**Court File No. BK-19-02484304-0031**
**Estate File No. 31-248304**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**IN BANKRUPTCY**

**IN THE MATTER OF GALTY B.V.**
**HAVING ITS HEAD OFFICE IN THE CITY OF AMSTERDAM**
**IN THE NETHERLANDS**

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# RESPONDING FACTUM OF THE TRUSTEE

(Motion returnable August 16, 2023)

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August 11, 2023

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## I. OVERVIEW

1. This is a motion by The Avenue Road Trust ("**ART**"). It is a creditor appealing a disallowance of its Proof of Claim. The motion is to adduce further evidence for the hearing of its appeal as set out at Exhibit "G" in its Motion Record (the "**Further Documents**").

2. The request to adduce the Further Documents is contrary to an agreement reached between Oct. 18 and 24, 2022 between counsel for ART and counsel for MNP Ltd. in its capacity as the trustee in bankruptcy of Galty B.V. (the "**Trustee**") regarding how the appeal would be argued and the evidence that would be before the Court in that regard (the "**Appeal Record Agreement**").

3. The Appeal Record Agreement permitted ART to rely upon some materials[1] that were not given to the Trustee prior to the disallowance of ART's Proof of Claim, but that was on the *express* basis that ART would not seek to rely on any further materials. This compromise behind the Appeal Record Agreement was because the Trustee and the estate inspectors were concerned to bring finality in the circumstances of ART's Proof of Claim and appeal.

4. ART should not be permitted to resile from its agreement. The Further Documents are said to have been found in a storage locker of the late Victor Seabrook, but without explanation whether or why he had not brought them up for use in ART's Proof of Claim or appeal. That ultimately does not matter, however, because the record is clear that the Further Documents were part of long-running civil litigation on similar issues and were in the

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[1] Namely an affidavit from Victor Seabrook sworn October 5, 2021.

possession of Ron Chapman, who continues to act for ART in that litigation and is instructing counsel to counsel for ART in this motion and appeal.

5. ART's argument that, in effect, the door has already been opened to filing some new material in the Appeal Record Agreement overlooks the fact that the new material was only permitted by virtue of that agreement. If ART now wants to resile from that agreement, it cannot take the benefit of that point such that the issue of whether anything that was not before the Trustee in support of ART's Proof of Claim can be before the Court on appeal will then need to be resolved.

## II. FACTS

### Background

6. The bankrupt made an assignment in bankruptcy on March 11, 2019.[2] Claims of CAD $25,079,500 have been filed by creditors. The only known assets of the bankrupt were $591,503 that had been held by its prior counsel as the proceeds of sale of real property formerly owned by the bankrupt in Toronto. The Trustee has since taken possession of those funds.[3] As of the April 30, 2023, $461,724.41 of that amount remained,[4] which is before the payment of approximately $100,000 of legal fees for counsel for the Trustee that have been approved by inspectors but are yet to be taxed, so the net amount is closer to

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2 Third Report of the Trustee dated May 12, 2023 (the "**Third Report**") at para. 1.

3 Third Report, paras. 4-6.

4 Interim R&D, Appendix "E" to the Third Report.

$360,000. Further proceedings for the Trustee and its counsel will decrease that amount before distributions to creditors take place.

7. Prior to its bankruptcy, the debtor was involved in litigation with ART and other parties in relation to the amounts that ART claims in the Proof of Claim under appeal. The bankruptcy was as a result of the ongoing costs to the debtor of that litigation.[5]

**ART's Proof of Claim and the appeal**

8. ART's Proof of Claim is unsecured and contingent and is for the equivalent of CAD $3,197,000. It asserts a loan, to and agreement with, the bankrupt.[6]

9. ART had previously filed a claim for the same amounts on the basis of a trust entitlement under s. 81 of the *Bankruptcy and Insolvency Act* (the "**BIA**"). That claim was disputed by the Trustee and an appeal from that decision was abandoned in 2019. The Trustee indicated to ART that the abandonment of the appeal would be without prejudice to the unsecured Proof of Claim, because the dispute had been on the basis of a trust claim and not the underlying asserted debt .[7]

10. In reviewing the unsecured Proof of Claim by ART, the Trustee requested further documents and evidence from ART on several occasions. The Trustee began that process on July 23, 2020, which resulted in a further affidavit from Victor Seabrook on August 14, 2020. In February of 2021, the Trustee asked that any further documents or evidence in support of ART's unsecured Proof of Claim be submitted by the end of that month. After

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5 Third Report, paras. 10-11.

