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APPLICANTS	SHRED CONSULTING LTD., SHRED CAPITAL LTD., and LEONITE FUND I, LP
RESPONDENT	VOG CALGARY APP DEVELOPER INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
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Clerk's Stamp

BENCH BRIEF OF SHRED CONSULTING LTD. SHRED CAPITAL LTD. AND LEONITE FUND I, LP

IN SUPPORT OF APPLICATION TO SET ASIDE STAY AND FOR THE APPOINTMENT OF A RECEIVER

TO BE HEARD BY THE HONOURABLE JUSTICE N.J. WHITLING
December 20, 2023 at 11:00 A.M.

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I. INTRODUCTION

1. This Bench Brief is submitted by Shred Consulting Ltd. ("**Shred Consulting**"), Shred Capital Ltd. ("**Shred Capital**" and together with Shred Consulting, "**Shred**"), and Leonite Fund I, LP. ("**Leonite**" and together with Shred, the "**Lender**").

2. The Lender entered into a series of agreements with VOG Calgary App Developer Inc. ("**VOG**") under which the Lender advanced funds to VOG.

3. VOG defaulted under those agreements and filed a Notice of Intention to Make a Proposal (the "**VOG NOI**") on November 29, 2023.

4. VOG has applied to this Honourable Court for an extension of the 30-day stay period (the "**Stay Period**") provided for in section 50.4(8) of the *BIA*.[1]

5. The Lender seeks, among other things, a denial of VOG's request for an extension of the Stay Period, the termination of the Stay Period or, in the alternative, a declaration that section 69 of the *BIA* no longer operates in respect of the Lender, pursuant to section 69.4 of the *BIA*,[2] and for the appointment of a receiver and manager.

II. ISSUES

6. The issues before this Honourable Court are:

   (a) Whether this Court should grant an extension to the Stay Period;

   (b) Whether this Court should terminate the Stay Period; or

   (c) In the alternative, whether the stay of proceedings should be lifted in respect of the Lender; and

   (d) Whether it is just and convenient to appoint a receiver over the property of VOG.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, cB-3, s 50.4(8) [***BIA***] [**TAB 1**].
[2] *BIA*, s 69.4 [**TAB 1**].

III. FACTUAL BACKGROUND

A. The Inception of the Lender-Borrower Relationship

7. The relevant factual background is set out in detail in the Affidavit of Matt Toner sworn on December 19, 2023 (the "**Toner Affidavit**"),[3] which provides a summary of the relationship between the Lender and VOG.[4]

8. Shred Capital and Shred Consulting are each corporations incorporated pursuant to the laws of the Province of British Columbia and both are extra-provincially company registered to carry on business in the Province of Alberta. Shred provides secured loans to commercial borrowers in Canada.

9. Leonite is a limited partnership formulated pursuant to the domestic laws of the State of Delaware. Leonite maintains its principal office in Spring Valley, New York. Leonite provides secured loans to commercial borrowers in the United States and Canada.

10. Shred and Leonite are related through a common shareholder. The majority shareholder of Shred is a significant shareholder of Leonite's manager. Shred and Leonite collaborate on funding opportunities in Canada where there is a chance to access security in a business through tax credits.

11. VOG is a corporation registered pursuant to the laws of the Province of Alberta with a registered office located in Calgary, Alberta. VOG carries on business primarily in the area of software development.

12. The commercial relationship between the Lender and VOG dates back to October 21, 2022, when Shred Capital and VOG entered into a Facilities Agreement (the "**Facilities Agreement**") pursuant to which Shred Capital agreed to make various advances to VOG.[5] The Facilities Agreement was secured by a security interest granted to Shred in respect of all present and after acquired personal property of VOG.[6]

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[3] Affidavit of Matt Toner sworn on December 19, 2023 [**Toner Affidavit**].
[4] Toner Affidavit at paras 14-30.
[5] Toner Affidavit at para 14.
[6] Toner Affidavit at para 15.

13. As part of the Facilities Agreement, VOG was to instruct the Canada Revenue Agency (the "**CRA**") to direct all tax credit proceeds into a certain bank account (the "**Designated Account**") and VOG was to grant Shred third party access to the Designated Account.[7] VOG initially agreed and obtained access for Shred for the Designated Account.

