

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT,  
R.S.O 1990, C. C. 43, AS AMENDED**

**AND IN THE MATTER OF THE ADMINISTRATION PROCEEDINGS OF  
CARRIAGE HILLS VACATION OWNERS ASSOCIATION**

**AND IN THE MATTER OF THE ADMINISTRATION PROCEEDINGS OF  
CARRIAGE RIDGE OWNERS ASSOCIATION**

**AIDE MEMOIRE OF THE RECEIVER, BDO CANADA LIMITED**  
**(February 27, 2023 Case Conference)**

1. The Court has scheduled a case conference on February 27, 2023 (the “**Case Conference**”) to discuss issues relating to the Receiver’s motion scheduled for March 31, 2023 (the “**March 31 Motion**”). The March 31 Motion will, among other things, seek Orders setting out the next steps in the processes established for claims by the Receiver against certain Owners and for claims of Owners to proceeds of the Applicants’ estates. The issues to be discussed at the case conference are (i) how appeals in the two processes should be conducted; and (ii) who should host the Zoom videoconference for the March 31 Motion hearing.
2. This Aide Memoire has been prepared to assist the Court at the Case Conference.

### ***Receiver Claims Process***

3. On February 16, 2021, the Court granted a Collection Plan Order in each of the receivership proceedings (collectively, the “**Collection Plan Orders**”).<sup>1</sup> The purpose of these Orders was to set out a procedure for the identification, quantification and resolution of the outstanding indebtedness owing to the Applicants by owners of a defined class (“**Subject Members**”). Pursuant to the Collection Plan Orders this process commenced in each case by the issuance of a “Receiver’s Claim” against a Subject Member, which constituted an initiating process against the Subject Member.<sup>2</sup> The service and adjudication of a Receiver’s Claim in accordance with the Collection Plan Orders would form a sufficient basis upon which the Court could grant judgment against the applicable Subject Member.<sup>3</sup>
4. The Collection Plan Orders appointed Tim Duncan of Fogler, Rubinoff LLP as the Claims Officer to adjudicate any Receiver’s Claims disputed by Subject Members. It has been held that determination by a court that claims must be heard first by a claims officer, is a valid exercise of the court’s inherent jurisdiction.<sup>4</sup>
5. Upon the Claims Officer’s issuance of his decision on a disputed Receiver’s Claim (a “**Claims Decision**”), each of the Receiver and the applicable Subject Member are entitled to appeal the Claims Decision to the Court.<sup>5</sup> The Receiver is to seek the Court’s direction regarding the procedure of such appeals.<sup>6</sup> Pursuant to the Collection Plan Orders, all

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<sup>1</sup> The Hills Collection Plan Order is available at: <https://www.bdo.ca/BDO/media/Extranets/carriage/Collection-Plan-Order-Hills-February-16,-2021.pdf>. The Ridge Collection Plan Order in substantially the same form is available at: <https://www.bdo.ca/BDO/media/Extranets/carriage/Collection-Plan-Order-Ridge-February-16,-2021.pdf>.

<sup>2</sup> Collection Plan Orders, *supra* note 1, at para 13.

<sup>3</sup> *Ibid*, at para 14.

<sup>4</sup> *Re ScoZinc Ltd., 2009 NSSC 136 (CanLII)*, at para 29. It has also been held that the ordering of a claims process in general is an exercise of inherent jurisdiction: *Jastram Properties Ltd. v Tan, 2021 BCSC 2432 (CanLII)*, at para 21.

<sup>5</sup> *Ibid*, at para 37. The exact language is as follows: “THIS COURT ORDERS that each of the Receiver and the Subject Member shall be entitled to appeal the applicable Claims Decision to the Court by serving upon the other, within the Appeal Period, a notice of appeal returnable on a date to be fixed by this Court.”