6 Third Report, para. 6.

7 First Report of the Trustee dated February 27, 2020, paras. 13-22.

extensions of that deadline were requested and granted, ART submitted further materials on March 23, 2021.[8]

11. On August 6, 2021, the Trustee issued its Notice of Disallowance of ART's unsecured Proof of Claim.[9]

12. On September 3, 2021, Jaffe & Peritz LLP as agent for Ron Chapman filed a Notice of Appeal from that disallowance.[10]

13. On April 14, 2022, Ron Chapman as counsel for ART wrote to counsel for the Trustee to append a further affidavit of Victor Seabrook dated October 5, 2021 and upon which ART wanted to rely in connection with its appeal. The Trustee reviewed that material and concluded that it did not alter its view of ART's Proof of Claim. On April 21, 2022, counsel for the Trustee wrote to Mr. Chapman to advise him of that, but also that such review was without prejudice to the issues of (a) further material should have been submitted given the several prior requests for evidence in support of the Proof of Claim, and (b) whether having already issued the Notice of Disallowance the Trustee was entitled or required to review it.[11]

14. On May 18, 2022, Victor Seabrook passed away.[12]

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8 Third Report, para. 27.

9 Third Report, para. 23.
See also Exhibit "B" to the Affidavit of Timothy Seabrook sworn May 5, 2023 (the "**T. Seabrook Affidavit**").

10 Third Report, para. 24.

11 Third Report, paras. 29-31.

12 Third Report, para. 32.

15. On or about that time, current insolvency counsel for ART, Fred Tayar & Associates Professional Corporation, was retained and took steps to schedule the appeal thereafter.[13]

**The agreement between counsel for ART and counsel for the Trustee regarding the appeal**

16. In the course of discussing the arrangements for the appeal, insolvency counsel for ART and counsel for the Trustee discussed and resolved a number of procedural issues.

17. Part of that included the issue of what materials should be before the Court on the appeal.

18. The discussion on that point began with a request from insolvency counsel for ART that the October 5, 2021 affidavit from Victor Seabrook also be included in those materials.[14]

19. The Trustee convened a meeting of inspectors specifically to discuss that issue,[15] because it and the estate inspectors were specifically concerned about delay by ART in prosecuting its appeal, the delay that final disposition of that claim was having on administration of the bankrupt's estate, and the multiple opportunities given to ART over a long period of time to substantiate its claim.[16]

20. Following that meeting of inspectors, counsel for the Trustee wrote to insolvency counsel for ART on August 3, 2022 as follows:

> The Trustee now has instructions from the estate inspectors on the request to admit further evidence on the appeal of the disallowance in this matter. The Trustee is prepared to agree that the evidence on the appeal will include (i) all materials that The Avenue Road Trust ("ART") provided to the Trustee prior to the disallowance of the claim, (ii) the bankrupt's financial statements for all years relevant to the periods at issue in the proof of claim, and (iii) the further affidavit of Mr. Seabrook sworn October 5, 2021 and delivered after the disallowance. In exchange for this agreement, ART will agree not to seek to admit any other materials and the argument will

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13 Third Report, paras. 33-34.

14 Third Report, para. 36.

15 Third Report, para. 39.

16 Third Report, para. 39.

> proceed before the Associate Justice sitting as Registrar in bankruptcy on this record. Please advise if that is acceptable.[17]

21. That offer was not immediately accepted by ART.

22. Indeed, insolvency counsel for ART raised concerns that this would preclude reliance on further materials. In response, counsel for the Trustee wrote to insolvency counsel for ART on September 19, 2022, which was the date before the initial case conference before an Associate Justice in this matter, as follows:

