

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

B E T W E E N:

**BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP**

Applicant

- and -

**THOMAS CANNING (MAIDSTONE) LIMITED
and 692194 ONTARIO LIMITED**

Respondents

**IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND
243 (1) OF THE *BANKRUPTCY ACT AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, C. c. 43, AS AMENDED**

**FACTUM OF THE RESPONDENTS,
Thomas Canning (Maidstone) Limited and 692194 Ontario Limited**

(Motion Returnable September 27, 2017)

September 15, 2017

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INDEX

SECTION	TITLE	PAGE
Part I	Overview	1
Part II	Facts	3
	Appointment of Interim Receiver and Monitor	3
	Outstanding Fees of Company Counsel	6
Part III	Issues & Law	8
	Fees to be paid to Blaney before further distribution to Bridging	9
	Charge should be granted <i>nunc pro tunc</i>	11
	Company did not control its own cash	12
	Contractual interpretation requires payment of Blaney's fees	13
Part IV	Relief Requested	15
Schedule A	Authorities	16
Schedule B	Statutes	17

Court File No. CV-17-11773-00CL

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FACTUM

(Motion Returnable September 27, 2017)

PART I - OVERVIEW

1. The Respondents, Thomas Canning (Maidstone) Limited and 692194 Ontario Limited (“**692 Ontario**”) (collectively, the “**Respondents**” or the “**Company**”), entered into a consensual arrangement with its principal creditor, Bridging Finance Inc., as agent for Sprott Bridging Income Fund LP (“**Bridging**”), in order to allow for the sale or refinancing of the Company (“**Accommodation Agreement**”).
2. The Company retained Blaney McMurtry LLP (“**Blaney**”) as counsel to provide advice with respect to the Company’s restructuring efforts.

3. Pursuant to the Accommodation Agreement, Richter Advisory Group Inc. (“**Richter**”) was appointed as monitor over the Company (“**Monitor**”) on May 1, 2017 (“**Monitor Order**”), and the Company and the Monitor engaged in a sale and refinancing process.

4. The Company, with the assistance of its counsel, was able to operate for a period of approximately 50 days during which a sale process was conducted and the business was sold.

5. The business was sold for a purchase price equal to the entirety of the debt owing to Bridging by the Company. Bridging suffered no loss on its loan, which was in the amount of approximately \$24,000,000. The restructuring process was, from Bridging’s perspective, a total success.

6. The Accommodation Agreement expressly states that counsel for the Company would be paid its reasonable fees and disbursements in this process. However, when the Company requested the funds necessary to pay its counsel, Bridging refused to honour the terms of the contract it had made and did not provide the Company with the funds necessary to allow it to pay its counsel.

7. Blaney has rendered services to the Company in the amount of \$90,324.63.

8. On June 21, 2017, Richter was appointed as receiver under the *Bankruptcy and Insolvency Act* (“**Receiver**”) for the purpose of completing the sale of the Respondents’ business (“**Receiver’s Appointment Order**”). The Receiver’s Appointment Order permitted Richter to distribute the net proceeds from the sale of the Respondents’ business to Bridging, subject to a reserve in the amount of \$1,200,000 (the “**Reserve**”). Richter has brought a motion seeking the Court’s guidance as to how the funds from the Reserve should be distributed.

9. The issue in this proceeding is whether or not the Receiver can pay the outstanding accounts of Blaney from the funds in its hands.

10. The Respondents respectfully submit that it is fair and equitable that Blaney's fees be paid from the Reserve. The Respondents further submit that Bridging is estopped from taking the position that the fees of Blaney should not be paid, or that Bridging's interest somehow ranks in priority to the Company's obligation to pay the fees which were incurred in the course of this restructuring, to which Bridging expressly consented, and from which Bridging directly benefited.

11. In the alternative, the Respondents claim an equitable charge equal in priority to the Receiver's Charge over the Reserve *nunc pro tunc* in an amount equal to the fees owing to Blaney.