<sup>6</sup> *Ibid*, at para 39.

appeals shall proceed as true appeals on the basis of the record before the Claims Officer and not as hearings *de novo*.<sup>7</sup>

6. As stated above, the Collection Plan Orders stipulate that parties are entitled to appeal Claims Decisions to the Court. In the context of a *Companies' Creditors Arrangement Act* proceeding it is, according to Houlden & Morawetz, usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the proceeding.<sup>8</sup> The Alberta Court of Appeal has stated that claimants in a receivership “rightly ought to expect . . . a meaningful court review process . . . where disagreements about the Claims Officer’s decision can be resolved.”<sup>9</sup> Commentators have also argued that a right to appeal a claims officer’s decision to a court is “mandated” by the principle of fairness, one of the guiding principles of a claims process.<sup>10</sup>
7. There is a need, however, to balance these considerations against the fact that the Court and the judge seized of these proceedings have limited resources to hear a large number of Claims Decision appeals, especially ones concerning relatively small amounts. The

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<sup>7</sup> *Ibid.* The standard of review for a true appeal of a claims officer’s decision in a receivership is as follows:

- (a) with respect to pure questions of law, the standard of review is correctness;
- (b) with respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error; and
- (c) with respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with;

[General Motors Corporation v. Tiercon Industries Inc., 2009 CanLII 72341](#), [2009] O.J. No. 5580 (OSJC [Commercial List]), at para. 12 and 69; affirmed, [General Motors Corporation v. Tiercon Industries Inc., 2010 ONCA 666](#), at para 3. These are the same deferential standards of review to be applied by an appellate court in general; [Housen v. Nikolaisen, 2002 SCC 33 \(CanLII\)](#), at paras. 8, 10 and 26.

<sup>8</sup> The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th Edition*, at § 23:3.

<sup>9</sup> [Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation, 2018 ABCA 113 \(CanLII\)](#), at para 93:

“Unless there is clear and express wording to the contrary, receivers and claimants participating in a receivership situation rightly ought to expect to engage in a process by which claims are fairly and efficiently adjudicated, with a meaningful court review process in place where disagreements about the Claims Officer's decision can be resolved. The claims process must serve the best interests of the commercial parties, including that it is *generally* the intention of the parties to limit the number, length and costs of hearings and appeals, and to recognize the expertise of those who engage in the claims process and that in a receivership, resources are finite.”

<sup>10</sup> Neil Bunker and Jeremy Dacks, “CCAA Claims Processes — Guiding Principles for Developing an Effective Method of Determining Creditor Claims”, *Insolvency Institute of Canada (Articles)*, I.I.C. Art. Vol. 6-4.

Claims Officer will render a total of 194 Claims Decisions. It is expected that approximately 60 to 65 of these Claims Decisions will be appealed by Subject Members, with an average amount at issue of approximately \$10,000 to \$11,000.<sup>11</sup>

8. The options for an adjudicator of the Claims Decision appeals are, as the Receiver sees them:
  - (a) Justice Conway, as the Judge seized of these proceedings;
  - (b) an Associate Judge, pursuant to Justice Conway's referral; or
  - (c) a private arbitrator, preferably a retired Judge, to be appointed on March 31.
  
9. Subject to any inner administrative limitations of the Court, the Receiver submits that the Court would have the inherent jurisdiction to make the referral to an Associated Judge contemplated as the second option above. While Rule 37.02(2)(g) specifies that an Associate Judge does not have jurisdiction to hear a motion in an appeal, the Rules do not contemplate appeals of the nature at hand, involving a decision of a court-appointed officer.<sup>12</sup> An Associate Judge hearing appeals of Claims Decisions in the present proceedings would be analogous to an Associate Judge sitting as a *Bankruptcy and Insolvency Act* Registrar hearing an appeal of a bankruptcy trustee's notice of revision or disallowance.<sup>13</sup> Referral to an Associate Judge by the Judge seized of these proceedings would be analogous to the referrals to Associate Judges allowed by: (i) Rule 37.15(1.1) where a Judge has been designated to hear all motions in a complicated proceeding; or (ii) Rule 77.07(3) where a Judge has been designated to hear all motions in a case managed proceeding.<sup>14</sup>
  
10. In any of the three options for adjudicator, there would also be the ability to have the appeals brought in writing rather than orally. The Receiver would also do its best to

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<sup>11</sup> The Receiver is not itself appealing any of the Claims Decisions.

