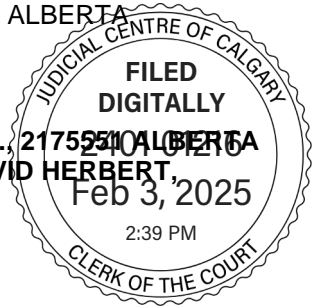


Clerk's stamp:

COURT FILE NUMBER	2401-01216
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	<b>APEX NUTRI-SOLUTIONS INC., 2175551 ALBERTA LTD., STEVEN HERBERT, DAVID HERBERT, MURRAY HERBERT AND CAROLYN HERBERT</b>
DEFENDANT/PLAINTIFF BY COUNTERCLAIM	<b>ATB FINANCIAL</b>
DEFENDANTS BY COUNTERCLAIM	<b>APEX NUTRI-SOLUTIONS INC., 2175551 ALBERTA LTD., DAVID HERBERT, MURRAY HERBERT AND CAROLYN HERBERT</b>
DOCUMENT	<b><u>AMENDED APPLICATION</u></b>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15 <sup>th</sup> Floor, 850 - 2 <sup>nd</sup> Street S.W. Calgary, Alberta T2P 0R8 Attn: Derek Pontin Ph. (403) 268-6301 Fx. (403) 268-3100 File No.: 141950-292



**NOTICE TO RESPONDENTS:**

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

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

To do so, you must be in Court when the application is heard as shown below:

Date: [February 13, 2025](#)

Time: [10:00 AM](#)

Where: Calgary Courts Centre

By WebEx (link information attached as **Schedule "A"** to this Application)

Before Whom: Honourable Justice [Simard](#)

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 Plaintiff by Counterclaim, ATB Financial (“**ATB**”), respectfully seeks the following relief:
  - (a) an Order:
    - (i) declaring service to be in order;
    - (ii) granting summary dismissal, under Rule 7.3 of the *Alberta Rules of Court*, of the claim of the Plaintiffs, Apex Nutri-Solutions Inc., 2175551 Alberta Ltd., Steven Herbert, David Herbert, Murray Herbert and Carolyn Herbert as against ATB;
    - (iii) in the alternative, if summary dismissal is not granted, ordering security for costs be paid by the Plaintiffs;
  - (b) an Order:
    - (i) lifting the stay of proceedings in place in respect of Steven Herbert, if applicable, and authorizing ATB to file an Amended Counterclaim, in the form attached hereto as Schedule “B”, adding Steven Herbert as a defendant in connection with his signed guarantees;
    - (ii) granting summary judgment, under Rule 7.2 of the *Alberta Rules of Court*, in favour of ATB, as against the Defendants by Counterclaim, Apex Nutri-Solutions Inc., 2175551 Alberta Ltd., David Herbert, Murray Herbert, Carolyn Herbert and Steven Herbert;
  - (c) an Order appointing BDO Canada Limited as receiver and manager (the “**Receiver**”) of all of the assets, undertakings, and properties of △ 2175551 Alberta Ltd. (“**217 AB**” △) and certain lands owned by Murray and Carolyn Herbert (the “**Herbert Lands**”), pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (the “**BIA**”) and section 13(2) of the *Judicature Act*, RSA 2000 c J-2;
  - (d) an Order appointing BDO Canada Limited as interim receiver (in such capacity the “**Interim Receiver**”) of all of the assets, undertakings, and properties of Apex Nutri-Solutions Inc. (“**Apex**”, collectively with 217 AB, the “**Debtor Companies**”), pursuant to section 47 of the BIA and section 13(2) of the *Judicature Act*, RSA 2000 c J-2;
  - (e) costs of this application on a solicitor and its own client, full indemnity basis; and
  - (f) such further and other relief as this Honourable Court may deem just and appropriate.

**GROUND FOR MAKING THIS APPLICATION:**

**The Parties**

2. ATB is a corporation pursuant to the *ATB Financial Act*, RSA 2000, c A-45.2 carrying on business in Alberta.

3. The Debtor Companies are owned and operated by the Herberts. Steven, David and Murray, along with their spouses, own the shares of 217 AB. 217 AB holds the shares of Apex. Steven, David and Murray are the directors of each of the Debtor Companies.
4. On or about April 28, 2023, Steven Herbert made a Consumer Proposal with Bromwich & Smith Inc., as his administrator. The indebtedness declared to his creditors at that time did not include the full amount of his guaranteed indebtedness to ATB. ATB's guarantees had not been demanded upon, at the time the Consumer Proposal was made.

#### **Loan Agreements, Guarantees and Security**

5. Apex is a party to various loan agreements with ATB, whereby Apex is indebted to ATB. 217 AB is a party to various loan agreements with ATB, whereby 217 AB is indebted to ATB.
6. The indebtedness of Apex and 217 AB is cross-guaranteed. Steven, David, Murray and Carolyn Herbert have guaranteed to ATB the indebtedness of both Apex and 217 AB.
7. As security for its obligations to ATB, Apex provided to ATB (among other security) a General Security Agreement and a collateral mortgage, charging the lands legally described as:

PLAN 1820044  
BLOCK 1  
LOT 1  
EXCEPTING THEREOUT ALL MINES AND MINERALS  
AREA: 8.53 HECTARES (21.08 ACRES) MORE OR LESS

(the "**Apex Lands**").

