

Estate File Number: 35-2638322
Court File No.: 35-2638322

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

FACTUM OF GEORGES RIVER ENERGY, LLC

May 13th, 2020

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich LSO# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@cassels.com

Sophie Moher LSO #72317H
Tel: 416.860.2903
Fax: 416.640.3021
smoher@cassels.com

Lawyers for Georges River Energy, LLC

TO: SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

FACTUM OF GEORGES RIVER ENERGY, LLC

PART I - INTRODUCTION

1. Georges River Energy, LLC (“**GRE**”) moves to lift the stay of proceedings (the “**Stay of Proceedings**”) established by section 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) upon the filing of the notice of intention to make a proposal (the “**NOI**”) of KMW Energy Inc. (“**KMW**”) on April 11, 2020, to allow GRE to declare KMW in default and formally terminate KMW’s right to complete the contract between GRE and KMW dated December 6, 2016 (the “**Contract**”). Taking such steps are necessary for GRE be able to make a claim against the performance bond (the “**Performance Bond**”) issued by Liberty Mutual Insurance Company (“**Liberty**”) as surety in favour of GRE in respect of the Contract.

2. KMW has failed to supply GRE with a conforming steam turbine to generate electricity as part of a biomass fired energy system (the “**System**”) as required under the Contract.¹

¹ Affidavit of James A. Robbins, sworn May 1st, 2020 attached at Tab 2 of the Motion Record of Georges River Energy, LLC returnable May 15th, 2020 (the “**Robbins Affidavit**”) at para 10.

3. As a result of KMW's failure to supply a conforming turbine, GRE has suffered and continues to suffer significant financial consequences, including damages through the end of January 2021 in excess of USD\$8.75 million and estimated operational losses through December 2020 in excess of USD\$3.5 million.²

4. Liberty has advised GRE that it will not fulfill any of its obligations as surety under the Performance Bond without GRE first issuing a formal termination notice under the Contract.³

5. The Court has discretion under section 69.4 of the BIA to lift the Stay of Proceedings in this case. Case law has established that the Court should exercise its discretion to do so, where: (i) the party requesting the stay of proceedings to be lifted is suffering material prejudice as a result of the continued operation of the stay of proceedings; (ii) the purpose of lifting the stay of proceedings is to permit recovery under a contract of indemnity; and (iii) lifting the stay of proceedings will not interfere with the administration of the insolvency estate.⁴

6. As set out below, the uncontradicted evidence is that GRE is suffering material prejudice as the Stay of Proceedings is preventing GRE from taking administrative steps required to permit GRE to call on the Performance Bond. Lifting the Stay of Proceedings to permit GRE to issue the required notice and thereby permit GRE to call on the Performance Bond does not interfere with the administration of KMW's NOI proceedings.. As such, this Court should exercise its discretion to lift the Stay of Proceedings as requested by GRE.

² Robbins Affidavit at paras 53, 56.

³ Robbins Affidavit at 61.

⁴ [*Re Advocate Mines Ltd.*, \(1984\), 52 CBR \(NS\) 277 \(Ont. SC\) at para 6](#); [*Fiorito v Wiggins*, 2017 ONCA 765 at para 38](#); [*Yigzaw v Ashagrie*, 2019 ONSC 2474 at para 12, citing *Re Pietrzak* at paras 7 and 14](#). See also [*Hemeon v. West Hants \(District\)*, 2008 NSSC 234](#).