<sup>12</sup> Rules of Civil Procedure, RRO 1990, Reg 19, Rule 37.02(2)(g).

<sup>13</sup> This power is granted to a Registrar by paragraph 192(1)(n) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3.

<sup>14</sup> Rules of Civil Procedure, *supra* note 12, Rule 37.15(1.1) and Rule 77.07(3).

group appeals together where the grounds are similar and schedule hearings accordingly, if required.

### ***Owner Claims Process***

11. On December 17, 2021, the Court granted a Claims Process Order in each of the receivership proceedings setting out a process for Owners to make their claims to the proceeds of the Applicants' estates (collectively, the "**Claims Process Orders**").<sup>15</sup> These Claims Process Orders provided that the Receiver could issue Notices of Revision/Disallowance ("**NORDs**") to Owners in respect of their filed claims and gave Owners a certain amount of time in which to provide notice that they intended to dispute such NORDs.
  
12. The Receiver has delivered 482 NORDs to date and expects to issue more as it works through the Owner Claims remaining to be resolved. Unlike in the Receiver Claims Process, there has not been a claims officer appointed to deal with disputes in the Owner Claims Process. Given the sheer volume of NORDs and the repeated attempts by the Receiver to settle the claims prior to the issuance of the NORDS, it is anticipated that, as compared to the Receiver Claims Process, there will be an even higher number of disputes at an even lower dollar value to be determined in the Owner Claims Process. The Receiver is proposing: (i) that an experienced claims officer be appointed to adjudicate the disputed NORDs (potentially in groupings to minimize costs where possible); and (ii) that appeals from the new claims officer's decisions follow a process similar to that which will be set out in the Receiver Claims Process. Our question at this point is who, among the options for adjudicators set out in the last section, the Court would prefer hears those ultimate appeals in the Owner Claims Process.

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<sup>15</sup> The Hills Receiver Claims Process Order is available at: <https://www.bdo.ca/BDO/media/Extranets/carriage/Claims-Process-Order-dated-December-17.pdf>. The Ridge Receiver Claims Process Order in substantially the same form is available at: [https://www.bdo.ca/BDO/media/Extranets/carriage/Claims-Process-Order-dated-December-17\\_1.pdf](https://www.bdo.ca/BDO/media/Extranets/carriage/Claims-Process-Order-dated-December-17_1.pdf).

***ZOOM Hearing***

13. The final issue relating to the March 31 Motion is the logistics of who should host the Zoom videoconference of the hearing. To this point in these proceeding, counsel and the Receiver have been appearing before the Court by Zoom videoconference with a YouTube live stream for non-participating observers. The Receiver's co-counsel, Aird & Berlis LLP, has been responsible for both the Zoom videoconference and the YouTube live stream, with a team from its marketing and IT departments overseeing each hearing.
14. The Commercial List's current practice is for the Court office itself to set up and run the Zoom videoconferences for hearings. The Aird & Berlis marketing/IT team has advised that it would be best if Aird & Berlis once again hosts the March 31 Zoom meeting as they need to connect the YouTube stream to the Zoom meeting to ensure that it starts properly and troubleshoot any issues that may arise.
15. Justice Conway previously granted the Receiver's request to have Aird & Berlis host the Zoom meeting for the last hearing on August 23, 2022. The Receiver once again recommends, and respectfully requests, that the Court use its discretion to stipulate that the March 31, 2023 hearing be held by judicial videoconference using a Zoom hearing established by Aird & Berlis.

Date: February 24, 2023

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Owners Association*

**IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O  
1990, C. C. 43, AS AMENDED**

**AND IN THE MATTER OF THE ADMINISTRATION PROCEEDINGS OF CARRIAGE HILLS  
VACATION OWNERS ASSOCIATION**

**AND IN THE MATTER OF THE ADMINISTRATION PROCEEDINGS OF CARRIAGE RIDGE  
OWNERS ASSOCIATION**

Court File No. CV-20-00640265-00CL

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
**Proceedings commenced at Toronto**

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**AIDE MEMOIRE OF THE RECEIVER BDO  
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