8. As security for its obligations to ATB, 217 AB provided to ATB (among other security) a General Security Agreement.
9. As security for their joint and respective obligations to ATB, Murray and Carolyn provided to ATB (among other security) collateral mortgage security, charging the lands legally described as:

MERIDIAN 4 RANGE 20  
TOWNSHIP 43 SECTION 25 QUARTER  
SOUTH EAST EXCEPTING THEREOUT  
ALL MINES AND MINERALS AREA:  
64.7 HECTARES (160 ACRES) MORE OR LESS

MERIDIAN 4 RANGE 20  
TOWNSHIP 43 SECTION 24 QUARTER  
NORTH EAST EXCEPTING THEREOUT  
ALL MINES AND MINERALS AERA:  
64.7 HECTARES (160 ACRES) MORE OR LESS

MERIDIAN 4 RANGE 20  
TOWNSHIP 43 SECTION 26 QUARTER  
SOUTH EAST CONTAINING 64.7 HECTARES (160 ACRES)  
MORE OR LESS EXCEPTING THEREOUT:  
2.53 HECTARES (6.25 ACRES) MORE OR  
LESS AS SHOWN ON RAILWAY PLAN 1983AJ AND BEING

TAKEN FOR RIGHT OF WAY OF THE CANADIAN NORTHERN RAILWAY  
COMPANY

(the “**Herbert Lands**”).

10. As of January 2, 2025, the total indebtedness of Apex and 217 AB to ATB is \$3,487,441.64.
11. Murray and Carolyn Herbert are additionally principally indebted to ATB under a borrowing facility, entered personally and secured against the Herbert Lands (the “**Herbert Borrowing Facility**”). The indebtedness owing to ATB presently, under the Herbert Borrowing Facility, has been essentially paid in full, through offset of funds previously deposited to Murray and Carolyn’s farming account.

**Background and Chronology**

12. In 2019, the Herberts acquired Apex, through 217 AB, for the purpose of continuing its existing farming operations.
13. The ATB credit facilities were established at the same time, including term loans and a revolving operating line of credit (“**RLOC**”), margined against inventory and accounts receivable.
14. The Apex business operations were principally comprised of 4 distinct streams of activity: canola crushing; extrusion to make feed products; roasting to make feed products; and raising broiler chickens.
15. Following its acquisition by the Herberts, Apex revenues declined. This related in part to a portion of the business not being continued by the Herberts (distribution of a soy product), higher expenses (including additional chicken quota costs), and seasonal factors reported by the Herberts to ATB (weather, commodity pricing, and so on). Apex has not been profitable since the acquisition.
16. ATB tolerated Apex being in default of its financial covenants after the first fiscal year (despite revenues being down 20%). The Herberts advised they were exploring alternatives to improve profitability.
17. The Herberts sought to improve their business, including negotiating for a better agreement with Cargill, a primary purchaser of Apex products. Apex unfortunately suffered a boiler failure, resulting in downtime and significant repair costs. Insurance refused coverage and Apex paid for the repairs directly, impacting working capital.
18. ATB continued to support Apex at this time, including by approval of an additional term loan. This was requested by the Herberts to move an additional residence onto the Apex Lands.
19. By the end of its second fiscal year (at and after March, 2021), Apex was again in default of its covenants, including financial covenants (debt service coverage ratio) and for late reporting.
20. In November, 2021, ATB and Apex entered into a new Commitment Letter, signed by all parties. The defaults of Apex were expressly noted and reserved by ATB, and amendments were made to the existing credit facilities, including revision to the margining formula, to account for priority and lienable payables.

21. A typographical error was included in the revised margining formula, which had the effect of benefitting Apex, as it would have provided for a higher margin threshold. There was no impact observed by either borrower or lender, from this drafting error. It was corrected within just over 60 days.
22. Through the fall of 2021, Apex had advised ATB of challenges with respect to quality of canola, commodity pricing and seasonal impacts. Further, Apex had negotiated a new agreement with Cargill, to produce a higher quality product. Apex had contracted with third parties to acquire necessary inventory (specifically soy beans and corn), to support the new production requirements for Cargill.
23. Apex requested from ATB, and was granted, a temporary bulge to the RLOC, to assist with overstocked inventory, accumulating payables and accumulating receivables. ATB agreed to provide the temporary bulge to Apex, to support its liquidity. In January of 2022, a new Commitment Letter was entered into, signed by all parties, extending the increased RLOC to next review date in July, 2022.
24. In February, 2022, Apex unfortunately suffered a fire loss. This resulted in major damage to its equipment and building and caused an immediate ceasing of two of its revenue streams: the extrusion and the roasting processes.
25. Apex commenced an insurance claim with Co-operators and started to receive business interruption insurance payments.
26. Apex was significantly dissatisfied with the handling, by its insurer, of its claim adjustment process. This had nothing to do with ATB.
27. In July, 2022, the insurer advised Apex that its operating insurance would not be further renewed. Without insurance, Apex could not continue to operate its crushing process, its extrusion (if ever restored) and its roasting process (similarly, if ever restored). Apex would be able to continue to raise broiler chickens, but this aspect of the business was viewed by ATB to be revenue neutral or more likely operating at a loss.
28. Apex negotiated with its insurer for an extension to its existing policy, while trying to source alternatives. Apex was given temporary extensions. Apex has never sourced an alternate insurance provider and appears unable to do so.
29. By August of 2022, Apex was in breach of its reporting covenants, still operating only a portion of its business, and was sitting on excess inventory, which it began liquidating.
30. Apex's insurer provided short extensions to the existing insurance policy, initially through the fall and out to December, 2022. ATB concurrently reduced Apex's loan payment obligations, to "interest only", to alleviate pressure on Apex's strained cash flow. This was confirmed by a further extension agreement, dated October 24, 2022, wherein Apex, ATB and the guarantors agreed (among other things):
  - (a) ATB would further extend the facilities (notwithstanding the significant ongoing interruptions to operations and collateral support);