PART II - SUMMARY OF FACTS

1. The Contract between GRE and KMW

7. Robbins Lumber, Inc. (“**Robbins**”) operates a sawmill in Searsmont, Maine. Robbins’ operations have historically included a co-generation plant which generates electricity and steam for Robbins’ kilns and lumber facility.⁵ In 2016, Robbins commenced a project under the ownership and operation of GRE, a separate but affiliated entity, to construct a new, more powerful co-generation plant to produce electricity and steam (the “**Project**”).⁶

8. GRE planned to purchase and install an 8.5 megawatt steam turbine in connection with the Project, and to this end, entered into the Contract pursuant to which KMW was to design, engineer and supply the co-generation System that would result in cost savings and increased efficiencies to Robbins.⁷ The Contract price for the System was \$12,825,000 USD.⁸

9. KMW recommended the provision of a steam turbine (the “**Chola Turbine**”) manufactured by Chola Turbo Machinery. KMW represented to GRE that Chola Turbo Machinery turbines were proven extensively and approved by General Electric.⁹ GRE relied on this information in believing that: (i) the Chola Turbine would meet the performance criteria under the Contract, to which KMW was required to meet; and (ii) GRE would realize net savings from a more efficient system and resultant revenue from GRE’s plans to sell electricity back into the electrical grid pursuant to a power purchase agreement with Central Maine Power Company.¹⁰

⁵ Robbins Affidavit at paras 2-3.

⁶ Robbins Affidavit at para 4.

⁷ Robbins Affidavit at paras 7-8.

⁸ Robbins Affidavit at para 8.

⁹ Robbins Affidavit at 12-13.

¹⁰ Robbins Affidavit at paras 14-15.

2. Issues with the Chola Turbine

10. Shortly after the Chola Turbine began operating, there were clearly significant issues with it: (i) the Chola Turbine did not generate electricity in the quantity required under the Contract; and (ii) the Chola Turbine did not produce sufficient steam to supply Robbins' kilns.¹¹ Robbins' operating costs associated with the System significantly exceeded its estimates because Robbins was forced to also continue operating its existing biomass system, and could not sell the anticipated quantity of electricity back to Central Maine Power Company as it had planned.¹²

11. MD&A Turbine Consultants, who were hired to analyse the Chola Turbine's operations, concluded that, among other things: (i) the Chola Turbine's castings were a safety risk; (ii) the Chola Turbine's electrical output was only 85% of what KMW guaranteed it would be under the Contract; (iii) the Chola Turbine required multiple replacement parts; and (iv) Chola Turbo Machinery could not remedy the Chola Turbine's issues due to its lacking engineering expertise.¹³

12. In light of the information provided by MD&A Turbine Consultants, GRE formally notified KMW that the Chola Turbine was non-conforming on May 3, 2019. On multiple occasions, GRE also notified KMW in writing of its accruing damages claims.¹⁴

13. KMW promised to replace the Chola Turbine with a conforming turbine and provided a preliminary schedule for doing so in the summer of 2019.¹⁵ Eventually, in January 2020, KMW agreed to purchase the replacement turbine from Fincantieri S.p.A. ("**Fincantieri**")¹⁶, however,

¹¹ Robbins Affidavit at para 20.

¹² Robbins Affidavit at paras 21-22.

¹³ Robbins Affidavit at paras 25-26 and Exhibit C.

¹⁴ Robbins Affidavit at paras 27, 42.

¹⁵ Robbins Affidavit at para 31.

¹⁶ Robbins Affidavit at para 37.

the purchase order to Fincantieri did not include certain critical equipment and services that KMW agreed to supply under the Contract and which were essential for the proper operation and maintenance of the new, conforming turbine.¹⁷

14. On February 4, 2020, GRE notified KMW and Liberty that it was considering declaring KMW in default under the Contract.¹⁸

15. In late February 2020, Fincantieri provided notice that it would halt the engineering and manufacturing of the replacement turbine until KMW finalized the applicable payment terms.¹⁹

16. GRE concluded that KMW was unwilling or financially unable to accomplish the replacement as required by the Contract, as a result of KMW: (i) failing to finalize the payment terms for the replacement turbine; (ii) failing to commit to purchasing critical spare parts and engineering support; and (iii) threatening to suspend work on the replacement turbine or cancel the order for it altogether.²⁰

17. On April 8, 2020 GRE again notified Liberty of its intention to terminate the Contract.²¹ On April 11, 2020, KMW commenced NOI proceedings, indicating that its insolvency resulted from difficulties encountered in performing its obligations under the Contract.²²

¹⁷ Robbins Affidavit at para 40.

