

Court File No. BK-23-00459641-0031
Estate No.: 31-459641

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF
INTEGRO BUILDING SYSTEMS INC.,
OF THE CITY OF VAUGHAN,
IN THE PROVINCE OF ONTARIO

AIDE MEMOIRE OF
ROYAL BANK OF CANADA

Date: March 7, 2024

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OVERVIEW

1. Royal Bank of Canada (“**RBC**”) submits this Aide Memoire in respect of a motion for an Order, *inter alia*,

- a. adjourning the Motion brought by MNP Ltd. (“**MNP**”) as trustee in bankruptcy (the “**Trustee**”) of Integro Building Systems Inc. (the “**Bankrupt**”) for an Administrative Order (the “**Administrative Order**”): (a) approving the First Report of the Trustee dated February 14, 2024 (as supplemented by a Supplemental Report dated February 22, 2024, the “**First Report**”) and the activities described therein; and (b) approving the fees and disbursements of the Trustee and its legal counsel, as detailed in the First Report and the Affidavit of Sheldon Title sworn February 14, 2024 and the Affidavit of Jane Dietrich sworn February 14, 2024 (together, the “**Fee Affidavits**”); and
- b. declaring that the fees and disbursements of the Trustee and its legal counsel, Cassels Brock & Blackwell (“**Cassels**”), not be paid out of the estate of the Bankrupt (the “**Estate**”) in priority to RBC, as the senior secured creditor of the Bankrupt.

2. RBC does not dispute the quantum of the fees and disbursements claimed by the Trustee and Cassels. Rather, RBC only disputes the source of payment of such fees and disbursements, and takes the position that the payment of such fees and disbursements cannot be made to the prejudice of the secured claims of RBC as the senior secured creditor of the Bankrupt.

BACKGROUND

3. By way of background, RBC is the senior secured creditor of the Bankrupt and its security over all of the present and after-acquired property, assets and undertaking of the Bankrupt is valid and enforceable, as confirmed in the opinion of Cassels, a true copy of which is attached as Exhibit

“B” to the Affidavit of Barry Mutis sworn March 4, 2024 (the “**Mutis Affidavit**”), which is included in the Motion Record of RBC dated March 4, 2024.

4. Pursuant to the evidence of indebtedness dated March 15, 2012 (the “**EOI**”), RBC provided certain credit facilities to the Bankrupt, on the terms and conditions as outlined in the EOI, a true copy of which is attached as Exhibit “A” to the Mutis Affidavit.

5. Without notice to RBC, the Bankrupt made an assignment in bankruptcy on August 31, 2023 under section 49(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and MNP was appointed as Trustee.

6. The Trustee and the Canada Revenue Agency (“**CRA**”) entered into an administrative agreement dated November 7, 2023, as amended on February 29, 2024 (the “**Administrative Agreement**”), pursuant to which CRA consented to allowing for the protection of the fees and disbursements of the Trustee and Cassels in an amount of up to \$305,560.13. CRA has asserted certain claims against the Estate, including a deemed trust claim in respect of unremitted source deductions (the “**Deemed Trust Claim**”).

7. The Trustee also entered into an engagement letter with Integro dated August 28, 2023 (the “**MNP Engagement Letter**”), which letter included a third-party deposit agreement attached as Schedule A thereto, pursuant to which Hi-Rise Vista Holdings Inc., 61/67 Claireville Holdings Ltd. and Chafhold Corporation (collectively, the “**Indemnitors**”) deposited with the Trustee an amount of \$287,000 (the “**Retainer**”) for the purpose of guaranteeing the costs, fees and disbursements of the Trustee and its counsel.

8. The MNP Engagement Letter further provided for a fee indemnity agreement attached as Schedule B thereto (the “**Fee Indemnity Agreement**”), pursuant to which the Indemnitors agreed to be liable to pay the balance of any of the Trustee’s fees and disbursements, if any, in the event that the Retainer is insufficient to fund such fees and disbursements. The Fee Indemnity was not

referenced in the materials filed by the Trustee in connection with the Administrative Order sought by the Trustee.