- (b) ATB would provide an initial 3-months of interest-only payments;
  - (c) Apex would provide certain reporting, including projection and variance analysis for its cash flows;
  - (d) Apex would obtain either an extension or new insurance;
  - (e) Apex would not make capital expenditures without ATB's prior consent;
  - (f) all loan facilities would be cross-defaulted;
  - (g) all facility documentation was verified as valid, enforceable, securing the indebtedness, and correctly stating the indebtedness owing;
  - (h) no events of default were waived by ATB, all expressly reserved;
  - (i) in consideration of ATB continuing to extend its facilities in those circumstances, Apex and the guarantors all and each released ATB from all claims and causes of action; and
  - (j) the indebtedness continued to be payable on demand.
31. At around the same time, Apex advised ATB it would not be continuing its extrusion and roasting processes, but would pursue a new crushing operation, instead. Apex believed there was opportunity for new product and better margins there, particularly due to pressure from purchasers (including Cargill) affecting its other business lines.
32. To the extent Apex was abandoning those operations, it doesn't follow that Apex now claims ATB prevented it from continuing those operations. Apex not only told ATB it was discontinuing that aspect of its business, but told Colliers, as well, when Apex later commissioned its own appraisal. ATB has never restricted, or stated a managerial or business position, in respect of Apex continuing whatever operations it would choose.
33. In December of 2022, Apex obtained a further extension of its existing insurance coverage, ultimately out to August 2023. ATB continued to be supportive, and agreed to extend the borrower's interest-only period for the same time.
34. By March, 2023, Apex exhausted its business interruption insurance payments and reached a settlement with its insurer for the proceeds of the damaged equipment and building (that is, proceeds of ATB's collateral).
35. Apex directed its insurer to deposit the insurance proceeds to ATB. Apex states in its pleadings that ATB took the funds, without knowledge or consent of Apex. This is patently incorrect. Apex expressly directed the deposit.
36. Apex then made periodic requests for ATB to fund capital expenditures. ATB approved further credit as it viewed appropriate, as prudent lender would.
37. In July, 2023, Apex was advised by its insurer that its existing insurance policy would not be further extended. Apex then advised ATB that it had terminated all non-shareholder employees and effectively ceased operations.

38. ATB issued demands for repayment. ATB had been patient and supportive for a long time, particularly given the circumstances. Faced with cessation of operations, and a severely impacted balance sheet, ATB had no option other than to demand, at that point. ATB put a lock on all deposit accounts and capped the RLOC.
39. ATB advised Apex it would not continue to support further broiler chicken cycles. To ATB's knowledge, there was currently a flock of chickens upon the Apex lands. ATB agreed to continue to fund approved costs, as required to support that existing flock, but once finished and sold, ATB would not support any future broiler chickens. That part of the operation was not profitable (and likely operating at a loss), and certainly not capable of supporting the other ongoing major shortfalls that would be required to support ongoing extension of credit.
40. Apex advised ATB that it intended to re-engage some of its former employees, to commence reconstruction of the fire-damaged facility. Proceeds from the insurance continued to be held in the ATB account, and Apex wanted to use those funds to rebuild. ATB expressed concern with funding reconstruction, unless adequate assurance could be provided that the building would be constructed to code and would be insurable. ATB advised Apex of the need for Apex to engage a construction consultant for that purpose, obtain an appraisal and engage a financial advisor.
41. Discussions around these parameters, including in context of a potential for forbearance after demands, were ongoing, but did not resolve any agreement. In September, 2023, the Debtor Companies, Murray Herbert and Carolyn Herbert filed for protection under the *Farm Debt Mediation Act* ("FDMA").
42. The FDMA invoked a stay of all proceedings, which the debtors extended the maximum of three times, out to December, 2023.
43. In January, 2024, the debtors then filed their Statement of Claim, alleging ATB had intentionally pursued and caused the failure of their business.
44. In February, 2024, ATB reiterated its demands for repayment under the credit facilities. In March, 2024, ATB filed its Statement of Defence and a Counterclaim, seeking loan repayment.
45. Although Steven Herbert had sued ATB, as one of the Plaintiffs, ATB did not include Steven in the Counterclaim, in view of the stay in place from his Consumer Proposal. ATB herein seeks leave to include Steven as a co-defendant to its Counterclaim, in respect of his guarantees, which are outside the Consumer Proposal.
46. In May, 2024, ATB effected a "soft seizure" of assets as located at the Apex Lands, leaving seized assets under a bailee's undertaking.

#### **Funds Applied to Indebtedness of Murray and Carolyn Herbert**

47. In late November, 2023, approximately \$171,178 was deposited to Murray and Carolyn's ATB farm account. As a result of demands previously issued and accounts locked, those funds were frozen and held.
48. The Herberts took the position that ATB must release those funds, particularly to pay creditors other than ATB. ATB disagreed.

49. The Herberts took the position that ATB is subordinate to the rights of The Canadian Canola Growers Association (“**CCGA**”) in respect of those funds. ATB disagrees and, in any case, CCGA has not made a claim to the funds. The claim is made by Murray (and Carolyn, by same extension).
50. Murray and Carolyn have signed postponements to ATB. Any claim that Murray or Carolyn would make to any funds is assigned and postponed to ATB. ATB is not agreeable to Murray and Carolyn effecting repayment of other creditors, given ATB’s significant current exposure.
51. ATB has justly exercised its rights of offset and consolidation of accounts.
52. Ultimately, after conclusion of the FDMA process and no resolution, ATB set off the funds as against indebtedness of Murray and Carolyn, firstly, against direct loan obligations to ATB, and secondly against their accelerated guarantee indebtedness.

