

COURT FILE NUMBER 1901-05010

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF 1056420 ALBERTA LTD.

DEFENDANT HEAVY NORTH CONSTRUCTION LTD.

DOCUMENT **APPLICATION**
(Approval of Accounts and Activities, Distribution of
Remaining Funds, and Discharge of Receiver)

ADDRESS FOR SERVICE Osler, Hoskin & Harcourt LLP
AND CONTACT Suite 2500, TransCanada Tower
INFORMATION OF 450 – 1st Street SW
PARTY FILING THIS Calgary, Alberta T2P 5H1
DOCUMENT

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Email: RVandemosselaer@osler.com
Matter: 1182059

NOTICE TO RESPONDENTS

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

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

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

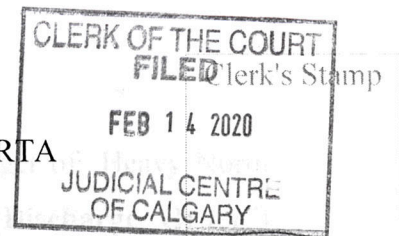
Date: February 26, 2020

Time: 10:00 a.m.

Where: Calgary Courts Centre, 601 – 5th Street SW, Calgary, AB

Before Whom: The Honourable Madam Justice M. Hollins

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



Orders Sought:

1. KPMG Inc. (the “**Receiver**”), in its capacity as receiver and manager of Heavy North Construction Ltd. (the “**Debtor**”) is seeking an Order (the “**Discharge Order**”) substantially in the form attached hereto as **Schedule “A”**:
 - a. abridging the time for service of this Application, if necessary, and declaring that this Application is properly returnable today, and that further service of this Application other than to those listed on the Service List established in these proceedings is hereby dispensed with;
 - b. approving the Receiver’s Statement of Receipts and Disbursements as at discharge, as set out in the Third Report of the Receiver, dated February 14, 2020 (the “**Third Report**”);
 - c. directing and authorizing the Receiver to distribute all remaining funds apart from the Holdback (as defined below) to 1056420 Alberta Ltd. (“**105**”) or, in the alternative, the Debtor’s Bankruptcy Trustee for distribution to the Debtor’s unsecured creditors;
 - d. providing advice and directions to the Receiver with respect to whether the claim of 105 should be treated as debt or equity, and hence whether the claim of 105 should be accorded priority over the claims of unsecured creditors or should be subordinated to the claims of unsecured creditors;
 - e. directing and authorizing the Receiver to maintain a holdback of \$135,600 (the “**Holdback**”) to cover: (i) professional fees of the Receiver and its independent legal counsel, Osler, Hoskin & Harcourt LLP (“**Osler**”) to complete the administration of the Receivership and the Debtor’s ongoing bankruptcy proceeding; and (ii) a potential deemed trust claim asserted by the Canada Revenue Agency (“**CRA**”) in respect of unpaid source deductions (collectively, the “**Holdback Expenses**”);
 - f. in the event any residual funds remain in the Holdback following payment of the Holdback Expenses, authorizing and directing the Receiver to distribute any such

residual funds to 105 or, in the alternative, the Debtor's Bankruptcy Trustee for distribution to the Debtor's unsecured creditors, as the case may be;

- g. approving the Receiver's accounts and Osler's accounts, inclusive of accrual for the fees and disbursements of the Receiver and those of its legal counsel in connection with the completion of these proceedings, including costs of this Application, all as set out in the Third Report;
- h. approving the actions, conduct and activities of the Receiver as described in the Third Report and all other reports filed by the Receiver in these proceedings;
- i. declaring that the Receiver has duly and properly discharged its duties, responsibilities, and obligations as Receiver;
- j. upon the filing of the Receiver's Certificate attached at **Schedule "A"** to the Discharge Order (the "**Receiver's Certificate**"), discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of the discharge of the Receiver's duties as court-appointed receiver of the Debtor, save and except for any liability arising out of fraud or gross negligence or wilful misconduct on the part of the Receiver;
- k. authorizing the Receiver to deliver the books and records of the Debtor to the Debtor's Bankruptcy Trustee; and
- l. granting such further and other relief as counsel may request and this Honourable Court may deem just.

