257 (Alta. C.A.) — considered

Schendel Management Ltd., Re (2019), 2019 ABQB 545, 2019 CarswellAlta 1457, 73 C.B.R. (6th) 13, 1 Alta. L.R. (7th) 385, [2020] 10 W.W.R. 443 (Alta. Q.B.) — referred to

Startek Computer Inc. (Trustee of) v. Samtack Computer Inc. (2000), 2000 BCSC 1316, 2000 CarswellBC 1802, 20 C.B.R. (4th) 166 (B.C. S.C. [In Chambers]) — considered

Wosk's Ltd., Re (1985), 58 C.B.R. (N.S.) 312, [1986] 2 C.T.C. 78, 86 D.T.C. 6243, 1985 CarswellBC 807, 58 C.B.R. 312 (B.C. S.C.) — referred to

728835 Ontario Ltd., Re (1998), 1998 CarswellOnt 2576, (sub nom. *728835 Ontario Ltd. (Bankrupt), Re*) 111 O.A.C. 155, 3 C.B.R. (4th) 214 (Ont. C.A.) — referred to

1732427 Ontario Inc. v. 1787930 Ontario Inc. (2019), 2019 ONCA 947, 2019 CarswellOnt 20100, 74 C.B.R. (6th) 273 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50(12) — referred to

s. 50(12.1) [en. 2005, c. 47, s. 34(4)] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 57 — referred to

s. 69(1) — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — referred to

s. 71(1) — considered

s. 95 — referred to

s. 96 — referred to

s. 121(1) — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Fraudulent Conveyances Act, 1571 (13 Eliz. 1), c. 5

Generally — referred to

Fraudulent Preferences Act, R.S.A. 2000, c. F-24

Generally — referred to

s. 1 — considered

s. 2 — considered

s. 3 — considered

s. 6 — referred to

APPLICATION by receiver for return of payment to estate that bankrupt made to creditor.

Douglas R. Mah J.:

A. Background

1 The dispute here concerns the legality of a \$40,000 payment made by an insolvent company to one of its suppliers. The Applicant Receiver, PricewaterhouseCoopers, says the payment is prohibited on a number of grounds, and seeks its return for the benefit of the estate. The recipient Hatch says the payment was both innocently and validly received, and that Hatch is entitled to retain it.

2 The insolvent company, Schendel Mechanical Contracting, was one of a trio of associated companies that at one time collectively constituted a major construction concern in Alberta operating under the Schendel name. The events leading to Schendel's financial demise are described in Justice Lema's receivership decision of July 19, 2019 reported at [2019 ABQB 545](#).

3 The payment in question was made by way of cheque on July 8, 2019. Schendel had filed a Notice of Intention under [section 50.4\(1\) of the Bankruptcy and Insolvency Act](#) on March 22, 2019 and had obtained a series of extensions from the Court to file a proposal. However, it was not until July 19, 2019 at 11:48 AM that Hatch's bank certified the cheque. There is no evidence before me as to the exact moment in time on that same day that Justice Lema's decision was pronounced.

4 Between April 2018 and May 2019, Hatch had supplied Schendel with HVAC equipment on various Schendel projects. The affidavit of Mr. Manning dated September 2, 2021 itemizes at para 8 the various invoices rendered by Hatch to Schendel during that period. As of May 24, 2019, Schendel was indebted to Hatch to the extent of \$175,860.35, of which the sum of \$34,476.75 was incurred post-NOI.

5 Mr. Manning, who is Hatch's sales manager, deposes that Schendel's cheque for \$40,000 was received by Hatch out of the blue. Hatch is arm's-length from Schendel. Mr. Manning deposes that Hatch had taken no steps to collect the indebtedness aside from normal periodic inquiries to the customer regarding payment. He states that no one at Hatch, as far as he knows, had any conversation with anyone at Schendel regarding special treatment for Hatch. Mr. Manning says on behalf of Hatch that he does not know why Schendel chose to forward the payment at that time or why Hatch may have received a payment when other creditors did not. The payment was assumed to be and treated by Hatch as a payment on account.

6 The Receiver is not able to shed much light on the matter. Mr. Fleming, the Receiver's deponent, in his December 1, 2020 affidavit simply states that PwC in the course of its administration duties reviewed Schendel's bank records and noted that the \$40,000 cheque cleared Schendel's bank on the same day that the Receivership Order was granted. PwC as Schendel's Receiver demanded that Hatch refund the amount, which Hatch has refused to do and which leads us to the present application.

7 No evidence was tendered by either side concerning the impugned transaction from Schendel itself, the proposal trustee under the NOI (Grant Thornton LLP), the current Trustee in Bankruptcy (also Grant Thornton LLP), nor ATB which was the secured creditor and the prime mover behind the receivership. Hatch applied the \$40,000 payment to certain specific invoices and provided that information to PwC but it was not put before the Court.

A. The Receiver's Arguments

8 The Receiver stakes its position that the funds should be returned on these grounds:

- upon the filing of the NOI, and throughout the extensions of the proposal period, the automatic stay under [section 69\(1\) of the BIA](#) was in effect and consequently Hatch had no remedy against Schendel;

C. Stay under Section 69(1) of the BIA

16 The Receiver's first branch of argument relates to the automatic stay created by section 69(1) of the BIA. This provision provides that no creditor has any remedy against the insolvent person or that person's property, on the filing of the NOI, or is permitted to commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy.