14. On November 14, 2022, Leonite and VOG entered into a General Security Agreement (the "**GSA**").[8]

15. Pursuant to the GSA, VOG granted a secured Promissory Note dated November 14, 2022 (the "**Promissory Note**") to Leonite.[9]

16. Under the Promissory Note, VOG promised to pay Leonite the principal sum of up to $1,111,111.11 or such additional and other amount as advanced by Leonite.[10]

(The Facilities Agreement, GSA, and the Promissory Note are collectively referred to herein as the "**Loan Agreements**")

17. An "Event of Default" under the Promissory Note included:

(a) Financial and performance defaults in addition to committing an act of bankruptcy or becoming insolvent; and

(b) A cross-default of any term or condition in any other financial instrument.[11]

18. Pursuant to the Loan Agreements, VOG granted to Leonite a security interest in all of VOG's present and after acquired property.[12]

19. On June 15, 2023, Shred Consulting and VOG entered into a Master Services Agreement (the "**MSA**").[13] As part of the MSA, VOG and Shred Consulting agreed to jointly prepare a statement of work (the "**SOW**") to specify details of each project that they would undertake.[14]

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[7] Toner Affidavit at para 15.
[8] Toner Affidavit at para 23.
[9] Toner Affidavit at para 20.
[10] Toner Affidavit at para 20.
[11] Toner Affidavit at para 22.
[12] Toner Affidavit at para 23.
[13] Toner Affidavit at para 16.
[14] Toner Affidavit at para 17-18.

20. Shred Consulting and VOG entered into a SOW dated June 15, 2023 (the "**June SOW**", and together with the MSA, the "**Consulting Agreements**").[15]

21. As part of the MSA, Shred Consulting was tasked with providing VOG with consulting and advisory services including, but not limited to, refundable tax credits and related accounting services, venture services, grant and government award programs application services, and C-suite/operations services.[16]

B. Defaults under the Loan Agreements and the Consulting Agreements

22. On November 20, 2023, the Lender issued a notice to VOG (the "**Demand**").[17] In the Demand, the Lender advised that VOG was in default of its obligations under the Loan Agreements and the Consulting Agreements.[18] Along with the Demand, the Lender also provided VOG with Notices of Intention to Enforce Security pursuant to section 244 of the *BIA* (the "**Notice**"). The Demand requested that VOG cure its default by November 30, 2023.[19]

23. VOG had committed a number of defaults under the Loan Agreements and the Consulting Agreements including, but not limited to, the following:

a) VOG is insolvent in that it is unable to meet its liabilities generally as they become due;

b) VOG is unable to repay its outstanding obligations to 2M7 Financial in the approximate sum of $130,000.00;

c) VOG has outstanding superior priority obligations to CRA in the approximate sum of $450,000.00;

d) VOG has increased indebtedness owing to the Royal Bank of Canada in excess of prescribed tolerances;

e) VOG has acquired subordinate secured debt to On Deck Capital Canada, Inc. in the approximate sum of $250,000.00.[20]

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[15] Toner Affidavit at para 18.
[16] Toner Affidavit at para 17.
[17] Toner Affidavit at para 32.
[18] Toner Affidavit at para 32.
[19] Toner Affidavit at para 32.
[20] Toner Affidavit at para 31.

(the "**Triggering Defaults**").

24. VOG failed to cure its defaults by November 30, 2023, or at all.[21] As a result, VOG committed an "Event of Default" under the Loan Agreements and the Consulting Agreements, resulting in all of the security granted by VOG under the Loan Agreements and Consulting Agreements to become immediately enforceable.[22]

25. On November 27, 2023, the Lender became aware that VOG had terminated Shred's third-party access to the Designated Account. Moreover, VOG had withdrawn the federal tax credit amounts (the "**November Tax Credit**") from the Designated Account and deposited them into a Royal Bank of Canada account for which Shred and Leonite have no access.[23]

26. On November 27, 2023, the Lender provided notice to VOG of its default.[24]

27. Notwithstanding the Demand and Notice, VOG has yet to pay the outstanding amounts and remains in default of the Loan Agreement and the Consulting Agreement.

