Estate/Court File No.: 31-2675288

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

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 2505243 ONTARIO LIMITED OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AFFIDAVIT OF PETER TAE-MIN CHOI
(Sworn September 26, 2020)

I, Peter Tae-Min Choi, of the City of Oakville in the Province of Ontario, MAKE OATH AND SAY THAT:

1 I am an associate at Norton Rose Fulbright Canada LLP (**NRFC**), solicitors for 2505243 Ontario Limited (the **Company**). In connection with the Company's motion scheduled for Tuesday, September 29, 2020, I attach the following documents:

(a) A copy of a letter dated September 25, 2020 from Mr. Peter Carey of Loopstra Nixon LLP to Randy Sutton of NRFC is attached hereto as Exhibit "A";

(b) A copy of a letter dated September 25, 2020 from Mr. Thomas Lambert of Loopstra Nixon LLP to the Ontario Superior Court of Justice (Bankruptcy Court) and the covering email attaching the letter are attached hereto as Exhibit "B";

(c) A copy of a letter dated September 25, 2020 from Ms. Jennifer Stam of NRFC to the Ontario Superior Court of Justice (Bankruptcy Court) is attached hereto as Exhibit "C"; and

(d) A copy of a letter dated September 27, 2020 from Mr. Thomas Lambert of Loopstra Nixon LLP to the Ontario Superior Court of Justice (Bankruptcy Court) is attached hereto as Exhibit "D".

SWORN BEFORE ME via videoconference this 27th day of September, 2020.

A Commissioner for taking Affidavits *(or as may be)*
Alexander Schimitt LSO#: 63068F

PETER TAE-MIN CHOI

THIS IS **EXHIBIT "A"** TO THE AFFIDAVIT OF PETER TAE-MIN CHOI SWORN BEFORE ME VIA VIDEOCONFERENCE, THIS 27TH DAY OF SEPTEMBER, 2020.

A Commissioner for taking Affidavits *(or as may be)*

LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Peter W. G. Carey
Tel: 416.746.4710
E-mail: pcarey@loonix.com

BY EMAIL (randy.sutton@nortonrosefulbright.com)

September 25, 2020

Norton Rose Fulbright
222 Bay Street, Suite 3000, P.O. Box 53
Toronto, ON M5K 1E7

Attention: Mr. Randy Sutton

Dear Mr. Sutton,

Re: Hotel X Toronto

We are in receipt of your correspondence dated September 24, 2020. We disagree with many of the factual representations and conclusions drawn therein and will respond to these allegations as and when is necessary.

We performed a Bankruptcy and Insolvency Records Search this morning which does not disclose 2505243 Ontario Ltd.'s ("**PnP**") filing of a Notice of Intention to Make a Proposal (the "**NOI**"). A copy of the search results is enclosed herewith. It is not clear to us whether the NOI has, in fact, already been filed with the official receiver. Until such time as the NOI is filled with the official receiver, there is no statutory stay of proceedings in favour of PnP. If the NOI has been filed as you've indicated, please provide us with a copy of the certificate of filing so we can confirm.

Next, contrary to the position taken in your correspondence, PnP's filing of the NOI does not automatically operate as a stay of our clients' bankruptcy application (the "**Bankruptcy Application**"). In this regard, we refer you to the decision of Steele J. in *389179 Ontario Ltd., Re*, 1979 CarswellOnt 183.

Additionally, we note that the stay of proceedings only operates to stay "a claim provable in bankruptcy". The Bankruptcy Application is not a "claim provable in bankruptcy" and as such it is not stayed under section 69 of the *Bankruptcy and Insolvency Act*. In this regard, we refer you to the decision of the Court of Appeal in *Provincial Refining Co. v. Newfoundland Refining Co.*, 1977 CarswellNfld 6.

Accordingly, our clients are not stayed and will be proceeding with the Bankruptcy Application.

Yours truly,

LOOPSTRA NIXON LLP
Per:

Peter W. G. Carey

PWC/tpl
Encl.

cc. Andrea Brwer (andrea.brewer@nortonrosefulbright.com)
Erika Anschuetz (Erika.anschuetz@nortonrosefulbright.com)
Jennifer Stam (Jennifer.stam@nortonrosefulbright.com)
Peter Choi (peter.choi@nortonrosefulbright.com)

Government of Canada | Gouvernement du Canada

Bankruptcy and Insolvency Records Search (BIA) search results | Résultats de la recherche dans le Registre des dossiers de faillite et d'insolvabilité (LFI)

2020-09-25

Search Criteria | Critères de recherche :	Name | Nom = 2505243 ONTARIO LIMITED, Province = Ontario, Name Type | Type de nom = Business | Entreprise
Reference | Référence :	

A search of the Office of the Superintendent of Bankruptcy records has revealed the following information, for the period 1978 to 2020-09-22, based on the search criteria above-mentioned.

Une recherche dans les dossiers du Bureau du surintendant des faillites a permis de trouver l'information suivante, pour la période allant de 1978 à 2020-09-22, selon les critères de recherche susmentionnés.

BIA Estate Number | Numéro du dossier en vertu de la LFI :	31-459049
BIA Estate Name | Nom du dossier en vertu de la LFI :	2505243 ONTARIO LTD.
Alias:	2505243 ONTARIO LTD BYPETERANDPAULS COM
Birth Date | Date de naissance :	
Province :	Ontario | Ontario
Address | Adresse :	Ontario
Estate Type | Type de dossier :	APPLICATION FOR BANKRUPTCY ORDER | REQUÊTE DE MISE EN FAILLITE
Date of Proceeding | Date de la procédure :	2020-09-09
Total Liabilities* | Total du passif* :	$0
Total Assets* | Total de l'actif* :	$0
First Meeting of Creditors | Première assemblée des créanciers :	
Discharge Status | Statut de la libération :	
Effective Date | Date d'entrée en vigueur :	
Court Number | Numéro de cour :	BK-20-00208450-OT

* As declared by debtor | Tel que déclaré par le débiteur

Appointed Licensed Insolvency Trustee or Administrator | Syndic autorisé en insolvabilité ou administrateur nommé :	THE FULLER LANDAU GROUP INC.
Responsible Person | Personne responsable :	ERLICH, ADAM MARK
Address | Adresse :	151 Bloor St West, Suite 1200, TORONTO, Ontario, Canada, M5S1S4
Telephone | Téléphone :	416-645-6560
Fax | Télécopieur :	416-645-6501
Licensed Insolvency Trustee or Administrator's Discharge Date | Date de la libération du syndic autorisé en insolvabilité ou de l'administrateur :	

Canada

OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

THIS IS **EXHIBIT "B"** TO THE AFFIDAVIT OF PETER TAE-MIN CHOI SWORN BEFORE ME VIA VIDEOCONFERENCE, THIS 27TH DAY OF SEPTEMBER, 2020.

