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JS
Oct. 15, 2025
J. Lema

COURT FILE NUMBER	2501-06120
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., and SUNTERRA ENTERPRISES INC.
APPLICANT	**NATIONAL BANK OF CANADA**
RESPONDENTS	**SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC., RAY PRICE, DEBBIE UFFELMAN and CRAIG THOMPSON**
DOCUMENT	**BENCH BRIEF OF NATIONAL BANK OF CANADA**
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BENCH BRIEF OF NATIONAL BANK OF CANADA

APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE LEMA

OCTOBER 15, 2025 at 10:00 a.m.

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I. INTRODUCTION

1. On October 15, 2025, the Court will be asked to consider separate requests made by:

   (a) National Bank of Canada ("**NBC**") to question a representative of KPMG as the auditor of the Sunterra Respondents' financial statements ("**KPMG**" or the "**Sunterra Auditor**");

   (b) the Sunterra Respondents to question the Chief Executive Officer and Chief Compliance Officer of NBC; and

   (c) the Sunterra Respondents to question the Chief Executive Officer and Chief Compliance Officer of Compeer.

2. Each of these requests has to be considered separately because each are subject to very different rules and principles.

   (a) This particular bench brief is submitted by National Bank of Canada ("**NBC**"), in support of NBC's application filed October 6, 2025 (the "**Application**"), seeking to question the Sunterra Auditor.

   (b) The Sunterra Respondents' request to question NBC's Chief Executive Officer and Chief Compliance Officer, Capital Markets, will be dealt with in a separate reply brief.

   (c) NBC has no submissions to make in respect of the Sunterra Respondents' request to question Compeer's CEO and compliance officer.

3. There are two separate claims processes underway, each of which is subject to very different procedural orders. NBC's request to question the Sunterra Auditor, and the Sunterra Respondents' request to question NBC's CEO and Chief Compliance Officer, Capital Markets, are to be determined pursuant to the Consent Order (Scheduling) made in respect of the "**NBC v. Sunterra Claims**"[1] (the "**NBC Scheduling Order**"). That Order is very different from the similarly titled Consent Order (Scheduling) that concerns the Compeer v. Sunterra Claims.

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[1] NBC Scheduling Order, Schedule "A" at para. 1(i):
"NBC v. Sunterra Claim" means every claim NBC has against the Sunterra Parties, or any of them, for:
(i) contribution and indemnity arising out of or in any way connected to the Compeer v. NBC Claim; and

4. In particular, Schedule A of the NBC Scheduling Order concerning the NBC v. Sunterra Claims specifically incorporates Rule 5.17 and 5.18 of the *Rules of Court*:

> 9. Each of the witnesses that are identified by a Party as being additional individuals falling **within the scope of Rules 5.17 and 5.18** pursuant to the process below shall be questioned pursuant to Rule 6.6 if they file affidavits and Rule 6.8 if they do not file affidavits, by the Parties who are adverse in interest.
>
> 10. On or before September 5, 2025, the Sunterra Parties shall advise NBC of the names of any two additional individuals **who are current or former NBC employees, officers or directors within the scope of Rules 5.17 and 5.18 associated with NBC** (apart from the deponents of affidavits filed by NBC and Listed Witnesses) and associated with NBC (apart from the deponents of affidavits filed by NBC), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 12, 2025.
>
> 11. Each deponent of an affidavit filed by the Sunterra Parties, each Listed Witness associated with the Sunterra Parties and **each individual who is identified by NBC as falling within the scope of Rules 5.17 and 5.18 as they relate to the Sunterra Parties** (collectively, the "**Sunterra Witnesses**") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by NBC.
>
> 12. On or before August 29, 2025, NBC shall advise the Sunterra Parties **the names of any two additional individuals excluding current or former officers and directors of the US Sunterra Entities within the scope of Rules 5.17 and 5.18 associated with the Sunterra Parties** (apart from the deponents of affidavits filed by the Sunterra Parties and the Listed Witnesses), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 29, 2025.
>
> 13. Each deponent of an affidavit filed by NBC and each individual who is identified by the Sunterra Parties as falling within the scope of Rules 5.17 and 5.18 as they relate to NBC (collectively, the "NBC Witnesses") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by the Sunterra Parties.