### **Summary Adjudication is Appropriate**

53. Summary judgment may be ordered under the *Alberta Rules of Court* in cases where there is no defence to a claim or any part of it. Summary dismissal may be ordered similarly where a claim or any part of it has no merit.
54. Summary judgment is appropriate where there is no genuine issue requiring a trial, as the judge is able to reach a fair and just determination on the merits. This is possible where the judge is able to make necessary findings of fact, apply the law to the facts, and summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result.
55. An applicant is not required to convince the Court that the strength of the applicant’s case is such that the outcome of the trial would be *obvious*. A summary judgment adjudicator can make contested findings of fact on a balance of probabilities, when it is fair and just to do so.
56. The relevant factors to take into account on a summary judgment application include:
  - (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
  - (b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
  - (c) If the moving party has met its burden, the resisting party must demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

- (d) The presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
57. The issue to be resolved, for summary judgment on ATB's counterclaim to be ordered, is the validity and enforceability of the ATB loan and security documents.
58. The issue to be resolved, for summary dismissal to be ordered, is whether there is any logical and reasonable basis to suggest ATB was somehow responsible for Apex's business failure.
59. ATB has always acted as a reasonable and prudent lender would and should have. ATB is entitled (and obligated, by its own stakeholders) to prudently manage its economic interests.
60. ATB submits there is no defence to its claims for repayment of its indebtedness. ATB submits there is no merit to the claims made by the Plaintiffs, including that ATB intentionally (or otherwise) forced its borrower out of business. It is clear the business failure was a result of a number of factors, including calamitous events, none of which ATB occasioned or had any role in.
61. The loan and security documentation is in order and the Plaintiffs (in capacity as Defendants to Counterclaim) are liable for the amounts owing to ATB under their respective loans and guarantees.
62. The guarantees were executed in compliance with the relevant Alberta legislation and include duly executed certificates, as required under the *Guarantees' Acknowledgment Act*, RSA 2000, c G-11.
63. There is no meritorious defence to the liability of the Defendants to Counterclaim. There is no genuine issue requiring trial with respect to the substance of the within Action, both claim and Counterclaim.
64. Summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result in this case.
65. Moreover, ATB submits there is no realistic basis for injunction, as is pleaded by the Plaintiffs. Any preservation of *status quo* would only be seriously detrimental to all stakeholders.
66. Injunction will not make this operation insurable, such that it can ever continue. Injunction will not make this operation profitable, in the event it ever can be restored.
67. Whereas summary judgment and/or summary dismissal would be determinative of injunctive relief, if neither is ordered, injunctive relief should still be denied, on the basis of failure to meet the tripartite test.

#### **Appointment of a Receiver is Just and Convenient**

68. Separately, and not contingent upon summary judgment or summary dismissal, ATB asserts its right to the appointment of a receiver in respect of [217 AB, and the Herbert Lands](#). ATB submits it is clearly just and convenient that a receiver be appointed in this case. There is no reasonable alternative.

69. ATB has the right to appoint a receiver, set out in various clauses within its facility documentation. The applicable legislation vests in this Honourable Court the authority to appoint a receiver where it is just and convenient to do so.
70. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co* [2002, ABQB 430, "**Paragon**", at para 27], the Court set out factors that may be considered in determining whether it is just or convenient to appoint a receiver, including:
- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
  - (b) the risk to the security holder;
  - (c) the nature of the property;
  - (d) the apprehended or actual waste of the debtor's assets;
  - (e) the preservation and protection of the property pending judicial resolution;
  - (f) the balance of convenience to the parties;
  - (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
  - (h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
  - (i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
  - (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
  - (k) [..., etc.]
71. Where the security documentation gives to the lender the right of appointment of a receiver, the "extraordinary nature of the remedy sought is less essential to the inquiry" [*Paragon*, at para 28].
72. This business has ceased all or a majority of its operations; it is uninsurable; it has no organic cash flow and no ability to forecast repayment of its substantial indebtedness.
73. The debtors have had an extended period (of years since the fire loss) in which to resolve any prospect of refinancing or other strategic alternative.
74. ATB has always maintained cooperation and liquidity support, notwithstanding increasing risk and a diminished balance sheet, only exercising rights of demand when the debtors had advised of the termination of employees and cessation of operations.

75. The debtors have failed or refused to repay their obligations to ATB, have moved their banking to another institution (or institutions), and cannot demonstrate collateral value sufficient to provide any assurance of repayment of their creditors.
76. BDO Canada Limited has consented to act as receiver and manager, or interim receiver of the assets, undertakings, and properties of 217 AB and the Herbert Lands, should the Court so appoint it.
77. It is just and convenient to appoint a receiver in the circumstances of this case.

#### **Appointment of an Interim Receiver is Necessary**

78. In discussions with the proposed Interim Receiver, ATB has determined a bifurcation of the receivership process, between receivership and interim receivership, is appropriate.
79. ATB has little to no visibility into the current operations of Apex, including for greater clarity, Apex's chicken operation. The proposed Interim Receiver has advised that it is unwilling to be appointed as a receiver-manager of Apex at this time, given the lack of understanding and visibility.
80. The appointment of an Interim Receiver is necessary to allow ATB to get a better understanding Apex's current circumstance of that company. Specifically, ATB requires the appointment of an Interim Receiver so that it can independently assess the condition of the Apex collateral and operations, and particularly to understand the scope of risk that a receiver may undertake.
81. Any potential prejudice to the Debtor Companies or other stakeholders is minimal given the statutory requirement for an initial term of 30 days. Further, the Court, ATB and Apex's creditors will have the near-term benefit of an interim receiver's independent assessment and report, informing as to next steps.
82. BDO Canada Limited has consented to act as interim receiver of the assets, undertakings, and properties of Apex, should the Court so appoint it.