PART II - FACTS

Appointment of Interim Receiver and Monitor

12. The Company entered into a credit arrangement with Bridging on July 3, 2015 ("**Credit Agreement**").¹ The Credit Agreement expired on January 3, 2017 without renewal, and Bridging made demand on the Respondents on April 5, 2017 for an amount which was at the time approximately \$21,000,000.²

¹ Affidavit of William Thomas, sworn June 20, 2017 ("**Thomas Affidavit**"), para. 4, Responding Motion Record of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited, dated June 20, 2017 ("**Responding Motion Record**"), Tab 1, pg. 2.

² Thomas Affidavit, *ibid.*, paras. 10, 15, Responding Motion Record, Tab 1, pgs. 3-4.

13. On April 20, 2017, counsel for Bridging attended court on an *ex parte* basis and obtained an order appointing Richter as interim receiver.³
14. Between April 20 and April 29th, the parties worked to find a consensual process to attempt to refinance or sell the business.⁴
15. On April 29, 2017, Bridging, the Company and the Company's principals, William Thomas, Robert Thomas and John Thomas, entered into the Accommodation Agreement, which is a form of forbearance agreement.⁵
16. In addition to setting out the intention of the parties to run a sale process, the central feature of the Accommodation Agreement was that Bridging would continue to fund the Company's operating expenses with the involvement of the Monitor.⁶
17. The Company agreed to the Accommodation Agreement, and in particular section 5.1, which sets out the following mechanism for the payment of expenses, including legal fees, during the Forbearance Period (as defined in the Accommodation Agreement):

5.1 Loan Availability

Subject to a Forbearance Termination Event, the Lender shall continue to provide advances under the Credit Agreement (but without further reference to any borrowing base calculation which would, but for this Accommodation Agreement, impact such advances) during the Forbearance Period in order to fund the "critical payments" requested by the Obligor and recommended and approved by the Monitor. For greater certainty, the Lender shall not be obligated to fund full normal course operations during the Forbearance Period, but rather only amounts which are necessary to allow the Borrower to continue to operate

³ Thomas Affidavit, *supra*, para. 21, Responding Motion Record, Tab 1, pg. 5.

⁴ Thomas Affidavit, *ibid.*, paras. 26-7, Responding Motion Record, Tab 1, pg. 6.

⁵ Thomas Affidavit, *ibid.*, para. 35 and Exhibit "D", Responding Motion Record, Tab 1 and Tab 1D, pgs. 8 and 33-55.

⁶ Thomas Affidavit, *ibid.*, para. 38, Responding Motion Record, Tab 1, pg. 8.

the Business for the duration of the Forbearance Period. The Lender will, in accordance with and upon the Monitor's review and recommendation, fund the payment of the reasonable fees and disbursements of the Borrower's counsel, Blaney McMurtry LLP, incurred in connection with this Accommodation Agreement or the Monitor Order, up to a maximum amount of \$20,000, **and** the reasonable fees and disbursements incurred by said counsel during the Forbearance Period also in accordance with the Monitor's review and recommendation but excepting any fees and disbursements relating to work done in opposition to motions brought by the Monitor or the Agent in connection with the RISP or any transaction resulting from the RISP [emphasis added].⁷

18. This section was negotiated to expressly include that the fees of Company counsel throughout the Forbearance Period would be paid.⁸

19. On May 1, 2017, Justice Newbould dismissed the interim receiver (subject to certain remaining administrative acts for it to perform), and adjourned Bridging's pending receivership application to no fixed date in exchange for the appointment of Richter as Monitor to which all parties consented.⁹

20. The Company was mandated by the Monitor Order to operate in accordance with the cash management system in the Credit Agreement, notwithstanding that the Credit Agreement had been terminated. As such, the Company had no operating cash of any kind. All cash was deposited daily into a blocked account and swept daily by Bridging. In order to have any cash with which to pay for any obligations, Bridging had to release funds as needed to pay any expenses of the Company.¹⁰

⁷ Thomas Affidavit, *supra*, Exhibit D, Responding Motion Record, Tab 1D, pg. 44.

⁸ Thomas Affidavit, *ibid.*, paras. 66-70, Responding Motion Record, Tab 1, pgs. 13-14.

