

**COURT FILE NUMBER Q.B. 1401 of 2019**

**COURT OF QUEEN'S BENCH FOR SASKATCHEWAN  
IN BANKRUPTCY AND INSOLVENCY**

**JUDICIAL CENTRE SASKATOON**

**APPLICANT PILLAR CAPITAL CORP.**

**RESPONDENT HARMON INTERNATIONAL INDUSTRIES INC.**

**IN THE MATTER OF THE RECEIVERSHIP OF HARMON INTERNATIONAL INDUSTRIES INC.**

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**BRIEF OF LAW OF THE RECEIVER, HARDIE & KELLY INC.**

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**Hearing Date: August 4, 2020**

**MLT AIKINS**

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## I. INTRODUCTION

1. This Brief of Law is filed in support of an application by Hardie & Kelly Inc. (the “**Receiver**”), the Court-appointed Receiver of all of the assets, undertakings and properties of Harmon International Industries Inc. (“**Harmon**”), for an Order:
  - (a) increasing the amount of the “**Receiver’s Borrowings Charge**”, as that term is defined in the Receivership Order granted in these proceedings on January 10, 2020 by the Honourable Mr. Justice R.W. Elson (the “**Receivership Order**”), from \$250,000.00 to \$500,000.00; and
  - (b) approving the actions, activities and conduct of the Receiver, the professional fees and disbursements of the Receiver, and the professional fees and disbursements of MLT Aikins LLP, legal counsel to the Receiver, to date.

## II. FACTS

2. The facts relied upon by the Receiver in support of this application are set out in the Third Report of the Receiver dated July 29, 2020 (the “**Third Report**”).

## III. ISSUES

3. The issues raised in this application which are addressed in this Brief of Law are as follows:
  - (a) Should the Receiver’s Borrowings Charge and the associated borrowing limit be increased from \$250,000.00 to \$500,000.00?
  - (b) Should the activities of the Receiver, the professional fees and disbursements of the Receiver, and the professional fees and disbursements of legal counsel to the Receiver, be approved?

## IV. ARGUMENT

### A. The Receiver’s Borrowings Charge Should Be Increased From \$250,000.00 To \$500,000.00

4. A receiver’s ability to recover reasonable disbursements incurred in the exercise of its mandate derives from the common law.<sup>1</sup> Logically, this supports the granting of a charge in favour of the Receiver over all of the debtor company’s assets at the outset of the receivership proceedings, in order to enable the Receiver to borrow the funds required to pay its suppliers and service

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<sup>1</sup> Frank Bennett, *Bennett on Receiverships*, 2<sup>nd</sup> ed (Toronto: Carswell, 1999) at 303-305.

providers on a timely basis. Indeed, the Saskatchewan Template Receivership Order expressly provides for such a charge, known as a “Receiver’s Borrowings Charge”.<sup>2</sup>

5. When considering the terms of an Order with respect to a super-priority charge for a receiver’s fees and disbursements, the primary focus is upon the affected secured creditors and other first lien lenders (such as builders’ lien claimants), if any.<sup>3</sup>
6. For instance, in the Saskatchewan receivership proceedings brought against Phenomenome Discoveries Inc. by its senior secured creditor, the Receiver’s Borrowings Charge was increased four times, from an initial amount of \$400,000.00 to \$800,000.00, \$3,000,000.00, \$3,650,000.00, and, finally, to \$3,850,000.00.<sup>4</sup> This was due, in part, to a requirement to provide for financing a complex sales procedure for the specialty biotechnology company involved in that case, including engaging consultants and meeting prospective purchasers worldwide.<sup>5</sup>
7. In this case, Harmon’s senior secured creditor, Pillar Capital Corp., initiated the receivership proceedings and supports the Receiver’s application for an increase to the Receiver’s Borrowings Charge. The Third Report of the Receiver details the costs which the Receiver is incurring and will continue to incur in carrying out its mandate, necessitating an increase in the borrowing limit and the Receiver’s Borrowings Charge.
8. Accordingly, the Receiver respectfully requests that the authorized borrowing limit and Receiver’s Borrowings Charge pursuant to section 20 of the Receivership Order be increased from \$250,000.00 to \$500,000.00.