> Colby: Our emails below discussed a possible further affidavit from Mr. Seabrook that you would also want to be part of the record on the appeal from the disallowance in addition to what we set out below. I don't yet have instructions to agree to any such further affidavit, and that is in part because I confess I'm not following why/how the affidavit noted (Oct. 21,2021) has anything to do with the ART proof of claim and its disallowance.
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> In addition to that, though, you and I also discussed in our call that you were not comfortable with the precise terms on which I indicated that the Trustee was prepared to resolve the issue of further evidence in the appeal record beyond what was submitted to the Trustee prior to the disallowance. Those terms were set out in my email of Aug.8 and were:
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> > The Trustee is prepared to agree that the evidence on the appeal will include (i) all materials that The Avenue Road Trust ("ART") provided to the Trustee prior to the disallowance of the claim, (ii) the bankrupt's financial statements for all years relevant to the periods at issue in the proof of claim, and (iii) the further affidavit of Mr. Seabrook sworn October 5, 2021 and delivered after the disallowance. In exchange for this agreement, ART will agree not to seek to admit any other materials and the argument will proceed before the Associate Justice sitting as Registrar in bankruptcy on this record.
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> The problem you outlined with that is that it would foreclose further materials and you instead preferred that further materials could go in by either agreement or by further order.
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> I have reviewed that suggestion and discussed it with the Trustee and it is unfortunately not acceptable. The directions from the estate inspectors

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[17] Third Report, para. 38.
See also email dated Aug. 3, 2022, Appendix "F" to the Third Report.

> were rather clear, and moreover the entire point of the terms suggested was to "nail down" the appeal record with finality. The history of this matter is replete with many requests from ART for supporting documentation and several deadlines to do so (along with several extensions of those deadlines). There is a real issue with the suggestions that for a matter that has been in litigation since 2015 that there is any evidence left to find or that a failure to find that evidence would not be due to a lack of diligence.
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> I understand the normal desire of counsel to leave "wiggle room" on something like this, but in this case I suggest it is unwarranted and in any event it is unacceptable to the Trustee.
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> If what I set out is agreeable then we can advise Ilchencko AJ. that there is no need to argue a fresh evidence motion. If what I set out is not agreeable then I think we need to tell His Honour the contrary and then we should schedule that motion in tomorrow's case conference.[18]

23. Counsel for ART was not prepared to agree to that before the Sept. 20, 2022 case conference. The issue was accordingly left open. The endorsement of that date reflected that counsel were to confer on the point and advise before the next scheduled case conference on Oct. 25, 2022.[19]

24. Thereafter, as between counsel it was agreed that ART would advise by Sept. 30, 2022 whether it wanted to file further materials or not. If not, then the agreement proposed by the Trustee would be implemented.[20]

25. Initially, ART advised on Sept. 30 that it did wish to file further material. Ultimately, however, ART advised on October 17, 2022 that nothing further was going to be relied upon after all.

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[18] Third Report, para. 40.
See also email dated Sept. 19, 2022, Appendix "G" to the Third Report.

[19] Endorsement dated Sept. 20, 2022; Exhibit "E" to the T. Seabrook Affidavit.

[20] Third Report, para. 40.

26. As a result, counsel for the Trustee and insolvency counsel for ART confirmed in emails between October 18 and 24, 2022 that they had reached the Appeal Record Agreement on the terms previously proposed by counsel for the Trustee on August 3, 2022.[21]

27. The Appeal Record Agreement allowed ART to rely on the Oct. 5, 2021 affidavit of Victor Seabrook in support of its appeal in addition to the materials previously provided to the Trustee. It also specifically noted that the financial statements of the bankrupt would be included in the record,[22] but those had been expressly referred to by the Trustee in the Notice of Disallowance.[23]

28. On the basis of no dispute about the record on appeal, the appeal by ART from the disallowance was then set for argument at a full day appointment on Feb. 16, 2023.[24]

**The Further Documents**

29. On January 24, 2023, insolvency counsel for ART wrote to counsel for the Trustee to advise that the Further Documents had been found by Timothy Seabrook at his late father's residence. Counsel for ART advised the Trustee's counsel that the Further Documents were in an unexpected location (and suggested in correspondence that they had been forgotten by the senior Seabrook himself although the affidavit on this motion does not say that.). As noted above, even if the Further Documents had been forgotten by Victor Seabrook, which cannot now be known given his passing, they were in the possession of Ron Chapman, ART's counsel throughout the litigation.[25]

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21 Email exchange at Exhibit "F" to the T. Seabrook Affidavit.

