

COURT FILE NUMBER 2001-06194

Clerk's Stamp

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANTS IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF REDROCK CAMPS INC., SOCKEYE ENTERPRISES INC., SWEETWATER HOSPITALITY INC. and BALDR CONSTRUCTION MANAGEMENT INC.

DOCUMENT **APPLICATION (Advice and Directions)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE TO THE RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must attend Court by videoconference or phone when the application is heard as shown below:

Date: March 4, 2021
Time: 10:00 am
Where: Calgary Courts Centre – via Webex.
Before: The Honourable Justice K.M. Horner

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

1. The Applicant, BDO Canada Limited, in its capacity as the court-appointed monitor (the “**Monitor**”) of Redrock Camps Inc. (“**Redrock**”), Sockeye Enterprises Inc., (“**Sockeye**”), Sweetwater Hospitality Inc. (“**Sweetwater**”), and Baldr Construction Management Inc. (“**Baldr**”, and together with Redrock, Sockeye and Sweetwater, collectively, the “**Companies**”), applies for advice and directions in respect of the following issues involving Mr. Troy Ferguson (“**Ferguson**”) the former Chief Executive Officer of the Companies:
 - (a) Certain amounts held in trust by the Monitor in respect of claims by Mr. Ferguson under the Builder’s Lien Act (British Columbia) to those funds that were advanced by Mr. Ferguson in respect of camp installations for Sockeye in British Columbia;
 - (b) Certain employee expenses incurred by Mr. Ferguson on behalf of the Companies;
 - (c) The return of certain deposits, currently being held in trust by the Monitor, that were provided by Mr. Ferguson to Her Majesty the Queen in Right of Alberta (the “**Province**”) that were provided for three contracts between Redrock and the Province to provide services and materials to fire camps administered by the Province;
 - (d) Payment of vacation pay to Mr. Ferguson as an employee of Redrock;
 - (e) A set-off claim advanced by Blue Collar Silviculture Ltd. (“**Blue Collar**”) as a result of a series of transactions between David Newton (principal of Blue Collar) and Mr. Ferguson that ultimately resulted in promissory notes granted by Mr. Ferguson to Mr. Newton being assigned to Blue Collar and a set-off agreement being entered into between Sockeye and Blue Collar on the eve of the Companies obtaining protection under the CCAA; and
 - (f) Such further and other relief as the Monitor may request and this Honourable Court may grant.

Basis for this Relief:

Background

2. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Seventh Report.
3. On May 13, 2020, this Honourable Court granted the Initial Order, among other things: (a) declaring that the CCAA applies to the Companies; (b) granting a stay of proceedings up to and including May 25, 2020 (the "**Stay Period**"); (c) approving the interim financing agreement among the Companies, as borrowers, and Invico Diversified Income LP ("**IDI**"), as lender (the "**Interim Financing Agreement**"); and (d) appointing BDO Canada Limited ("**BDO**") as the Monitor of the Companies in these proceedings.
4. Since then, and in addition to extending the stay period, the Court has granted the following orders:
 - (a) On May 25, 2020 – the Amended and Restated Initial Order, which among other things, approved the Amended Financing Agreement;
 - (b) On July 14, 2020 – the SISP Approval Order, pursuant to which the sale and investment solicitation process (as amended, the "**SISP**") was approved, the engagement of KPMG Corporate Finance Inc. (the "**Sale Advisor**") as the sale advisor in respect of the SISP was approved, and certain charges against the Companies' Property (as defined in the Amended and Restated Initial Order) were granted; and
 - (c) On July 14, 2020 – the Enhanced Powers Order, pursuant to which the powers of the Monitor was enhanced to enable it to execute any definitive asset sale agreements or investment agreements for and on behalf of the Companies in connection with the SISP.
5. The Monitor conducted the SISP and purchase and sale agreements have been entered into with Invico as the purchaser to acquire all of the property, assets and undertakings of Sockeye and Redrock.

6. The stay of proceedings has been extended by further order of this Court to March 31, 2021.

Claims by Mr. Ferguson

Sockeye Camp Installations in British Columbia

7. Sockeye had been experiencing difficulties collecting accounts receivable including a significant account due from a single customer (the “**Customer**”) because the Customer required statutory declarations from Sockeye confirming approximately \$381,000 of payments had been or would be made to sub-contractors engaged by Sockeye (the “**Affected Subcontractors**”) related to work performed by Sockeye on two projects for the Customer in British Columbia (the “**B.C. Projects**”). In light of the majority of these outstanding liabilities to the Affected Sub-Contractors having been incurred prior to the Filing Date, Sockeye was not able to execute the Statutory Declarations.
8. The Monitor’s counsel reviewed the trust conditions imposed by the *Builders’ Lien Act* (British Columbia) (the “**BLA**”) and determined that any funds paid by the Customer would be impressed with a trust in favour of the Affected Subcontractors. Legal counsel for Invico agreed with the Monitor’s analysis of the trust created under the BLA.
9. In order to resolve the matter, the Monitor and the Customer negotiated an agreement (the “**Payment Agreement**”) providing for the following:
 - i. Sockeye would execute modified Statutory Declarations in a form agreeable to the Customer;
 - ii. The Customer would holdback approximately \$260,000 (the “**Holdback**”) representing 10% of amounts previously paid to Sockeye and 10% of amounts related to the most recent invoice issued by Sockeye;
 - iii. The Customer would make a payment, net of the Holdback and exclusive of applicable taxes, amounting to a payment of approximately \$1,500,000 directly to the Monitor; and
 - iv. The Monitor would attend to payment of the valid known outstanding