28. As of November 20, 2023, the amount owed to Shred pursuant to the Facilities Agreement and the Consulting Agreement, excluding legal costs to date, was $712,187.76 CAD (the "**Shred Indebtedness**").[25]

29. As of November 20, 2023, the amount owed to Leonite pursuant to the Promissory Note, excluding legal costs to date, was $1,325,167.00 USD (the "**Leonite Indebtedness**").[26]

(The Shred Indebtedness and the Leonite Indebtedness are collectively referred to herein as the "**Current Indebtedness**")

[21] Toner Affidavit at para 33.
[22] Toner Affidavit at para 33.
[23] Toner Affidavit at para 36.
[24] Toner Affidavit at para 37.
[25] Toner Affidavit at para 34.
[26] Toner Affidavit at para 35.

C. Notice of Intention to File a Proposal

30. On November 29, 2023, VOG filed the VOG NOI, and subsequently delivered a Notice to Creditors of Notice of Intention to Make Proposal dated November 29, 2023 (the "**Creditors' Package**").[27] Faber Inc. ("**Faber**") was appointed as proposal trustee of VOG.

31. The Creditors' Package specified Shred Capital and Leonite as secured creditors and placed their combined claim amount as $1,857,902.00 (the "**Listed Indebtedness**").[28]

32. The total claim amount for all of VOG's creditors was listed in the Creditors' Package as $3,258,438.00 (the "**Total Indebtedness**").[29]

33. The Lender takes the position that the Current Indebtedness is the actual amount owed to the Lender by VOG, not the Total Indebtedness.[30]

34. Regardless, the Listed Indebtedness comprises of almost Fifty-Seven Percent (57%) of the Total Indebtedness.[31]

35. On December 11, 2023, VOG advised the Lender that it had filed an application to extend the Stay Period (the "**Extension Application**").

36. On December 11, 2023, the Lender advised VOG that it intended to file a cross-application to be heard at the same time as the Extension Application.

IV. LAW AND ARGUMENT

A. The Extension to the NOI Stay Period Should Not be Granted

37. Pursuant to section 50.4(9) of the *BIA*, before the expiry of a stay extension, a debtor in a proposal proceeding may apply to the Court for an order to further extend the time to file a proposal by a maximum of 45 days and the Court may extend the time if it is satisfied that:

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[27] Toner Affidavit at paras 38-39.
[28] Toner Affidavit at para 39.
[29] Toner Affidavit at para 40.
[30] Toner Affidavit at para 41.
[31] Toner Affidavit at para 40.

(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.[32]

i. First Element

38. The first element of the section 50.4(9) test is whether the insolvent debtor has and is acting in good faith and with due diligence.

39. In *Atlantic Sea*, the Court stated that an inquiry under 59.4(a) is more than just a recitation by a trustee that good faith and due diligence are at hand.[33] It is a determination to be made by the Court, not by the trustee.[34]

40. The Court in *Atlantic Sea* further articulated that:

> …failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test — that there is good faith; not the presence or absence of bad faith. (emphasis added)[35]

41. The Lender respectfully submits that VOG has not acted, and is not acting, in good faith and with due diligence. The filing of the VOG NOI is merely a delay tactic designed to restrict the Lender's enforcement of their right of repayment pursuant to the Loan Agreements and the Consulting Agreements.

42. Contrary to the Facilities Agreement, VOG unilaterally terminated Shred's third party access to the Designated Account and withdrew the November Tax Credit despite the fact that VOG and the Lender were engaged in Without Prejudice discussions aimed at resolving VOG's ongoing

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[32] *BIA*, s 50.4(9) [**TAB 1**].
[33] *Atlantic Sea Cucumber Limited (Re)*, 2023 NSSC 238 at para 21 [***Atlantic Sea***] [**TAB 2**].
[34] *Atlantic Sea* at para 21 **[TAB 2]**.
[35] *Atlantic Sea* at para 25 [**TAB 2**].

