

**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**

FACTUM OF 2505243 ONTARIO LIMITED
(returnable September 29, 2020)

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TO: **THE SERVICE LIST**

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PART I - INTRODUCTION

1. This factum is filed in support of an urgent motion by 2505243 Ontario Limited (the **Company**) for an order declaring that a bankruptcy application commenced by, among others, the operator of Hotel X Toronto (**Hotel X**) is stayed pursuant to sections 43(11) and/or 69(1) of the *Bankruptcy and Insolvency Act* (**BIA**).

PART II - THE FACTS

A. Background

2. The Company is one entity within a broader group of companies (the **Group**) that is a family-run business that is operated under the business name “byPeterandPauls.com”.¹ On September 24, 2020, the Company filed a *Notice of Intention to Make a Proposal* (**NOI**) pursuant to section 50.4 of the BIA.²

¹ Affidavit of Peter Eliopoulos sworn September 25, 2020 (**Eliopoulos Affidavit**), Motion Record of 2505243 Ontario Limited dated September 25, 2020 (**MR**), Tab 2, para 4.

² *Ibid*, para 24.

3. The filing of the NOI was necessitated by the Company's desire to protect and restructure the business in the face of an application for a bankruptcy order (the **Bankruptcy Application**) filed primarily by a party against whom the Company has commenced litigation, Princes Gates GP Inc., the general partner of Princes Gates Hotel Limited Partnership (collectively, **PGH**).³

B. The Company

4. For over 38 years, the Group has operated in the hospitality industry and currently operates several restaurants and event venues across Ontario.⁴
5. The Company, until recently, provided high-end food, beverage and catering services at the property known as the Hotel X in Toronto, Ontario.⁵ Hotel X is operated by PGH.⁶
6. The Company was the main operating entity for two restaurants at Hotel X – Petros82 and Maxx's Kitchen – and catering and other building and food services provided to Hotel X pursuant to two commercial leasing agreements with Hotel X both dated as of January 4, 2017 (collectively, the **Leases**) and a food and beverage agreement with Hotel X dated as of January 4, 2017 (as amended, the **F&B Agreement**, and together with the Leases, the **Service Agreements**).⁷
7. Pursuant to the Service Agreements, the Company was to be the exclusive provider of food and beverage services at Hotel X through its banquet facilities, conference room facilities, cinema, rooftop bar, VIP lounge and room service offerings.⁸

³ *Ibid*, paras 6 and 25.

⁴ *Ibid*, para 4.

⁵ *Ibid*, para 5.

⁶ *Ibid*, para 5.

⁷ *Ibid*, para 7.

⁸ *Ibid*, para 8.

8. On March 23, 2020, Hotel X closed as a result of the province-wide shutdown due to COVID-19.⁹ In the following months, the Company sought to work with Hotel X operators to obtain government rent relief, look for other avenues of revenue loss mitigation and to be in a position to resume operations when Hotel X was ready to open.¹⁰
9. Hotel X refused to cooperate with all mitigation or revenue generating attempts by the Company and just weeks before Hotel X was to start hosting NHL players as part of the NHL Bubble, Hotel X purported to terminate the Service Agreements by way of a termination letter dated July 2, 2020 (the **Termination Letter**).¹¹
10. The Termination Letter sets out a number of alleged defaults under the Service Agreements which are disputed by the Company and, in any event, the Company was not provided the opportunity to “cure” any such defaults as required under the Service Agreements.¹² The Company takes the position that none of the alleged defaults outlined in the Termination Letter constituted an event of default entitling Hotel X to terminate the Service Agreements in circumstances where Hotel X was in fact closed and the Company was unable to operate.¹³
11. After the issuance of the Termination Letter, PGH:¹⁴
 - (a) changed passwords and blocked access to PGH’s systems and servers and email accounts used by over 50 of the Company’s employees in respect of Hotel X matters;

⁹ *Ibid*, para 11.

¹⁰ *Ibid*, paras 12.

¹¹ *Ibid*, para 13.

¹² *Ibid*, para 14.

¹³ *Ibid*, para 15.

¹⁴ *Ibid*, para 16.

(b) broke the locks on approximately 100 lockers that contained personal effects of the Company staff which were left “bagged and tagged” in the loading dock area and gave no opportunity for the Company or its employees to assess whether employee belongings were missing; and

(c) sent harmful and misleading written and oral communications to the Company’s suppliers, clients, former employees and landlords.