¹⁸ Robbins Affidavit at para 45.

¹⁹ Robbins Affidavit at para 47.

²⁰ Robbins Affidavit at 49.

²¹ Robbins Affidavit at para 50.

²² Robbins Affidavit at para 51.

3. Significant, ongoing damages suffered by GRE

18. GRE has continued to suffer financially, as a result of damages for engineering, testing, equipment repairs and professional services in order to address the issues associated with the Chola Turbine. This will continue with each day that the non-conforming Chola Turbine remains in operation.²³

19. The Chola Turbine's failure to generate sufficient electricity output has caused significant operational losses and expenditures to GRE, which also continue to increase each day.²⁴

20. The relief sought by KMW in its NOI proceedings, including the proposed stalking horse purchase agreement, does not make any provision for KMW's outstanding obligations to GRE under the Contract.²⁵

21. GRE cannot afford to continue sustaining the ongoing losses from KMW's failure to deliver a non-conforming turbine and KMW's inexcusable delays in supplying a turbine that does conform to the requirements set out under the Contract.²⁶

22. It is critical to GRE's and Robbins' continued existence that Liberty undertake to fulfill its obligations under the Bond by completing the order to replace the Chola Turbine with a conforming turbine, as well as any additional steps required to complete KMW's obligations owed to GRE under the Contract.²⁷

²³ Robbins Affidavit at para 53-54.

²⁴ Robbins Affidavit at para 55-56.

²⁵ Robbins Affidavit at para 60.

²⁶ Robbins Affidavit at para 62.

²⁷ Robbins Affidavit at para 63.

23. In order for GRE to enforce its rights under the Bond and take necessary steps to secure Liberty's performance of KMW's obligations, GRE must issue a notice of default to KMW and formally terminate the Contract.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

24. The following issue is to be determined on this motion:

- (a) Should this Court grant an order under section 69.4 of the BIA, declaring that the Stay of Proceedings provided for in section 69(1) of the BIA shall be lifted in respect of KMW, to permit GRE to issue a notice of default and formally terminate KMW's right to complete the Contract?

25. As set out below, the Court has the discretion to lift the Stay of Proceedings under section 69.4 of the BIA, and case law provides that the Court should do so in circumstances such as these, where: (i) GRE will suffer material prejudice if the Stay of Proceedings is not lifted; (ii) the lifting of the Stay of Proceedings is for the purpose of permitting access to a contract of indemnity or insurance, and (iii) lifting the Stay of Proceedings will not interfere with the administration of the insolvency estate.²⁸

1. This Court has the Discretion to Lift the Stay of Proceedings

26. Pursuant to section 69.4 of the BIA, the Court may lift a stay of proceedings where it is satisfied:

²⁸ [*Re Advocate Mines Ltd.*, \(1984\), 52 CBR \(NS\) 277 \(Ont. SC\) at para 6; *Fiorito v Wiggins*, 2017 ONCA 765 at para 38; *Yigzaw v Ashagrie*, 2019 ONSC 2474 at para 12, citing *Re Pietrzak* at paras 7 and 14. See also *Hemeon v. West Hants \(District\)*, 2008 NSSC 234.](#)

- (a) that the creditor or person seeking to lift the stay is likely to be materially prejudiced by the continued operation of the stay; or
- (b) that it is equitable on other grounds to lift the stay.²⁹

27. The unchallenged evidence is that GRE is suffering material prejudice as a result of the Stay of Proceedings preventing GRE from being able to call on the Performance Bond.³⁰ As well, in these circumstances, it would be equitable to lift the Stay of Proceedings to permit GRE to take the steps necessary to call on the Performance Bond, as no other creditor has access to the Performance Bond. Permitting GRE to look to Liberty as surety under the Performance Bond is equitable in the circumstances – GRE should, in equity, be entitled to seek recourse to the Performance Bond in exactly the situation it was intended for.