financial challenges. The Lender gave notice to VOG that termination of access to the Designated Account and withdrawal of the November Tax Credit amounted to a breach of the Facilities Agreement however, VOG has refused to cure the default.[36]

43. The November Tax Credit funds were secured in favour of the Lender and, despite the clear obligations on the part of VOG, were purposefully removed from the Designated Account and deposited into another account (for which the Lender has no visibility). A significant amount of the November Tax Credit funds were then swept by Royal Bank of Canada ("**RBC**") to pay a facility that exceeded applicable tolerance levels.[37]

ii. Second Element

44. The second element under the stay extension test is whether the insolvent debtor can show that it is likely able to make a viable proposal if the stay extension is granted. For the purposes determining the likelihood of a viable proposal, the Court has said "viable" means reasonable on its face to a reasonable creditor and "likely" does not require certainty but means "might well happen" or "probable".[38]

45. In *Baldwin*, the Court stated that Parliament's intention with respect to 50.4(9)(b) was to distinguish between a situation of a viable proposal as opposed to a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal could be.[39] The Court went on to consider what "likely [to] be able to make a viable proposal" entails by relying on the dictionary definition of likely, "such as might well happen, or turn out to be the thing specified; probable. 2. to be reasonably expected".[40]

46. VOG argues that, if given 45 more days, it will be able to canvas the market, identify potential transactions, and negotiate a deal which can be put into a proposal for consideration to the creditors. While this plan seems reasonable on its face, it completely ignores the fact that VOG's

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[36] Toner Affidavit at paras 36-37.
[37] Toner Affidavit at para 43.
[38] Scotia Rainbow Inc v Bank of Montreal, 186 NSR (2d) 153, 18 CBR (4th) 114 at para 17 [***Scotia Rainbow***] [**Tab 3**].
[39] *Baldwin* Valley Investors Inc, Re, [1994] OJ No 271, 23 CBR (3d) 219 at para 3 [***Baldwin***] [**Tab 4**].
[40] *Baldwin* at para 4 [**TAB 4**].

business is in dire straits and it is not likely to yield a viable solution to resolve their numerous defaults.[41]

47. In the Affidavit of Vincent O'Gorman sworn December 12, 2023 (the "**O'Gorman Affidavit**"), it has been acknowledged that "VOG has very little in terms of physical assets" and that the its assets lie "in its client relationships, employees, ongoing projects, contracts, and brand recognition".[42]

48. The lack of assets that can be monetized or pledged as security for a new loan only further weakens any limited prospects that VOG has of obtaining a proposal that a commercial lender would find feasible.

49. VOG's use of its employees and ongoing projects is tantamount to mere window dressing, as not only has it laid off a number of its employees and still has outstanding priority claims, it has also narrowed the scope of projects that it will undertake.[43]

50. VOG's assertion that it will "mitigate future credit risk" by requiring "front-loaded advance payments" is also not feasible.[44] The Lender submits that customers will be hesitant to make upfront payments to a business that is in a public state of financial turmoil.

51. The results of VOG's efforts to collect its account receivables, as per the Cash Flow prepared by Faber and VOG, have also been mixed as approximately $22,000 has been collected as at the week ending December 12, 2023, representing only 43% of anticipated collections for that period.[45]

52. VOG's assertion that it anticipates to collect $20,000 by the end of December 2023, a further $174,000 by the end of January 2024, and a further $225,000 by the end of February 2024 as part of its "New A/R" is, at best, speculative.[46] Both VOG and Faber have been unable to provide particulars or details about this "New A/R". At this point these hopeful projections are likely to be nothing more than wishful thinking or rudderless optimism.

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[41] Toner Affidavit at paras 47-50.
[42] Toner Affidavit at para 44.
[43] Toner Affidavit at para 45.
[44] First Report of the Proposal Trustee, Faber Inc, dated December 14, 2023 at para 33 [**Faber Report**].
[45] Toner Affidavit at para 47(c).
[46] Toner Affidavit at para 47(e).