12. To this date, the Company is still unsure of the status of some of its remaining assets which remain on the premises and to which it has not had access.¹⁵ The Company has effectively ceased operating at Hotel X and was forced to lay off over 275 employees.¹⁶

13. As noted, the Termination Letter was delivered two weeks before the scheduled reopening of Hotel X and days before the announcement that Hotel X had been selected as one of the venues to accommodate players from the National Hockey League who were resuming their 2020 season.¹⁷

14. It is now abundantly clear that Hotel X has taken this high-handed and improper approach to permit its new preferred provider, Harlo Entertainment (**Harlo**), to come in to operate the restaurants and provide the Services.¹⁸

C. The Company Commences an Action against Hotel X

15. On July 20, 2020, the Company commenced an action in the Ontario Superior Court of Justice against Hotel X (as amended, the **Action**). The Action seeks, among other things, the following relief: ¹⁹

¹⁵ *Ibid*, para 17.

¹⁶ *Ibid*, para 11.

¹⁷ *Ibid*, para 18.

¹⁸ *Ibid*, para 19.

(a) An interim, interlocutory and permanent injunction prohibiting Hotel X from interfering with the Company's right of possession at the Hotel X premises in connection with the Leases;

(b) An interim, interlocutory and permanent injunction prohibiting Hotel X from interfering with the Company's right of access to and use of the facilities during the term of the F&B Agreement;

(c) A certificate of pending litigation with respect to the premises at Hotel X;

(d) A declaration that the Service Agreements had not been terminated and remain in force; and

(e) In the alternative, damages for breach of contract and breach of the duty of good faith in contractual performance in the amount of \$50,000,000.

16. Hotel X has not yet responded to the Action.²⁰ A motion has been filed seeking a certificate of pending litigation. Hotel X has not delivered a response nor provided dates of availability to have that motion heard.²¹

17. Instead of responding to the Action, on September 9, 2020, Hotel X and five other unsecured creditors (the **Bankruptcy Applicants**) commenced the Bankruptcy Application. To date, the Company had not been contacted by any of the creditors formally demanding payment of the outstanding amounts allegedly owing to them. More

¹⁹ *Ibid*, para 20.

²⁰ *Ibid*, para 21.

²¹ Exhibit "C" to the Eliopoulos Affidavit, MR, Tab 2.

importantly, the Company disputes certain of the amounts listed as outstanding including, importantly, the “debt” claim of Hotel X.²²

18. The Bankruptcy Application is scheduled to be heard in writing on September 28, 2020.²³

D. NOI Filing

19. On September 24, 2020, the Company made the decision to file the NOI pursuant to section 50.4 of the BIA to seek protection under the stay of proceedings and to obtain a streamlined path forward on the Action. In connection with the NOI, KSV Restructuring Inc. was appointed as proposal trustee (the **Proposal Trustee**) in the NOI proceedings.²⁴
20. The ultimate goal of the NOI is to allow the Company to seek to restructure the business, obtain re-entry to Hotel X so that revenue can be earned or the recovery of damages from Hotel X and repay the Company’s creditors.²⁵

PART III - ISSUE

21. The sole issue addressed in this factum is whether this Court should declare and confirm that the Bankruptcy Application is stayed.

²² Eliopoulos Affidavit, MR, Tab 2, para 22.

²³ *Ibid*, para 23.

²⁴ *Ibid*, para 24.

²⁵ *Ibid*, para 25.

PART IV - LAW AND ANALYSIS

A. The Court has the Jurisdiction to Grant or Recognize the Stay

22. Pursuant to section 69(1)(a) of the BIA,²⁶ upon the filing of a notice of intention under section 50.4 of the BIA, “no creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy”.
23. On one hand, there is caselaw that demonstrates the Court’s acceptance of a filing of a proposal as imposing a stay against petition proceedings.
24. The caselaw as to whether the stay under section 69(1) of the BIA automatically stays an application for a bankruptcy order is primarily historical and ambiguous although there is at least one case where the Court appears to have accepted that the filing of a proposal stays petition proceedings.²⁷ In the case of *Re Lingen Trailer*, in a brief endorsement, the Court noted that after the commencement of a petition for a receiving order, “On 17th October 1969, a proposal was filed by the debtor which, of course, stayed any further proceedings on the petition.”²⁸
25. The primary case of the opposite finding appears to be the decision in *Re Provincial Refining Co. v Newfoundland Refining Co. (Provincial Refining)*,²⁹ where the Court of Appeal for Newfoundland upheld the lower court’s finding that an application for a bankruptcy order (formerly a petition for a receiving order), is not, *per se*, an “action, execution or other proceeding” for the “recovery of a claim provable in bankruptcy.”