Consent Order (Scheduling), granted on July 24, 2025 at paras. 9-13 [emphasis added] ["NBC Scheduling Order"].

5. Different parts of Rule 5.17 address a party's ability to question the opposite party's current and former officers and directors [Rule 5.17(1)(b)], the opposite party's current and former employees [Rule 5.17(1)(d)] and the opposite party's auditor or former auditor [Rule 5.17(1)(e)]:

> **5.17(1)** A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:
>
> …
>
> (b) if the party adverse in interest is a corporation,

(ii) damages,

which claim shall exclude a claim for the NBC Indebtedness as set out in paragraph 2 of this Order;

(i) one or more officers or former officers of the corporation **who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation**, and
(ii) the corporate representative;

…

(d) one or more other persons who are or were employees of the party adverse in interest **who have or appear to have relevant and material information that was acquired because of the employment**;

(e) an auditor or former auditor engaged by a party adverse in interest, but not an auditor or former auditor engaged solely for the purpose of the action;

***Rules of Court*, Alta. Reg. 124/2010 ["*Rules of Court*"] at R. 5.17(1)(b), (d), (e) [emphasis added] [Book of Authorities ("BOA") TAB 2].**

6. This brief will focus on the NBC Scheduling Order concerning the NBC v. Sunterra Claims and Rule 5.17(1)(e) which concerns the opposite party's auditors.

II. THE FACTS

A. The Commitment Letter Reporting Requirements

7. The Amended & Restated Commitment Letter (the "**Commitment Letter**")[2] that is central to the matters before the Court was made on November 15, 2022, among NBC and:

(a) Sunterra Farms Ltd. ("**Sunterra Canada**"), Sunwold Farms Limited ("**Sunwold Canada**"), Sunterra Food Corporation ("**Sunterra Food**"), Trochu Meat Processors Ltd. ("**Trochu Meat**"), Sunterra Quality Food Markets Inc. ("**Sunterra Markets**") (collectively, the "**Borrowers**"), and

(b) the Borrowers, Sunterra Beef Ltd. ("**Sunterra Beef**"), Sunterra Enterprises Inc. ("**Sunterra Enterprises**"), Sunterra Farm Enterprises Ltd. ("**Sunterra Farm Enterprises**"), and Lariagra Farms Ltd. ("**Lariagra Canada**") as guarantors, (collectively and alternatively the "**Guarantors**" or the "**Canadian Sunterra Entities**" as the context requires).

8. Schedule "C" of the Commitment Letter required the Borrowers to deliver to NBC certain financial statements prepared to various assurance standards on a monthly and annual basis. Included among the financial statements required to be delivered to NBC annually were:

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2 Affidavit #4 of Raymond Pai, sworn October 6, 2025 ["**Pai #4 Affidavit**"], Exhibit "A" ["**Commitment Letter**"].

(a) audited, annual consolidated financial statements, prepared by a firm of qualified professional accountants, of the "**Sunterra Group of Companies**"[3] which was comprised of:

(i) Sunterra Farm Enterprises (a Guarantor) and its affiliates:

A. Sunterra Canada (a Borrower);

B. Sunwold Canada (a Borrower); and

C. Sunterra Farms Greenhouse Ltd.;

(ii) Sunterra Food (a Borrower) and its affiliates:

A. Sunterra Markets (a Borrower);

B. Sunterra Wine Markets Inc.; and

C. Trochu Meat (a Borrower);

(iii) Sunterra Enterprises (a Guarantor) and its affiliates:

A. Sunwold Farms Inc. ("**Sunwold US**");

B. Sunterra Farms Iowa Ltd. ("**Sunterra Iowa**");

C. Lariagra Farms South Inc.; and

D. Sunterra Beef (a Guarantor);

(b) review engagement, annual consolidated financial statements, prepared by a firm of qualified professional accountants, of Sunterra Farm Enterprises,[4] Sunterra Food,[5] and Sunterra Enterprises;[6]

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3 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 5.
4 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 8.
5 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 7.
6 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 9.

