

2022 01G0994

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION

**BETWEEN:**

**HSBC BANK CANADA**

**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC.**

**RESPONDENT**

**ORIGINATING APPLICATION**

*(Inter Partes)*

<b>SUMMARY OF CURRENT DOCUMENT</b>	
Court File Number(s):	2022 01G
Date of Filing Document	March __, 2022
Name of Party Filing or Person	The Applicant, HSBC Bank Canada
Application to which Document being filed relates:	Originating Application ( <i>Inter Partes</i> ) by the Applicant for an Order to appoint Deloitte Restructuring Inc. as receiver over certain property of the Respondent pursuant to section 105 in the <i>Judicature Act</i> , RSNL 1990, c J-4, as amended, and Rule 25.01 of the <i>Rules of the Supreme Court</i> , 1986 and for an order abridging the required time for service of notice of the within Originating Application ( <i>Inter Partes</i> ) and supporting materials on the Respondent pursuant to Rule 29.05(2)(a) of the <i>Rules of the Supreme Court</i> , 1986.
Court Sub-file No.	N/A

TO the Supreme Court of Newfoundland and Labrador, or one of the Honourable Judges thereof:

This Originating Application (*Inter Partes*) of HSBC Bank Canada, the Applicant, says:

## **NATURE OF THE APPLICATION**

1. This is an application for an order appointing Deloitte Restructuring Inc. (“**Deloitte**”) as receiver over certain financed receivables of the Respondent, as described herein, pursuant to section 105 in the *Judicature Act*, RSNL 1990, c J-4, as amended, and Rule 25.01 of the *Rules of the Supreme Court*, 1986 and for an order abridging the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent pursuant to Rule 29.05(2)(a) of the *Rules of the Supreme Court*, 1986.

## **MATERIAL FACTS**

2. The Applicant, HSBC Bank Canada, is a chartered bank of Canada, having a head office in the City of Vancouver, in the Province of British Columbia and having a branch at 205 Water Street, in the Province of Newfoundland and Labrador.

3. The Respondent, Canada Fluorspar (NL) Inc. is a corporation duly incorporated on or about March 3, 1995 pursuant to the *Corporations Act*, R.S.N.L. c. C-36, as amended. The Registered Office of the Respondent is located at Clarks Pond Road, St. Lawrence, Newfoundland and Labrador and the Respondent’s directors are listed as Bill Dobbs, Dan Hecht, Dave Thomas and Casey Walsh.

4. The principal business of the Respondent is the mining of fluorspar at or near St. Lawrence, in the Province of Newfoundland and Labrador, where all of the Respondent’s operational assets are located.

5. The Respondent is the only active fluorspar producer in Canada and the United States and has been developing the St. Lawrence fluorspar mine project in St. Lawrence, NL. Fluorspar is an essential mineral to many industries and applications, including lithium ion batteries, solar panels, refrigeration and air conditioners, high performance polymers for aerospace, automotive and

electronics applications, high strength and purity glass for smart phones and electronic devices, pharmaceuticals, anaesthetics and medical devices, fire retardants and welding consumables, and steel and aluminum production. Since 2018, the Respondent's shipments of fluorspar product were loaded from a pier in Marystown, Newfoundland and Labrador, but in 2021, the Respondent started loading shipments from its new Blue Beach Marine Terminal, five kilometres from the mine site in St. Lawrence, with fluorspar shipments and exports going worldwide.

**Respondent's Indebtedness to the Applicant**

6. The Applicant, as lender, and the Respondent, as borrower, executed a Trade Invoice Recourse Financing Facility Agreement dated May 25, 2018, as amended by a first amendment dated February 21, 2019, a second amendment dated September 30, 2019, and a third amendment dated February 17, 2020 (collectively, the "**RFA**"), pursuant to which the Applicant agreed to provide trade financing to the Respondent in connection with certain receivables and financed receivables (collectively, the "**Financed Receivables**") up to a maximum facility amount of USD20,000,000 (the "**Trade Account Facility**"). A true copy of the RFA is attached and marked as **Exhibit "B"** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

7. As of March 10, 2022, the total indebtedness due and owing to the Applicant by the Respondent pursuant to the RFA is approximately USD11,881,582.05, plus all accruing interest, fees and expenses (collectively, the "**Indebtedness**"), representing an aggregate value of approximately 23 separate outstanding Financed Receivables.