⁹ Thomas Affidavit, *ibid.*, para. 30, Responding Motion Record, Tab 1, pg. 7. See also Order (Appointment of Monitor) of the Honourable Mr. Justice Newbould, dated May 1, 2017, Respondents' Brief of Authorities, Tab 1.

¹⁰ Thomas Affidavit, *ibid.*, para. 39, Responding Motion Record, Tab 1, pg. 8.

21. The Forbearance Period continued until a sale of the Company's assets was approved by the Court on June 21, 2017 and the Receiver was appointed.¹¹

22. On June 21, 2017, Bridging obtained an Order appointing Richter as Receiver, and an Approval and Vesting Order from Justice Conway approving the sale of the business to 2581150 Ontario Inc. ("**Approval and Vesting Order**").¹²

23. Under the terms of the sale transaction that was approved by the Court, the purchaser paid the full amount of Bridging's debt, being approximately \$24,000,000, and also paid for the costs relating the proceeding.¹³

24. Prior to June 21st, the Accommodation Agreement was in good standing and the Company performed its role thereunder to the best of its ability and at all times in good faith.¹⁴

Outstanding Fees of Company Counsel

25. Throughout the Company's restructuring process, Blaney provided advice to the Company with respect to a variety of issues, including the impact of the sale process on the day-to-date operations of the business, how to deal with various licensing agencies, and advice in connection with the operations of the Company under the Accommodation Agreement and the Monitor Order, which required essentially daily communication. Indeed, both Bridging and the

¹¹ Thomas Affidavit, *supra*, Exhibit D, s. 3.1, Responding Motion Record, Tab 1D, pg. 39.

¹² Order (Appointment of Receiver) of the Honourable Justice Conway, dated June 21, 2017, Respondents' Brief of Authorities, Tab 2. Approval and Vesting Order of the Honourable Justice Conway, dated June 21, 2017, Respondents' Brief of Authorities, Tab 3.

¹³ See Report of Richter Advisory Group Inc. in its capacity as Interim Receiver and Monitor of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited, dated June 15, 2017, para. 101.

¹⁴ Thomas Affidavit, *supra*, para. 49, Responding Motion Record, Tab 1, pg. 10.

Monitor at all times required active engagement from the Company and its counsel throughout the restructuring process.¹⁵

26. The Company has sworn to the effect that the advice was useful and necessary to this restructuring process.¹⁶

27. It was always contemplated among the parties that the Company would have counsel during the Forbearance Period and in the course of its restructuring efforts. Below is an excerpt from the deal memorandum advanced by the Company, which gave rise to section 5.1 of the Accommodation Agreement:

15) Counsel: The company shall continue to have counsel during the forbearance period including to enable the company to complete a sale or refinancing, to deal with creditors and ordinary company issues etc. **The reasonable fees and expenses of company counsel (Blaney), including those incurred related to the negotiation of this forbearance agreement, will be paid during the forbearance when cash is available or otherwise protected by a charge on the assets.** The reasonable fees and expenses of counsel to Bridging (A&B) will presumably be paid by Bridging in the ordinary course and added to the secured debt as has been done in the past. The reasonable fees of counsel to the Receiver/Monitor (Chaitons) and the fees of Richter will be paid by the company when cash is available or otherwise protected by a charge on the assets [emphasis added].¹⁷

28. On June 12, 2017, the Company applied to the Monitor for approval of Blaney's outstanding account in the amount of approximately \$20,000 for the work done up to and including April 30th and advised that a further account for work done during the Forbearance

¹⁵ Thomas Affidavit, *supra*, paras. 71,75, Responding Motion Record, Tab 1, pgs. 15-16.

¹⁶ Thomas Affidavit, *ibid.*, para. 73, Responding Motion Record, Tab 1, pg. 15.

¹⁷ Thomas Affidavit, *ibid.*, paras. 69-70, Responding Motion Record, Tab 1, pg. 14.

Period would follow. The Company was not provided with the funds necessary by Bridging to pay this account.¹⁸

29. It was not until June 14, 2017 that Bridging first advised that it would not pay Blaney's outstanding fees. Until that point, the Company had been operating on the understanding that its counsel would be paid and that Bridging would honour its obligation.¹⁹

30. Blaney's accounts for services rendered in connection with the Accommodation Agreement and during the Forbearance Period total \$90,324.63, inclusive of HST and disbursements.