A Commissioner for taking Affidavits *(or as may be)*

Choi, Peter

From: Adamo, Amanda <aadamo@loonix.com>
Sent: September 25, 2020 4:03 PM
To: JUS-G-MAG-CSD-Toronto-SCJ Bankruptcy
Cc: Brewer, Andrea; Anschuetz, Erika; Stam, Jennifer; Choi, Peter; Carey, Peter; Paul Martin; Adam Erlich; Lambert, Thomas; Sutton, Randy
Subject: In the Matter of the Bankruptcy of 2505243 Ontario Ltd. o/a Bypeterandpauls.com, of the City of Vaughan, in the Province of Ontario
Attachments: Letter to Bankruptcy Court (2020Sept25) (L1886522xC2C1F).PDF; Re. 389179 Ontario Limited (L1886495xC2C1F).PDF; Re. Provincial Refining Company Limited (L1886497xC2C1F).PDF; Section 10 - Stay of Application for a Bankruptcy Order by Reason of the Filing of a Proposal (L1886493xC2C1F).PDF

Dear Sir or Madam,

We are the lawyers for the applicant creditors, Princes Gates GP Inc., Lowell Security Inc., The Small Winemakers Collection Inc., D.N.B. Media Group Inc., PR CC Plated Meals Inc. and Platinum Valet Hotel Cleaners Inc. (collectively, the "**Applicants**"), in the above noted proceeding.

The Applicants have applied for a bankruptcy order against 2505243 Ontario Ltd. (the "**Debtor**") and the hearing is scheduled to proceed this Monday, September 28, 2020. An issue has arisen which, in our view, ought to be brought to the Court's attention before it decides the application. In light of the COVID-19 restrictions and the fact that the matter is proceeding in writing, we are unable to raise the issue with the Court at the hearing and so we request that the attached correspondence be brought to the Court's attention on an urgent basis.

Counsel for the Debtor is copied hereto.

Thank you and have a good weekend,
Amanda

Amanda Adamo
Legal Assistant|Bankruptcy, Insolvency & Restructuring|Loopstra Nixon LLP
☎ 416.748.4186 | F: 416.746.8319
aadamo@loonix.com | www.loopstranixon.com
135 Queens Plate Drive, Suite 600, Toronto, ON Canada M9W 6V7

LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Thomas P. Lambert
Tel: 416-748-5145
Email: tlambert@loonix.com

September 25, 2020
File No. 17600-0007

SENT BY EMAIL (Toronto.bankruptcy@ontario.ca)

Superior Court of Justice – Bankruptcy Court
330 University Avenue, 9th Floor
Toronto, ON M5G 1R7
Attn: Registrar

Dear Registrar,

Re: In the Matter of the Bankruptcy of 2505243 Ontario Ltd. o/a Bypeterandpauls.com, of the City of Vaughn, in the Province of Ontario
Court File No.: BK-20-00208450-OT31

We are the lawyers for the applicant creditors, Princes Gates GP Inc., Lowell Security Inc., The Small Winemakers Collection Inc., D.N.B. Media Group Inc., PR CC Plated Meals Inc. and Platinum Valet Hotel Cleaners Inc. (collectively, the "**Applicants**"), in the above noted proceeding.

We are advised by 2505243 Ontario Ltd.'s (the "**Debtor**") counsel, copied on this correspondence, that, subsequent to receiving notice of the bankruptcy application (the "**Bankruptcy Application**"), the Debtor has filed a Notice of Intention to Make a Proposal and that the stay of proceedings imposed under section 69.(1) of the *Bankruptcy and Insolvency Act* (the "***BIA***") operates to stay the Applicants' bankruptcy application (the "**Application**"). We disagree with the Debtor's counsel's assessment on the effect the stay of proceedings.

The stay of proceedings does not operate to stay a bankruptcy application. This is clear on both a technical interpretation of section 69.(1) and a review of common law.

On a technical interpretation of section 69.1(1), the stay of proceedings only operates to stay "claims provable in bankruptcy". A "claim provable in bankruptcy" is a debt or liability, present or future, to which the bankrupt is subject to on the day on which the bankrupt becomes bankrupt. In the present circumstances, no claim for a debt or liability is being advanced by the Applicants in the Application. Accordingly, on a technical reading of section 69.1(1), the Application is not a "claim provable in bankruptcy" and is therefore not stayed.

The law on this issue is similarly clear – a bankruptcy application is not stayed because of an intervening insolvency proceeding. In this regard, we refer you to the Court of Appeal's decision in *Provincial Refining Co. v. Newfoundland Refining Co.* ["***Refining Co.***"] and the Bankruptcy Court's decision in 389179 Ontario Ltd, Re ["***Re 389Co.***"], copies of which are enclosed herewith.

The relevant paragraphs *Refining Co.* are paragraphs 21 and 22 and the relevant paragraph in *Re 389Co.* is paragraph 2. Notably, both cases are referenced in The 2020 Annotated Bankruptcy and Insolvency Act commentary for these exact propositions. For ease of reference a copy of the commentary is enclosed herewith.

As an aside, we note that a bankruptcy order will not prejudice the Debtor in any way as it remains authorized under subsection 50.(1) of the *BIA* to make an in-bankruptcy proposal. Additionally, and perhaps most importantly, the Debtor has admitted that it is insolvent by filing an NOI such that it would be improper and disingenuous for it to now take a position contrary to it being insolvent.

Accordingly, for the reasons stated herein, we request that the Court proceed with the hearing of the Application and make the requested bankruptcy order.

Yours very truly,

LOOPSTRA NIXON LLP

Thomas P. Lambert
TPL

Encl.

cc. Randy Sutton (randy.sutton@nortonrosefulbright.com)
Andrea Brwer (andrea.brewer@nortonrosefulbright.com)
Erika Anschuetz (Erika.anschuetz@nortonrosefulbright.com)
Jennifer Stam (Jennifer.stam@nortonrosefulbright.com)
Peter Choi (peter.choi@nortonrosefulbright.com)
Peter Carey (pcarey@loonix.com)
Paul Martin (pmartin@loonix.com)
MNP Ltd. c/o Adam Erlich, Licensed Insolvency Trustee (aerlich@fullerllp.com)

THIS IS **EXHIBIT "C"** TO THE AFFIDAVIT OF PETER TAE-MIN CHOI SWORN BEFORE ME VIA VIDEOCONFERENCE, THIS 27TH DAY OF SEPTEMBER, 2020.

A Commissioner for taking Affidavits *(or as may be)*

NORTON ROSE FULBRIGHT

September 25, 2020

Norton Rose Fulbright Canada LLP
222 Bay Street, Suite 3000, P.O. Box 53
Toronto, Ontario M5K 1E7 Canada

F: +1 416.216.3930
nortonrosefulbright.com

Sent By E-mail

Superior Court of Justice - Bankruptcy Court
330 University Avenue, 9th Floor
Toronto, ON M5G 1R7

Attention: Registrar

Jennifer Stam
+1 416.202.6707
jennifer.stam@nortonrosefulbright.com

Dear Sir/Madam:

RE: In the matter of the Bankruptcy of 2505243 Ontario Ltd. o/a Bypeterandpauls.com of the City of Vaughan, in the Province of Ontario: Court File No. BK-20-00208450-OT31

AND RE: In the Matter of a Notice of Intention to Make a Proposal of 2505243 Ontario Limited: Estate Number 31-2675288

We are the lawyers for 2505243 Ontario Limited (the "**Company**").

We understand there is a pending application for a bankruptcy order (the "**Bankruptcy Application**") made by, among others, Princes Gate GP Inc. ("**PGH**" and together with the other applicant creditors, the "**Applicants**") bearing Court File No. BK-20-00208450-OT31 scheduled for Monday September 28, 2020. Late this afternoon, we were advised by counsel that the matter is to proceed by written submission.