(c) annual financial statements consolidating all Borrowers: Sunterra Canada, Sunwold Canada, Sunterra Food, Trochu Meat and Sunterra Markets;[7]

(c) notice to reader, annual unconsolidated financial statements for each of Sunterra Canada, Sunwold Canada, Trochu Meat and Sunterra Markets;[8] and

(d) any further information, data, financial reports and records, accounting or banking statements, certificates, evidence of insurance and other assurances which NBC may from time to time require in its sole discretion, acting reasonably,[9]

(collectively, the "**Commitment Letter Reporting Requirements**").

9. The Sunterra Group of Companies that were to be the subject of the annual audited consolidated financial statements provided to NBC annually was comprised of the Borrowers, the Guarantors and certain of their affiliates: Sunterra Farms Greenhouse Ltd., Sunterra Wine Markets Inc., Sunwold US, Sunterra Iowa, and Lariagra Farms South Inc. The last 3 of these were subsidiaries of Sunterra Enterprises. Sunwold US and Sunterra Iowa are the US entities implicated in the cheque kiting scheme that is central to the NBC v. Sunterra Claim (and also the Compeer v. Sunterra Claim). Sunterra Enterprises' consolidated financial statements were also required to be delivered annually subject to a review engagement.[10]

B. KPMG was the Canadian Sunterra Entities' Auditor for 2022 and 2023

10. KPMG was the external auditor of certain of the financial statements required to be delivered annually to NBC pursuant to the Commitment Letter and also prepared the other financial statements to other assurance standards required pursuant to the Commitment Letter.

11. For the 2022 fiscal year, NBC was provided with:

(a) consolidated financial statements for the Sunterra Group of Companies audited by KPMG (the "**2022 Audited Statements**");[11]

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7 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 10.

8 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 11.

9 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 14.

10 Pai #4 Affidavit, Exhibit A (Commitment Letter), Schedule C, paragraph 9.

11 Pai #4 Affidavit, Exhibit B.

(b) annual consolidated financial statements that were the subject of a review engagement by KPMG, of Sunterra Food,[12] Sunterra Farm Enterprises,[13] and Sunterra Enterprises;[14]

(e) annual financial statements subject to a compilation engagement by KPMG consolidating all Borrowers[15] (Sunterra Canada, Sunwold Canada, Sunterra Food, Trochu Meat and Sunterra Markets);[16]

(f) unconsolidated financial statements subject to a compilation engagement by KPMG for each of Sunterra Canada,[17] Sunwold Canada,[18] Trochu Meat,[19] and Sunterra Markets;[20] and

(g) although not specifically required by the Commitment Letter, NBC was also provided with unconsolidated financial statements subject to compilation or review engagements by KPMG for each of Sunwold US (subject to a compilation engagement),[21] Sunterra Iowa (subject to a compilation engagement),[22] Lariagra Farms South Inc. (subject to a compilation engagement),[23] and Sunterra Farms Greenhouse Ltd. (subject to a review engagement).[24]

12. However, for the 2023 fiscal year audit cycle:

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12 Pai #4 Affidavit, Exhibit C.

13 Pai #4 Affidavit, Exhibit D.

14 Pai #4 Affidavit, Exhibit E.

15 Pai #4 Affidavit, para. 7(c): The title of this document refers to Sunwold US although the requirement under the Commitment Letter was that such financial statement would be provided for the Borrowers (including Sunwold Canada, rather than Sunwold US). It is unclear whether the error is in referencing the wrong corporate name or in consolidating the wrong party.

16 Pai #4 Affidavit, Exhibit F.

17 Pai #4 Affidavit, Exhibit G.

18 Pai #4 Affidavit, Exhibit H.

19 Pai #4 Affidavit, Exhibit I.

20 Pai #4 Affidavit, Exhibit J.

21 Pai #4 Affidavit, Exhibit K.

22 Pai #4 Affidavit, Exhibit L.

23 Pai #4 Affidavit, Exhibit M.

24 Pai #4 Affidavit, Exhibit N.

(a) NBC was not provided with consolidated financial statements for the Sunterra Group of Companies, whether audited by KPMG or any other firm of qualified professional accountants;[25]

(b) NBC was provided with annual consolidated financial statements that were the subject of a review engagement by KPMG, in respect of Sunterra Farm Enterprises[26] and Sunterra Food;[27]