## **Security**

8. As security for its Indebtedness and liability to the Applicant pursuant to the RFA, the Respondent executed and delivered to the Applicant, a general security agreement dated May 25, 2018 (the “GSA”). A true copy of the GSA is attached and marked as **Exhibit “D”** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

9. The Applicant holds a registered security interest over all personal property of the Respondent. A true copy of the *Personal Property Security Act* (NL) search certificate dated March 10, 2022 against the Respondent is attached and marked as **Exhibit “E”** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

10. In addition to the security interests granted to the Applicant, the Respondent has also granted a general security agreement in favour of Bridging Finance Inc., (“BFI”) and the Government of Newfoundland and Labrador (“GOV NL”). The priority of the security interests granted among BFI, GOV NL and the Applicant are governed by an amended and restated inter-creditor agreement dated May 25, 2018, as amended (collectively, the “ICA”). In accordance with the ICA, the Applicant holds a first position priority in relation to the Financed Receivables. A true copy of the ICA is attached and marked as **Exhibit “F”** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

## **The Insolvency of the Respondent**

### **Interim Receivership Proceedings of the Respondent (February 21, 2022)**

11. On February 21, 2022, upon the application of PricewaterhouseCoopers Inc. (“PwC”), in its capacity as receiver and manager of BFI and Bridging Income Funds LP (collectively,

“**Bridging**”), Grant Thornton Limited was appointed interim receiver (the “**Interim Receiver**”) over the assets, properties and undertakings (save and except for certain excluded property) of the Respondent and Canada Fluorspar Inc. (collectively, the “**Receivership Companies**”) pursuant to an interim receivership order dated February 21, 2022 (the “**Interim Receivership Order**”). A true copy of the Interim Receivership Order is attached and marked as Exhibit "G" to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

12. Based on the Affidavit of Graham Page sworn on February 19, 2022 in support of the Interim Receivership Order (the “**Page Affidavit**”), the appointment of the Interim Receiver was necessary, just and convenient because:

- (a) the operations of the Receivership Companies had ceased and there was an immediate requirement for funding to preserve the property, licenses and operations, and further allow PwC (along with other stakeholders) to develop a restructuring plan in respect of the Receivership Companies; and
- (b) the interim receivership proceedings would:
  - (i) stabilize any risks associated with the Receivership Companies assets and allow PwC to assess options as it relates to a sale process for the Receivership Companies and its assets; and
  - (ii) allow the Interim Receiver to re-engage necessary employees and other agents to assist in a care and maintenance program for the Receivership Companies assets, since most of the employees were terminated just prior to the Court’s issuance of the Interim Receivership Order.

A true copy of the Page Affidavit (without exhibits) is attached and marked as **Exhibit "H"** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

13. Leading up to the Court application for the appointment of the Interim Receiver, the Applicant herein sought to "carve-out" the Financed Receivables from the Interim Receivership Order. As a result, the Interim Receivership Order as granted by the Honourable Court contains the defined term "*Excluded Property*" which means "*any and all Receivables and /or Financed Receivables, as such terms are defined pursuant to a Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc. dated May 25, 2018, as amended, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favour of HSBC*". In short, the "*Excluded Property*" does not form part of the interim receivership estate.

14. The interim receivership proceedings are ongoing, and the Interim Receiver's activities have been limited to the care and maintenance program referenced above. Since the appointment of the Interim Receiver, the Applicant has discussed with the Interim Receiver (together with its advisors) the ongoing collection of the Financed Receivables, as well as three purchase orders / receivables where the Respondent has yet to deliver the purchased fluorspar product to the Account Debtor (the "**Purchase Orders**"). The Applicant is currently assessing its options as it relates to the Purchase Orders. The Applicant has advanced amounts under the Trade Account Facility in respect of the Purchase Orders as Financed Receivables, which amounts are included in the Indebtedness of the Respondent to the Applicant.