In our submission, the Bankruptcy Application should not proceed on Monday for the below reasons.

1. An Notice of Intention to Make a Proposal Has been Filed: On September 24, 2020, the Company filed a notice of intention ("**NOI**") to make a proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("**BIA**"). The NOI was accepted for filing by the Superintendent of Bankruptcy and the NOI will proceed in Estate Number 31-2675288. The Certificate of Filing is attached as Schedule "A" for reference.

2. A Motion is Pending to determine the Stay Issue: We advised counsel for the Applicants on September 24, 2020 of the filing of the NOI and of our intention to seek application of the Stay in the NOI proceeding. We now have a motion scheduled before Justice Hainey on the Commercial List on Tuesday September 29, 2020 at 2:00 pm.

   The cases relied upon by the Applicants are highly distinguishable to the current situation where (a) the Company disputes the amounts alleged to be outstanding by some or all of the Applicants and (b) there is clearly an improper purpose for bringing the Bankruptcy Application. The caselaw is clear that the filing of an NOI or a proposal is a factor in considering whether a stay should be granted and is particularly salient in this case where there are numerous disputed facts. See *Sport Maska Inc. v. RBI Plastique Inc./ RBI Plastic Inc.* 2005 NBQB 394 attached hereto as Schedule "B".

3. The Bankruptcy Application is Opposed: The Bankruptcy Application is opposed and the Company disputes many of the factual elements in the underlying Bankruptcy Application itself. In the event that it

is determined the Bankruptcy Application should proceed, we will require time to cross examine the Applicant's witness on his affidavit of verification and set a timetable for the hearing of the application.

On July 20, 2020, the Company commenced litigation against the main Applicant, PGH, and the Bankruptcy Application is no more than an improper tactic in response to that litigation. Bankruptcy Applications in these situations have clearly been found to be improper pursuant to Section 43(7). See, for instance, the decision of Justice Patillo in *Stretch v. Solid Gold Resources Corp.* 2015 ONSC 82 attached hereto Schedule "C".

4. All Opposed Matters Should be Determined by a Judge. Respectfully, pursuant to Section 192(1) of the BIA, the Registrar does not have the jurisdiction to hear disputed matters. In light of the circumstances, including the pending motion, all issues in both the Bankruptcy Application and the NOI proceeding are rightfully returnable in front of a judge of the Commercial List.

5. There is No Prejudice to the Applicants. There is clearly no prejudice to the Applicants for the Bankruptcy Application to be stood down given the Company's diligence in seeking relief with respect to the stay issue.

Yours very truly,

Jennifer Stam
Partner

SCHEDULE "A"

Industry Canada
Office of the Superintendent of Bankruptcy Canada

Industrie Canada
Bureau du surintendant des faillites Canada

District of Ontario
Division No. 09 - Toronto
Court No. 31-2675288
Estate No. 31-2675288

In the Matter of the Notice of Intention to make a proposal of:

2505243 Ontario Limited
Insolvent Person

KSV RESTRUCTURING INC.
Licensed Insolvency Trustee

Date of the Notice of Intention: September 24, 2020

CERTIFICATE OF FILING OF A NOTICE OF INTENTION TO MAKE A PROPOSAL
Subsection 50.4 (1)

I, the undersigned, Official Receiver in and for this bankruptcy district, do hereby certify that the aforenamed insolvent person filed a Notice of Intention to Make a Proposal under subsection 50.4 (1) of the *Bankruptcy and Insolvency Act.*

Pursuant to subsection 69(1) of the Act, all proceedings against the aforenamed insolvent person are stayed as of the date of filing of the Notice of Intention.

Date: September 25, 2020, 15:20

E-File/Dépôt Electronique

Official Receiver

151 Yonge Street, 4th Floor, Toronto, Ontario, Canada, M5C2W7, (877)376-9902

Canada

SCHEDULE "B"

2005 NBQB 394
New Brunswick Court of Queen's Bench

Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.

2005 CarswellNB 635, 2005 NBQB 394, [2005] N.B.J. No. 463, 143 A.C.W.S. (3d) 624, 17 C.B.R. (5th) 244, 290 N.B.R. (2d) 278, 755 A.P.R. 278

In the Matter of the bankruptcy of RBI Plastique Inc./RBI Plastic Inc.

Sport Maska Inc. (Petitioner) and RBI Plastique Inc./RBI Plastic Inc. (Respondent)

LaVigne J.

Heard: November 8, 2005
Judgment: November 9, 2005 *
Docket: NB 11804

Counsel: Frederick C. McElman, Kimberly A. Wylde for Sports Maska Inc.
Raymond P. Gorman for RBI Plastique Inc./RBI Plastic Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Creditor was single largest creditor of debtor and was its only client — Debtor owed creditor about $3.8 million, only $2 million of which was secured — Creditor brought petition for receiving order against debtor and successfully brought ex parte motion for appointment of interim receiver — Debtor filed proposal that was subject to approval by creditor as secured creditor — Debtor brought motion for stay of proceedings under petition — Creditor brought cross-motion for order deeming proposal to have been rejected and deeming debtor to have thereupon made assignment, and for order appointing interim receiver as trustee in lieu of debtor's proposed trustee — Motion dismissed; cross-motion granted — Creditor had clearly lost all confidence in debtor and its sole director — Creditor was clearly in position to veto proposal as secured creditor and would also be able to veto proposal on behalf of unsecured creditors — Creditor indicated that under no circumstances would it vote in favour of this or any other proposal put forth by debtor — No plan of arrangement could succeed without creditor's approval — No useful purpose would be served in putting plan of arrangement to meeting of creditors — Possibility that debtor might be able to pay off creditor before meeting was highly unlikely — Interim receiver was appointed trustee as it had intimate familiarity with all issues arising in this matter and was not shown to be in conflict — Debtor was not precluded from continuing to pursue proposal.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — Pending arrangement with creditor

Creditor was single largest creditor of debtor and was its only client — Debtor owed creditor about $3.8 million, only $2 million of which was secured — Creditor brought petition for receiving order against debtor and successfully brought ex parte motion for appointment of interim receiver — Debtor filed proposal that was subject to approval by creditor as secured creditor — Debtor brought motion for stay of proceedings under petition — Creditor brought cross-motion for order deeming proposal to have been rejected and deeming debtor to have thereupon made assignment, and for order appointing interim receiver as trustee in lieu of debtor's proposed trustee — Motion dismissed; cross-motion granted — Creditor had clearly lost all confidence in debtor and its sole director — Creditor was clearly in position to veto proposal as secured creditor and would also be able to veto proposal on behalf of unsecured creditors — Creditor indicated that under no circumstances would it vote in favour of this or any other proposal put forth by debtor — No plan of arrangement could succeed without creditor's approval — No useful purpose would be served in putting plan of arrangement to meeting of creditors — Possibility that debtor might be able to pay off creditor before meeting was highly unlikely — Interim receiver was appointed trustee as it had intimate familiarity with all issues arising in this matter and was not shown to be in conflict — Debtor was not precluded from continuing to pursue proposal.

MOTION by debtor for stay of proceedings under petition for receiving order; CROSS-MOTION by creditor for order deeming proposal to have been rejected and deeming debtor to have thereupon made assignment, and for order appointing interim receiver as trustee in lieu of debtor's proposed trustee.

