

COURT FILE NUMBER 1603-20704

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF(S) ROYAL BANK OF CANADA

DEFENDANTS ELEMENTS WEST INC., DAMEN TRUCKING LTD., PETER DAMEN,
DAVID DAMEN, ANDREW DAMEN, and KAREN DAMEN

DOCUMENT **THIRD REPORT OF THE RECEIVER**

**ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT**

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Introduction

1. On December 2, 2016, Elements West Inc. and Damen Trucking Ltd. (individually referred to hereafter as "**Elements**" and "**Damen**", respectively, and as the "**Companies**" collectively) were placed into receivership pursuant to an Order (the "**Receivership Order**") issued by the Court of Queen's Bench of Alberta (the "**Court**"). Deloitte Restructuring Inc. ("**Deloitte**") was appointed as receiver (the "**Receiver**").
2. The Companies are incorporated under the laws of Alberta and carried on business from leased premises located at 51517 Range Road 275, Stony Plain, AB (the "**Head Office**") and their primary business was hauling and trucking. The directors of the Companies are Peter Damen, David Damen, and Andrew Damen.
3. On February 13, 2017, the Court granted an Order (the "**Sale and Vesting Order**"), which, *inter alia*, approved the sale of much of the Companies' assets by way of a transaction with EW Transport Inc. On February 24, 2017, the Receiver received the purchase price of \$475,000, plus GST, and concluded the transaction with EW Transport Inc. as contemplated in the Sale and Vesting Order.
4. On May 16, 2017, the Court granted an Order (the "**Interim Distribution Order**"), which, *inter alia*, directed the Receiver to pay all priority claims ranking in priority to RBC's secured claim, and to make an interim distribution from the Elements' Estate to RBC in the amount of \$500,000. The Order further provided that the Receiver could make further interim distributions to RBC not to exceed \$1,971,318, representing RBC's secured claim against the Companies'.
5. The Receiver paid the interim distribution of \$500,000 to RBC on May 24, 2017. A further \$7,500.01 was paid to RBC on June 28, 2017.

Purpose of this report

6. The purpose of the Receiver's Third Report is to:
 - 6.1. Provide a status update to the Court on the Receiver's activities since the Second Report of the Receiver dated May 3, 2017 (the "**Second Report**");
 - 6.2. Respectfully recommend that this Honourable Court approve the Receiver's proposed assignments of its right, title, and interest in Court actions 1703-07015, 1703-07016, and 1703-07017 to RBC.

Terms of reference

7. In developing this Third Report, the Receiver has relied upon unaudited financial information prepared by the Companies' management, the Companies' books and records and discussions with its management. The Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants Canada Handbook. The Receiver expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Second Report, or relied upon by the Receiver in preparing this Third Report.

Currency

8. All currency reference in this Third Report are in Canadian dollars.

Activities of the Receiver

Chattels

9. On May 16, 2017, the Receiver's legal counsel made a demand upon Northland Tank and Heavy Haul Ltd. ("**Northland**"), a creditor of Elements, which was the recipient of Elements' transfer of a bobcat (the "Bobcat") to settle an outstanding debt. The Receiver's legal counsel made the demand on the basis that the conveyance constituted a preference in the estimated amount of \$25,000 representing the Receiver's market value estimate of the Bobcat.
10. Northland disagreed that the transfer was a preference, but offered to settle the matter for \$5,000. The Receiver declined the offer of settlement as there was no reasonable basis for the discount from the Receiver's estimate of market value.
11. Northland subsequently provided the Receiver with evidence of the Bobcat's condition, and the Receiver obtained a new estimate in the amount of \$10,000 for a bobcat in similarly poor condition, but still running.
12. After continued negotiation, the Receiver and Northland agreed to settle the matter of the Bobcat for payment by Northland in the amount of \$8,000. The Receiver believes this to be a reasonable settlement as the Bobcat is located in Grande Prairie, Alberta. The cost to inspect the Bobcat or litigate the matter with Northland would erode recovery to creditors. The settlement was concluded on November 30, 2017.

13. With the Bobcat settlement concluded, realization of the Companies' chattels is complete.

Accounts receivable

14. On April 11, 2017, the Receiver commenced the below civil actions (the "**Actions**"), in the Court of Queen's Bench of Alberta, against Western Precast Structures Inc. (the "**Key Customer**"), and other entities:

1703-07015 in the amount of \$311,042.81;

1703-07016 in the amount of \$121,162.79; and

1703-07017 in the amount of \$134,694.02.

The Actions assert trust claims based on the Receiver's position that the Companies' receivables were subsumed within amounts due to the Key Customer for which builder liens were registered.