amounts owed to the Affected Subcontractors as represented by Sockeye pursuant to trust conditions imposed by the BLA.

10. The implementation of the Payment Agreement was initially delayed for several days as a result of Management not being prepared to execute the Statutory Declaration associated with one of the B.C. Projects (the “**Huntercreek Project**”) as Mr. Ferguson believed that he should be classified as an Affected Subcontractor in respect of approximately \$75,000 of payments he personally made directly to various Sockeye suppliers for goods and services supplied to the Huntercreek Project on behalf of Sockeye. It was ultimately agreed between the Monitor and Mr. Ferguson that certain of the claims generally related to accommodation expenses, would not be eligible to be classified as a claim of an Affected Subcontractor under any circumstance such that the amount in question is \$72,033.15 (the “**Ferguson BC Claim**”).
11. It was ultimately agreed between the Monitor and Mr. Ferguson that the Monitor would hold an equivalent amount of the Ferguson BC Claim paid from the Customer in trust pending an agreement amongst Invico, the Monitor and Mr. Ferguson as to the propriety of the Ferguson BC Claim or a determination of same by the Court.
12. The Monitor is of the view that the Ferguson BC Claim ranks an unsecured claim against Sockeye and does not qualify as a claim by an Affected Sub-Contractor on the basis that:
 - a. Mr. Ferguson was not the actual supplier of goods or services to the Huntercreek Project such that he does not classify as a “subcontractor” pursuant to the definition set out in the BLA being...”*a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:*
 - i. *perform or provide work;*
 - ii. *supply material...*”; and
 - b. expenses incurred on behalf of the Redrock Group by any employee, including Mr. Ferguson, would represent an unsecured claim as against the Redrock Group.

Employee Expenses

13. It was common for employees of the Redrock Group, including Mr. Ferguson, to incur expenses on behalf of the Redrock Group and then be reimbursed accordingly from the Redrock Group in due course.
14. Mr. Ferguson advises that in the months preceding the Filing Date, he personally funded a significant amount of the Redrock Group's expenses over and above the Ferguson BC Claim in light of the financial pressures the Redrock Group was experiencing. The initial list of Redrock's creditors furnished by Management as at the Filing Date indicated a balance due to Mr. Ferguson of \$322,520.55, which the Monitor understands is inclusive of the Ferguson BC Claim.
15. Any claims for employee expenses incurred prior to the Filing Date, rank as unsecured claims as against the Redrock Group.

Redrock Fire Catering Performance Deposits

16. Shortly before the commencement of the Proceedings, Redrock entered into three contracts, in the ordinary course of business, with Her Majesty the Queen in Right of Alberta (the "**Province**") to provide services and materials to fire camps administered by the Province (the "**Contracts**"), for which the performance guarantees to be paid by Redrock (the "**Deposits**") pursuant to the Contracts were substantially personally funded by Mr. Ferguson by way of bank draft directly to the Province as set out below.

Contract Details			Bank Draft	
#	Date	Deposit	Amount	Date
21MFD003	4-May-20	7,347.71	7,347.71	29-Apr-20
21HFD800	8-May-20	26,705.76	26,705.76	29-Apr-20
21MFD002	11-May-20	9,580.03	8,590.03	29-Apr-20
			<u>\$ 42,643.50</u>	

17. Mr. Ferguson has claimed that any refund of the Deposits, totalling \$42,643.50, should be repayable to him personally (the "**Deposit Claim**") on the basis that the Contracts provide for the payment of the Deposits...*"as a guarantee and security for the due and faithful*

performance of the Contract by the Contractor and to protect the Province against any loss or damage arising by reason of the acts and omissions of the Contractor.”

18. The Monitor is of the view that the Deposit Claim is an unsecured claim against Redrock on the basis that:
 - a. the payments made by Mr. Ferguson to the Province pursuant to the Contracts were not subject to any form of agreement between Mr. Ferguson and Redrock providing for any form of security in favour of Mr. Ferguson; and
 - b. the payments made by Mr. Ferguson were recorded in Redrock’s books and records as an account payable in the amount of \$42,643.50 due to Mr. Ferguson
19. The Monitor is holding an equivalent amount to the Deposit Claim in trust pending the Monitor seeking the Court’s advice and direction in respect of the Deposit Claim.