**B. The Activities of the Receiver, and the Professional Fees and Disbursements of the Receiver and its Legal Counsel, are Fair and Reasonable**

9. In the course of insolvency proceedings, approval is routinely sought for the activities of the insolvency professional in question (e.g. a Receiver, Monitor, or Proposal Trustee), as well as the professional fees and disbursements of its legal counsel.
10. The Saskatchewan Template Distribution and Discharge Order contemplates each of these three types of approvals.<sup>6</sup> It is common practice for such approvals to be granted by this Honourable Court at various intervals during the insolvency proceedings, and prior to the discharge of the

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<sup>2</sup> At para 20.

<sup>3</sup> See e.g. *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 17 at para 25, 2020 CarswellYukon 37, citing *Robert F. Kowal Investments Ltd. v Deeder Electric Ltd.* (1975), 9 OR (2d) 84, 21 CBR (NS) 201 (Ont CA).

<sup>4</sup> QBG 1639 of 2015, Judicial Centre of Saskatoon, per Scherman J (15 April 2016 and 26 April 2016), Rothery J (30 August 2016) and Schwann J (25 October 2016).

<sup>5</sup> *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*, 2016 SKQB 306 at para 10, 41 CBR (6<sup>th</sup>) 141.

<sup>6</sup> At paras 2-4.

insolvency professional (i.e. during the course of the insolvency proceedings), including in the following matters:

- (a) *Re Beckerland Farms Inc.*, a 2019 Order in which Madam Justice Rothery approved the activities of the Receiver, the professional fees and disbursements of the Receiver, and the professional fees and disbursements of the Receiver's legal counsel on an interim basis;<sup>7</sup>
- (b) *Re Morris Industries Ltd. (Second Extension)*, granted by Mr. Justice Smith on May 8, 2020, which approved the activities of the Monitor, the professional fees and disbursements of the Monitor, and the professional fees and disbursements of the Monitor's legal counsel on an interim basis;<sup>8</sup> and
- (c) The Sales Process Order previously granted in these proceedings by Mr. Justice Elson on June 5, 2020, which approved the activities of the Receiver to date, and the professional fees and disbursements of the Receiver and its legal counsel to date, on an interim basis.<sup>9</sup>

11. The Court's jurisdiction to provide interim approvals of a Receiver's activities, as well as interim approvals for professional fees and disbursements, is contained within the *BIA*. Section 249 of the *BIA* allows the Receiver to apply to the Court for direction in relation to the receivership and, by extension, for interim approval of the Receiver's activities. Likewise, section 243(6) of the *BIA* provides the Court with jurisdiction to make any order respecting the payment of fees and disbursements of the Receiver that it considers proper.

12. As stated above, the Receiver has an obligation under section 247 of the *BIA* to act honestly and in good faith, and to deal with the property of Harmon in a commercially reasonable manner. The Receiver's activities to date are detailed in the Third Report at paragraphs 33-50. The Receiver submits that this evidence demonstrates that it has acted honestly and in good faith, and dealt with Harmon's property in a commercially reasonable manner. Accordingly, approval of the Receiver's and the Receiver's legal counsel's activities to date is appropriate in the circumstances.

13. In terms of assessing the Receiver's fees to date (including legal fees and disbursements), the Court should have regard to the following non-exhaustive list of factors:

- (a) the nature, extent and value of the assets;

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<sup>7</sup> (unreported), QBG 915 of 2019, Judicial Centre of Saskatoon (28 October 2019) (Rothery J) at paras 22-24.

<sup>8</sup> (unreported), QBG 1884 of 2019, Judicial Centre of Saskatoon (8 May 2020) (Smith J).