LaVigne J. **(orally):**

I. Introduction

1 As a result of its filing of a Proposal, RBI Plastique Inc./RBI Plastic Inc. ("RBI") seeks a stay of the proceedings under the Petition for Bankruptcy, commenced by Sport Maska Inc. ("Sport Maska") against it. Sport Maska seeks an Order deeming the Proposal rejected and deeming RBI to have thereupon made an assignment. It also seeks an Order appointing the Interim Receiver, KPMG Inc., Trustee, in lieu of A.C. Poirier and Associates, the Trustee under the Proposal.

II. Summary of the Proceedings

2 Sport Maska filed a Petition for a Receiving Order against RBI on September 26th, 2005. Sport Maska also filed, on that day, an *ex parte* Motion for the appointment of an Interim Receiver, and KPMG Inc. was duly appointed as Interim Receiver of the property, assets and undertaking of RBI by the Registrar in Bankruptcy, on September 26th, 2005.

3 RBI filed and served a Notice of Motion on September 30th, 2005, returnable on October 3rd, 2005, requesting that the appointment of the Interim Receiver be set aside, and that RBI be granted sufficient time to conclude financing arrangements. On October 4th, 2005, I rendered a decision on this Motion. This decision, which is now reported online at Quick Law, at (N.B. Q.B.), puts the Petition in context, and therefore the reader may want to familiarize himself with it. In summary, I upheld the appointment of the Interim Receiver but required that the petitioning creditor file an undertaking as to damages. This was complied with.

4 The hearing for the Petition was scheduled before this Court on October 14th, 2005. On October 13th, 2005, RBI filed a Notice of Motion seeking a stay of proceedings based on subsections 43(10) and 43(11) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3 ("*BIA*"), so that RBI could have the benefit of pre-trial procedures in this matter, such as examination for Discovery, and have more time to respond to the Petition.

5 The stay of proceedings was not granted prior to the hearing on October 14th, 2005, however, this Court reserved its decision to consider RBI's Motion at the end of the hearing. Due to time shortages, the hearing of the Petition was adjourned at the end of the day to November 4th, 2005 for continuation.

6 On November 2nd, 2005, RBI filed a Proposal with the Official Receiver of the office of the Superintendent of Bankruptcy Canada. The Official Receiver has set November 23rd, 2005 at 12:00 noon for the meeting of creditors under the *BIA*.

7 On November 2nd, 2005, RBI forwarded a Notice of Motion requesting another stay of proceedings, based on subsection 43(11) of the *BIA*, this time on the basis of the filing of the Proposal.

8 On November 3rd, 2005, Sport Maska forwarded a Motion seeking an Order deeming the Proposal rejected pursuant to subsection 50(12) of the *BIA*, and deeming RBI to have thereupon made an assignment pursuant to section 57 of the *BIA*. Furthermore, pursuant to section 57.1 of the *BIA*, Sport Maska asked that the Interim Receiver, KPMG Inc., be appointed as Trustee in the Bankruptcy of RBI, in lieu of A.C. Poirier and Associates, the Trustee under the Proposal. Both Motions were made returnable on November 4th, 2005.

9 On November 4th, 2005, the hearing of the Petition continued all day, but was not completed. Due to time shortages, the Motions were not heard and the hearing on the Petition has been adjourned to November 24th, 2005.

10 With the consent of the parties, the Motions filed on November 2nd and November 3rd, 2005, were heard by conference call on November 8th, 2005.

III. Evidence Before the Court

11 The parties agreed that the following affidavit evidence would be part of the record and considered in both Motions.

A. RBI Submitted the Following Affidavits:

- Affidavit of Michel Lebel dated September 30, 2005
- Affidavit of Michel Lebel dated October 14, 2005
- Affidavit of Michel Lebel dated November 2, 2005 (a 3 page affidavit)
- Affidavit of Michel Lebel dated November 3, 2005
- Affidavit of Marvin Minkoff dated November 3, 2005
- Affidavit of Susan A. Cole dated November 3, 2005

B. Sport Maska Submitted the Following Affidavits:

- Affidavit of Richard Desroches dated September 22, 2005
- Affidavit of Robert Desrosiers dated September 23, 2005
- Affidavit of Robert Desrosiers dated October 3, 2005
- Affidavit of Robert Desrosiers dated November 3, 2005

IV. The Petition

12 A Petition has been filed in this matter alleging that the debtor in question was justly and truly indebted to the Petitioner, such sum being in excess of $1,000.00. It is further alleged in the Petition that the debtor has ceased to meet its liabilities generally as they became due in that it had failed to meet its obligations to the Petitioner, and to some of its other creditors.

13 A dispute was filed to this Petition denying the amount of the indebtedness, denying that there had been failure to meet liabilities as they fell due, and further denying that any act of bankruptcy had been committed.

14 Sport Maska claims in the Petition that RBI is justly and truly indebted to it in the sum of $4,467,972.13, together with interest thereon and costs from September 6th, 2005. Sport Maska holds security for the payment of part of the said sum and estimates the value of such security at the sum of $2,000,000.00. Sport Maska is the single largest creditor of RBI and its only client.

15 In its Notice Disputing the Petition, RBI has questioned a portion of the amount of indebtedness claimed by Sport Maska, but there is no reference to the specific amount being questioned.

16 However, no issue was taken in the Notice Disputing the Petition with the value placed on Sport Maska's security. The evidence has not convinced me that the security is undervalued.

17 Based on the evidence before the Court, I conclude that the amount of the debt is at least 3.8 million dollars, with 1.8 million being unsecured debt.

V. Issues

18 The issues before the Court are as follows:

> (i) Should this Court grant a stay of proceedings concerning the Petition for a Receiving Order pursuant to subsection 43(11) of the *BIA* as a result of the filing of a Proposal by RBI?
>
> (ii) Should this Court declare that the Proposal filed by RBI be deemed to have been refused by the creditors of RBI pursuant to subsections 50(12) of the *BIA* and RBI thereby be deemed to have made an assignment in bankruptcy as at the date of such Order pursuant to section 57 of the *BIA*?
>
> (iii) Should KPMG Inc. be appointed as Trustee in the Bankruptcy of RBI in lieu of A.C. Poirier and Associates (the Trustee under the Proposal) pursuant to section 57.1 of the *BIA*?

VI. Law and Argument

(1) Sport Maska's Motion

19 I will deal first with the relief requested by Sport Maska.

20 Subsection 50(12) of the *BIA* allows a creditor to apply to the Court at any time before a meeting of creditors occurs to declare that a Proposal is deemed to have been refused by the creditors. Subsection 50(12) provides, specifically, as follows:

> 50(12) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that
>
> (a) the debtor has not acted, or is not acting, in good faith and with due diligence;
>
> (b) the proposal will not likely be accepted by the creditors; or
>
> (c) the creditors as a whole would be materially prejudiced if the application under this section is rejected.

21 Similar to subsection 50(12), where a debtor files a Notice of Intention to make a Proposal, a creditor can apply under subsection 50.4(11) of the *BIA* to terminate the 30 day grace period an insolvent debtor has to file a Proposal, on the basis that the debtor will not likely be able to make a Proposal before the expiration of the period in question, that will be accepted by its creditors. Sport Maska cited a variety of cases which have been decided under subsection 50.4(11).