28. Given that the statutory requirements are met, the Court has the discretion to lift the Stay of Proceedings, and as case law demonstrates, the Court should do so.

2. The Court should exercise its Discretion to Lift the Stay of Proceedings

29. Courts have held that the stay of proceedings should be lifted on account of material prejudice or other equitable grounds if a creditor's claim falls within one of the circumstances identified in *Re Advocate Mines Ltd.* These enumerated circumstances include actions brought to establish judgment against the debtor to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.³¹

²⁹ [*Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s 69.4.*](#)

³⁰ Robbins Affidavit at paras 53-56 and Exhibit L.

³¹ [*Re Advocate Mines Ltd., \(1984\), 52 CBR \(NS\) 277 \(Ont. SC\) at para 6; Fiorito v Wiggins, 2017 ONCA 765 at para 38; Hemeon v. West Hants \(District\), 2008 NSSC 234.*](#)

30. This identified circumstance captures GRE's request in this case. GRE is asking for the Stay of Proceedings to be lifted so that GRE can take the steps required to enable it to recover on a contract of indemnity – the Performance Bond. As such, this Court should exercise its discretion to lift the Stay of Proceedings.

31. Case law has also indicated that a stay of proceedings should be lifted where to do so would not interfere with the proper administration of that estate.³² Permitting GRE to issue a notice of default and terminate the Contract, and seek recourse to the Performance Bond, would not, in the circumstances of this case, interfere with the administration of KMW's NOI proceedings. Notably, the stalking horse purchase agreement proposed by KMW, and which forms the basis for the court-approved sale process in this case³³, does not seek to assume the Contract.³⁴

32. As such, there is no harm to the KMW estate if the Contract is terminated and GRE is permitted to proceed to enforce its remedies under the Performance Bond.³⁵

PART IV - ORDER REQUESTED

33. For all of the aforementioned reasons, it is respectfully requested that an order be granted lifting the Stay of Proceedings to permit GRE to declare a default and formally terminate KMW's right to complete the Contract.

³² [*Yigzaw v Ashagrie*, 2019 ONSC 2474 at para 12, citing *Re Pietrzak* at paras 7 and 14.](#)

³³ See para 40 and Exhibit "M" of Affidavit of Eric Bertil Rosen, Motion Record of KMW returnable May 1, 2020.

³⁴ Robbins Affidavit at para 60.

³⁵ Any recourse Liberty may have against 'indemnitors' under the Performance Bond is not an issue in this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2020.

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP

CASSELS BROCK & BLACKWELL LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich LSO# 49302U

Tel: 416.860.5223

Fax: 416.640.3144

jdietrich@cassels.com

Sophie Moher LSO #72317H

Tel: 416.860.2903

Fax: 416.640.3021

smoher@cassels.com

Lawyers for Georges River Energy, LLC

SCHEDULE “A”**LIST OF AUTHORITIES**

1. [*Re Advocate Mines Ltd.*, \(1984\), 52 CBR \(NS\) 277 \(Ont. SC\)](#)
2. [*Fiorito v Wiggins*, 2017 ONCA 765](#)
3. [*Yigzaw v Ashagrie*, 2019 ONSC 2474](#)
4. [*Re Pietrzak*, 268 A.C.W.S. \(3d\) 721, 39 C.B.R. \(6th\) 145](#)
5. [*Hemeon v. West Hants \(District\)*, 2008 NSSC 234](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Section 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

SCHEDULE "C"

Most Negative Treatment: Check subsequent history and related treatments.

1984 CarswellOnt 156
Ontario Supreme Court, In Bankruptcy

Advocate Mines Ltd., Re

1984 CarswellOnt 156, [1984] O.J. No. 2330, 52 C.B.R. (N.S.) 277

Re ADVOCATE MINES LIMITED

Ferron, Q.C., Reg.