<sup>9</sup> (unreported), QBG 1401 of 2019, Judicial Centre of Saskatoon (5 June 2020) (Elson J) at paragraphs 3-5 [**Sales Process Order**]. This Order is currently under appeal to the Saskatchewan Court of Appeal.

- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor;
- (d) the time spent;
- (e) the receiver's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results of the receiver's efforts; and
- (i) the cost of comparable services when performed in a prudent and economical manner.<sup>10</sup>

14. As detailed in the Third Report at paragraph 53, the Receiver's fees and disbursements and those of its legal counsel for the period of May 1, 2020 to June 30, 2020 are \$49,880.00 and \$28,540.00, respectively. Given the nature of the assets, the issues encountered to date with respect to identifying which personal property located on the Premises is owned by Harmon, the limited assistance provided by Harmon's representatives to date, and the ongoing proceedings in the Court of Appeal, the Receiver submits that the disbursements incurred to date are fair and reasonable in the circumstances.

15. Accordingly, the Receiver respectfully submits that there are sufficient grounds for this Honourable Court to approve the activities of the Receiver, the professional fees and disbursements of the Receiver, and the professional fees and disbursements of the Receiver's legal counsel at this time.

## V. CONCLUSION

16. For all of the reasons set out above, the Receiver respectfully requests that an Order increasing the Receiver's Borrowings Charge and approving the activities of the Receiver and the professional fees and disbursements of the Receiver and its legal counsel be granted in the form of the Draft Order filed.

ALL OF WHICH is respectfully submitted at Saskatoon, Saskatchewan, this 29th day of July, 2020.

**MLT AIKINS LLP**

Per: 

Jeffrey M. Lee, Q.C. and Paul Olfert  
Solicitors for the Receiver, Hardie & Kelly Inc.

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<sup>10</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 33, 20 CBR (6<sup>th</sup>) 292.

**CONTACT INFORMATION AND ADDRESS FOR SERVICE:**

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## VI. LIST OF AUTHORITIES

### TAB DOCUMENT

#### Jurisprudence

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851, 20 CBR (6th) 292.
2. *Re Beckerland Farms Inc.* (unreported), QBG 915 of 2019, Judicial Centre of Saskatoon (28 October 2019) (Rothery J).
3. *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*, 2016 SKQB 306, 41 CBR (6<sup>th</sup>) 141.
4. *Re Harmon International Industries Inc. (Sales Process Order)* (unreported), QBG 1401 of 2019, Judicial Centre of Saskatoon (5 June 2020) (Elson J).
5. *Re Morris Industries Ltd. (Second Extension)* (unreported), QBG 1884 of 2019, Judicial Centre of Saskatoon (8 May 2020) (Smith J).
6. *Re Phenomenome Discoveries Inc. (Approval of Sales Process, KERP and Receiver's Borrowing Charge)* (unreported), QBG 1639 of 2015, Judicial Centre of Saskatoon (15 April 2016) (Scherman J).
7. *Re Phenomenome Discoveries Inc. (Approval of Sales Process and Receiver's Borrowing Charge)* (unreported), QBG 1639 of 2015, Judicial Centre of Saskatoon (26 April 2016) (Scherman J).
8. *Re Phenomenome Discoveries Inc. (Approval of Receiver's Borrowing Charge)* (unreported), QBG 1639 of 2015, Judicial Centre of Saskatoon (30 August 2016) (Rothery J).
9. *Re Phenomenome Discoveries Inc. (Approval of Increased Receiver's Borrowing Charge)* (unreported), QBG 1639 of 2015, Judicial Centre of Saskatoon (25 October 2016) (Schwann J).
10. *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 17, 2020 CarswellYukon 37.

#### Secondary Sources

11. Bennett, Frank. *Bennett on Receiverships*, 2<sup>nd</sup> ed (Toronto: Carswell, 1999).

#### Template Orders

12. Saskatchewan Template Distribution and Discharge Order, adopted on June 5, 2019.
13. Saskatchewan Template Receivership Order, adopted on December 6, 2017.