#### **Security for Costs**

83. The Defendants by Counterclaim will likely be unable to pay the costs of ATB, in the event that ATB is successful in defending the action they have commenced.
84. ATB has a strong defence to this action on the merits, as set out ATB's Statement of Defence and Counterclaim.
85. In the event the Plaintiffs' Statement of Claim is not summarily dismissed, ATB seeks an order for security for costs, payable by the Plaintiffs to the Court, in the sum of \$250,000.00, or in such amount as this Court may direct, together with an Order that:
  - (a) security be provided no later than 2 months after the date of the order;
  - (b) the Plaintiffs' Statement of Claim be stayed until the security is provided; and

- (c) if the security is not provided within 2 months of the order, that the Plaintiffs' action be dismissed, with costs to ATB.

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

**MATERIAL OR EVIDENCE TO BE RELIED ON:**

- 87. The pleadings and proceedings herein.
- 88. The Affidavit of Rehman Mulji, dated January 5, 2025.
- 89. Affidavits of the Plaintiffs, Murray Herbert and Steven Herbert, filed and cross-examination transcripts in respect of the same.
- 90. Consent of BDO Canada Limited, to act as receiver and manager, to be filed.
- 91. Bench Brief of ATB, to be filed.
- 92. Such further and other material or evidence as counsel may advise and this Honourable Court may permit.

**APPLICABLE RULES:**

- 93. *Alberta Rules of Court*, Alta Reg 124/2010, including Part 7, Division 2; Part 4, Division 4.
- 94. *Bankruptcy and Insolvency General Rules*, CRC, c 368.
- 95. Such further and other Rules as counsel may advise and this Honourable Court may permit.

**APPLICABLE ACTS AND REGULATIONS:**

- 96. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3.
- 97. *Judicature Act*, RSA 2000 c J-2.
- 98. *Personal Property Security Act*, RSA 2000, c P-7.
- 99. Such further and other Acts and Regulations as counsel may advise and this Honourable Court may permit.

**HOW THE APPLICATION IS PROPOSED TO BE HEARD OR CONSIDERED:**

- 100. By Web-Ex, before the presiding Honourable Justice.

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

**SCHEDULE "A"**

See attached

**Virtual Courtroom 60** has been assigned for the above noted matter:

Virtual Courtroom Link:

<https://albertacourts.webex.com/meet/virtual.courtroom60>

Instructions for Connecting to the Meeting

1. Click on the link above or open up Chrome or Firefox and cut and paste it into your browser address bar.
2. If you do not have the Cisco Webex application already installed on your device, the site will have a button to install it. Follow installation instructions. Enter your full name and email address when prompted
3. Click on the **Open Cisco Webex Meeting**.
4. You will see a preview screen. Click on **Join Meeting**.

Key considerations for those attending:

1. Please connect to the courtroom **15 minutes prior** to the start of the hearing.
2. Please ensure that your microphone is muted and remains muted for the duration of the proceeding, unless you are speaking. Ensure that you state your name each time you speak.
3. If bandwidth becomes an issue, some participants may be asked to turn off their video and participate by audio only.
4. **Note: Recording or rebroadcasting of the video is prohibited.**
5. **Note: It is highly recommended you use headphones with a microphone or a headset when using Webex. This prevents feedback.**

For more information relating to Webex protocols and procedures, please visit:

<https://www.albertacourts.ca/qb/court-operations-schedules/webex-remote-hearings-protocol>

You can also join the meeting via the "Cisco Webex Meetings" App on your smartphone/tablet or other smart device. You can download this via the App marketplace and join via the link provided above.

**SCHEDULE "B"**

See attached

Clerk's Stamp:

COURT FILE NUMBER	2401-01216
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	<b>CALGARY</b>
PLAINTIFF	<b>ATB FINANCIAL</b>
DEFENDANTS	<b>APEX NUTRI-SOLUTIONS INC., 2175551 ALBERTA LTD., DAVID HERBERT, <u>STEVEN HERBERT</u>, MURRAY HERBERT AND CAROLYN HERBERT</b>
DOCUMENT	<b><u>AMENDED COUNTERCLAIM</u></b>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8  Attention: Derek Pontin Ph. (403) 268-6301 File No.: 141950-262

**NOTICE TO DEFENDANTS BY AMENDED COUNTERCLAIM**

You are being sued. You are a defendant by counterclaim.

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

**Statement of facts relied on:**

**Parties**

1. The Plaintiff by Counterclaim ATB Financial, formerly Alberta Treasury Branches ("**ATB**") is a corporation pursuant to the *ATB Financial Act*, RSA 2000, c A-45.2 carrying on business in Alberta.
2. The Defendant by Counterclaim, Apex Nutri-Solutions Inc. ("**Apex**") is a corporation pursuant to the laws of Alberta carrying on or formerly carrying on business in Alberta.
3. The Defendant by Counterclaim, 2175551 Alberta Ltd. ("**217 AB**") is a corporation pursuant to the laws of Alberta carrying on or formerly carrying on business in Alberta.
4. The Defendant by Counterclaim, Murray Herbert ("**Murray**") is an individual ordinarily resident in Alberta.

5. The Defendant by Counterclaim, Carolyn Herbert (“**Carolyn**”) is an individual ordinarily resident in Alberta.
6. The Defendant by Counterclaim, David Herbert (“**David**”) is an individual ordinarily resident in Alberta.
7. The Defendant by Counterclaim, Steven Herbert (“**Steven**”) is an individual ordinarily resident in Alberta.
8. Apex, 217 AB, Murray, Carolyn, Steven, and David are collectively the “**Defendants by Counterclaim**” and each a “**Defendant by Counterclaim**”.