53. These realities that VOG faces make it unlikely for a financial saviour to emerge and rescue VOG from complete financial disorder.

iii. Third Element

54. The third and final aspect of the test is whether there is any creditor who would suffer material prejudice as a result of the stay extension. To the extent that the *BIA* contemplates prejudice to the creditors, Justice Goodfellow in *H&H Fisheries* laid down the threshold of the material prejudice element within section 50.4(9)(c) to be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept.[47]

55. Material prejudice is "an objective prejudice, as opposed to a subjective one in that it refers to the degree of prejudice suffered vis-àvis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua person".[48]

56. The Court noted in *Baldwin* that the majority creditor had lost all confidence in the debtor and would not vote for any proposal put forth. The Court ruled that even if the debtor companies were successful in their 50.4(9) application, it would have been a "Pyrrhic victory", as the majority creditor would have been able to come right back in with a motion based on s.50.4(11)(c).[49]

57. Both the O'Gorman Affidavit and the Faber Report signal that VOG's tangible assets are limited to the November Tax Credit and the anticipated Alberta SRED credit in the sum of $380,000 (the "**SRED Credit**") which is expected to be received before the end of December 2023.[50] These two assets appear to be the only tangible sources of funding VOG has to carry on its business. Both these assets are secured in favour of the Lender leading to further risk of redirection and erosion of security.[51]

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[47] *H & H Fisheries Ltd, Re*, 2005 NSSC 346 at para 37 [***H & H Fisheries***] [**TAB 5**].
[48] *Cumberland Trading Inc, Re*, 1994 CanLII 7458, [1994] OJ No 132 at para 11 [***Cumberland***] [**TAB 6**].
[49] *Baldwin* at para 8 [**TAB 4**].
[50] Toner Affidavit at para 47(a).
[51] Toner Affidavit at para 47(b).

58. The Lender has already suffered material prejudice as the November Tax Credit, which was specifically secured in favour of the Lender, was garnished for almost $400,000 (which amount exceeded applicable tolerances) in order to repay the indebtedness VOG owed to RBC.[52]

59. VOG's payment of its outstanding wages in the amount of approximately $300,000 is also a source of prejudice to the Lender as it is beyond dispute that the funding was sourced from the November Tax Credit.[53]

60. In light of the remaining amounts of the November Tax Credit, the Lender fears that the soon to arrive SRED Credit is also at risk of being improperly redirected and used for other means.

61. In addition to the prejudice that the Lender has suffered prior to the filing of the VOG NOI, the potential misuse of the November Tax Credit and the SRED Credit puts the Lender in a position to suffer additional material prejudice.

62. As a result of the continued mismanagement of VOG and its breach of the Loan Agreements and the Consulting Agreements, the value of the Lender's collateral is steadily shrinking further exposing the Lender to risk of suffering material prejudice.[54]

63. In the event that this Honourable Court grants the Extension Application, it will materially prejudice the Lender as no amount of additional time will change the fact that the Lender will refuse any proposal put forth by VOG.

B. The Stay Period Should be Terminated

64. Under s 50.4(11) of the *BIA*, the Court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, terminate, 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;

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[52] Toner Affidavit at para 43.
[53] Toner Affidavit at para 47(a).
[54] Toner Affidavit at para 54.

(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.[55]

65. The important distinction between an application by a debtor under s 50.4(9) and an application by a creditor under s 50.4(11) is the requirement that any proposal made by the debtor be accepted by its creditors.

i. First Element

66. The first element of the section 50.4(11) test is whether the insolvent debtor has and is acting in good faith and with due diligence.[56]

67. As stated in *Atlantic Sea*, a rubber stamp nod by the trustee of good faith on the part of the debtor is not determinative. The Court has the authority to use its discretion to make a determination on this issue. The Court in *Cougar Metal* stated that the standard of proof to determine bad faith is that of a balance of probabilities.[57]

68. As stated above in paragraphs 41 - 43 above, VOG has exercised a variety of bad faith behaviours, including, but not limited to, the following:

(a) filing the NOI without consultation with the Lender;

(b) unilaterally terminating the third-party access to the Designated Account;

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[55] *BIA*, s 50.4(11) [**TAB 1**].
[56] *BIA*, s 50.4(11)(a) [**TAB 1**].
[57] Cougar Metal Industries Inc, Re, 2004 BCSC 1258 at para 12 [***Cougar Metal***] [**TAB 7**].