**CCAA Application (March 11, 2022)**

15. On March 8, 2022, the Interim Receiver filed and served application materials under the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") for an initial order (the "**Initial Order**") in respect of the Respondent, Canada Fluorspar Inc. and Newspar (NL) (a General Partnership) (collectively, the "**CCAA Companies**"). A true copy of the Notice of Application and the Affidavit of Phil Clarke sworn March 8, 2022 in support of the Initial Order (without exhibits) is attached and marked as **Exhibit "I"** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

16. Based on the Affidavit of Phil Clarke, the Initial Order was necessary because:

- (a) the CCAA Companies are insolvent and are suffering from a liquidity crisis;
- (b) the CCAA Companies operations have ceased;
- (c) the CCAA proceedings will allow the CCAA Companies the opportunity to implement a sale and investment solicitation process for the sale of the business enterprise (the "**SISP**"); and
- (d) the CCAA proceeding will allow for debtor-in-possession financing to improve the liquidity crisis, fund the CCAA proceeding, and provide the necessary funding to implement a SISP.

17. Consistent with the approach in the Interim Receivership Order, the CCAA Companies have agreed to "carve out" the "*Excluded Property*".

18. The CCAA Companies application for the Initial Order was heard on March 11, 2022 and the Initial Order granted by this Honourable Court on the same day, appointing the Interim Receiver as Monitor of the CCAA Companies (the “**Monitor**”). A true copy of the Initial Order is attached and marked as **Exhibit "J"** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

19. The Comeback hearing ordered pursuant to the Initial Order has been set down for March 18, 2022 at 10:00 AM.

#### **Demand for Payment by the Respondent**

20. On March 14, 2022, Dentons Canada LLP (“**Dentons**”), as legal counsel to the Applicant, delivered a demand letter dated March 11, 2022 (the “**Demand Letter**”) upon the Interim Receiver on behalf of the Respondent for payment of all amounts outstanding to the Applicant pursuant to the RFA. The Demand Letter was accompanied by a Notice of Intention to Enforce Security (the “**NOI**”) pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), also dated March 10, 2022. A copy of the Demand Letter and the NOI is attached and marked as **Exhibit "K"** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

21. The stay of proceedings provided for in the Interim Receivership Order and the Initial Order does not apply in respect of the Applicant and the Financed Receivables.

#### **Financed Receivables | Status of the Respondent**

22. While the Applicant is working diligently to oversee the collection of the Financed Receivables, the Applicant is concerned about access to relevant documentation supporting the



Financed Receivables, monitoring and overseeing rolling payment terms, and communications with Account Debtors.

23. The Account Debtors are domiciled internationally in Germany, Switzerland, Italy, India, the Netherlands and Hong Kong.

24. As stated above, the CCAA Companies, the Monitor and its advisors are prioritizing and will be focused on the implementation of a SISP with a view of either selling the business enterprise or negotiating a recapitalization plan in order to create the best value for Bridging, the GOV NL, the employees and other stakeholders.

25. The monitoring and collection of Financed Receivables will not form part of the business activities of the CCAA Companies (through contracted employees or the Monitor) going forward, especially since the Financed Receivables, as "*Excluded Property*", does not form part of the CCAA administration or the Initial Order. During the CCAA proceeding, the CCAA Companies will not be operating in the usual course or re-engaging the production of "fresh" fluorspar for its customer base, and most certainly not to those Account Debtors with outstanding Financed Receivables. By consequence, the previously existing customer relationships between the Respondent and the Account Debtors have faded away and the direct line of a customer / supplier relationship has been removed.

26. As stated above, the Applicant has current exposure under the RFA in the amount of USD\$11,881,582.05, with receivables coming due on a rolling basis up until May 2022 (some of which are already past due). The Applicant states there is now a pressing requirement for a process that can support the orderly flow of Financed Receivables collections.

27. The Applicant repeats all of the foregoing and states that it is just and convenient for the appointment of a Receiver over the Financed Receivables.

**Just And Convenient To Appoint A Receiver**

28. The Applicant states that, given the current circumstances of the Respondent, the filing of the CCAA proceedings and the focused efforts on the implementation of a SISP, the “carve-out” of the Financed Receivables as “*Excluded Property*” pursuant to the Interim Receivership Order and the Initial Order, a transitional gap in the collection exercise for the Financed Receivables has developed that needs to be addressed through the use of a Court appointed receiver.

29. The appointment of a receiver over the Financed Receivables is necessary, just and convenient in order to protect the interests of the Applicant, to create a process upon which a receiver can gain access to the necessary books and records associated with each outstanding Financed Receivable to address any issues that may surface in the future while protecting any sensitive information contained therein, designate a Court officer in a transparent proceeding with the necessary authority and powers to prosecute any and all issues with respect to the collection of the Financed Receivables internationally.