### **Loan Facility**

9. Pursuant to a Commitment Letter, dated January 7, 2022, as amended pursuant to the Extension Agreement dated October 24, 2022 (the “**Apex Loan Agreement**”), ATB made available to Apex the following credit facilities:
  - (a) an operating loan in the amount of 500,000 (“**Facility 1**”)
  - (b) a term loan in the amount of 1,900,678.68 (“**Facility 2**”);
  - (c) a term loan in the amount of 640,059.63 (“**Facility 3**”);
  - (d) a term loan in the amount of 260,945.92 (“**Facility 4**”);
  - (e) a BusinessCard Mastercard in the amount of \$50,000.00 (“**MasterCard Facility**”),  
(collectively, the “**Apex Facilities**”).
10. The Apex Loan Agreement provides, among other things,
  - (a) amounts borrowed pursuant to Facility 1 shall bear interest a rate of ATB’s prime rate plus 2% per annum;
  - (b) amounts borrowed pursuant to Facility 2 and Facility 4 shall bear interest a rate of ATB’s prime rate plus 1% per annum;
  - (c) amounts borrowed pursuant to Facility 3 shall bear interest a rate of ATB’s prime rate plus .5% per annum;
  - (d) amounts borrowed pursuant to the MasterCard Facility shall bear interest a rate of 19.90% per annum;
  - (e) Facility 2, Facility 3 and Facility 4 mature on July 31, 2022;
  - (f) the Credit Facilities are repayable on demand;
  - (g) Apex is responsible for all costs, including legal fees (on a solicitor and his own client, full indemnity basis), incurred by ATB in connection with the Apex Loan Agreement.
11. Pursuant to a Business Loan Credit Agreement dated March 18, 2019 concerning 217 Alberta Ltd. (the “**217 Loan Agreement**”), ATB made available to 217 AB the following credit facility:

- (a) a term loan in the amount of \$413,425.00 (the “**217 Facility**”).
12. The 217 Loan Agreement provides, among other things,
- (a) amounts borrowed pursuant to 217 Facility shall bear interest a rate of ATB’s prime rate plus 0.5% per annum;
  - (b) 217 Facility matures on February 28, 2020;
  - (c) 217 AB is responsible for all costs, including legal fees (on a solicitor and his own client, full indemnity basis), incurred by ATB in connection with the Apex Loan Agreement.

**Guarantees**

13. In support of the repayment of the indebtedness of Apex to the Lender, the following guarantees were provided to ATB:
- (a) from Carolyn Herbert and Murray Herbert, jointly and severally, a limited guarantee up to the maximum amount of \$1,100,000.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, including legal costs on a solicitor and own client basis, dated June 10, 2019;
  - (b) from Steven Herbert, a limited guarantee up to the maximum amount of \$1,100,000.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, dated June 10, 2019;
  - (c) from David Herbert (David Herbert along with Steven Herbert, Carolyn Herbert and Murray Herbert are collectively the “**Personal Guarantors**”), a limited guarantee up to the maximum amount of \$1,100,000.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, dated June 10, 2019; and
  - (d) from 217, an unlimited guarantee, including interest at the rates payable by Apex under the Apex Loan Agreement, and costs, dated June 10, 2019,
- (collectively, the “**Apex Guarantees**”).
14. In support of the repayment of the indebtedness of 217 to the Lender, the following guarantees were provided to ATB:
- (a) from Carolyn Herbert and Murray Herbert, jointly and severally, a limited guarantee up to the maximum amount of \$413,425.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, including legal costs on a solicitor and own client basis, dated June 10, 2019;
  - (b) from Steven Herbert, a limited guarantee up to the maximum amount of \$413,425.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, dated June 10, 2019;
  - (c) from David Herbert, a limited guarantee up to the maximum amount of \$413,425.00, plus interest at ATB’s prime rate plus 3% per annum, plus costs, dated June 10, 2019; and
  - (d) from Apex, an unlimited guarantee, including interest at the rates payable by 217 AB the Apex Loan Agreement, and costs, dated June 10, 2019,
- (collectively, the “**217 Guarantees**”, along with the Apex Guarantees are collectively, the “**Guarantees**”)

15. It is a term of each of the Guarantees, among others, that:
  - (a) each guarantor guarantees repayment of legal fees (on a solicitor and his own client basis), costs and expenses incurred in connection with the enforcement of the guarantee;
  - (b) each guarantor guarantees repayment of all interest on unpaid amounts under the guarantee from the date of demand at the rates applicable to the guaranteed indebtedness; and
  - (c) the Guarantees shall be governed by the law of the Province of Alberta.
16. In addition to the Herbert Guarantee, Carolyn Herbert executed a Waiver of Independent Legal Advice, dated June 10, 2019 ("**Waiver of Legal Advice**").
17. Pursuant to the Apex Guarantees, the Personal Guarantors and 217 AB assigned and postponed all claims of Apex to ATB. In addition to the assignment provided for in his guarantees, David Herbert, also granted ATB a postponement his mortgage registered as Instrument No. 092 110 166 against the Apex Lands (as defined below) to the rights of ATB under the Apex Mortgage (as defined below).
18. Pursuant to the 217 AB Guarantees, the Personal Guarantors and Apex assigned and postponed all claims of 217 AB to ATB.
19. The Guarantees are due and payable on demand following the occurrence of a default under the respective loan documents, and ATB is not bound to exhaust its recourse against any other party before seeking payment under the Guarantees.
20. ATB submits that the Guarantees are valid and enforceable, and in compliance with the *Guarantees Acknowledgment Act*, RSA 2000, c G-11.