22 Sport Maska submits that the case law considering subsection 50.4(11) of the *BIA* is clear that where a single creditor in a *veto* position refuses to vote in favor of any Proposal to be filed by an insolvent debtor, the Court will terminate the 30 day period referred to above, resulting in the debtor's bankruptcy. It contends that the same considerations apply where a creditor requests the Court to declare a Proposal terminated on the basis that the Proposal will not likely be accepted by the creditors of the debtor.

23 RBI submits that the test to be applied under subsection 50.4(11), where only a Notice of Intention to make a Proposal is filed, differs from the test to be applied where a Proposal has been made and a date set for the meeting of the creditors. It alleges, therefore, that the cases decided under subsection 50.4(11), cited by Sport Maska, can be distinguished from the case at bar on this basis. I do not agree with this contention. Paragraph 50(12)(b) and paragraph 50.4(11)(c) stipulate that the Court has a discretion to, *declare that the proposal is deemed to have been refused by the creditors* (s-s.50(12)), or *declare terminated the time to file a proposal* (s-s 50.4(11)), if the Court is satisfied that *the proposal will not likely be accepted by the creditors* (para. 50(12)(b)), or *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 (para. 50.4(11)(c)). The same consideration applies. In both cases the Court must determine ultimately whether a Proposal made or to be made by the debtor will likely be accepted by the creditors. Therefore, I find that the principles that emanate from the cases decided under subsection 50.4(11) are relevant and can be considered when making a determination under paragraph 50(12)(b).

24 In *Triangle Drugs Inc., Re* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.), the Court made an Order terminating a Proposal even before the enactment of subsection 50(12). In that case, a trade creditor's committee held a *veto* over any Proposal, and the committee had indicated that it had lost all confidence in the debtor's management and that it would vote against any Proposal. In these circumstances, the Court held that it was not necessary to wait for a formal vote.

25 In *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]), Skyview International Finance Corporation ("Skyview") brought a Motion under subsection 50.4(11) of the *BIA*. Skyview represented 95% of the value of the claims of secured creditors of Cumberland and 67% of all creditors' claims. Skyview, who would have had a *veto* power on any vote on a Proposal, asserted that its faith and confidence in the management of Cumberland had been irreparably damaged and that it would not be prepared to vote in favor of any Proposal that Cumberland may make. Farley, J. allowed Skyview's Motion. He noted, specifically, as follows in paragraph 9:

> (...) I do not see anything in the 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...

26 In *1512759 Ontario Ltd., Re*, [2002] O.J. No. 4457 (Ont. S.C.J.), Ground, J. also allowed a Motion under subsections 50.4(11), where the petitioning creditor was in a position to *veto* any Proposal made by the insolvent debtor and indicated that it would indeed, vote against any Proposal offered.

27 In *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.) the Court allowed a Motion under subsection 50.4(11) and noted, specifically, as follows:

> ... it must be recognized that the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor had 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 (and Mr. Gottdank)...

28 In my opinion, the same comments can be made in the present case. It is clear that Sport Maska has lost all confidence in RBI and Michel Lebel, its president and sole director.

29 In paragraph 9 of his affidavit dated November 3rd, 2005, Robert Desrosiers, who is the Vice-President, Finance and Administration and Chief Financial Officer of Sport Maska, swore that:

> 9. As I stated in my Affidavit of October 2, 2005, given the lack of information from Mr. Lebel as to RBI's use of funds; funds being removed from RBI without Sport Maska's knowledge or consent; funds received by RBI not being properly applied to the indebtedness owed to Sport Maska; RBI's failure to keep production running smoothly by paying suppliers, creditors and employees in the normal course; and RBI's inability to meet production requirements, Sport Maska has lost all confidence in the operation of RBI under Mr. Lebel's direction.

(a) The Proposal

30 Sections 3, 4 and 5 of the Proposal filed by RBI state that:

> **3. CONDITIONS PRECEDENT**
>
> Notwithstanding the acceptance of this Proposal by the creditors and approval by the Court, the Debtor will not be obligated to complete the Proposal unless the following conditions are met:

(a) The Interim Receiver has provided complete and unrestricted access, during normal business hours, to Mr. Lebel, the Trustee and their respective agents, employees and consultants to the Debtor's premises and books and records.

(b) The arrangements with SMI, described in section 5 of this Proposal, are agreed to between the Debtor and SMI or other arrangements are agreed to which are satisfactory to the Debtor and SMI.

(c) The payments called for under the Proposal are subject only to the completion of the financing as between the Debtor, TD Bank, BDC and the Province of New Brunswick, which financing shall be completed within 45 days of approval of the Proposal by the unsecured and secured creditors.

4. CLASSES OF CREDITORS

There shall be two classes of creditors voting on the Proposal as follows:

CLASS I: The Unsecured Creditors.

CLASS II: SMI as a secured creditor

The Debtor requires that all classes of creditors vote in favour of the Proposal in order for the Proposal to be approved.

5. SECURED CREDITORS

Secured Creditors, if any, must prove their secured claim to the Trustee. The provisions of the BIA with respect to proofs of claim and secured proofs of claim shall apply. To the Debtor's best knowledge, the only Secured Creditor is SMI.

SMI claims to be owed approximately $4,500,000.00 excluding any amount owing in relation to the appointment of the Interim Receiver, as may be reduced by arbitration. Subject to the Trustee receiving an independent legal opinion confirming the validity and enforceability of SMI's security interest in the Debtor's assets, SMI's claim will be settled as follows:

(a) All inventory in the possession of the Debtor as at the date of the appointment of the Interim Receiver be return to SMI for full credit. Subject to an accounting, it is estimated that this will reduce the amount owing to SMI by $1.0 to $1.5 million.

(b) Approximately $600,000 of the amount owing is the subject of arbitration proceedings to be completed in the Province of Quebec as agreed between the Debtor and SMI. The amount owing, as determined by the arbitrator (up to $600,000), shall be paid within 30 days of the final arbitrator's written decision.

(c) The remaining balance owing, after application of the inventory return credit and the exclusion of the amounts subject to arbitration, shall be paid to SMI within 60 days of the Approval Date.

(d) The excess, if any, of the operating expenses over the operating revenues during the operation of the Debtor's business by the Interim Receiver, together with the Interim Receiver's taxed fees and disbursements, shall be paid by SMI without recourse to, or contribution by, the Debtor.

(e) SMI and the Debtor shall negotiate a mutually satisfactory supply contact within 60 days of the Approval Date.

(f) All payments to SMI will be made directly by the Debtor or its parent and none of these funds will be administered by the Trustee.

31 Pursuant to section 4 of the Proposal, RBI expressly made the success of the Proposal conditional on Sport Maska's approval, as a secured creditor. It is patently clear, that Sport Maska, being the only secured creditor, is in a position to *veto*

the Proposal. In addition to this, paragraph 3(b) requires that arrangements be agreed to between RBI and Sport Maska, and paragraph 5(e) is premised on the condition that Sport Maska and RBI negotiate a mutually satisfactory supply contract.

32 Concerning the ordinary creditors, which form part of the class of the unsecured creditors, section 9 of the Proposal states that:

> **9. ORDINARY CREDITORS**
>
> The Ordinary Creditors shall share rateably (in proportion to their proven claims) in the $200,000 paid by Mr. Lebel to the Trustee deduction of not more than $15,000, plus HST, on account of Administrative Fees & Expenses. Such dividend to be paid 60 days from approval date.