31. On June 21st, Bridging required that the Receiver distribute the net proceeds from the sale of the business to Bridging, but the Court ordered that a \$1,200,000 reserve ("**Reserve**") be established to, subject to a further order of this Court, pay certain outstanding claims of the Company, such as the fees owing to Blaney.²⁰

PART III - ISSUES & LAW

32. This Honourable Court must consider the following issue with respect to the Receiver's distribution motion: Should the reasonable fees owing to Blaney for its work done for the Company during the restructuring be paid from the Reserve? It is our respectful position that it should. To hold otherwise would allow Bridging, who has suffered no loss, to have the benefit of the work done by the Company and its counsel, without paying for that work, which it expressly agreed to do.

¹⁸ Thomas Affidavit, *supra*, para. 72 and Exhibit "I", Responding Motion Record, Tab 1 and Tab 1I, pgs. 8 and 80-83.

¹⁹ Thomas Affidavit, *ibid.*, para. 74, Responding Motion Record, Tab 1, pg. 15.

²⁰ Order (Appointment of Receiver) of the Honourable Justice Conway, dated June 21, 2017, para. 24, Respondents' Brief of Authorities, Tab 2.

Fees to be paid to Blaney before further distribution to Bridging

33. It is trite law that during the restructuring of a business the debtor company is entitled to counsel, and that its legal advisors are routinely awarded a charge over the assets of the company, which ranks in priority to the claim of any secured creditor when that secured creditor consents to same, as Bridging did in this case.²¹

34. The parties in this case contemplated that no charge would be necessary because Bridging would pay Blaney's reasonable fees and disbursements under s. 5.1 of the Accommodation Agreement.²² Given that during the Forbearance Period, Bridging controlled all of the Company's cash, it was reasonable for the Company to accept a promise from Bridging to pay those fees as effectively the same thing as a charge.²³

35. Bridging expressly acknowledged and agreed that the Company would be entitled to have counsel and that this was a cost of the restructuring.²⁴

36. Assuming Bridging's security is valid, Bridging is entitled to the net proceeds of the sale of the business under its security, but it is not entitled to the gross proceeds. It is submitted that the distinction is that the proceeds of sale distributed to any creditor in an insolvency should be net of the costs of creating those proceeds. Bridging expressly agreed that one of those costs would be payment of the fees of counsel for the Company.²⁵ It is fundamentally unfair and inequitable that Bridging should benefit from Blaney's involvement in the restructuring without

²¹ See, for example, s. 64.2 of the *Bankruptcy and Insolvency Act* and s. 11.52 of the *Companies' Creditors Arrangement Act*.

²² Thomas Affidavit, *supra.*, paras. 66-70, Responding Motion Record, Tab 1, pgs. 13-14.

²³ Thomas Affidavit, *ibid.*, para. 39, Responding Motion Record, Tab 1, pg. 8.

²⁴ Thomas Affidavit, *ibid.*, paras. 66-70, Responding Motion Record, Tab 1, pgs. 13-14.

²⁵ Thomas Affidavit, *ibid.*, paras. 66-70, Responding Motion Record, Tab 1, pgs. 13-14.

Blaney being compensated for its efforts when Bridging originally agreed that it would pay for Blaney's services.

37. The Supreme Court of Canada has held that promissory estoppel exists where one party has, explicitly or otherwise, made a promise to another with the intention of affecting their legal relationship by the other party's reliance on it.²⁶ Three requirements must be met in order for a legal obligation to arise in this manner:

- (a) a promise was made by one party to another while a legal relationship existed between them;
- (b) the other party, to the promisor's knowledge, relied on the promise;
- (c) the other party altered its position to its detriment as a result of its reliance on the promise made to it.²⁷

38. In this case, Bridging promised that the Company would have funds to pay its counsel for services rendered during the restructuring period. The Company relied on that promise and retained counsel, to Bridging's knowledge. The Company incurred a debt to Blaney for these services, which it could not pay without funds from Bridging, and which now remains outstanding as a result of the failure of Bridging to honour its obligation under the Accommodation Agreement.

39. Bridging cannot now resile from its consent to the payment of the fees owing to Blaney's under the Accommodation Agreement by simply asserting priority over all of the funds in the

²⁶ *H.S.C. Aggregates Ltd. v. McCallum*, 2014 ONSC 6214, para. 105 (“**HSC Aggregates**”), relying on *Maracle v. Travelers Indemnity Co. of Canada*, 1991 SCC 58, para. 13, Respondents' Brief of Authorities, Tab 4.

²⁷ *HSC Aggregates, ibid.*, para. 105, Respondents' Brief of Authorities, Tab 4.

Reserve, or by arguing that the action of appointing a receiver and completing a sale somehow relieves Bridging of this obligation. As such, Bridging is estopped from asserting that its interest in the funds in the hands of the Receiver should not be diminished by the amount owing to the Company for payment to Blaney.

Charge should be granted *nunc pro tunc*

40. Charges are often granted in a restructuring to ensure that the fees and expenses of professionals integral to the restructuring process are paid.²⁸

41. The Court granted such a charge in favour of the Monitor and its counsel pursuant to the Monitor Order, as well as for the fees of the Receiver and its counsel in this proceeding.²⁹ It is not disputed that the Court has the equitable and inherent jurisdiction to grant such charges.

42. Since Bridging has refused to honour its obligation to remit to the Company funds to pay Blaney's reasonable fees and disbursements, the Respondents submit that, in the alternative to an Order for payment out of the Reserve, it is appropriate for the Court to exercise its jurisdiction to grant a charge in the amount of \$90,324.63 *nunc pro tunc*.

43. In balancing the equities of the positions of the parties, the Court should consider that Bridging has, through this process, recovered the entirety of its debt in the amount of \$24,000,000, which, it is respectfully submitted, would have been impossible without the

²⁸ See, for example, s. 64.2 of the *Bankruptcy and Insolvency Act* and s. 11.52 of the *Companies' Creditors Arrangement Act*, which provides the Court with jurisdiction to grant charges in favour of professionals and other parties.

²⁹ Order (Appointment of Monitor) of the Honourable Mr. Justice Newbould, dated May 1, 2017, para. 20, Respondents' Brief of Authorities, Tab 1. Order (Appointment of Receiver) of the Honourable Justice Conway, dated June 21, 2017, para. 17, Respondents' Brief of Authorities, Tab 2.

involvement of the Company and its counsel maintaining the business as a going concern pending the completion of the sale process.

Company did not control its own cash

44. But for the cash management system imposed in the Accommodation Agreement and the Monitor Order, the Company would have already paid the fees owing to Blaney. The Company has sworn that the services rendered were useful and that the fees owing are reasonable.³⁰

45. The Monitor Order required the Company to operate in accordance with the cash management system stipulated under the Credit Agreement, which meant that the Company had no operating cash because its cash would get swept daily by Bridging.³¹

46. Additionally, while the Monitor Order did not contemplate that the Monitor would be in control of the business, the Monitor exercised total control of the Company, including over the cash management system and who would be paid and when. The Company did not have access to any cash and could not pay for anything without the Monitor's permission.³²

47. Effectively, the only way the Company can pay its counsel is through the mechanism set out in section 5.1 of the Accommodation Agreement.

48. Furthermore, the proceeds from the sale of the business and all of the Company's assets are currently in the hands of the Receiver. Since Bridging has refused to honour its obligation under s. 5.1 of the Accommodation Agreement, the only way the Company can pay its counsel is from the funds currently in the Reserve.

³⁰ Thomas Affidavit, *supra.*, para. 73, Responding Motion Record, Tab 1, pg. 15.

³¹ Thomas Affidavit, *ibid.*, para. 39, Responding Motion Record, Tab 1, pg. 8.

³² Thomas Affidavit, *ibid.*, paras. 55-57, Responding Motion Record, Tab 1, pgs. 11-12.

Contractual interpretation requires payment of Blaney's fees

49. Contractual interpretation is an exercise in giving effect to the intentions of the parties. It is of paramount importance to achieve accuracy in interpretation. Accuracy in interpretation requires consideration of two things, namely the words selected by the parties to set out their agreement and the context in which those words have been used.³³

50. The Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.* held that:

The overriding concern is to determine “the intent of the parties and the scope of their understanding”. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.³⁴

51. In the present case, the parties negotiated and agreed to the terms of the Accommodation Agreement. In particular, the parties turned their mind to section 5.1, which was negotiated in several drafts, and was the agreed to mechanism under which Blaney's fees would be paid.³⁵

52. The ordinary words of the contract and the context of the agreement clearly set out the intentions of the parties, namely that Bridging is required to pay Blaney's reasonable fees and disbursements upon the Monitor's recommendation during the Forbearance Period.

³³ Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd Ed. (Markham: LexisNexis Canada, 2012) at pg. 9, Respondents' Brief of Authorities, Tab 5.

³⁴ *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (SCC), para. 47, Respondents' Brief of Authorities, Tab 6.

³⁵ Thomas Affidavit, *supra.*, paras. 66-70, Responding Motion Record, Tab 1, pgs. 13-14.

53. This obligation is subject to two caveats: (a) Bridging is only required to fund up to a maximum of \$20,000 in connection with the Accommodation Agreement or the Monitor Order; and (b) Bridging is not required to fund "...work done in opposition to motions brought by the Monitor or [Bridging] in connection with the RISP or any transaction resulting from the RISP."³⁶

54. Blaney's fees \$90,324.63 are set out in three accounts: Invoice No. 607546, Invoice No. 611218 and Invoice No. 612584. Invoice No. 607546 dated April 30, 2017 represents work done by Blaney between April 21st and April 30th relating to the Accommodation Agreement or the Monitor Order, and is approximately \$20,000. Invoices No. 611218 and 612584, dated June 30th and July 11th, respectively, relate to work done during the Forbearance Period, and do not include work done in opposition to motions brought by the Monitor or Bridging. Moreover, nothing in the accounts relates to the preparation or negotiation of Mr. Robert Thomas' offer to purchase the Company, for which Mr. Thomas hired other counsel.³⁷

55. In addition, the invoices relate to services rendered up to and including June 20, 2017, which falls within the Forbearance Period under the Accommodation Agreement.

56. The evidence on this motion establishes that the Accommodation Agreement was in good standing up until the approval of the sale and the appointment of the Receiver.³⁸

57. The Company was entitled to rely on the expectation that Bridging would pay these accounts in accordance with its obligations under the Accommodation Agreement.

³⁶ Thomas Affidavit, *supra*, Exhibit "D", section 5.1, Responding Motion Record, Tab 1D, pg. 44.

³⁷ Thomas Affidavit, *ibid.*, para. 76, Responding Motion Record, Tab 1, pg. 16.

³⁸ Thomas Affidavit, *ibid.*, para. 49, Responding Motion Record, Tab 1, pg. 10.

PART IV - RELIEF REQUESTED

30. The Respondents respectfully request that this Honourable Court make an Order directing the Receiver to pay Blaney the sum of \$90,324.63 from the Reserve, plus its costs in seeking this relief.

31. In the alternative, the Respondents respectfully request a charge in the amount of \$90,324.63 equal in priority to the Receiver's Charge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON SEPTEMBER 15, 2017.



David Ullmann
Counsel for the Respondents

SCHEDULE “A” - AUTHORITIES

1. Order (Appointment of Monitor) of the Honourable Mr. Justice Newbould, dated May 1, 2017
2. Order (Appointment of Receiver) of the Honourable Justice Conway, dated June 21, 2017
3. Approval and Vesting Order of the Honourable Justice Conway, dated June 21, 2017
4. *H.S.C. Aggregates Ltd. v. McCallum*, 2014 ONSC 6214, para. 105
5. Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd Ed. (Markham: LexisNexis Canada, 2012)
6. *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (SCC)

SCHEDULE “B” - STATUTE

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under [section 50.4](#) or a proposal is filed under [subsection 62\(1\)](#) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee’s duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

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Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**
Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENTS,
Thomas Canning (Maidstone) Limited and
692194 Ontario Limited**
(Motion Returnable September 27, 2017)

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