(c) However, NBC was not provided with review engagement (or any other assurance standard), annual consolidated financial statements for Sunterra Enterprises;[28]

(d) NBC was provided with annual financial statements subject to a compilation engagement by KPMG consolidating all Borrowers[29] (Sunterra Canada, Sunwold Canada, Sunterra Food, Trochu Meat and Sunterra Markets) (the "**2023 Compilation Engagement Statements**");[30] and

(e) NBC was provided with annual unconsolidated financial statements subject to compilation engagements by KPMG for each of Sunterra Canada,[31] Sunwold Canada,[32] Trochu Meat,[33] Sunterra Markets,[34] and Sunterra Beef.[35]

13. NBC has not yet been provided with the applicable financial statements in respect of the fiscal year ended December 31, 2024, as required under the Commitment Letter.[36]

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25 Pai #4 Affidavit, paragraph 9(a).

26 Pai #4 Affidavit, Exhibit O.

27 Pai #4 Affidavit, Exhibit P.

28 Pai #4 Affidavit, paragraph 9((b)

29 Pai #4 Affidavit, paragraph 9(c): The title of this document refers to Sunwold US although the requirement under the Commitment Letter was that such financial statement would be provided for the Borrowers (including Sunwold Canada, rather than Sunwold US). It is unclear whether the error is in referencing the wrong corporate name or in consolidating the wrong party.

30 Pai #4 Affidavit, Exhibit Q.

31 Pai #4 Affidavit, Exhibit R.

32 Pai #4 Affidavit, Exhibit S.

33 Pai #4 Affidavit, Exhibit T.

34 Pai #4 Affidavit, Exhibit U.

35 Pai #4 Affidavit, Exhibit V.

36 Pai #4 Affidavit, paragraph 11.

C. The Claim

14. NBC's claim (the "**Claim**"),[37] made pursuant to the NBC Scheduling Order, seeks relief against the Respondents for:

(a) contribution and indemnity arising or in any way connected to the "Compeer v. NBC Claim" (as defined in the NBC Scheduling Order);[38] and,

(b) damages.

15. Among other things, the Claim alleges that the Canadian Sunterra Entities breached the Commitment Letter Reporting Requirements by, *inter alia*:

(a) the Canadian Sunterra Entities' failing to provide annual financial statements, following the provision of audited financial statements for the year ended December 31, 2022. Specifically, for the year ended December 31, 2023, the only financial statements provided were prepared to the "compilation engagement" assurance standard, and not audited or the subject of a review engagement;[39] and,

(b) Sunterra Canada, Sunwold Canada, Sunwold US, Sunterra US, Ray Price, Debbie Uffelman, and Craig Thompson:

(i) providing false and knowingly misleading information when providing information in purported satisfaction of the Commitment Letter Reporting Requirements;

(ii) providing (or causing to be provided) financial information and records to NBC, which failed to disclose the Kiting Scheme (as defined in the Claim) and were false or contained misrepresentations as to the status and transactions taking place; and

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37 As of October 6, 2025, the Claim has not yet been filed, due to timing issues related to the receipt of the filed copy of the Consent Order. NBC and the Canadian Sunterra Entities will seek a fiat by consent to permit the filing of the Claim.

38 ""**Compeer v. NBC Claim**" means every claim Compeer has or may have against National Bank of Canada (as amalgamation successor to Canadian Western Bank) that is related to, arises from or is in anyway connected to Canadian Western Bank dishonoring cheques issued by Sunterra Farms Inc. or Sunwold Farms Limited in favour of the Sunterra US Entities."