### **Security**

21. To secure Carolyn Herbert and Murray Herbert's obligations to ATB, Carolyn Herbert and Murray Herbert granted ATB:
  - (a) a collateral mortgage, dated March 2, 2018, (the "**First Herbert Mortgage**") in the principal sum of \$450,000.00 charging the lands legally described as:

MERIDIAN 4 RANGE 20 TOWNSHIP 43 SECTION 26 QUARTER SOUTH EAST CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS EXCEPTING THEREOUT: 2.53 HECTARES (6.25 ACRES) MORE OR LESS AS SHOWN ON RAILWAY PLAN 1983AJ AND BEING TAKEN FOR RIGHT OF WAY OF THE CANADIAN NORTHERN RAILWAY COMPANY EXCEPTING THEREOUT ALL MINES AND MINERALS AND THE RIGHT TO WORK THE SAME

(the "**Herbert 1 Lands**");
  - (b) a mortgage, dated June 19, 2019, (the "**Second Herbert Mortgage**", along with the First Herbert Mortgage are collectively the "**Herbert Mortgages**") in the principal sum of \$1,000,000.00, charging the lands legally described as:

MERIDIAN 4 RANGE 20

TOWNSHIP 43 SECTION 25 QUARTER  
SOUTH EAST EXCEPTING THEREOUT  
ALL MINES AND MINERALS AREA:  
64.7 HECTARES (160 ACRES) MORE OR LESS

MERIDIAN 4 RANGE 20  
TOWNSHIP 43 SECTION 24 QUARTER  
NORTH EAST EXCEPTING THEREOUT  
ALL MINES AND MINERALS AERA:  
64.7 HECTARES (160 ACRES) MORE OR LESS

MERIDIAN 4 RANGE 20  
TOWNSHIP 43 SECTION 26 QUARTER  
SOUTH EAST CONTAINING 64.7 HECTARES (160 ACRES)  
MORE OR LESS EXCEPTING THEREOUT:  
2.53 HECTARES (6.25 ACRES) MORE OR  
LESS AS SHOWN ON RAILWAY PLAN 1983AJ AND BEING  
TAKEN FOR RIGHT OF WAY OF THE CANADIAN NORTHERN RAILWAY  
COMPANY

(the "**Herbert 2 Lands**", and the Herbert 1 Lands are collectively the "**Herbert Lands**");

- (c) an interest of all of its present and after-acquired personal property pursuant to a general security agreement, dated March 2, 2018;
  - (d) a pledge of its security pursuant to two Deposit of Security Agreements dated June 10, 2019 and June 26, 2019;
22. To secure 217 AB's obligations to ATB, 217 AB granted ATB:
- (a) an interest of all of its present and after-acquired personal property pursuant to a general security agreement, dated June 10, 2019;
  - (b) a pledge of its security pursuant to two Deposit of Security Agreements dated June 10, 2019 and June 26, 2019;
23. To secure Apex's obligations to ATB, Apex granted ATB:
- (a) an interest of all of its present and after-acquired personal property pursuant to a general security agreement, dated June 10, 2019;
  - (b) a pledge of its security pursuant to two Deposit of Security Agreements dated June 10, 2019 and June 26, 2019;
  - (c) a collateral mortgage, dated June 10, 2019 (the "**Apex Mortgage**"), as amended pursuant to an Amending Agreement, dated September 29, 2020, in the principal sum of \$2,400,000.00, charging the lands legally described as:

PLAN 1820044  
BLOCK 1  
LOT 1  
EXCEPTING THEREOUT ALL MINES AND MINERALS

AREA: 8.53 HECTARES (21.08 ACRES) MORE OR LESS

(the “**Apex Lands**”, and the Herbert Lands are collectively, the “**Lands**”)

- (d) an assignment of rents and leases pursuant to a General Assignment of Leases and Rents, dated June 10, 2019, as amended pursuant to the Amending Agreement dated September 29, 2020.
24. The agreements described in paragraphs 20-21, along with the assignment and postponement contained in the Guarantees are collectively referred to as the “**Security**”. The Security, the Guarantees, the Apex Loan Agreement and the 217 Loan Agreement are collectively referred to as the “**Loan Documents**”.
25. ATB perfected its interest pursuant to the Security by registrations in the Alberta personal Property Registry and the Alberta Land Titles Registry.

#### **Default and Demands**

26. On or about June 28, 2023, Apex and 217 were in default of the Loan Documents, including but not limited to by failing to make required payments of interest and principal.
27. On or about July 27, 2023, ATB issued demands for payment to each of the Defendants by Counterclaim (other than Steven) in respect of their obligations under the Apex Loan Agreement, the Apex Guarantees and the security granted thereunder (the “**Demands**”). In addition to the Demands, ATB issued to Apex, 217 AB, and Carolyn and Murray Herbert, a Notice of Intention to Enforce Security in accordance with Section 244 of the *Bankruptcy and Insolvency Act* (Canada) and a notice pursuant in accordance with Section 21 of the *Farm Debt Mediation Act* (Canada).
28. On or about February 29, 2024, ATB re-issued a demand for payment to the Defendants by Counterclaim (other than Steven), through their counsel, in respect of their obligations under the Loan Documents. In addition to the Demands, ATB also re-issued to Apex, 217 AB, and Carolyn and Murray Herbert, a Notice of Intention to Enforce Security in accordance with Section 244 of the *Bankruptcy and Insolvency Act* (Canada) and a notice pursuant in accordance with Section 21 of the *Farm Debt Mediation Act* (Canada).
29. The Defendants by Counterclaim have failed or refused, and continue to fail or refuse, to pay, in whole or in part, their obligations to ATB, which are fully due, owing and payable.
30. It is a term of the Guarantees that the indebtedness owing thereunder shall continue to accrue interest on all amounts outstanding at the rates set forth therein.
31. In the alternative, ATB pleads and relies on the provisions of the *Judgment Interest Act*, RSA 2000, c J-1, as amended.
32. ATB believes the nature of this claim is not one that will or is likely to result in an agreement between the parties, and that a Dispute Resolution Process would not be beneficial or would be futile. A decision of this Honourable Court is necessary and desirable in the circumstances.

