

JUN 15 2022

No. **S-224806**
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA

PETITIONER

AND:

PREMIUM COMFORT HEATING & AIR CONDITIONING LTD.,
DAMIAN GERARD ELIA GASPARETTO, and
DIANE ALICIA SECORD

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

**PREMIUM COMFORT HEATING
& AIR CONDITIONING LTD.**

Registered and Records Office
208 – 1664 Richter Street
Kelowna, BC V1Y 8N3

DAMIAN GERARD ELIA GASPARETTO

10271 Bryson Drive
Richmond, BC V7A 4P8

DIANE ALICIA SECORD

10271 Bryson Drive
Richmond, BC V7A 4P8

This proceeding is brought for the relief set out in Part 1 below, by the Petitioner, National Bank of Canada (the “**Petitioner**” or the “**Bank**”).

If you intend to respond to this Petition, you or your lawyer must

1. file a Response to Petition in Form 67 in the above-named registry of this Court within the time for Response to Petition described below, and
2. serve on the Petitioner
 - (a) 2 copies of the filed Response to Petition, and
 - (b) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for Response to Petition

A Response to Petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by Order of the Court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, B.C., V6Z 2E1
(2)	The ADDRESS FOR DELIVERY is: Fasken Martineau DuMoulin LLP 2900 - 550 Burrard Street Vancouver, B.C. V6C 0A3 Fax number for delivery is: n/a E-mail address for service is: n/a
(3)	The name and office address of the Petitioner’s Solicitor is: Fasken Martineau DuMoulin LLP 2900 - 550 Burrard Street Vancouver, B.C. V6C 0A3 Telephone: 604 631 3131. (Reference: 248426.01483/Kibben Jackson)

CLAIM OF THE PETITIONER

Part 1: DECLARATIONS AND ORDERS SOUGHT

1. A Declaration that pursuant to a general security agreement dated January 29, 2020 (the “GSA”) and a general assignment of book debts dated January 29, 2020 (the “Assignment of Book Debts”, and, together with the GSA, the “Security

Agreements”), Premium Comfort Heating & Air Conditioning Ltd. (“**Premium Comfort**” or the “**Debtor**”) granted a security interest in favour of the Petitioner, which security interest constitutes a charge in favour of the Petitioner over all present and after acquired personal property of Premium Comfort and all proceeds thereof (the “**Property**”) in priority to the interests therein or claims thereto of all Respondents;

2. A Declaration that the amounts owing to the Petitioner and secured under the Security Agreements are due and owing;
3. Judgment against Premium Comfort in the amount of \$2,146,640.30 together with interest accruing thereon subject to fluctuations in the Bank’s prime rate from June 14, 2022 to the date of payment, and together with the Petitioner’s costs of and related to this proceeding;
4. Judgment against the Respondents Damian Gerard Elia Gasparetto and Diane Alicia Secord (together, the “**Guarantors**”), jointly and severally, in the amount of \$500,000 plus interest thereon;
5. An order, substantially in the form set out in Schedule “A” hereto, appointing FTI Consulting Canada Inc. (“**FTI**”) as receiver and manager, without security, of the Property pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”), section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (the “**LEA**”) and section 65 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the “**PPSA**”);
6. Costs of this action against the Debtor and the Guarantors, jointly and severally, on a solicitor and own client basis or, alternatively, on such basis as this Honourable Court may deem just; and
7. Such further relief as the circumstances may require and as this Honourable Court deems appropriate.

Part 2 FACTUAL BASIS

The Parties and Background

1. The Petitioner is a chartered bank of Canada having an address for service c/o Fasken Martineau DuMoulin LLP, 2900 – 550 Burrard Street, Vancouver, B.C.
2. The Respondent Premium Comfort is a company incorporated pursuant to the laws of British Columbia, with a registered and records office at 208 - 1664 Richter Street, Kelowna, B.C.
3. Damian Gerard Elia Gasparetto is a businessperson and director of Premium Comfort, having an address of 10271 Bryson Drive, Richmond, B.C.
4. Diane Alicia Secord is a businessperson and director of Premium Comfort, having an address of 10271 Bryson Drive, Richmond, B.C.

The Secured Indebtedness

5. Pursuant to an offer of financing dated December 12, 2019 among the Petitioner and the Debtor, as amended by further agreement dated February 4, 2021 (as amended, the “**Credit Agreement**”), among other things, the Bank advanced loans or made certain credit facilities available to Premium Comfort (collectively, the “**Credit Facilities**”), including:
 - (a) a demand revolving operating credit facility;
 - (b) a business transfer term loan;
 - (c) an EFT settlement facility and
 - (d) a MasterCard facility.
6. As security for Premium Comfort’s obligations to the Petitioner, Premium Comfort granted certain security in favour of the Petitioner, including without limitation:
 - (a) the GSA, in respect of which a financing statement was filed in the Personal Property Registry at Victoria under base registration number 025377M on January

27, 2020, by which Premium Comfort granted a charge in favour of the Petitioner on all present and after acquired goods of Premium Comfort; and

(b) the Assignment of Book Debts.