33 As per the Proposal, Sport Maska would be an ordinary creditor in relation to its unsecured debt. With an unsecured debt of at least 1.8 million, Sport Maska would also be in a position to *veto* the Proposal on behalf of the unsecured creditors, since it would hold more than 50% of the value of the unsecured debt, the total value of the debt of the other unsecured creditors being approximately 1.2 million. As we know, a Proposal is deemed to be accepted if, and only if, the unsecured creditors vote for the acceptance of the Proposal by a majority in number and two thirds in value (see paragraph 54(2)(d)).

34 Mr. Desrosiers specifically states that Sport Maska will not, under any circumstances, vote in favor of the Proposal filed by RBI, or any other Proposal that could be made by Mr. Lebel and RBI.

35 He deposed as follows in paragraphs 11 and 12 of his affidavit in support of his Motion:

> 11. The proposal in sections 4 and 5 is entirely dependent on Sport Maska agreeing to accept the terms set out in section 5 which terms are not fair to Sport Maska or commercially reasonable and are not in any circumstances acceptable to Sport Maska.
>
> 12. Sport Maska is not prepared to continue any relationship with RBI and Mr. Lebel. I confirm that Sport Maska will not, under any circumstances, vote in favour of the Proposal filed by Mr. Lebel and RBI or any other proposal by Mr. Lebel and RBI. I further confirm that Sport Maska refuses to agree to the terms set out in section 5 of the proposal or any terms suggested by Mr. Lebel and RBI.

36 Sport Maska asserts that the Proposal will not succeed, as there is no chance that Sport Maska will accept this Proposal, or any Proposal made by RBI. It therefore submits that it is not necessary or indeed practical, that a meeting of creditors be held, since it is already known that Sport Maska will vote to defeat the Proposal.

37 It is obvious that no plan of arrangement can succeed without Sport Maska's approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance it cannot succeed.

38 It is apparent that Sport Maska is overwhelmingly opposed to the plan. No persuasive argument was put forward as to why the vote should proceed in those circumstances.

39 I am of the view that it is fruitless to proceed to a further stage with this Proposal.

40 RBI argues that while it may be appropriate for the Court to use its discretion when the Proposal has not yet been tabled, the Court should not use its discretion in the present case since RBI has made its Proposal and a meeting date has been set. I find that it is easier for the Court to make a finding as to what the creditors are likely to do when the terms of the Proposal are known, and the meeting of the creditors is set to occur in the very near future such as in situations contemplated in subsection 50(12), then when the terms of the Proposal are unknown and the date of the meeting of creditors is to happen sometime later.

41 RBI also argued that it may obtain sufficient financing to pay off completely the debt actually owed to Sport Maska. In my view, that is highly unlikely considering the evidence presently before this Court.

42 A creditor does not have to show beyond certainty that a Proposal would be rejected in order to be successful on a Motion under subsection 50(12). A creditor simply has to show that the Proposal would not likely be accepted by the creditors.

43 Therefore, on a balance of probabilities, based on the evidence before this Court, I am satisfied that the Proposal that was filed by RBI will not likely be accepted by the creditors.

(b) Appointment of trustee

44 Section 57.1 of the *BIA* provides that when an Order has been made under subsection 50(12), the Court may appoint a Trustee in lieu of the Trustee appointed under the Proposal, if it would be in the best interest of the creditors to do so. That section provides, specifically, as follows:

> 57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

45 KPMG Inc. has acted as Interim Receiver of RBI since September 26th, 2005. Because of this, it is reasonable to assume that KPMG Inc. has an intimate familiarity with all issues arising in this matter. If A.C. Poirier and Associates, the Trustee under the Proposal, remains as trustee, it is reasonable to conclude that a lot of extra time and money would have to be expended for it to reach the degree of familiarity needed to carry out the terms of its appointment. RBI has not put forward any facts that would indicate that KPMG Inc. is in a conflict of interest position and therefore should not be appointed Trustee. In the circumstances of this case, I am satisfied that it is in the best interests of the creditors that KPMG Inc. be appointed Trustee.

(2) RBI's Motion

46 As to RBI's Motion, I will deal with it briefly and more generally given the conclusion I have reached with respect to Sport Maska's Motion.

47 RBI was originally seeking a stay for a limited time, 18 days to be exact, that was the period between November 4th, and the first meeting of the creditors set for November 23rd, 2005. It argued that this period could be utilized to work out a resolution acceptable to all interested parties, and if a solution was not worked out, the deeming provisions would prevail. At this point RBI's Motion is moot as the hearing of the Petition for a Receiving Order has been adjourned to November 24th, 2005.

48 Furthermore, RBI based its Motion for a stay on the fact that a Proposal had been filed. It argued that it would be in the best interests of all parties that a stay be granted while the creditors considered the Proposal. Due to my decision deeming the Proposal rejected, there is no longer a Proposal to be considered and therefore there is no more basis for RBI's Motion.

49 I will in any event make the following general comments. As per subsection 43(11) of the *BIA*, the Court has the discretion to grant a stay if it has sufficient reason to do so. A stay of proceedings, under this subsection is permissive and not mandatory. The Court may decide that it would be in the best interests of the creditors to stay the Petition, while the creditors consider the Proposal. However, the filing of a Proposal does not operate as an automatic stay of proceedings with respect to a Petition (see *Provincial Refining Co. v. Newfoundland Refining Co.* (1977), 27 C.B.R. (N.S.) 192 (Nfld. C.A.), affirmed [1978] 2 S.C.R. 836 (S.C.C.) and *Houlden and Morawetz — The 2006 Annotated Bankruptcy & Insolvency Act*, Section 42-48, D 15(4), at page 166). It is, nevertheless, a factor that the Court can consider. The filing of a Proposal does not prevent a court from making a Receiving Order and adjudging a debtor bankrupt.

50 Moreover, the issuance of a Receiving Order does not prevent the filing of a Proposal. A Proposal may be made by an insolvent person, or even by a bankrupt, after the granting of a Receiving Order (see paragraphs 50(1)(a) and (d) of the *BIA*). No stay is required for a bankrupt to pursue a Proposal.

51 The onus is on the debtor to satisfy the Court that there is a sufficient reason for staying the Petition (see *Mediacoat Inc., Re* (1990), 80 C.B.R. (N.S.) 39 (Ont. S.C.)). In the present case, I find that the onus has not been discharged.

VII. Disposition

52 The Motion seeking a stay of the Petition is denied.

53 I am satisfied that RBI's Proposal will not likely be accepted by the creditors.

54 I declare that the Proposal filed by RBI on November 2 nd , 2005 is deemed to have been refused by the creditors. RBI is deemed to have made an assignment on the date the Proposal was filed.

55 I hereby appoint KPMG Inc. Trustee in the Bankruptcy of RBI, in lieu of A.C. Poirier and Associates.

VIII. Costs

56 As for costs, due to the nature of these proceedings, costs on these Motions are to be paid out of the estate of RBI to Sport Maska, on a solicitor-client basis.

57 I wish to thank the solicitors for their cooperation, helpful presentations and Pre-Motion briefs filed in this matter. It is in great part because of their efforts that the Court was able to deal with these Motions forthwith, and render a decision at this time.