17 The Receiver argues that the stay was continuously in effect from March 22, 2019 and throughout the various extensions until the date of Schendel's receivership and deemed bankruptcy on July 28, 2019. All through that period, says the Receiver, Hatch was legally prevented by the statutory stay from dealing in any manner whatsoever with the \$40,000 cheque.

18 Hatch says that it took no positive steps to collect on any indebtedness from Schendel. Rather, it says the cheque simply appeared on July 8, 2019 and that Hatch was a totally passive party.

19 In *Startek Computer Inc (Trustee of) v Samtech Computer Inc* 2000 BCSC 1316, 20 CBR (4th) 166, Harvey J found that the cashing of a cheque by a creditor after the NOI date (although the cheque was received prior to that date) was a "remedy" within the meaning of section 69(1) and therefore prohibited by the statutory stay. However, as I read the case, the judge does not explain why this is the case and his view seems to be influenced by the fact that the cheque-casher was attempting to get paid twice for the same services.

20 A case cited by Hatch, *1732427 Ontario Inc v 1787930 Ontario Inc*, 2019 ONCA 947, makes the point that not every post-NOI payment by an insolvent company to a creditor is necessarily prohibited by the stay. There are circumstances where such payments are necessary to enable the company to pursue the restructuring process, and thus are valid. The case involved a preauthorized debit arrangement that had been entered into between the parties prior to the NOI and there was evidence that honouring the arrangement was essential to continue delivery of required fuel post-NOI. The Ontario Court of Appeal in *1732427 Ontario Inc* overturned the commercial court judge, who had cited and made a similar finding as Harvey J in *Startek Computer*, and stated:

[13] We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the BIA process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the BIA is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

[14] Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

There is, however, no specific prohibition in the BIA on the debtor effecting payment of claims provable in the proposal proceedings. Instead, the BIA provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. . . . In the context of proposals section 97 of the BIA arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid. [Emphasis in original.]

21 The Ontario Court of Appeal concluded in this case that it was a critical question whether the payment of past indebtedness was a *bona fide* condition of post-NOI fuel supply, needed for the restructuring to proceed. The question was remitted to the commercial court to determine.

22 Here, what is known from the evidence is that Schendel was trying to make a proposal to its creditors and had continued to do business with Hatch after filing its NOI, as evidenced by the various invoices issued by Hatch to Schendel in the post-NOI period. There is no evidence of what Schendel was trying to achieve by making the \$40,000 payment. Mr. Manning, Hatch's

representative, reports that there were no discussions between Hatch and Schendel with regard to treating Hatch differently from other creditors. He has no further information about any other conversations that might have occurred.

23 Further, the proposal process was subject to court supervision at the relevant time. In the last of the extension orders, granted by Justice Yamauchi on June 11, 2019, the following conditions were imposed by the Court:

(a) For the period of the Further Extension, Schendel shall report prior to the end of each business day on actual payments proposed to be made regarding disbursements for the next day (the "Projected Disbursements"). The report on the Projected Disbursements is to be made concurrently to the Proposal Trustee and to ATB. The Proposal Trustee shall review the Projected Disbursements and provide its approval to pay the Projected Disbursements or comment on any concerns with payment before noon on the next business day. The Proposal Trustee's comments shall be provided concurrently to Schendel and ATB. Following approval by the Proposal Trustee, Schendel may proceed to pay the Projected Disbursements;

(b) For the period of the Further Extension, Schendel will not enter into any further specific direct payment arrangements that would modify existing contracts without approval from the Proposal Trustee and ATB, or pending further Order of this Court . . .

24 There is no evidence before me as to whether the \$40,000 payment in question either was an approved payment within the meaning of condition (a) above, in which event it would be valid, or a prohibited payment arrangement under condition (b) above. In the latter regard, I do not know whether there was an existing supply contract between Hatch and Schendel or whether the payment in question modified it or not, or if so, whether there was approval from the Proposal Trustee and ATB.

25 Finally, it is known that Hatch supplied goods to various Schendel projects during the post-NOI period to the tune of \$34,476.75. Hatch advised the Receiver of which specific invoices to which the \$40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.

26 The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy" per section 69(1): *Wosk's Ltd R, e*, 1985 Carswell BC 807 (SC), 58 CBR 312; *728835 Ontario Ltd., Re*, 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and *Jones, Re*, 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258.

27 In summary, there is no evidence before the Court, one way or the other, as to:

- whether the payment was, or was not, authorized by Yamauchi J's Order of June 11, 2019. (Certainly, Hatch would be in no position to know one way or the other.)

- whether the payment was intended by Schendel to secure future supply of critical product, as part of the process of trying to put forward a viable proposal.

28 The onus of proof is upon the Receiver to prove that the payment was in violation of the stay. The evidence does indicate that Schendel and Hatch continued to do business together after the NOI was filed. I should not simply assume facts that are in the Receiver's favour. As shown in the above two bullet points, there may well be circumstances in which the payment is valid. In the absence of evidence, the probability of either "yes" or "no" to either of the questions posed in the two bullet points above is evenly balanced, not tipped in favour of the Receiver.

29 Further, the evidence before me indicates that some portion of the \$40,000 payment was applied to post-NOI supply of goods. The evidence shows that some \$34,476.75 worth of product was supplied by Hatch to Schendel in the post-NOI period.

30 I also agree that the question of whether Hatch should be allowed to retain the payment is better analysed as a question of whether the payment is a preference, as stated by the Court of Appeal of Ontario in *1732427 Ontario Inc*.