Vacation Pay

20. Mr. Ferguson has also advanced a claim for approximately \$42,500 of accrued vacation pay that was outstanding as of the effective date of his resignations (the “**Vacation Pay Claim**”). Mr. Ferguson also argues that such a claim may attract directors’ liability which may constitute a claim against the Directors’ Charge established by the ARIO.
21. Section 109 of the Alberta *Employment Standards Code* provides that ... “*wages, overtime pay, vacation pay and general holiday pay accruing due to an employee are deemed to be secured by a security interest on the property and assets of the employer to a maximum of \$7,500, whether or not that property or those assets are subject to other security interests, and are payable in priority to any other claim or right in the property...*”.
22. It appears that Mr. Ferguson is entitled to payment of \$7,500 of the Vacation Pay Claim on the basis that this amount has a form of “super-priority” against the assets of Redrock ranking above any other security interests including that of Invico.
23. As of this time, any residual balance of the Vacation Pay Claim, or resultant claim that may arise against the directors of Redrock giving rise to a claim pursuant to the Directors’ Charge, has not been properly pursued and crystalized by way of Mr. Ferguson advancing

a formal claim through Alberta Employment Standards pursuant to the *Employment Standards Code*. The Monitor is not aware of any such claim being formally advanced pursuant to the *Employment Standards Code* by Mr. Ferguson.

Blue Collar Set-Off Claim

24. The Redrock Group has been having difficulty collecting accounts receivable throughout the Proceedings. Consequently, the ARIO was amended to provide the Monitor with enhanced powers to, amongst other things, receive and collect all monies and accounts owing to the Redrock Group.
25. On November 24, 2020, the Monitor's legal counsel issued a letter to Blue Collar Silviculture Ltd. ("**Blue Collar**") in respect of approximately \$722,000 that was due from Blue Collar to Sockeye as the Monitor became aware that Silviculture was withholding payment and asserting a right of set-off of \$250,000 against the amount due to Sockeye pursuant to the following documents:
 - a. Promissory Note (the "**Newton Promissory Note**") in the amount of \$250,000 dated April 1, 2020 between Mr. Troy Ferguson as "Borrower" and Mr. David Newton as "Lender". The Monitor understands that Mr. Newton is a director of Blue Collar;
 - b. Promissory Note (the "**Ferguson Promissory Note**") in the amount of \$250,000 dated April 1, 2020 between Sockeye as "Borrower" and Mr. Ferguson as "Lender";
 - c. Notice of Assignment of Debt dated May 12, 2020 providing for the assignment of Mr. Ferguson's rights under the Promissory note to Mr. Newton;
 - d. Notice of Assignment of Debt dated May 12, 2020 providing for the assignment of Mr. Newton's rights under the Promissory Note to Blue Collar; and
 - e. Set-Off Agreement dated May 12, 2020 (the "**Set-Off Agreement**") between Blue Collar and Sockeye confirming Blue Collar's ability to assert a set-off of \$250,000 against the account receivable due to Sockeye.

26. The \$250,000 advanced by Mr. Newton in April 2020 was deposited into Sockeye's bank account and that the associated accounting entry was simply recorded in Sockeye's books and records as "*Loans payable – other*".
27. The net effect of the various transactions/documents noted above is that \$250,000 originally advanced by Mr. Newton to Mr. Ferguson pursuant to the Newton Promissory Note ultimately gave rise to a set-off claim of \$250,000 against the account receivable owed by Blue Collar to Sockeye.
28. Mr. Ferguson advised the Monitor that the Notice of Assignments and the Set-Off Agreement were entered into to reflect the fact that the original \$250,000 advanced by Mr. Newton to Mr. Ferguson was injected to fund the Sockeye payroll.
29. The Notices of Assignment and the Set-off Agreement were all entered into the day before the Filing Date. Consequently, the Monitor is of the view that the entering into of the Set-Off Agreement between Sockeye and Blue Collar is a preference that is contrary to section 36.1 of the CCAA, which incorporates by reference sections 95 and 96 of the *Bankruptcy and Insolvency Act* RSC 1985, c B-3 (the "**BIA**"). The obligations that were incurred by Sockeye pursuant to the terms of the Set-Off Agreement were granted at the time that Sockeye was insolvent and constituted a preference to Blue Collar as a creditor of Sockeye.

Miscellaneous

30. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

31. Pleadings and proceedings in the within Action;
32. Seventh Report of the Monitor dated February 12, 2021, to be filed concurrently with this Application; and
33. Such further and other materials or evidence as counsel may advise and this Honourable Court may permit.

Applicable rules:

34. Rules 6.3, 6.9, 6.28 and 11.27 of the *Alberta Rules of Court*, Alta Reg 124/2010; and
35. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

36. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, including section 36.1;
37. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, sections 95, 96 and 97; and
38. Such further and other acts and regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

39. None.

How the application is proposed to be heard or considered:

40. By Webex.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.