Motion dismissed; cross-motion granted.

Footnotes

* Affirmed *Sport Maska Inc. c. RBI Plastique Inc./RBI Plastic Inc.* (2005), 2005 CarswellNB 689 (N.B. C.A.).

SCHEDULE "C"

2015 ONSC 82
Ontario Superior Court of Justice [Commercial List]

Stretch v. Solid Gold Resources Corp.

2015 CarswellOnt 38, 2015 ONSC 82, 22 C.B.R. (6th) 133, 248 A.C.W.S. (3d) 255

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Solid Gold Resources Corp. of the City of Toronto, in the Province of Ontario

Darryl Cameron Stretch and 0894566 BC Ltd., Applicants and Solid Gold Resources Corp. of the City of Toronto, in the Province of Ontario, Respondent

L.A. Pattillo J.

Heard: October 15, 2014
Judgment: January 7, 2015
Docket: 31-OR-208023-T

Counsel: Christopher Funt for Applicants
Andre Tanguay for Respondent

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy within 6 months prior to petition

Mining company was junior company whose main asset was block of mining claims — Plaintiffs entered into consulting agreement with mining company — Plaintiffs brought action against mining company for breach of contract — Plaintiffs brought application for bankruptcy order — Application dismissed — Plaintiffs did not show they were creditors within meaning of Bankruptcy and Insolvency Act — Claims were contingent at present stage — Mining company had denied claim and had initiated counterclaim — Some evidence that certain loan was not demand loan — Admission by mining company that it was insolvent was made in another proceeding and therefore was privileged and could not be used as proof of act of bankruptcy — Not shown that mining company had not met liabilities as they became due — Counterclaim had substance, and there was no reason to end proceedings by beginning bankruptcy.

APPLICATION by defendants for bankruptcy order.

***L.A. Pattillo J.*:**

Introduction

1 Darryl Cameron Stretch ("Stretch") and 0894566 BC Ltd. ("Stretchco") (collectively the "Applicants") bring this application pursuant to s. 43(1) of the *Bankruptcy and Insolvency Act* ("BIA") for a bankruptcy order against Solid Gold Resources Corp. ("Solid Gold") (the "Application").

2 At the outset of the Application, and in the absence of any opposition from the Applicants, I granted leave to Andre Tanguay, the chief executive officer and a director of Solid Gold, to represent it on the Application.

3 Solid Gold is a junior mining exploration and development company, incorporated in Ontario. Its main asset is a 50,000 acre contiguous block of mining claims in Northern Ontario.

4 Stretch is a former chief executive officer of Solid Gold. Stretchco is a company controlled by Stretch. In January 2011, Stretch and Stretchco entered into an Executive Consulting Agreement with Solid Gold (the "Agreement"). The Agreement was terminated by Solid Gold on November 29, 2012.

5 In December 2013, Stretch and Stretchco commenced an action against Solid Gold in the Ontario Superior Court alleging breach of the Agreement and claiming damages of $553,280 made up of unpaid fees and expenses and severance amounts as well as for repayment of a loan (the "Action"). Solid Gold filed a defence and counterclaim in the Action denying liability of the claim and seeking damages in the amount of $2,194,685 against Stretch and Stretchco for breach of contract, breach of duty of care and gross negligence. Apart from filing a brief defence to counterclaim, no further steps have been taken in the Action.

The Issues

6 The parties agree that the issues to be decided on the Application are as follows:

a) Are the Applicants creditors within the meaning of the BIA;

b) Did Solid Gold commit one or more acts of bankruptcy within six months of the filing of the Application; and

c) Are there justifiable reasons in law or equity for the Application to be stayed or dismissed.

Are the Applicants Creditors?

7 The Applicants submit they are creditors as defined in s. 2 of the BIA because their claim, as encompassed by the Action, is a provable claim in bankruptcy. They further submit that their claim is "acknowledged publicly by Solid Gold."

8 Based on the material filed, I am not prepared to accept for the purpose of this Application that either Stretch or Stretchco are creditors of Solid Gold within the meaning of the BIA.

9 Note 5 of Solid Gold's interim financial statements for the nine month period ended June 30 2013, refers to an amount payable to Stretchco of $540,720. That amount relates to the amount alleged to be owing to Stretch and Stretchco pursuant to the Agreement and is the amount claimed by Stretch and Stretchco in the Action. As noted, however, Solid Gold has denied liability and counterclaimed for substantial damages based on the alleged actions of Stretch in running the company. In my view the claims of both parties are contingent at this stage such that I do not consider the claims of Stretch or Stretchco in the Action to establish that they are creditors pursuant to the BIA.

10 Apart from the Action, the evidence fails to establish that Stretch was a creditor of Solid Gold. Note 5 of the above noted financial statement refers to, among other things, a loan from Stretch of $13,000 to assist cash flow which "will be repaid as soon as funds are available." The loan is not a demand loan and is arguably not due until funds are available and there is no evidence that is the case.

Did Solid Gold Commit an Act of Bankruptcy within Six Months of the Application?

11 Section 42(1) of the BIA sets out 10 different acts of bankruptcy. The Applicants submit that the counterclaim, which pleads the Solid Gold is insolvent, is evidence of an act of bankruptcy. In my view, that admission cannot be used to support the submission Solid Gold committed an act of bankruptcy. It is a statement made by Solid Gold in the Action, both in its defence of Stretch and Stretchco's claim and in support of its counterclaim against them. As such, it is subject to the doctrine of "absolute privilege".

12 A written or oral statement made in judicial proceedings is subject to "absolute privilege" such that no liability can arise from such statement. The immunity extends to any action, not just defamation. Statements in a pleading are included in the privilege. See: *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (Ont. C.A.); *Mopal Construction Ltd. v. Powell Motorsport Advanced Driving School Inc.*, [2004] O.J. No. 807 (Ont. C.A.).

13 Accordingly, the admission by Solid Gold in its defence in the Action that it was insolvent cannot now be used by the Applicants in the Application to establish an act of bankruptcy.

14 There is no evidence that Solid Gold has exhibited to a meeting of its creditors any statement of assets and liabilities that shows that Solid Gold is insolvent. To the contrary, the interim nine months statements dated June 30, 2013, (unaudited) which are the most recent statements provided, show the value of the assets to be significantly in excess of the liabilities.

15 Nor do I consider that the Applicants have established that Solid Gold has ceased to meet its liabilities generally as they fall due. In his second affidavit, Stretch states that he is unaware of any creditors of Solid Gold other than those described in Solid Gold's interim financial statements for the nine month period ended June 30, 2013. Apart from Stretchco, there are amounts shown as owing to a law firm and an accounting firm which are indicated to be related parties. There is no evidence as to the current status of the amounts owing to them, if any.

16 In his affidavit, Mr. Tanguay states that George Downing Estate Drilling Limited is a judgment creditor of Solid Gold and that its president, Mr. George Downing is opposed to putting Solid Gold into bankruptcy at this time. An email from Mr. Downing confirming his position is provided. Notwithstanding the judgment, I infer from that evidence that Solid Gold has reached an accommodation with George Downing Estate Drilling Limited concerning its debt, at least for the present.

17 Apart therefore from the above and the Applicants' allegation that they have not been paid, there is no evidence that Solid Gold's creditors are not being paid.