22 Exhibit "F" to the T. Seabrook Affidavit.

23 Notice of Disallowance, para. (d), Exhibit "B" to the T. Seabrook Affidavit.

24 Third Report, para. 44.

25 Third Report, para. 45.

30. In reviewing the Further Documents, the Trustee consulted with one of the estate inspectors, Anne Marie Heinrichs, who has been a party to the civil litigation with ART, about whether those documents had previously been disclosed in that litigation. Ms. Heinrichs advised that they had been so disclosed at various points including March of 2016, October of 2017, and February of 2021.[26]

31. ART initially disputed that the Further Documents had been disclosed earlier. After further review, Mr. Chapman's office advised insolvency counsel for ART that they had in fact been disclosed.[27]

## III. ISSUES AND LAW

32. The Trustee states that the issues on this motion are whether:

a) ART should now be permitted to rely on the Further Documents despite the Appeal Record Agreement?

b) if so, should the issue of whether any materials that were not before the Trustee when it considered ART's Proof of Claim be considered?

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[26] Third Report, para. 48(ii).
See also spreadsheet at Appendix "I" to the Third Report.

[27] Moving Party's Factum, para. 28(b).

## A. ART should not now be permitted to rely on the Further Documents despite the Appeal Record Agreement

**The issue is not common law principles on the admission of further evidence, but rather common law principles on agreements between counsel in litigation**

33. ART frames the issue on this motion as relating to fresh evidence and seeks to show how that is inapplicable to the claims process under the BIA, or why it nonetheless should be entitled to rely on the Further Documents now.

34. The issue is instead whether an agreement made between counsel for the parties about the conduct of the appeal should be adhered to or not. The same matters that the Trustee and estate inspectors were concerned about when offering the terms of what ultimately became the Appeal Record Agreement are still applicable, and probably even more so. Namely, there has been delay in getting ART's appeal heard and there were already multiple prior attempts over a long period of time to get ART to advise what it wanted to rely upon for its claim.

35. Agreements between counsel as to the carriage of litigation are more than mere contracts to be breached under normal common law principles. That was the express finding in *Harkema v. Hutchison*, where a much more substantive result flowed. In that case the plaintiff was precluded from seeking greater damages despite an earlier agreement with the defendant to admit liability in exchange for a cap on damages to be sought.[28] The Court quoted an earlier case of *Gagro v. Morrison* as follows:

> It is significant to point out that this was not an agreement between contracting parties, but rather was an agreement between counsel,

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[28] *Harkema v. Hutchison*, 2004 CanLII 53534 (ON SC) at para. 27.

> properly forged in the crucible of the litigation they were retained to conduct.

36. A similar approach has been taken to agreements between counsel on procedural matters. In *RFG Private Equity Limited Partnership No 1B v Value Creation Inc*., the Alberta Court of Queen's Bench (as it was then known) held that an agreement between counsel about the timing of delivery of expert reports, which differed from the applicable rules of court, was binding and prevented the delivery by the defendant of a surrebuttal expert report.[29] At a subsequent decision on costs, that Court also sanctioned the party that sought to resile from that agreement by awarding full indemnity costs.[30]

37. The *Harkema v. Hutchison* case is instructive on the grounds on which a Court could consider allowing a party not to comply with an agreement made about existing litigation. In that case, the Court noted that there was no evidence of lack of authority on the part of the lawyers who entered into the agreement on behalf of their clients, and the Court also found that there was no absence of consideration for the agreement.

38. There is similarly no such evidence or argument here. If anything, the record shows that insolvency counsel for ART entered into the Appeal Record Agreement cautiously and after inquiry with ART and with Mr. Chapman as instructing counsel and the lawyer with carriage of the related civil litigation over weeks. Consideration was also ample in allowing some further materials to go into the record and avoiding an argument about how the appeal should proceed.

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[29] RFG Private Equity Limited Partnership No 1B v Value Creation Inc., 2014 ABQB 61 at para. 59.

[30] 2015 ABQB 42 at paras. 17-18.

39. Notably, the merits of the new matters that a party seeks to bring forward in breach of an agreement between counsel about the conduct of litigation do not seem to be considered in the cases. Whether the further claims for damages in *Harkema v. Hutchison* were well-founded, or whether the surrebuttal expert report was in fact properly reply and relevant material, was not referred to by those Courts.