39 Claim at para. 30.

(iii) misrepresenting the quantum of the inter-company receivables as between Sunterra Canada, Sunwold Canada and the US Sunterra Entities,

all in order to actively maintain and conceal the Kiting Scheme (as defined in the Claim), while knowing they were being deceitful about the truth of such matters, or being willfully blind, or being reckless, as to the truth of such matters.[40]

16. As the Sunterra Auditor, KPMG has first-hand knowledge of:

(a) the financial statements referenced above;

(b) the scope of the audit of the 2022 Audited Statements;

(c) the scope, planning, interim findings, communications with the Sunterra Group's management and board, and the reasons for cessation of the audit of the consolidated financial statements for the Sunterra Group of Companies for the 2023 fiscal year and the timing of when this determination was made.[41]

17. This evidence is relevant and material to NBC's Claim and the efficient summary determination directed by the Court. In particular, the aforementioned financial statements provide point-in-time information regarding the financial circumstances of the Sunterra Group of Companies, and in particular the corporate respondents, that is relevant and material to the Claim. It is expected that KPMG would be able to fill a material evidentiary gap that is not available without KPMG's evidence, as KPMG would have reviewed the relevant accounts and materials in the course of the 2023 audit, prior to its cessation.[42]

18. On August 29, 2025, NBC requested that the Respondents produce KPMG for questioning under Rules 5.17 and 5.18, pursuant to paragraph 12 of the NBC Scheduling Order.[43]

19. The Canadian Sunterra Entities refused to produce KPMG for questioning but offered no reason or rationale for their refusal.[44]

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40 Claim at para. 94.

41 Pai #4 Affidavit, para. 12.

42 Pai #4 Affidavit, para. 13.

43 Pai #4 Affidavit, Exhibit W.

44 Pai #4 Affidavit, Exhibit X.

III. ISSUES

20. The principal issue to be determined in the Application is whether it is appropriate to designate the Sunterra Auditor as an additional witness and authorize questioning under Rule 6.8, considering:

(a) the terms of the NBC Scheduling Order pertaining to the Claim and its incorporation of Rule 5.17(1)(e).

(b) the relevance and materiality of the Sunterra Auditor's potential evidence;

(c) the principles of fairness and proportionality; and,

(d) the appropriate terms for the proposed order (the "**Witness Order**"), including terms related to confidentiality, timing, and co-operation.

IV. LAW

21. Rule 1.2 of the *Rules of Court* requires proportionate, timely, and cost-effective procedures by which claims may be justly decided on their merits:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> …
>
> 1.2(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

***Rules of Court*, R. 1.2(1) and (4) [BOA TAB 2].**

22. Rule 5.2 expresses how information should be determined to be relevant and material:

> 5.2(1) For the purposes of this Part, a question, record or information is **<u>relevant and material</u>** only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to **<u>significantly help determine</u>** one or more of the issues **<u>raised in the pleadings</u>**, or
>
> (b) to ascertain evidence that could reasonably be expected to **<u>significantly help determine</u>** one or more of the issues **<u>raised in the pleadings</u>**.

***Rules of Court*, R. 5.2(1) <u>[emphasis added]</u> [BOA TAB 2].**

23. Rule 5.17(1)(e) permits the questioning of parties, including auditors, about relevant and material records and information:

> 5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:
>
> …
>
>> (e) an auditor or former auditor engaged by a party adverse in interest, but not an auditor or former auditor engaged solely for the purpose of the action;

***Rules of Court*, R. 5.17(1)(e) [BOA TAB 2].**

24. Rule 6.8 governs questioning of witnesses, and states:

> 6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and
>
>> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>>
>> (b) the transcript of the questioning must be filed by the questioning party.

***Rules of Court*, R. 6.8 [BOA TAB 2].**

25. Section 11 of the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") provides broad remedial discretion to the Court to make any order "it considers appropriate in the circumstances":

> **General power of court**
>
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

***Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ["CCAA"], at s. 11 [BOA TAB 1].**

V. ARGUMENT

A. It is Appropriate to Question the Sunterra Auditor

26. KPMG is an auditor as contemplated by Rule 5.17(1)(e) and is an appropriate witness in relation to the Claim.

27. When considering an application under Rule 5.17(1)(e), the Court must consider:

(a) whether the party to be questioned is an auditor or former auditor;

(b) whether the topics of questioning meet the definition of "relevant and material", under Rule 5.2; and,

(c) if ordering the questioning will provide a means by which the Claim can be fairly and justly resolved, and is proportionate.