²⁶ *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (**BIA**), s 69(1)(a).

²⁷ *Re Lingen Trailer and Manufacturing Company Limited*, 1969 CarswellOnt 79 (*Re Lingen Trailer*), Book of Authorities of 2505243 Ontario Limited (**BOA**), Tab 3, para 1.

²⁸ *Re Lingen Trailer*, BOA, Tab 3, para 1.

²⁹ *Re Provincial Refining Co. v Newfoundland Refining Co.*, 1977 CarswellNfld 6 (**Provincial Refining**), BOA, Tab 4.

26. In *Provincial Refining*, the petition hearing had already started and the proposal was filed on the final day of the hearing. Given the facts, the Court found it was manifestly unjust and that, a petition for a receiving order was for the benefit of all creditors and not just a single creditor. Similarly in *Re 389179 Ontario Ltd.*,³⁰ in a brief endorsement made on the record, the judge was compelled by the fact that an interim receiver had already been appointed and there was no dispute as to the amount of the debt that was owing.³¹
27. The facts of this case could not be more different where:
- (a) the primary petitioning creditor, PGH, is the named defendant in litigation commenced by the Company and PGH is alleged to have unlawfully cut off the Company's revenue source leading to its inability to pay its creditors in the context of a global pandemic;³²
 - (b) the primary petitioning creditor, PGH, is alleged to have acted contrary to government measures which prohibit a landlord from taking steps to re-enter premises where it has not sought rent relief due to the global pandemic;³³
 - (c) the debt claimed by PGH is disputed and PGH has failed to meet with the Company to reconcile the amounts allegedly owed;³⁴
 - (d) PGH has failed to defend the Action for over two months, presumably on the basis that procedural deadlines have been extended due to the shutdown of the courts and various emergency measures;³⁵ and

³⁰ *Re 389179 Ontario Ltd.*, 1979 CarswellOnt 183 (**Re 389179**), BOA, Tab 1.

³¹ *Re 389179*, BOA, Tab 1, para 3.

³² Eliopoulos Affidavit, MR, Tab 2, para 20.

³³ *Ibid*, para 16.

³⁴ *Ibid*, para 22; Exhibit "C" to the Eliopoulos Affidavit, MR, Tab 2.

(e) the Company has been proactive in seeking protection for the benefit of all of its creditors and seeks to recover in the Action so that it may satisfy its outstanding debts owing.³⁶

28. In any event, although the interpretation of what type of proceeding is stayed by virtue of section 69(1) of the BIA in *Provincial Refining* seem to have hinged on entirely different facts, it is not necessary for the Court to determine the issue as to whether the Bankruptcy Application is automatically stayed, as the Court has the clear authority pursuant to sections 43(10) and 43(11) of the BIA to stay the Bankruptcy Application if (a) the facts alleged in the application are denied, and (b) for any “other sufficient reason” on any terms and subject to any conditions that the court may think just, respectively.³⁷

29. The law 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 in the Bankruptcy Application, including the amount of the alleged debts that are outstanding.³⁸

B. The Bankruptcy Application was Brought for an Improper Purpose

30. Pursuant to section 43(7) of the BIA, the Court may dismiss a bankruptcy application if it determines that for any “sufficient cause no order ought to be made”.³⁹ To show sufficient cause, a debtor company may demonstrate that a bankruptcy application was

³⁵ Exhibit “C” to the Eliopoulos Affidavit, MR, Tab 2.

³⁶ Eliopoulos Affidavit, MR, Tab 2, para 25.

³⁷ BIA, ss 43(10) and 43(11).

³⁸ See for example, *Sport Maska Inc. v RBI Plastique Inc.*, [2005 NBQB 394](#), para 49.

³⁹ BIA, s 43(7).

filed for the purpose of obtaining an improper collateral advantage, including but not limited to, pre-emptively eliminating an adversary in ongoing litigation.