15. On February 5, 2018, the Key Customer was placed in receivership by Court Order. The Receiver continues to assert its trust claims; however, it does not appear that the claims will be resolved in the short term due to the receivership of the Key Customer, and the entanglement of other parties contracted to the Key Customer.
16. The quantum of the amounts sought by the Receiver in the Actions total \$566,899.62. This amount is unlikely to be recovered in full as there are numerous subtrades who will have priority to the Key Customer and by extension the Companies' trust claim. Even if the amounts in the Actions are collected in full, the resulting recovery would not provide RBC with a recovery in excess of its secured claim in Elements.
17. RBC believes the estate will incur duplicative professional fees from the Receiver that could be avoided if the Actions are assigned from the Receiver to RBC. RBC has provided the Receiver with a form of assignment of the Actions (the "**Assignment**").
18. The Receiver agrees that there would be duplication of costs, and it is reasonable that RBC, as the sole beneficiary of any recovery from the Actions, does not require an additional layer of professional fees for the Receiver's involvement in the Actions. For these reasons, the Receiver does not oppose the Assignment. The Receiver does not believe there is any prejudice to creditors subordinate to RBC as the Assignment provides that any recoveries in excess of RBC's secured claim in Elements is to be paid to the Receiver.
19. The Receiver has executed the Assignment, which is subject to this Honourable Court's approval. A copy of the Assignment executed by RBC and the Receiver is attached hereto as Appendix "A".

Conclusion and recommendation

20. Upon conclusion of the Assignment, the Receiver will be in a position to finalize outstanding income tax and GST matters, take steps to distribute any remaining funds to RBC, and apply for the Receiver's discharge.
21. The Assignment provides that any surplus funds recovered by RBC from the Actions, over and above its secured claim in Elements, are to be paid to the Receiver. In the event surplus funds are paid to the Receiver after its discharge, the Receiver will apply to this Court for its re-appointment or for directions.
22. Based on the foregoing, the Receiver respectfully recommends that this Honourable Court grant an Order approving the Assignment.

All of which is respectfully submitted this 10th day of June, 2019.

DELOITTE RESTRUCTURING INC.,

In its capacity as Court-appointed Receiver of
Elements West Inc. and Damen Trucking Ltd.
and not in its personal capacity



Darren Crocker, CPA, CGA, CIRP, LIT
Senior Vice-President

Appendix "A"

ASSIGNMENT OF CHOSE IN ACTION

THIS AGREEMENT made effective as of the 15th day of APRIL, 2019.

BETWEEN:

DELOITTE RESTRUCTURING INC., in its capacity as court-appointed Receiver of the assets, property and undertaking of Elements West Inc., and not in its personal capacity (the "Assignor")

AND:

ROYAL BANK OF CANADA, a chartered bank continued pursuant to the *Bank Act* (Canada), with a branch located in Edmonton, Alberta (the "Assignee")

WHEREAS:

- A. At all material times, Elements West Inc. ("Elements") carried on the business of logistics services including planning, scheduling, loading, and transporting manufactured goods to various construction sites at pre-arranged rates ("Logistics Services").
- B. On December 2, 2016, the Court of Queen's Bench for Alberta (the "Court") appointed the Assignor as receiver of all current and future assets, undertakings and properties of Elements, pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (Canada) and section 13(2) of the *Judicature Act* (Alberta), both as amended from time to time.
- C. On April 11, 2017 the Assignor commenced a civil action in the Court of Queen's Bench of Alberta under Court File Number 1703-07015 (the "Calgary Compost Action") against Western Precast Structures Inc. ("Western") and other entities, in which the Assignor alleged, *inter alia*, that Western neglected, refused or failed to pay Elements for the balance owing, in an amount totalling \$311,042.81, in respect of certain Logistics Services provided by Elements to Western between December 3, 2015 and June 30, 2016;
- D. On April 11, 2017 the Assignor commenced a civil action in the Court of Queen's Bench of Alberta under Court File Number 1703-07016 (the "McKenzie School Action") against Western and other entities, in which the Assignor alleged, *inter alia*, that Western neglected, refused or failed to pay Elements for the balance owing, in an amount totalling \$121,162.79, in respect of certain Logistics Services provided by Elements to Western between February 18, 2016 and June 30, 2016;
- E. On April 11, 2017 the Assignor commenced a civil action in the Court of Queen's Bench of Alberta under Court File Number 1703-07017 (the "Cohen School Action") against Western and other entities, in which the Assignor alleged, *inter alia*, that Western neglected, refused or failed to pay Elements for the balance owing, in an amount totalling \$134,694.02, in respect of certain Logistics Services provided by Elements to Western between February 22, 2016 and May 31, 2016;