(c) withdrawing the earmarked November Tax Credit from the Designated Account; and

(d) depositing the November Tax Credit into the RBC account to which the Lender has no access or visibility.

ii. Second Element

69. The second element of the section 50.4(11) test is whether the insolvent debtor will not likely be able to make a viable proposal before the expiration of the period in question.[58]

70. As stated above in paragraphs 47 - 53, VOG is not likely to be able to make a viable proposal before the expiration of the period in question for reasons including, but not limited to, the following:

(a) VOG has very little in terms of physical assets;

(b) VOG has laid off a number of its employees;

(c) VOG still owes outstanding wages;

(d) VOG has narrowed the scope of projects that it will undertake;

(e) VOG's insistence to "mitigate future credit risk" by requiring "front-loaded advance payments" will scare customers away who are hesitant to pay upfront to a business that is going through financial issues;

(f) VOG has only been successful in collecting 43% of its projected aged accounts receivables; and

(g) VOG and Faber have provided no details or particulars about its "New A/R".

[58] *BIA*, s 50.4(11)(b) [**TAB 1**].

iii. Third Element

71. The third element of the section 50.4(11) test is whether the insolvent debtor will not likely be able to make a proposal before the expiration of the period in question that will be accepted by the creditors.[59]

72. In the event that there is a majority creditor that holds veto power over any potential proposal, the lines between 50.4(11)(b) and 50.4(11)(c) start to blur as noted by Justice Farley in *Hitech*. In that case, when discussing (b) and (c) regarding the ability to make a viable proposal, or a proposal that would be accepted by the creditors, Justice Farley noted "the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Borrower has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the debtor".[60] In that case, Justice Farley held that the Bank had made out its case for terminating the thirty-day stay period.[61]

73. It has been held that section 50.4(11) can be utilized where it is clear that a debtor has no hope of making a viable proposal or a proposal acceptable to creditors even though no proposal has been filed. Where a creditor holding sufficient votes to defeat a proposal has indicated that it will not accept a proposal, that will be sufficient to satisfy section 50.4(11)(c).[62]

74. In the frequently cited *Cumberland* case, the Court opined that:

> It seems to me that clause (c) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when

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[59] *BIA*, s 50.4(11)(c) [**TAB 1**]
[60] *Com/Mit Hitech Services Inc, Re*, [1997] O.J. No. 3360, 43 O.T.C. 376 at para 9 [***Hitech***] [**TAB 8**].
[61] *Hitech* at para 10 [**TAB 8**].
[62] Bankruptcy and Insolvency Law of Canada, 4th Edition, § 4:6. Termination of Notice of Intention and Stay, citing *Cumberland* [**TAB 6**].

> one considers that the court need only be satisfied that "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…" (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland. (emphasis added)[63]

75. In addition to the Lender's submissions concerning VOG's lack of good faith in these proceedings, the Lender respectfully submits that VOG will not be able to make a viable proposal that will be accepted by the Lender.[64]

76. Similar to the circumstances in *Hitech*, the Lender is the majority secured creditor of VOG and represent almost 57% of the creditor claims of VOG. The Lender has veto power over any proposal by VOG and does not support this proceeding.

77. The Lender has made it clear that they do not intend to wait and hear what the proposal is before deciding whether to vote it down. VOG and its management have lost all confidence of the Lender and, as a result, the Lender will not accept any proposal put forth by VOG.[65]

iv. Fourth Element

78. The final element of the section 50.4(11) test is whether the creditors as a whole would be materially prejudiced in the event that the application under this subsection was rejected.[66]

79. When considering the question of material prejudice under section 50.4(11) or section 69.4, the material prejudice referred to is an objective prejudice as opposed to a subjective one. That is, "it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant

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[63] *Cumberland* at para 9 [**TAB 6**].
[64] Toner Affidavit at para 52.
[65] Toner Affidavit at paras 56.
[66] *BIA*, s 50.4(11)(d) [**TAB 1**]

security, and not to the extent that such prejudice may affect the creditor qua person". It does not refer to the extent to which the prejudice subjectively affects the creditor.[67]

80. Extending the Stay Period or allowing it to continue is unlikely to give rise to a successful proposal. The only thing such an outcome will accomplish is to impose additional and unnecessary professional fees, further erode the Lender's security and a waste of judicial resources.