***Rules of Court*, RR. 1.2 and 5.2(1) [BOA TAB 2];**
***Stewart v Timber Bear Developments Ltd,* 2017 ABQB 594 at paras. 39-40 and 45-50 [BOA TAB 7].**

28. As further described below:

(a) KPMG is an auditor of the Canadian Sunterra Entities, for the purposes Rule 5.17(1)(e), whether in its capacity as auditor of the 2022 Audited Statements, or by its production of the 2023 Compilation Engagement Statements;

(b) KPMG's evidence is relevant and material to the Claim; and,

(c) it is fair and appropriate to question KPMG.

i. KPMG is an "Auditor"

29. The definition of an "auditor", for the purposes of Rule 5.17(1)(e) (and the previous Rule 200(4), under the former *Alberta Rules of Court*, Alta Reg 390/1968 (the "**Previous Rule**")[45],

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[45] The Previous Rule was substantially similar to Rule 5.17(1)(e), and stated:
200(1) Before trial, a party to proceedings may orally examine under oath, without an order of the Court,

…

(c) one or more other persons who

(i) are or were employed by the other party, and

(ii) have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment.

includes an accounting firm who has conducted an audit engagement or a review engagement. As this Honourable Court held in considering the Previous Rule in *Harcap Investments Inc. v Alberta Permit Pro Inc.*:

> I cannot think that the drafters of the Rules of Court had in mind the subtle distinctions within the accounting profession between an audit and a review engagement. To a lay person, the difference between those two tasks is essentially the extent to which information in the company's records is independently examined and verified. Both processes involve an official examination and verification of accounts, by a professional whose work is intended to be relied on by others.
>
> …
>
> For the purpose of this application, I need not decide what other services might bring an external accountant within the meaning of Rule 200(4), but **I am satisfied that the term applies to a public accounting firm, performing or purporting to perform an audit engagement or review engagement** under s. 3(1) of *Regulated Accounting Profession Act*.

***Harcap Investments Inc. v. Alberta Permit Pro Inc.*, 2009 ABQB 643, at paras. 14 and 27 [emphasis added] [BOA TAB 5].**

30. In this case, KPMG performed numerous audit and review engagements as set out above. KPMG is therefore appropriate for NBC to question under Rule 5.17(1)(e), because:

(a) having produced the 2022 Audited Statements for the Canadian Sunterra Entities, KPMG is an "auditor or former auditor" of the Canadian Sunterra Entities; and,

(b) having produced the 2023 Compilation Engagement Statements, KPMG has acted as an "auditor or former auditor" of the Canadian Sunterra Entities in its capacity as a regulated, external accountant.

ii. KPMG's Evidence is Relevant and Material

31. The limitations set out in Rule 5.2(1) regarding relevance and materiality are intended to narrow the scope of discovery, as discussed by the Court of Appeal of Alberta in its commentary on the predecessor rule, Rule 186.1 (now Rule 5.2(1)):

> Oral examination for discovery is now confined to **eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance,**

200(4) In these Rules an auditor who is or has been engaged by a party shall be deemed to be an employee employed by the party, but an auditor engaged solely for the purposes of the action shall not be deemed to be an employee in respect of that engagement.

> **<u>that is, facts from which the existence of the primary facts may be directly inferred.</u>** Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.
>
> In addition to being relevant within the meaning of Rule 186.1, **<u>information sought on discovery must be material, that is, be reasonably expected to "significantly" help determine one or more of the issues raised in the pleadings</u>**. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: Black's Law Dictionary, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in *Weatherill Estate v. Weatherill*, (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also *Tolko Industries Ltd. v. Railink Ltd. (2003)*, 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6.

***NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission*, 2006 ABCA 246, at paras. 12-13 <u>[emphasis added]</u> [BOA TAB 6].**

32. KPMG's evidence is both relevant and material to the Claim, as it is expected to include details regarding:

(a) the audited financials of the Canadian Sunterra Entities, which are required by the Commitment Letter;

(b) the scope and progress of the 2023 audit; and,

(c) the reasons for cessation of the 2023 audit.