- F. The Calgary Compost Action, McKenzie School Action and Cohen School Action shall be hereinafter collectively referred to as the "Actions".
- G. The Assignor has potential claims, causes of action or choses of action at law or in equity against Western in regard to Western neglecting, refusing or failing to pay the outstanding amounts owed to Elements as outlined in the Actions (the "Western Indebtedness"), whether as represented in the Actions or otherwise (the "Choses in Action");
- H. The Western Indebtedness as at April 11, 2017 is \$566,899.62 plus accruing interest thereafter, fees and costs, including legal costs.
- I. The Assignee is the senior secured lender of Elements pursuant to a General Security Agreement – Floating charge on Land dated October 31, 2013 in favour of the Assignee and by which Elements granted to RBC a security interest in all of Elements' present and after-acquired personal and real property, both for current indebtedness and future advances (the "Assignee Security Interest");
- J. By the Assignee Security Interest, the Assignee is the primary benefactor of the Choses in Action;
- K. The Assignor has agreed to assign to the Assignee the Choses in Action for the sum of Ten (\$10.00) Dollars and other good and valuable consideration.

NOW, THEREFORE, IN CONSIDERATION of the sum Ten (\$10.00) Dollars now paid by the Assignee to the Assignor (the receipt and sufficiency of which is hereby acknowledged by the Assignee and the Assignor), the parties agree as follows:

1. The Assignor, in its capacity as court-appointed receiver of Elements, and not in its personal capacity, unconditionally and irrevocably grants, transfers, assigns and sets over unto the Assignee all of the right, title and interest in or to the Western Indebtedness and the Choses in Action.
2. The assignment herein is an absolute assignment and not by way of charge only, such that the Assignee has the legal right to the Western Indebtedness and the Choses in Action in contemplation of section 20 of the *Judicature Act* (Alberta), as amended from time to time.
3. The Assignee shall receive and take the Choses in Action for the Assignee's absolute use and benefit and the Assignee shall stand in the full place and stead of the Assignor as plaintiff in any proceedings commenced or continued to pursue the Choses in Action, including (for greater certainty) the Actions.
4. The Assignee shall be entitled, at its own cost and risk, to initiate, prosecute, cease to prosecute, settle, compromise or discontinue any action arising out of the Choses in Action, including (for greater certainty) the Actions, in whole or in part, as the Assignee shall determine in its full and absolute discretion.
5. The Assignor has made absolutely no representations or warranties whatsoever to the

Assignee regarding the merits of the Choses in Action. The Assignee takes the assignment of the Choses in Action from the Assignor on an "as is, where is" basis, with absolutely no recourse against the Assignor in respect of the Choses in Action. The Assignee hereby remises, releases and forever discharges the Assignor, its employees together with officers, directors and agents of and from all manner of debts, liability, obligations, actions or causes or action, and all costs, charges and expenses which against the Assignor, its employees together with officers, directors and agents the Assignee and now has or will in the future have for or by reason of any matter or thing arising out of or created by the assignment by the Assignor of the Western Indebtedness and the Choses in Action to the Assignee.

6. Notwithstanding any other provision contained in this Assignment of Chose in Action (this "Assignment"), any net amount recovered by the Assignee pursuant to the Choses in Action, including (for greater certainty) the Actions, which is in excess of the Western Indebtedness shall be paid to the Assignor, in its capacity as court-appointed receiver of Elements, and not in its personal capacity.
7. The Assignee shall apply for Court approval of this Assignment, and this Assignment shall be effective only upon the Court's approval.
8. This Assignment shall be binding upon the Assignor and the Assignee and shall enure to the benefit of their respective successors and assignees.
9. This Assignment shall be governed by, construed and enforced in accordance with the laws in force in the Province of Alberta. The parties hereto hereby irrevocably attorn to the non-exclusive jurisdiction of the courts of the Province of Alberta for any matter or cause arising out of or in any way related to the terms of this Assignment.
10. In the event that any provision of this Assignment shall be invalid, illegal or unenforceable in any respect in any jurisdiction, it shall not affect the validity, legality or enforceability of such provision in any other jurisdiction or the validity, legality or enforceability of any other provision of this Assignment. This Assignment contains the complete and final understanding and agreement of the Assignor and the Assignee and supersedes all prior representations, warranties, agreements, arrangements, understandings and negotiations.

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11. This Assignment may be executed in several counterparts and each such counterpart will constitute an original document and such counterparts, taken together, will constitute one and the same instrument. A counterpart may be delivered by fax or any other form of electronic transmission.

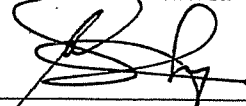
IN WITNESS WHEREOF the parties have executed this Assignment of Chose in Action effective as of the date first above written.

DELOITTE RESTRUCTURING INC., in its capacity as court-appointed receiver of Elements West Inc., and not in its personal capacity

Per: 

Darren Crocker, CPA, CGA, CRRP, LIT
Senior Vice-President

ROYAL BANK OF CANADA

Per: 

Marlene Starenky
SR. Manager, SPECIAL LOANS
AND ADVISORY SERVICES