81. By terminating the Stay Period, this Honourable Court will allow the creditors to proceed to the inevitable phase of receivership. Allowing this to happen will not only spare the creditors from additional prejudice and permit them an opportunity to maximise their security position.

C. The Stay Should be Lifted in Respect to the Applicants

82. Under section 69.4 of the *BIA*, 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.[68]

83. The material prejudice in section 69.4(a) is objective prejudice and not subjective prejudice. It refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor as a person, organization or entity. The fact that the creditor is a financially strong organization is therefore immaterial. To succeed under section 69.4(a), the creditor must be able to show quantitatively the prejudice that it will suffer if the stay is not removed.[69]

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[67] *Cumberland* at para 11 [**Tab 6**].
[68] *BIA*, s 69.4 [**TAB 1**].
[69] *Toronto Dominion Bank v Ty (Canada) Inc,* 122 ACWS (3d) 18, [2003] OJ No 1552 at para 22 [**TAB 9**].

84. On such a motion, the role of the Court is not to inquire into the merits of the action sought to be commenced or continued, but rather to ensure that there are sound reasons, consistent with the scheme of the *BIA*, to relieve against the automatic stay. For sound reasons to exist, the action needs to have more than little prospect of success.[70]

85. The Lender's application satisfies these grounds. Maintaining the stay will result in material prejudice against the Lender further, equitable grounds support a lifting of the stay.

86. As stated above in paragraphs 57 - 62, the Lender is likely to be materially prejudiced by the continued operation of those sections due to reasons including, but not limited to, the following:

(a) VOG's only sources of funding are secured in favour of the Lender;

(b) the November Tax Credit was moved in violation of the Loan Agreements and the Consulting Agreements;

(c) the amount of the November Tax Credit has already been substantially eroded in order to satisfy another creditor, and were the likely source of VOG's payment of its unpaid wages;

(d) the SRED Credit is also at risk of not being deposited into the Designated Account being a further violation of the Loan Agreements and the Consulting Agreements; and

(e) the remaining amounts of the November Tax Credit and SRED Credit are at risk of being misappropriated by VOG for its own ends.

87. It is in the interest of all stakeholders that the stay be lifted as doing so will not only save costs among the parties, it will also allow them to proceed to the next inevitable part of this process – receivership.[71]

D. This Court has Discretion to Appoint a Receiver Where Just and Convenient

88. Under section 243(1) of the *BIA*, on the application of a "secured creditor" who has complied with the statutory notice period, the Court may appoint a receiver over the property of an "insolvent

[70] *Ma v Toronto-Dominion Bank*, 2001 CanLII 24076 (ON CA), [2001] OJ No 1189 at paras 2-3 (CA) [***Re Ma***] [**TAB 10**].
[71] Toner Affidavit at para 59.

person". The Court may authorize the appointment of a receiver where it considers that it is "just and convenient" to do so.[72]

89. This inquiry requires the Court "to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required".[73] The ultimate question is, "what are the relative risks to the parties of granting or withholding the remedy?"[74]

90. In *Paragon*, the Court set out a number of factors that may be considered in deciding whether to grant a final receivership order:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

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[72] *BIA*, s 243(1) -(1.1) [**TAB 1**].
[73] *MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB 647 at para 11 [***MTM***] [**TAB 11**]; *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at para 209 [***CWB***] [**TAB 12**].
[74] *MTM* at para 11 [**TAB 11**]; *CWB* at para 209 [**TAB 12**].

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(j) the consideration of whether a Court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.[75]

91. In contractual cases where the security documentation expressly provides for the appointment of a receiver, the concern about the extraordinary nature of the remedy sought is less essential to the Court's inquiry.[76]

E. The Appointment of MNP as Receiver of the Property is Just and Convenient

i. Contractual Receivership Provisions

92. The Facilities Agreement expressly contemplates the appointment of a receiver. Section 18(c) of the Standard Terms and Conditions contained in Attachment A of the Facilities Agreement provides that Shred Capital may:

[75] *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27 [*Paragon*] [**Tab 13**]; *CWB* at para 210 [**TAB 12**].
[76] *CWB* at para 211 [**TAB 12**]; *Paragon* at para 28 [**TAB 13**].