Judgment: July 17, 1984
Docket: Toronto No. 31202288

Counsel: *M. Zigler*, for applicant, Gerald Oxford et al.
C.H. Morawetz, Q.C., for trustee.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

[XVI](#) Effect of bankruptcy on other proceedings

[XVI.1](#) Proceedings against bankrupt

[XVI.1.a](#) Before discharge of trustee

[XVI.1.a.iii](#) Effect of failure to obtain leave

[XVI.1.a.iii.B](#) Leave nunc pro tunc

Headnote

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Effect of failure to obtain bankrupt — Leave nunc pro tunc

Practice and procedure — Stay of proceedings — Creditor applying for leave to continue action in ordinary courts of Newfoundland — Proof of claim having been disallowed by trustee and appeal from disallowance pending in Ontario bankruptcy court — Continuation of Newfoundland proceedings raising danger of inconsistent findings in Ontario bankruptcy proceedings — Application dismissed.

Table of Authorities

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 49(1), 95(2).

Application for leave under s. 49 to continue proceedings in ordinary courts in other province.

Ferron, Q.C., Reg.:

1 Section 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.

2 The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:

3 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.

4 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.

5 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.

6 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.

7 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

8 The authority given by the court to an applicant creditor to commence or continue proceedings in the circumstances referred to in items 2 to 5 is invariably limited to restrict or prohibit execution of any judgment obtained against the bankrupt.

9 The proceedings in the Court of Appeal of Newfoundland had their genesis in a determination and assessment made by the Director of Labour Standards under the Labour Standards Act. If the applicant on this motion is successful in the Court of Appeal in maintaining the determination and assessment of the director as varied by the District Court Judge, Advocate Mines Limited will be guilty of an offence liable to a fine and to an order enforcing the court's determination as a judgment. I say that the company will be guilty of an offence because, since it is operating under a proposal, it cannot comply with any determination made against it by the court without doing violence to the proposal. In this sense, the thrust of the proceedings is to defeat the proposal.

10 There is, in my opinion, no doubt that this is the type of proceeding to which s. 49(1) of the Bankruptcy Act applies and that by the terms of that section is stayed.

11 Three considerations militate against an order for leave to the applicant to proceed:

12 1. Any judgment obtained in the Newfoundland courts is not binding on the trustee, so that in that sense, the continuation of the proceedings in Newfoundland serves no purpose.

13 2. The proceedings are against the intent of the Act the effect of which would defeat the proposal which is binding upon the applicant.

14 3. Regardless of the outcome of the proceedings in Newfoundland, the very question now before the Court of Appeal of Newfoundland must be tried again in the Ontario bankruptcy court.

15 In January 1982 the applicant on his own behalf and on behalf of other employees of Advocate Mines Limited filed a proof of claim in the proposal in respect of the same claim which it seeks to establish in the courts of Newfoundland under the Labour Standards Act. That claim was filed after the director's determination for the amount which the director found was owing by the company to the employees by reason of the non-compliance with s. 53 of

the Act.

16 That proof of claim was disallowed by the trustee and an appeal from that disallowance is now pending in the bankruptcy court.

17 To authorize the continuation of the proceedings in Newfoundland raises the danger of inconsistent findings in the parallel proceedings in the bankruptcy court.

18 It is clear that logic in the sense which I have heretofore used that word is not served in allowing the applicant to proceed.

19 The application is accordingly dismissed and leave under s. 49(1) is refused.

20 This is not a case for costs save and except the usual order with respect to the trustee's costs out of the assets of the estate.

Application dismissed.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.

Estate File Number: 35-2638322

Court File No.: 35-2638322

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

PROCEEDING COMMENCED AT
TORONTO

FACTUM

Cassels Brock & Blackwell LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich LSO# 49302U

Tel: 416.860.5223

Fax: 416.640.3144

jdietrich@cassels.com

Sophie Moher LSO #72317H

Tel: 416.860.2903

Fax: 416.640.3021

smoher@cassels.com

Lawyers for Georges River Energy, LLC