Grounds for making this application:

Approval and Discharge of Receiver

- 2. On April 16, 2019, the Receiver was appointed Receiver, without security, of all of the current and future assets, undertakings and properties of every nature and kind whatsoever and wherever situate of the Debtor, including all proceeds thereof (the "**Receivership Order**").

3. The realization of the Property (as that term is defined in the Receivership Order) is complete. Apart from attending to minor administrative matters, including final payment of all Receivership costs and expenses, final distribution of remaining funds to 105 (or, in the alternative, the Debtor's bankruptcy trustee for distribution to its unsecured creditors), and payment of a potential trust claim which may be asserted by the CRA in respect of unremitted source deduction (if and when a proof of claim is received from the CRA in respect of such trust claim) and other minor administrative matters, the Receiver has performed its mandate as Receiver under the Receivership Order.
4. It is appropriate that the Receiver be discharged as Receiver of the Debtor upon filing of the Receiver's Certificate.

Advice and Direction regarding Proposed Distribution to 105

5. The Receiver was contacted by counsel to a potential unsecured creditor of the Debtor who raised concerns in respect of the characterization of the funds advanced to Heavy North by 105 (the "**105 Advances**") and the associated security position. Specifically, the potential unsecured creditor raised concerns with respect to whether the 105 Advances should be treated as, in substance, an equity claim rather than a debt claim, with the result that 105's claim should be subordinated to all other debt claims.
6. The Receiver undertook an investigation into the 105 Advances but did not identify any information to suggest that the 105 Advances should be treated as equity rather than debt. The Receiver is seeking advice and direction from this Court in respect of whether the 105 Advances rank in priority to, or are subordinate to, Heavy North's unsecured creditors.
7. Such further and other grounds as counsel may recommend and this Honourable Court may permit.

Affidavit or other Evidence and Materials to be used in Support of this Application:

8. The Third Report of the Receiver, dated February 14, 2020;
9. Evidence and Reports of the Receiver previously filed in this Action; and

10. Such further and other evidence or materials as counsel may advise and this Honourable Court may permit.

Applicable Rules:

11. The *Alberta Rules of Court*, Alta Reg. 124/2010.

Applicable Acts and Regulations:

12. The *Bankruptcy and Insolvency Act*, RSC 1985, chap. B-3, as amended.
13. The *Judicature Act*, RSA 2000, c J-2, as amended.

Any Irregularity Complained of or Objection Relied On:

14. None.

How the Application is Proposed to be Heard or Considered:

15. In person before the Honourable Madam Justice M. Hollins on February 26, 2020 at 10:00 a.m.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

Schedule "A"

COURT FILE NUMBER 1901-05010

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF 1056420 ALBERTA LTD.

DEFENDANT HEAVY NORTH CONSTRUCTION LTD.

DOCUMENT **ORDER**
(Approval of Accounts and Activities, Distribution of
Remaining Funds, and Discharge of Receiver)

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 – 1st Street SW
Calgary, Alberta T2P 5H1

Solicitors: Randal Van de Mosselaer
Phone: 403.260.7060
Fax: 403.260.7024
Email: RVandemosselaer@osler.com
Matter: 1182059

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED: February 26, 2020

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Madam Justice M.
Hollins

UPON THE APPLICATION of KPMG Inc., in its capacity as receiver and manager (the "**Receiver**") of Heavy North Construction Ltd. (the "**Debtor**"); **AND UPON** reviewing the Third Report of the Receiver, dated February 14, 2020 (the "**Third Report**") and other Reports previously filed by the Receiver in this Action; **AND UPON** hearing from counsel for the Receiver and counsel for any other interested party appearing at the hearing of the Application; **AND UPON** reviewing the Affidavit of Service of _____, sworn February ____, 2020;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this Application, and time for service of this Application is abridged to that actually given.

APPROVAL OF RECEIPTS, DISBURSEMENTS AND ACCOUNTS

2. The Receiver's accounts and the accounts of its independent counsel, Osler, Hoskin & Harcourt LLP ("**Osler**"), as set out in the Third Report, are hereby approved.
3. The Receiver's Statement of Receipts and Disbursements, as set out in the Third Report, is hereby approved.
4. The Receiver is directed and authorized to maintain a holdback of \$135,600 (the "**Holdback**") to cover: (i) professional fees of the Receiver and Osler to complete the administration of the Receivership and the Debtor's ongoing bankruptcy proceeding; and (ii) a potential trust claim which may be asserted by the Canada Revenue Agency ("**CRA**") in respect of unpaid source deductions (collectively, the "**Holdback Expenses**").
5. The Receiver is authorized and directed to distribute all remaining funds apart from the Holdback to ●.
6. In the event any residual funds remain in the Holdback following payment of the Holdback Expenses, the Receiver is authorized and directed to distribute any such residual funds to ●.