MOTION FOR ADJOURNMENT AND DECLARATION

9. The Trustee has brought the motion for the Administrative Order in order to seek approval from this Court of the fees and disbursements of the Trustee and Cassels (the “**Fees**”). It is RBC’s understanding that the materials filed by the Trustee in connection with the Administrative Order sought by the Trustee seeks to have a portion of the Fees paid out of the Estate, in priority to the secured claims of RBC, as the senior secured creditor of the Bankrupt, given the Trustee’s speculation that there is no expectation of any proceeds remaining in the Estate following the satisfaction of the Deemed Trust Claim.

10. Given that there are several layers of protection in place with respect to the Fees, the Fees of the Trustee and Cassels should not be paid out of the proceeds of realization of the Estate in priority to the secured claims of RBC (the “**Secured Claim**”).

11. The Trustee has recourse to the following sources of funds in respect of the Fees:

- a. the full amount of the Retainer;
- b. the Indemnitors pursuant to the Fee Indemnity Agreement; and
- c. payment of the Fees out of the Crown’s priority claim (Deemed Trust Claim) against the Estate pursuant to the Administrative Agreement.

12. Directive 12R – Administrative Agreements with Insolvency Practitioners, issued by the Office of the Superintendent in Bankruptcy (“**Directive 12R**”),¹ sets out the relevant guidance with respect to administrative agreements between CRA and insolvency trustees in connection with the fees and disbursements relating to the administration of a bankrupt estate and outlines the CRA’s

¹ *Administrative Agreements with Insolvency Practitioners*, May 7, 2010: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/licensed-insolvency-trustees/notices-trustees-canada-revenue-agency/administrative-agreements-insolvency-practitioners>.

position regarding the payment of some or all of such fees and disbursements with regard to the Crown's priority claim(s).²

13. Directive 12R provides that CRA will consider allowing the payment of reasonable fees and costs of the administration of an estate out of the Crown's priority claim.³ Such fees and costs are those related to the general administration of the estate and/or to the realization of assets against which the Crown's priority claim applies, and includes the trustee's costs and expenses in possessing, storing, insuring and/or selling such assets.

14. The costs and expenses associated with the realization of the assets, in addition to the costs and expenses related to the general administration of the Estate constitute fees and costs the payment of which the CRA has allowed out of its priority claim, pursuant to the Administrative Agreement.

15. Directive 12R further provides that in allowing the payment of reasonable fees and costs of the Crown's priority claim(s), administrative agreements for such allowance by CRA are not binding on other creditors holding a priority over fees and costs for administration of the estate.⁴

16. Directive 12R also includes the guidance that in instances where a secured creditor has not released its security interest against the property of the bankrupt, and the estate does not have sufficient assets or funds to cover the administrative costs of the estate as a result, CRA will typically not enter into an administrative agreement with a trustee for the allowance of the trustee's administrative fees and costs,⁵ which indicates that it is not the purpose or intention of such administrative agreements to provide protection for a trustee's fees and costs at the expense of or in priority to the claims of secured creditors.

17. Further, Directive 12R provides that CRA will typically only make such allowances for the payment of a trustee's fees and costs out of the Crown's priority claim(s) in instances where funding for such fees and costs from third-party sources is not available. In that regard, Directive

² Directive 12R, p. 3.

³ Directive 12R, p. 3.

⁴ Directive 12R, p. 4.

⁵ Directive 12R, p. 8.

12R provides explicit guidance for trustees to arrange for third-party deposit or guarantee arrangements when accepting an appointment as trustee in order to secure recovery of administrative costs, in recognition of the fact that there may be insufficient funds in the estate to cover administrative costs after the payment of the claims of other creditors. Directive 12R states that trustees should look to such third-party deposit or guarantee arrangements before seeking recovery of their administrative costs from amounts available for the Crown's priority claim(s).⁶

18. The provisions of Directive 12R outlined above are indicative of the following:

- a. administrative agreements are intended to address CRA's position on allowing the payment of the trustee's reasonable fees and costs out of the Crown's priority claim as they relate to the general administration of the estate and/or the realization of an asset against which the Crown's claim applies;
- b. trustees are expressly encouraged to enter into third-party deposit, guarantee or indemnity arrangements, and are directed to exhaust such third-party sources of recovery before seeking recovery of fees and costs out of the Crown's claim;
- c. in cases where there are surplus funds after payment to CRA in respect of its priority claim, the source of the trustee's fees and expenses may be a matter of negotiation between the trustee and other creditors; and
- d. CRA generally enters into administrative agreements where there are no persisting security interests or claims by secured creditors, or where such interests have been released, and where funding for the trustee's administrative costs from third-party sources is not available.

19. As emphasized in Directive 12R, the Administrative Agreement and the protection for the Fees provided thereunder is not binding on RBC. The Trustee should therefore be required to exhaust the above-mentioned third-party sources of recovery in respect of the Fees before seeking

⁶ Directive 12R, p. 4.

recovery out of the Estate, and should only be entitled to recovery from remaining funds, if any, after RBC's Secured Claim has been satisfied.

20. In *Genometrics Corp. (Re)*, the Saskatchewan Court of King's Bench found that Directive 12R provides that a trustee enters into an administrative agreement with CRA in order to reach an arrangement to postpone the Crown's deemed trust claim to a trustee's reasonable costs of realization, and to provide for the protection of such reasonable costs with assets of the estate that are subject to the Crown's deemed trust claim.⁷ The court held that once a trustee becomes aware of a CRA deemed trust claim, the trustee is working for CRA "to the exclusion of other creditors", and that if the trustee does not enter into an administrative agreement with CRA for the protection of its administrative fees, "it does so at its own peril".⁸

21. The court's comments in *Genometrics Corp. (Re)* emphasize the fact that such administrative agreements between a trustee and CRA are not binding on, and should not impact the claims of other creditors. This is further supported by that court's decision in *Danbrook (Re)*, in which it held that amounts payable to secured creditors are to be excluded from the total receipts of the estate upon which a trustee's fees are calculated in a summary administration bankruptcy pursuant to Rule 128(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368 (the "**BIA Rules**").⁹

22. The court's decisions in *Genometrics Corp. (Re)* and *Danbrook (Re)* reflect the treatment of the claims of secured creditors in a bankruptcy, as supported by section 71 of the BIA, which provides that upon a bankruptcy order being made or an assignment being filed, the property of a bankrupt vests in the trustee in bankruptcy, subject to the rights of secured creditors.¹⁰

23. In *Mikan Inc. v. Hillier*, a debtor sold a matrimonial home and paid the proceeds into court with the consent of CIBC, as the first mortgagee and a judgment creditor. The debtor subsequently made an assignment in bankruptcy and the court approved the payment of the proceeds to the

⁷ *Re Genometrics Corp.*, [2005 SKQB 488](#), at para 22.

⁸ *Ibid.*

⁹ *Bankruptcy and Insolvency General Rules*, [C.R.C. c. 368](#) [the "**BIA Rules**"]; *Re Danbrook*, [2007 SKQB 304](#) ["**Danbrook**"], at para 18.

¹⁰ *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3](#), as amended [the "**BIA**"], s. 71.

trustee in bankruptcy, after allowing for the amount owed to CIBC as the senior secured creditor. The court considered Section 71 of the BIA, which it interpreted to mean that the bankrupt's interest in the proceeds of the sale of the matrimonial home vested in the trustee, subject only to the rights of secured creditors.¹¹

24. The relief sought in the Administrative Order is premature, given that there is no certainty with respect to the quantum of the Deemed Trust Claim, or the final realizable value of the Estate.

25. RBC's motion for the adjournment of the Trustee's Motion for the Administrative Order and for the declaration that the Fees not be paid out of the Estate in priority to RBC's Secured Claim is made on the following basis:

- a. the Trustee has recourse to the following sources of funds to pay the Fees:
 - i. the full amount of the Retainer;
 - ii. the Indemnitors pursuant to the Fee Indemnity Agreement; and
 - iii. payment of the Fees out of the Crown's priority claim against the Estate pursuant to the Administrative Agreement;
- b. payment of the Fees out of the Deemed Trust Claim should be made pursuant to the Administrative Agreement and in accordance with the guidance set out in Directive 12R;
- c. the payment of the Fees should not be made out of the Estate in a manner that is prejudicial to and compromises the claims and rights of RBC as the senior secured creditor, which would be inconsistent with the provisions of the BIA, including, without limitation, section 71 of the BIA; and
- d. approval of the Fees is premature at this point in time, unless it is clear that payment of same does not prejudice RBC.

¹¹ *Mikan Inc. v. Hillier*, [2015 CanLII 36771](#) (NLSC) [*"Mikan"*], at para 14.

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PROCEEDINGS COMMENCED AT TORONTO

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