40. ART's assertions that the Further Documents are relevant are similarly not relevant here.

41. It is possible that a Court may want to engage different considerations if a moving party who seeks to resile from an agreement between counsel never had an informed basis to come to that agreement, for example by not being aware of the basis for further damages or of the possible further expert (or other) evidence. That is not referred to in the case law, but on the right facts could it arise? This case does not, however, engage such hypotheticals because it is not clear that Victor Seabrook on behalf of was not aware of the Further Documents ART and it certainly *is* clear that Mr. Chapman as its counsel *did* have the Further Documents (among much more) in his possession.

**ARTs reliance on s. 135 of the BIA is misplaced**

42. ART suggests that the Trustee has an obligation to consider further materials by virtue of the wording of s. 135(1) of the BIA, which permits a trustee to "require further evidence in support of the claim".

43. That is of course true as far as it goes, but to extend that to the circumstances of this case and motion may be taking the point too far, because that would overlook the several attempts by the Trustee to do just that between July of 2020 and March of 2021, and even the deliberate considerations and negotiations that led to the Appeal Record Agreement in

October of 2022. The Trustee did require further evidence several times. That ART effectively now says it did not comply is at the heart of this motion.

44. Moreover, ART's submissions on this point overlook the general obligation on a creditor to bear the burden of proof in substantiating its claim under s. 124 of the BIA.

**No proper argument or evidence of solicitor's error**

45. There is the hint of an argument from ART's factum that merits comment. Namely, ART seems to be suggesting, but without actually saying, that the Appeal Record Agreement was the result of Mr. Chapman's error. Para. 28(b) of ART's factum says that "[i]t appears that Chapman's initial review of the files was imperfect" and goes on to cite cases where Courts have relieved clients from the consequences of oversights by their lawyers on civil procedure matters.

46. There are several problems with that argument:

a) The evidentiary record says nothing about anything being wrong with Mr. Chapman's review of records in September/October of 2022 when the Appeal Record Agreement was reached (or at any other time in the numerous instances when the Trustee was pressing ART for evidence).

b) The evidence on point is from Timothy Seabrook who simply states that before committing to the Appeal Record Agreement, he (as trustee of ART) asked Mr. Chapman to review the files for whether there was anything that ART should produce for use in the Appeal, and that Mr. Chapman advised there was not.

c) Timothy Seabrook's affidavit does not say or allege that Mr. Chapman erred.

d) More to the point, there is no affidavit from Mr. Chapman saying that he erred.

47. If ART or Mr. Chapman wanted to make the argument that he erred and that his error should not lead to a detrimental result against ART, much more should have been put before this Court to do so. An adverse inference should be drawn from its absence.

**ART's reliance on prior disclosure in the civil litigation as possible proof of relevance**

48. ART tries to turn its failure prior to January of 2023 to refer to the Further Documents in support of its Proof of Claim when they were disclosed previously in the civil litigation into a positive factor for this motion by suggesting that the Further Documents having been so disclosed is an implied admission of relevance.[31]

49. For context, recall that Ms. Heinrichs' evidence is that the Further Documents were disclosed in the civil litigation in 2016, 2017 and 2021 – all well before the Appeal Record Agreement (to say nothing of the prior requests by the Trustee for evidence to support ART's Proof of Claim). The records were accordingly in Mr. Chapman's possession as then and current counsel for ART in the civil litigation, and someone very obviously still involved in these BIA proceedings while insolvency counsel for ART takes the lead.

50. It may also be a good question whether the late Victor Seabrook overlooked this cache of documents said to have been in his residence, and if so, how or why. But given the clear evidence of their availability to Mr. Chapman as counsel with carriage of the litigation, that likely does not matter.

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[31] Moving Party's Factum, para. 23.

51. The answer to ART's claim that relevance ought to trump anything to the contrary is that any rule or argument that seeks to curtail the admission of possible evidence before the Court runs up against that issue.

52. In any event, the general principles about the admission of fresh evidence on appeal, or in support of BIA proofs of claim, do not apply here. In this case, it was *expressly* discussed between insolvency counsel for ART and counsel for the Trustee that the intended Appeal Record Agreement would preclude further materials from going in by (among other things) further order of the court.

53. ART should not be permitted to now depart from the Appeal Record Agreement. It has had many opportunities to assemble and provide what it wanted to rely upon in its Proof of Claim and then in its appeal from the disallowance. After the time and effort made by the Trustee, including in the lead up to the Appeal Record Agreement. one could fairly wonder whether ART will ever firmly and unequivocally commit to anything on that without the compulsion of the Court. The time for ART to do so was in October of 2022 and it did.

**Caselaw cited by ART is not as expansive as suggested**

54. ART argues in its factum that the controlling test on this motion and for fresh evidence, and also hearing *de novo* considerations for appeals from disallowance generally, is whether there is "injustice to the creditor" not to do so.[32]

55. With respect, the cases cited are more nuanced than that. The *Aronson v Whozagood Inc.* case cited in fact stands for the proposition that in Alberta appeals from disallowance of

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[32] Moving Party's Factum, para. 27.

claims may proceed as hearings *de novo*, which would permit fresh evidence, but not necessarily that they will. There is consideration of injustice to the creditor, but, and importantly to this motion, that Court also emphasized that creditors have to put their best foot forward in support of a claim "to ensure efficient and expeditious claims determinations."[33]

56. Similarly, the reference to "injustice to the creditor" in the Court of Appeal decision in *Credifinance Securities Limited v. DSLC Capital Corp*. was also accompanied by a comments that this factor was not uniformly applied across the country. The Court of Appeal went on to note countervailing policy considerations to treat appeals from disallowance as true appeals as set out in the British Columbia Court of Appeals' decision in *Re Galaxy Sports*. It declined to rule on the point in that case, so the proposition being advanced by ART was expressly not the ratio of that decision.[34]

57. More recent decisions on this point also demonstrate that the considerations are more than simple injustice to a creditor. In *YG Limited Partnership and YSL Residences Inc*., a judge of the Commercial List held that the proper approach is that appeals from disallowance of proofs of claim "should generally proceed as true appeals, based on a record consisting of the materials relied upon by the trustee in its decision to disallow the claim", while also noting a discretion to permit a hearing *de novo* in appropriate cases. In that case, evidence to show that parties conducted themselves in accordance with an agreement not technically signed was presented after disallowance, which was then accepted by that trustee to settle

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[33] *Aronson v Whozagood Inc.* 2019 ABQB 656 at para. 29.

[34] *Credifinance Securities Limited v. DSLC Capital Corp*. 2011 ONCA 160 at paras. 24-27.

the claim. The unsuccessful appeal in that case was by other parties claiming an equity interest in the estate.[35]

58. Given the multiplicity of opportunities for ART to provide more evidence in support of its claim, which it did, and the further opportunities to do so in coming to the Appeal Record Agreement, the fact that not including the Further Documents may prejudice ART will not mean a straight-line equation the "injustice to a creditor" references in the case law. The countervailing considerations of efficient and expeditious process and requiring a creditor to put its best foot forward apply, and could be determinative in this case.

**B. <u>If ART can now seek to introduce the further materials, the issue of whether any materials that were not before the Trustee when it considered ART's Proof of Claim should be considered</u>**

59. This issue arises because ART's position seems to be that since the Appeal Record Agreement contemplated allowing *some* further evidence that was not before the Trustee in determining the Proof of Claim in the record appeal, then it must be effectively open season on that front now.

60. With respect, in so saying ART is seeking to both resile from the Appeal Record Agreement but also get the benefit of it. That Agreement included a concession by the Trustee that further evidence (the October 5, 2021 affidavit of Victor Seabrook) could go in the record in exchange for a commitment that ART would not rely on anything else. If that *quid pro*

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[35] *YG Limited Partnership and YSL Residences Inc* 2022 ONSC 6548 at paras. 8-13 and 33-38. Appeal on other grounds dismissed at 2023 ONCA 505.

*quo* is going to be undone, which the Trustee should not be the case, but this argument is made in the alternative, then the issue of the appeal record must go back to square one.

61. As ART's factum notes, there is a debate in the case law about whether an appeal from a trustee's determination of a claim under s. 135 of the BIA should be a true appeal, restricted to the materials before the trustee, or whether it should be a hearing *de novo*, with parties free to submit new materials as well.

62. If, however, that debate needs to now happen in this case, then there is good basis to think that this case may demonstrate a basis to say that the manner of review on appeal from this Trustee's determination should be a true appeal on the facts of this matter. Such factors include:

a) The issues in ART's Proof of Claim are the presence or absence of a loan to the bankrupt, which may arguably be much closer to a trained accountant's expertise than other matters (for example a personal injury tort claim against an estate).

b) The process of dealing with ART's Proof of Claim was the antithesis of rushed. Mr. Chapman was asked over months to produce further records, and formal affidavits were filed on a seemingly considered basis.

c) ART seems, then and now, to be taking its Proof of Claim against the bankrupt far more seriously than its potential *pro rata* share of the modest funds remaining in the estate would be under a distribution even if its claim were allowed in full. With over $25 million in claims (including those of ART if successful) and assets of only approximately $360,000 at present (and declining with further professional fees), creditors will only see a dividend of less than 1.5%. On ART's highest claim, that

would equate to a dividend of approximately $46,000. Instead, the interplay between this Proof of Claim and the related civil litigation, all of which is premised on the presence of a loan from ART to the bankrupt, is what may be really driving this. Either way, there is reason to say that ART has not been treating the BIA claims process in this matter in a perfunctory or dismissive manner as creditors might do in some cases (not that the case law would necessarily countenance this anyhow).

d) ART has benefitted from a very high degree of disclosure through the civil litigation process. Other cases may involve creditors with potentially insufficient access to records to establish their claims, which could raise different issues on standard of appeal matters.

e) On a practical level, with the passing of Victor Seabrook and the fact that Timothy Seabrook had no involvement with the matters at issue in the Proof of Claim, it is not clear whether an appeal *de novo* is even possible. If ART had to lead evidence in a formal trial setting, there are real issues with whether ART has any witnesses who could properly testify to the matters at issue.

63. If the Court permits ART to seek to introduce the "new" records on the appeal from the disallowance, then the issue of whether any further materials beyond what was before the Trustee needs to be resolved. The Appeal Record Agreement sought to side-step that debate, but if ART is not to be held to that agreement, then neither should it bind the Trustee any longer.

64. That is not of course to say that such a further preliminary motion about ART's appeal is desirable. It is not. The Trustee and the estate's inspectors were already concerned about delay a year ago. The evidentiary issues in this matter may, however, be consequential.

## IV. NATURE OF THE ORDER SOUGHT

65. The Trustee asks that the motion by ART to rely upon the Further Documents (or anything other than what was specified in the Appeal Record Agreement) be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of August, 2023.

*Reconstruct LLP*

## SCHEDULE A – LIST OF AUTHORITIES

*Aronson v Whozagood Inc.* 2019 ABQB 656

*Credifinance Securities Limited v. DSLC Capital Corp*. 2011 ONCA 160

*Harkema v. Hutchison*, 2004 CanLII 53534 (ON SC)

RFG Private Equity Limited Partnership No 1B v Value Creation Inc., 2014 ABQB 61

RFG Private Equity Limited Partnership No 1B v Value Creation Inc., 2015 ABQB 42

*YG Limited Partnership and YSL Residences Inc* 2022 ONSC 6548

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## SCHEDULE B – RELEVANT STATUTORY PROVISIONS

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ss. 124 and 135**

### Proof of Claims

### Creditors shall prove claims

**124 (1)** Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

### Proof by delivery

**(2)** A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

### Who may make proof of claims

**(3)** The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

### Shall refer to account

**(4)** The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

### Admission and Disallowance of Proofs of Claim and Proofs of Security

### Trustee shall examine proof

**135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

### Determination of provable claims

The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

### Disallowance by trustee

**(2)** The trustee may disallow, in whole or in part,

**(a)** any claim;

**(b)** any right to a priority under the applicable order of priority set out in this Act; or

**(c)** any security.

**Notice of determination or disallowance**

**(3)** Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

**Determination or disallowance final and conclusive**

**(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

**Expunge or reduce a proof**

**(5)** The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

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Estate File No. 31-248304

IN THE MATTER OF GALTY B.V.
HAVING ITS HEAD OFFICE IN THE CITY OF AMSTERDAM
IN THE NETHERLANDS

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**IN BANKRUPTCY**

**Proceedings commenced at Toronto**

# RESPONDING FACTUM OF THE TRUSTEE
**(Motion returnable August 16, 2023)**

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