18 In the circumstances, therefore, I do not consider that the Applicants have established that Solid Gold has committed an act of bankruptcy as set out in s. 42(1) of the BIA.

Are there justifiable reasons in law or equity for the Application to be stayed or dismissed?

19 Section 43(7) of the BIA gives the court discretion to dismiss the bankruptcy application if it is made for an improper purpose.

20 I am concerned about the Applicants bona fides in bringing the Application. Rather than proceeding with the Action which they commenced against Solid Gold some time ago and which involves a significant counterclaim against them, the Applicants now seek to effectively terminate that proceeding by putting Solid Gold into bankruptcy and as a result, effectively end the counterclaim against them. In my view there is no good reason to do that particularly when it is not clear that Solid Gold will end up owing the Applicants any money. Based on the material filed, I am satisfied that there is substance to the counterclaim.

21 The evidence indicates that Solid Gold's claims have some value. There is some potential for it to realize on that value with third parties and potential investors and Mr. Tanguay has been working to make that happen. Bankruptcy will put an end to those efforts. The Applicants have made it clear in their material that they want an opportunity to get their hands on Solid Gold's claims through the bankruptcy process. In light of the issues between the parties as raised in the Action, I am satisfied that the Application is being brought by the Applicants to eliminate Solid Gold's counterclaim against them and enable them to take over Solid Gold's mining claims. Given the history between the parties and the issues in the Action, I consider such a purpose to be improper.

Conclusion

22 For the foregoing reasons, therefore, the Application is dismissed.

23 In the normal course, costs follow the result. Solid Gold was not represented by counsel. However, Mr. Tanguay indicated that in preparing Solid Gold's response to the Application, including the factum and brief of authorities, he utilized the services of a lawyer and incurred legal fees. As a result, he requests $6,000 in legal costs.

24 The Applicants filed no bill of costs and submit the costs should be fixed at $10,000.

25 In the circumstances, I award Solid Gold $4,000 in legal costs. Although it was not represented by counsel, it is clear from the material filed that Mr. Tanguay did have significant legal assistance, for which Solid Gold should receive some reimbursement.

Application dismissed.

End of Document

THIS IS **EXHIBIT "D"** TO THE AFFIDAVIT OF PETER TAE-MIN CHOI SWORN BEFORE ME VIA VIDEOCONFERENCE, THIS 27TH DAY OF SEPTEMBER, 2020.

A Commissioner for taking Affidavits *(or as may be)*

LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Thomas P. Lambert
Tel: 416-748-5145
Email: tlambert@loonix.com

September 27, 2020
File No. 17600-0007

SENT BY EMAIL (Toronto.bankruptcy@ontario.ca)

Superior Court of Justice – Bankruptcy Court
330 University Avenue, 9th Floor
Toronto, ON M5G 1R7
Attn: Registrar

Dear Registrar,

Re: In the Matter of the Bankruptcy of 2505243 Ontario Ltd. o/a Bypeterandpauls.com, of the City of Vaughn, in the Province of Ontario
Court File No.: BK-20-00208450-OT31

We write in reply to the written submissions of Ms. Stam dated September 25, 2020. It is our reply submissions that:

1. The filing of an opposition to a bankruptcy application does not automatically result in the matter being referred to a trial. In this regard, we enclose herewith the unreported decision of Master Weibe in *In The Matter of the Bankruptcy of Akiko Abe*. In that matter, the debtor opposed the bankruptcy application and filed a proposal. Notwithstanding the foregoing, Master Weibe exercised the court's discretion and made the requested bankruptcy order. Master Weibe's endorsement reads:

   > "Adjourned to February 17, 2015 to allow the OSB to investigate the filing of the consumer proposal in the face of this pending application. It appears the debtor is opposed to bankruptcy.
   >
   > ...
   >
   > I exercise my discretion to allow the bankruptcy application to proceed and I hereby grant the bankruptcy order requested. This is without prejudice to the debtor's right to filling a div-II proposal within the bankruptcy. The existing proposal is annulled."

2. 2505243 Ontario Ltd. (the "Debtor") has admitted it is insolvent by filing a notice of intention to make a proposal, such that a trial of the application should not be required in the circumstances. Furthermore, allowing the bankruptcy to proceed does not prejudice the Debtor as it is authorized under the Bankruptcy and Insolvency Act to make an in-bankruptcy proposal.

LOOPSTRA NIXON LLP

BARRISTERS AND SOLICITORS

Yours very truly,

LOOPSTRA NIXON LLP

Thomas P. Lambert
TPL

Encl.

cc. Randy Sutton (randy.sutton@nortonrosefulbright.com)
Andrea Brwer (andrea.brewer@nortonrosefulbright.com)
Erika Anschuetz (Erika.anschuetz@nortonrosefulbright.com)
Jennifer Stam (Jennifer.stam@nortonrosefulbright.com)
Peter Choi (peter.choi@nortonrosefulbright.com)
Peter Carey (pcarey@loonix.com)
Paul Martin (pmartin@loonix.com)
MNP Ltd. c/o Adam Erlich, Licensed Insolvency Trustee (aerlich@fullerllp.com)

Estate No. 31-OR-208058-T

TO:

Akiko Abe
55 North Bonnington Avenue
Toronto, Ontario
M1K 1X5

ONTARIO
SUPERIOR COURT OF JUSTCE

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPCTY OF

AKIKO ABE

of the City of Toronto,
in the Province of Ontario

AMENDED APPLICATION FOR A BANKRUTPCY ORDER

TAKE NOTICE that an Application for a bankruptcy order in respect of your property will be heard before the presiding Judge in Chambers (or, if unopposed, before the Registrar in Chambers) at 393 University Avenue, Toronto, Ontario on the 10th day of February, 2015, at the hour of 10:00 in the forenoon or so soon thereafter as the application can be heard.

AND TAKE NOTICE that if notice of cause against the application is not filed in the court and a copy thereof served on the solicitor for the application creditor at least two days before the hearing and if you do not appear at the hearing, the court may make a bankruptcy order on such proof of the statements in the application as the court shall think sufficient.

DATED at Toronto this 12th day of January, 2015.

PAPAZIAN HEISEY MYERS
Barristers & Solicitors
510-121 King Street West
Toronto, Ontario M5H 3T9

Michael S. Myers (LSUC # 19640W)

Tel: (416) 601-2701
Fax: (416) 601-1818

Solicitors for the Applicant

Feb. 10/15
Adjourned to Feb 17/15
to allow the OSB to investigate
the filing of the consumer proposal
in the face of this pending application
It appears the debtor is opposed to
bankruptcy.

Feb. 17/15
Quigley, J. for NBC
Killeen, R. consenting the ale
Chang Lin, parties to the ale
Akiko ale.
I exercise my discretion to allow
the bankruptcy application
to proceed and I
hereby grant

the bankruptcy order rescinded. This is without prejudice to Mr. Abe's right to bring a proposal (Division II) within the bankruptcy. The existing proposal is annulled.

CCV

Master C. Wiebe

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
2505243 ONTARIO LIMITED OF THE CITY OF TORONTO,
IN THE PROVINCE OF ONTARIO

Estate/Court File No.: 31-2675288

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

Proceeding commenced at TORONTO

AFFIDAVIT OF PETER TAE-MIN CHOI
(Sworn September 27, 2020)

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