> take legal proceedings for the appointment of a receiver or receivers (to which it shall be entitled as a matter of right) to operate the business of the Recipient or take possession of the Collateral pending the sale thereof pursuant either to the power of sale granted by this Agreement or to a judgment, order or decree made in any judicial proceeding for the foreclosure or involving the enforcement of this Agreement;[77]

93. Section 5.3.2 of the GSA expressly provides Leonite with ability to enforce its rights:

> by proceedings in any court of competent jurisdiction for the appointment of a Receiver or of all or any part of the Collateral;[78]

94. Therefore, the fact that the appointment of a receiver would otherwise be an extraordinary remedy should be given little weight, as should the consideration of irreparable harm in the absence of a receiver, as noted above.

ii. Justice and Reasonableness Aside from Contract

95. The Lender submits that, the procedural requirements for the appointment of a Receiver under the *BIA* have been satisfied by the Lender. In particular:

(a) the Lender is a secured creditor of VOG;[79]

(b) VOG is insolvent, by having ceased to pay its current obligations in the ordinary course of business as they generally become due;[80] and

(c) the Lender has satisfied the notice requirement under s 244 of the *BIA*, by having delivered the Demands and Notice to VOG on November 20, 2023.[81]

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[77] Toner Affidavit at Exhibit "E": Facilities Agreement at s 18(c).
[78] Toner Affidavit at Exhibit "I": GSA at s 5.3.2.
[79] Toner Affidavit at para 15(f).
[80] *BIA,* at s 2, "insolvent person" at ss (b) [**TAB 1**]; Toner Affidavit at para 31.
[81] Toner Affidavit at para 32.

96. Aside from the contractual provisions which contemplate the appointment of a receiver, a Court-appointed receiver and manager is the most appropriate, efficient, and cost-effective means of realizing upon the security provided in the Loan Agreement and the Consulting Agreements.

97. There is urgency to the appointment of a receiver and manager, given the ongoing risk of diminution in value of the assets. VOG has not provided evidence of the amount of equity they have in the secured property nor is the there a clear path to future financial health outside the November Tax Credit and the SRED Credit.[82]

98. In all the circumstances, and based on the record before the Court, the Lender submits that a Court-appointed receiver and manager is the most fair, balanced, just, and reasonable remedy, and ought to be granted.

V. RELIEF REQUESTED

99. In light of the foregoing, the Applicants respectfully request that this Honourable Court grant the relief set out in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 19th day of December, 2023.

BORDEN LADNER GERVAIS LLP

Per: Kevin E. Barr / Farrukh Ahmad

Counsel for the Applicants, Shred Consulting Ltd., Shred Capital Ltd., and Leonite Fund I, LP.

[82] Toner Affidavit at paras 47(b).

VI. LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c.B-3.
2.	*Atlantic Sea Cucumber Limited (Re)*, 2023 NSSC 238.
3.	*Scotia Rainbow Inc v Bank of Montreal*, 186 NSR (2d) 153, 18 CBR (4th) 114.
4.	*Baldwin Valley Investors Inc, Re*, [1994] OJ No 271, 23 CBR (3d) 219.
5.	*H & H Fisheries Ltd, Re*, 2005 NSSC 346.
6.	*Cumberland Trading Inc, Re*, 1994 CanLII 7458, [1994] OJ No 132.
7.	*Cougar Metal Industries Inc, Re*, 2004 BCSC 1258.
8.	*Com/Mit Hitech Services Inc, Re*, [1997] OJ No 3360, 43 OTC 376.
9.	*Toronto Dominion Bank v Ty (Canada) Inc*, 122 ACWS (3d) 18, [2003] OJ No 1552
10.	*Ma v Toronto-Dominion Bank*, 2001 CanLII 24076 (ON CA), [2001] OJ No 1189.
11.	*MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB.
12.	*CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137.
13.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430.