31. Courts have dismissed bankruptcy applications in situations which are similar to those before the Court on this motion. In *Stretch v Solid Gold Resources Corp. (Solid Gold)*,⁴⁰ the petitioning party was in the midst of back-and-forth litigation with the debtor. Justice Pattillo dismissed an application for a bankruptcy order finding that the application was, among other things, filed for an improper purpose.
32. In coming to his conclusion, Justice Pattillo found that the bankruptcy order would effectively terminate the civil proceeding by forcing Solid Gold into bankruptcy and as a result, effectively ending the counterclaim against them and taking over Solid Gold's mining claims:

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.⁴¹ [*Emphasis added*]

33. The same issue is alive in this case. Instead of responding to the Company's Action, Hotel X has brought this Bankruptcy Application.⁴² If appointed, the trustee in bankruptcy (chosen by Hotel X) will notionally become vested with the Action.

⁴⁰ *Stretch v Solid Gold Resources Corp.*, [2015 ONSC 82](#) (*Solid Gold*).

⁴¹ *Solid Gold*, para 21.

⁴² Eliopoulos Affidavit, para 22.

34. The granting of the Bankruptcy Application will effectively diminish any chances of the Company's recovery on the Action for the benefit of its creditors and, in fact, will only benefit one alleged creditor, Hotel X.
35. The bringing of the Bankruptcy Application in these circumstances is clearly being done for an improper purpose.

C. Bankruptcies are for “Clear-Cut” Situations

36. It is also trite law that a bankruptcy is for “clear-cut situations”. In *Re Abalone Holdings Ltd.*, Justice Anderson of the Ontario Supreme Court (In Bankruptcy) held:⁴³

The Bankruptcy Act, R.S.C. 1970, c. B-3, clearly bestows a discretion on the court to refuse a petition even if the essential elements are made out. In my view bankruptcy is for clear-cut situations where the liabilities are clearly established and the act of bankruptcy similarly established by sound and convincing evidence and the court can be generally satisfied that a receiving order is the appropriate remedy. That is not the position in which I find myself in this case. [Emphasis added]

37. Here, the Company submits that the situation is not “clear-cut” to justify a bankruptcy order for several reasons, including the disputed amount of the debt alleged by PGH and the Action against PGH alleging improper termination of the Service Agreements in the context of a global pandemic.

D. There is No Prejudice to the Bankruptcy Applicants

38. There is no prejudice to the Bankruptcy Applicants if the Bankruptcy Application is stayed. In fact, the non-PGH applicants will benefit (in respect of proven claims) if the Company is ultimately successful in its Action. PGH and the other Bankruptcy Applicants (who in total are alleged to be owed less than \$94,000.00)⁴⁴ will be entitled to

⁴³ *Re Abalone Holdings Ltd.*, 1979 CarswellOnt 177, BOA, Tab 2, para 17.

⁴⁴ Exhibit “B” to the Eliopoulos Affidavit, MR, Tab 2.

participate in the NOI proceedings (if they wish) and, if they have proven claims, vote on any proposal. In the meantime, as discussed above, there is clear prejudice to the Company if the Bankruptcy Application is not stayed.

PART V - ORDER REQUESTED

39. Based on the foregoing, the Court should exercise its authority pursuant to sections 43(10) and 43(11) of the BIA and stay the Bankruptcy Application given: (a) the numerous disputed facts in the Bankruptcy Application, (b) the improper purpose behind the commencement of the application, and (c) the Company's filing of the NOI. The Bankruptcy Application should be stayed so that the Company can restructure its business and affairs under the NOI proceedings and make a proposal for the benefit of all of its creditors.
40. For the reasons set out above, the Company requests that this Court grant an order declaring that the Bankruptcy Application is stayed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2020.

Noted For Twilight Canal CP

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re 389179 Ontario Ltd.*, 1979 CarswellOnt 183
2. *Re Abalone Holdings Ltd.*, 1979 CarswellOnt 177
3. *Re Lingen Trailer and Manufacturing Company Limited*, 1969 CarswellOnt 79
4. *Re Provincial Refining Co. v Newfoundland Refining Co.*, 1977 CarswellNfld 6
5. *Sport Maska Inc. v RBI Plastique Inc.*, [2005 NBQB 394](#)
6. *Stretch v Solid Gold Resources Corp.*, [2015 ONSC 82](#)

SCHEDULE "B" **RELEVANT STATUTES**

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

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

- **(a)** the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
- **(b)** the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

Dismissal of application

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Stay of proceedings if facts denied

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

Stay of proceedings for other reasons

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

[...]

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- **(a)** the insolvent person's intention to make a proposal,
- **(b)** the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- **(c)** the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

[...]

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

- **(a)** no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

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