7. On January 26, 2020, the Guarantors executed a letter of guarantee by which they jointly and severally guaranteed all obligations of Premium Comfort to the Bank limited to the sum of \$500,000 plus interest thereon in accordance with the terms thereof (the “**Guarantee**”).

The Default

8. The Debtor defaulted on its obligations to the Petitioner under the Credit Agreement, including by virtue of:
- (a) being outside the Working Capital Ratio (as defined in the Credit Agreement) for the periods ending January 21, February 28, and March 31, 2022; and
 - (b) delivering on May 20, 2022 the monthly and quarterly financial reporting which was required to have been provided by April 30, 2022.
9. Subsequent to these events of default, the parties began negotiating a forbearance agreement.
10. On June 10, 2022:
- (a) the Debtor advised the Petitioner that it was shutting down operations effective immediately;
 - (b) the Petitioner made immediate demand on the Debtor to pay the balance of the debt owing, which the Debtor has failed to do; and
 - (c) the Petitioner delivered a Form 86 Notice of Intention to Enforce a Security to the Debtor, which the Debtor endorsed and returned to the Petitioner, thereby waiving the 10-day notice period before the Petitioner could enforce its security.

11. On June 11, 2022, the Petitioner engaged a bailiff to attend at the Debtor's premises, change the locks and remove some of the collateral, consisting primarily of vehicles, to a secure storage compound.
12. On June 14, 2022, the Petitioner made demand on the Guarantors to pay the full amount contemplated under the Guarantee, which the Guarantors have failed to do.
13. As at June 14, 2020, the Debtor was indebted to the Petitioner in the amount of \$2,146,640.30, exclusive of legal and other costs. Interest continues to accrue on the foregoing amount subject to fluctuations in the Petitioner's prime rate. The amount owing to the Petitioner by the Debtor, including accruing interest and legal costs is hereafter referred to as the "**Indebtedness**".

Need for Receivership Order and Urgency

14. Upon shutting down operations, the Debtor advised the Petitioner that some of its employees and suppliers were taking assets off the business premises. While a bailiff was engaged by the Petitioner to change the locks and move certain mobile assets to a secure location, because the premises are vacant and assets remain on and around the premises, the Petitioner is concerned that the Property's value may be impaired due to neglect, looting and vandalism.
15. Mr. Gasparetto has advised the Petitioner that the Debtor and he will cooperate fully with the Bank's attempts to enforce its security, understood that the Bank would seek the immediate appointment of a receiver, and raised no objections to the Bank's stated intention to do so.

Consent of Licensed Trustee in Bankruptcy to Act as Receiver

16. FTI, a trustee within the meaning of section 2 of the BIA, is qualified to act as receiver and manager of the Property, has consented and agreed to act as such and is acceptable to the Petitioner.

Part 3 LEGAL BASIS

17. The Petitioner relies on:

- (a) Rules 1-3, 2-1, 10-2, 13-5, 14-1, 16-1 and 22-1 of the *Supreme Court Civil Rules*;
 - (b) the BIA, including section 243 thereof;
 - (c) the LEA, including section 39 thereof;
 - (d) the PPSA, including section 65 thereof; and
 - (e) such other legal basis as counsel may advise.
18. The Petitioner applies for an order appointing FTI as the receiver and manager of the Property.
19. The Petitioner is a secured creditor of the Debtor having a perfected security interest in the Property by virtue of the Security Agreements.
20. The overarching consideration of the court on an application to appoint a receiver is whether it is just and convenient in all of the circumstances.
- Cascade Divide Enterprises Inc. v. Laliberte*, 2013 BCSC 263;
Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., 2009 BCSC 1527.
21. The appointment of a receiver of the Property is just and convenient in the circumstances.
22. There are a number of factors that may figure in the determination of whether it is appropriate to appoint a receiver:
- (a) whether irreparable harm might be caused if no order were made;
 - (b) the nature of the property;
 - (c) the apprehended or actual waste of the debtor's assets;
 - (d) the preservation and protection of the property;
 - (e) the balance of convenience to the parties;
 - (f) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
 - (g) the effect of the order upon the parties;
 - (h) the conduct of the parties;
 - (i) the cost to the parties;

- (j) the likelihood of maximizing return to the parties;
- (k) the goal of facilitating the duties of the receiver.