33. The expected scope of the questioning of KPMG, in its capacity as the Canadian Sunterra Entities' auditor, is material and relevant to the breach of the Commitment Letter Reporting Requirements, which has been specifically pled by NBC in the Claim.

iii. Questioning KPMG is Fair and Appropriate

34. It is fair and appropriate that NBC be permitted to question KPMG, as:

(a) without the independent Sunterra Auditor's evidence, NBC faces a material evidentiary gap;

(b) management witnesses are not a substitute for the evidence of an independent auditor, particularly where the allegations relate to fraud and concealment by members of management;

(c) the evidence tendered by the Canadian Sunterra Entities, in relation to financial matters, does not address the issues pled by NBC; and,

(d) the Sunterra Auditor's independent vantage point is unique, and there will therefore not be any duplication of other witnesses by KPMG's testimony.

35. Further, the terms of the proposed Witness Order, as discussed below, are reasonable in the circumstances, and provide for a focused and limited questioning of KPMG, in its role as auditor of the Canadian Sunterra Entities.

B. The Terms of the Witness Order are Appropriate

36. It is well established that the authority under section 11 of the CCAA permits the supervising court broad discretionary powers to craft orders it considers appropriate in the circumstances, considering the purpose of the CCAA:

> The most important feature of the CCAA — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court ... **Section 11 of the CCAA confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast.** As the Chief Justice and Moldaver J. recently observed in their joint reasons, "[o]n the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be 'appropriate in the circumstances'" ... Keeping in mind the centrality of judicial discretion in the CCAA regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence... The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA.

***Canada v. Canada North Group Inc.*, 2021 SCC 30, at para. 21 [emphasis added, citations omitted] [BOA TAB 3].**

37. In the context of the CCAA, appropriateness is determined by reference to whether the order will advance the remedial purposes of the statute:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness,

> good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. **Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.** The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

***Century Services v. Canada (Attorney General)*, 2010 SCC 60 at para. 70 [emphasis added] [BOA TAB 4].**

38. The purpose of the NBC Scheduling Order is to determine NBC's Claim, within these CCAA proceedings, in an efficient and timely manner, as part of the restructuring process. Any order advancing that purpose and, by extension, the remedial purpose of the CCAA, is appropriate.

39. The terms of the proposed Witness Order are appropriate in the circumstances. In addition to promoting the resolution of claims within the CCAA process, the Witness Order addresses the following topics:

(a) **Proportionality**: The questioning of KPMG will be limited by: (i) focused topics, related to KPMG's role as auditor of the Canadian Sunterra Entities; (ii) a time limit of 2.5 hours for the questioning to be complete, under Rule 6.8; and, (iii) confidentiality guardrails, which have been included to protect any valid privilege claims or other matters which may be asserted with respect to KPMG's role as auditor. The requirements for the Canadian Sunterra Entities, under the Witness Order, are that they will deliver the waivers and cooperate with the terms of the Witness Order. The Witness Order would provide for costs in the cause.

(b) **Confidentiality**: Any concerns regarding confidentiality issues, arising from KPMG's engagement as a professional accounting firm by the Canadian Sunterra Entities, are addressed via a limited use-and-disclosure order. While there is no auditor–client privilege applicable to testimony generally, any concerns regarding privilege can be asserted on a question-by-question basis.

(c) **Timing**: The direction in relation to timing sought by NBC on this Application is consistent with the timelines in Schedule "A" of the NBC Scheduling Order, which provides that all questioning will be completed by October 24, 2025.

VI. CONCLUSION / ORDER REQUESTED

40. NBC respectfully requests that this Honourable Court approve the Witness Order, in the form attached, with such additions as the Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF OCTOBER, 2025

Sean Collins, KC / Sean Smyth, KC /
Pantelis Kyriakakis / Nathan Stewart /
Samantha Arbor
Counsel to National Bank of Canada

VII. LIST OF AUTHORITIES

Statutes

1. *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, at section 11;

2. *Rules of Court*, Alta. Reg. 124/2010, at Rules 1.2(1) and (4), 5.2(1), 5.17(1)(b), (d), and (e), and 6.8;

Case Law

3. *Canada v. Canada North Group Inc.*, 2021 SCC 30;

4. *Century Services v. Canada (Attorney General)*, 2010 SCC 60;

5. *Harcap Investments Inc. v. Alberta Permit Pro Inc.*, 2009 ABQB 643;

6. *NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission*, 2006 ABCA 246; and,

7. *Stewart v Timber Bear Developments Ltd,* 2017 ABQB 594.