30. The Applicant proposes that Deloitte be appointed receiver of the Financed Receivables.

31. Deloitte is a licensed trustee in bankruptcy and is familiar with the circumstances of the Respondent.

32. Deloitte has consented to act as receiver should the Court so appoint it. A copy of Deloitte’s consent is attached and marked as **Exhibit “L”** to the affidavit of Brian Pettit filed in support of the within Originating Application (*Inter Partes*).

**Just and Fair for Court to Abridge Time for Service of Notice of this Application**


33. The Applicant states that, given the current circumstances of the Respondent, the prior involvement of the parties hereto in the Interim Receivership proceedings and the CCAA proceeding in this Honourable Court and the granting of the Interim Receivership Order and the Initial Order, there is no injustice or prejudice arising to the Respondent from, and the balance of equities and the justice of the circumstances at hand support, the exercise of the discretionary power of this Honourable Court, pursuant to Rule 3.03, to abridge the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent.

**RELIEF SOUGHT**

34. The Applicant, HSBC Bank Canada, therefore requests an order:

- (a) appointing Deloitte Restructuring Inc. as receiver of the Financed Receivables;
- (b) abridging the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent;
- (c) for the Applicant's costs of this proceeding; and
- (d) for such further and other relief as counsel may advise and this Honourable Court deem just.

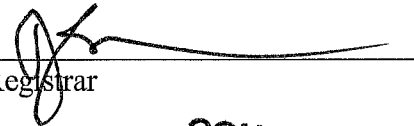
ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16<sup>TH</sup> DAY OF MARCH, 2022.

  
\_\_\_\_\_  
**KEVIN F. STAMP, Q.C.**  
**GEOFFREY DAVIS-ABRAHAM**  
Martin Whalen Hennebury Stamp PLC Inc.

**DENNIS R. WIEBE**  
**ROBERT J. KENNEDY**  
Dentons Canada LLP

Solicitors for the Applicant  
Whose address for service is:  
15 Church Hill  
PO Box 5910  
St. John's, NL A1C 5X4

**ISSUED** at St. John's, in the Province of Newfoundland and Labrador this 17 day of March 2022.

  
\_\_\_\_\_  
Registrar

**COURT  
OFFICER**

TO: The Supreme Court of Newfoundland  
and Labrador  
General Division  
309 Duckworth Street  
St. John's, NL A1C 1G9  
**Attention: Registry**

TO: Cox and Palmer  
Solicitors for the Respondent  
235 Water Street, Suite 1100  
St. John's, NL A1C 1B6  
**Attention: Darren O'Keefe**  
**Allison Philpott**

TO: Government of Newfoundland and Labrador  
Department of Industry, Energy and Technology  
Natural Resources Building  
50 Elizabeth Avenue  
PO Box 8700  
St. John's, NL A1B 4J6  
**Attention: David Rodgers  
Julia Tomson**

TO: McInnes Cooper  
Solicitors for the Monitor, Grant Thornton  
5<sup>th</sup> Floor, 10 Fort William Place  
PO Box 5939  
St. John's, NL A1C 5X4  
**Attention: Geoffrey Spencer  
Meghan King**

TO: Stewart McKelvey  
Solicitors for PricewaterhouseCoopers, on behalf of Bridging Finance Inc.  
PO Box 5038  
11<sup>th</sup> Floor, Cabot Place  
100 New Gower Street  
St. John's, NL A1C 5V3  
**Attention: Joe Thorne**

TO: Goodmans LLP  
Solicitors for Golden Gate Capital  
Bay Adelaide Centre – West Tower  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7  
**Attention: Brendan O'Neill**

**2022 01G**  
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**BETWEEN:**

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**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC.**

**RESPONDENT**

**NOTICE OF APPLICATION**

You are hereby notified that the foregoing Originating Application (*Inter Partes*) will be made to the judge presiding in Chambers at the Court House, 309 Duckworth Street, St. John's, Newfoundland and Labrador on Friday, the 18 day of March, 2022 at the hour of 10:00 o'clock in the forenoon or as soon thereafter as the application can be heard.

TO: Cox and Palmer  
Solicitors for the Respondent  
235 Water Street, Suite 1100  
St. John's, NL A1C 1B6  
**Attention: Darren O'Keefe**  
**Allison Philpott**

TO: Government of Newfoundland and Labrador  
Department of Industry, Energy and Technology  
Natural Resources Building  
50 Elizabeth Avenue  
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