Maple Trade Finance, at para. 25.

23. On the whole, the factors favour the granting of a receivership order.
24. In this case, preservation and protection of the Property are necessary as there is a risk of waste of the Debtor's assets, particularly as there has already been reported looting of the Property and the Debtor's premises are unoccupied.
25. The Petitioner is currently owed well over \$2 million dollars and the Debtor has admitted it is unable to meet its payment obligations.
26. Premium Comfort is aware of and has not raised any concerns with respect to the Bank's intention to appoint a receiver. Premium Comfort waived the notice period to enforce security, essentially "handed over the keys" to the Petitioner and has no intention of continuing the operation of its business.
27. The GSA provides that the Petitioner is entitled to appoint a receiver upon the Debtor's default.
28. The Petitioner requires the appointment of a receiver to ensure the Property is secured and preserved, and to complete a timely sale of the Property.
29. The Petitioner is seeking the appointment of a receiver over all of the Debtor's assets, and seeks to have the court-ordered charges contemplated under the draft receivership order attach to those assets in priority to the interests of all other persons, including secured creditors whose secured claims may rank ahead of the Petitioner's.
30. The fact that other creditors may have security interests in the debtor's property which rank ahead of the security interest of the appointing creditor is not a bar to the order sought, including granting charges over such assets to secure the receiver's expenses. While the decision is discretionary and determined on a case-by-case basis, courts have held that it may be appropriate to make such an order where:

- (a) the receiver has been appointed at the request, or with the consent or approval, of the security holders;
- (b) the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; or
- (c) the receiver has expended money for the necessary preservation or improvement of the property.

Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.,
9 OR (2d) 84, 59 DLR (3d) 492, at 88;
Royal Bank of Canada v Reid-Built Homes Ltd, 2018 ABQB 124 (“**Reid-Built**”), at para. 19.

31. In the event that a secured creditor with a security interest in one or more of the Debtor’s assets which ranks ahead of that of the Petitioner wants its collateral to be exempt from the receivership, including the court-ordered charges granted therein, they are entitled to seek such relief at a later stage of the proceeding. This approach has been encouraged by the courts of British Columbia, Alberta and Ontario to enable receivers “to maintain control over the debtor’s assets to ensure their advantageous and orderly disposition for the benefit of all creditors and to avoid duplicative costs that would otherwise arise from multiple sales.”

Royal Bank of Canada v Delta Logistics, 2017 ONSC 368, at paras. 26-27;
Reid-Built, at para. 97.

32. Whether any of the collateral subject to security interests which rank in priority to that of the Petitioner should later be released by the receiver to the creditor having the first-ranking security interest in such asset will depend on a number of factors, including:
- (a) whether the receiver requires the use of the asset in order to carry out its duties, including the operation of the debtor’s business;
 - (b) whether the receiver is of the view that selling the assets en bloc rather than piecemeal is more beneficial to the stakeholders as a whole;
 - (c) whether there is any equity in such asset; and
 - (d) whether there are any claims which attach to such asset in priority to all other creditors (i.e. deemed trust claims of Canada Revenue Agency).

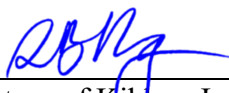
33. In the present case, the Petitioner has already incurred costs in order to secure the Debtor's assets after it ceased operations and abandoned its business premises. The receiver, if appointed, will similarly incur costs securing and preserving the Debtor's assets pending their disposition. Such actions have benefited, and will continue to benefit, all of the Debtor's secured creditors.
34. In the circumstances, including most significantly the Debtor's abandonment of its premises and assets, the overall balance of convenience favours the immediate appointment of a receiver over all of the Debtor's assets, and securing the receiver's expenses against all of the Debtor's assets is appropriate.
35. The draft receivership order includes provisions which facilitate an application by a secured creditor affected by the order to seek relief from the order, specifically:
 - (a) paragraph 27, which allows any interested party to apply for an order allocating the court-ordered charges amongst the assets; and
 - (b) paragraph 34, which allows any interested party to apply to the court for an order amending or varying the receivership order itself.

Part 4 MATERIAL TO BE RELIED ON

36. Affidavit #1 of Sonia de Lorenzi, sworn June 15, 2022;
37. Consent to Act, FTI Consulting Canada Inc.; and
38. Such further and other material as counsel may advise and this Honourable Court deems admissible.

The petitioner estimates that the hearing of the application will take 30 minutes.

Dated: 15-Jun-2022

 (articled student)
for Signature of Kibben Jackson
Lawyer for Petitioner

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this Petition

with the following variations and additional terms:

.....
.....
.....
.....

Date:

.....
Signature of Judge Master

SCHEDULE "A"

FORM OF RECEIVERSHIP ORDER