**Indebtedness Owing**

33. As of February 16, 2024 Apex and 217 AB are indebted to ATB in an amount equal to \$3,530,159.66, plus all interest, costs (including legal costs on a solicitor and its own-client full indemnity basis), and fees, all of which continue to accrue (collectively, the “**Indebtedness**”), comprised as follows:

	<b>Outstanding Balance</b>	<b>Interest</b>	<b>Total</b>	<b>Per Diem (as of February 16, 2024)</b>
<b>Apex Facilities</b>				
Impaired Cost Account 766-45017011900	\$41,355.66	\$1,009.55	<b>\$42,365.21</b>	\$11.56
Term Loan 766-45932993500	\$52,019.57	\$712.30	<b>\$52,731.87</b>	\$14.54
CEBA Loan 915-39601392900	\$60,000.00	\$230.14	<b>\$60,230.14</b>	\$8.22
Term Loan 766-35651873700	\$626,959.84	\$28,264.74	<b>\$655,224.58</b>	\$132.26
Term Loan 766-35652111800	\$1,737,580.79	\$63,322.13	<b>\$1,800,902.92</b>	\$390.36
Term Loan 766-38965928500	\$244,350.96	\$9,279.04	<b>\$253,630.00</b>	\$54.90
Revolving Line of Credit 766-35652071500	\$254,485.98	\$12,871.74	<b>\$267,357.72</b>	\$64.14
<b>217 Facility</b>				
Commercial Term Loan 766-35652871600	\$381,268.94	\$16,448.28	<b>\$397,717.22</b>	\$80.43
<b>TOTAL</b>	<b>\$3,398,021.74</b>	<b>\$132,137.92</b>	<b>\$3,530,159.66</b>	<b>\$756.41</b>

34. Pursuant to the guarantees granted by Carolyn and Murray Herbert in support of the indebtedness of Apex and 217 to ATB, Carolyn and Murray Herbert jointly and severally are indebted to ATB, as of February 16, 2024, in the amount of \$1,513,425 (the “**Herbert Indebtedness**”).
35. Pursuant to the guarantees granted by David Herbert in support of the indebtedness of Apex and 217 to ATB, David Herbert is indebted to ATB, as of February 16, 2024, in the amount of \$1,513,425 (the “**David Indebtedness**”).
36. Pursuant to the guarantees granted by Steven Herbert in support of the indebtedness of Apex and 217 to ATB, Steven Herbert is indebted to ATB, as of the dated of demand or deemed demand, in the amount of \$1,513,425 (the “**Steven Indebtedness**”).

**Remedy sought:**

37. ATB respectfully seeks:

- (a) a declaration that the Guarantees are valid and enforceable against the Defendants by Counterclaim;
- (b) a declaration that all of the loan agreements and the Security granted in favour of ATB is valid and enforceable as against the Defendants by Counterclaim and forms a valid and enforceable first charge against the property of the Defendants by Counterclaim;
- (c) a declaration that the Defendants by Counterclaim are in default of their obligations to ATB;
- (d) judgment against each the Apex and 217 AB, in an amount equal to the Indebtedness, plus interest thereafter up to the date of judgment as set forth in the Loan Documents, or, in the alternative, as set forth in the *Judgment Interest Act*, RSA 2000, c J-1, as amended;
- (e) judgment against each of Carolyn and Murray Herbert, in an amount equal to the Herbert Indebtedness, plus interest thereafter up to the date of judgment as set forth in the Loan Documents, or, in the alternative, as set forth in the *Judgment Interest Act*, RSA 2000, c J-1, as amended;
- (f) judgment against David Herbert, in an amount equal to the David Indebtedness, plus interest thereafter up to the date of judgment as set forth in the Loan Documents, or, in the alternative, as set forth in the *Judgment Interest Act*, RSA 2000, c J-1, as amended;
- (g) judgment against Steven Herbert, in an amount equal to the Steven Indebtedness, plus interest thereafter up to the date of judgment as set forth in the Loan Documents, or, in the alternative, as set forth in the *Judgment Interest Act*, RSA 2000, c J-1, as amended;
- (h) interest on all amounts outstanding, both before and after judgment, in accordance with the agreements of the parties or, in the alternative, interest as set forth in the *Judgment Interest Act*, RSA 2000 c J-1, as amended;
- (i) a declaration as to the amount owing under each of the mortgages registered against the Lands, accruing according to the terms thereof and, in default of payment, sale to the Plaintiff by Counterclaim or otherwise, or foreclosure and possession of the Lands;
- (j) in the alternative, immediate foreclosure and possession of the Lands;
- (k) an Order for possession of the Lands;
- (l) a preservation Order;
- (m) an Order shortening the period of redemption to 1 day setting the period of redemption for such period as the Court may direct;
- (n) an Order waiving Rule 4.16 of the *Alberta Rules of Court*, Alta Reg 124-2010;
- (o) costs of this action on a solicitor and its own client, full indemnity basis; and

(p) such further and other relief as this Honourable Court deems just.

**NOTICE TO THE DEFENDANT(S) BY COUNTERCLAIM**

You only have a short time to do something to defend yourself against this counterclaim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice to counterclaim in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice to counterclaim on the plaintiff by counterclaim's address for service.

**WARNING**

If you do not file and serve a statement of defence or a demand for notice to counterclaim within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) by counterclaim against you.