DISCHARGE OF THE RECEIVER

7. As of the date of the Third Report and based on the evidence before this Honourable Court:
 - a. The Receiver has acted honestly and in good faith, and has dealt with the Property (as that term is defined in the Receivership Order granted in these proceedings on April 16, 2019) in a commercially reasonable manner;
 - b. The actions and conduct of the Receiver are approved and the Receiver has satisfied all of its duties and obligations as receiver of the Property;

- c. The Receiver shall not be liable for any act or omission pertaining to the discharge of the Receiver's duties as court-appointed receiver of the Property, save and except for any liability arising out of fraud or gross negligence or wilful misconduct on the part of the Receiver; and
 - d. Any and all claims against the Receiver arising from, relating to or in connection with the performance of the Receiver's duties and obligations as court-appointed receiver of the Property, save and except for claims based on fraud or gross negligence or wilful misconduct on the part of the Receiver, shall be forever barred and extinguished.
- 8. No action or proceeding arising from, relating to, or in connection with the performance of the Receiver's duties and obligations in respect of the Property may be commenced or continued without the prior leave of this Honourable Court, on notice to the Receiver and on such terms as this Honourable Court may direct.
- 9. The Receiver is hereby authorized and permitted to deliver to the Debtor's Bankruptcy Trustee copies of any corporate records in the possession and control of the Receiver relating to the Debtor.
- 10. Upon the filing of the Receiver's Certificate attached hereto as Schedule "A" confirming, among other things, that the Receiver has: (i) finalized payment of all Receivership costs and expenses as set out in the Third Report including, but not limited to, payment of the Holdback Expenses; (ii) distributed all remaining funds to ●; and (iii) completed all other minor administrative matters, the Receiver shall be absolutely and unconditionally discharged as Receiver of the Property and shall have no further duty, liability or obligation with respect to the Property, provided however, that notwithstanding its discharge, the Receiver shall:
 - a. remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership; and
 - b. shall continue to have the benefit of the provisions of this Order and all Orders granted in these proceedings, including all approvals, protections and stays of proceedings in favor of the Receiver in its capacity as Receiver.

MISCELLANEOUS

11. The Receiver has leave to reapply to this Honourable Court for such further advice and directions as may be necessary.
12. This Order must be served only upon those interested parties attending or represented at the within application and service may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents.
13. Service of this Order on any party not attending this application is hereby dispensed with.

J.C.Q.B.A.

Schedule "A"

COURT FILE NUMBER	1901-05010
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	1056420 ALBERTA LTD.
DEFENDANT	HEAVY NORTH CONSTRUCTION LTD.
DOCUMENT	RECEIVER'S CERTIFICATE
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Osler, Hoskin & Harcourt LLP Suite 2500, TransCanada Tower 450 – 1st Street SW Calgary, Alberta T2P 5H1 Solicitors: Randal Van de Mosselaer Phone: 403.260.7060 Fax: 403.260.7024 Email: RVandemosselaer@osler.com Matter: 1182059

Clerk's Stamp

This Receiver's Certificate is the certificate referred to in paragraph 10 of the Order (Approval of Accounts and Activities, Distribution of Remaining Funds, and Discharge of Receiver) of the Honourable Madam Justice Hollins, granted February 26, 2020 (the "Order").

Capitalized terms not otherwise defined herein shall have the meanings given to those terms in the Order.

KPMG Inc., solely in its capacity as Court-appointed receiver (the "Receiver") of the Property (as that term is defined in the Receivership Order) and not in its personal or corporate capacity, hereby certifies that:

1. All Receivership costs and expenses as set out in the Third Report including, but not limited to, the Holdback Expenses, have been paid.
2. All remaining amounts have been distributed to ●.
3. The administration of the receivership proceedings as described in the Third Report have been completed.

Dated this ____ day of _____, 2020.

**KPMG Inc., in its capacity as Receiver of
the undertakings, property and assets of
Heavy North Construction Ltd.**

NAME:

TITLE: