



**FORCE FILED**

No. H230802  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BANK OF MONTREAL

PETITIONER

AND:

HARO-THURLOW STREET PROJECT LIMITED  
PARTNERSHIP, HARO AND THURLOW GP LTD., HARLOW  
HOLDINGS LTD., 1104227 B.C. LTD., CLOUDBREAK  
HOLDINGS LTD., CM (CANADA) ASSET MANAGEMENT  
CO. LTD., FORSEED HARO HOLDINGS LTD., 1115830  
B.C. LTD., TERRAPOINT DEVELOPMENTS LTD., KANG YU  
ZOU, WEI DONG, WEI ZOU, XIA YU, and TREASURE BAY  
HK LIMITED

RESPONDENTS

**NOTICE OF APPLICATION**

**Name of applicant: Bank of Montreal**

To: The Service List maintained by the Receiver in these proceedings

TAKE NOTICE that an application will be made by the applicant, Bank of Montreal (“BMO”), to Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on August 23, 2024 at 10:00 a.m. for the orders set out in Part 1 below.

The applicant estimates that the application will take 60 minutes.

This matter is not within the jurisdiction of an associate judge. Madam Justice Fitzpatrick is seized of these proceedings.

**Part 1 ORDERS SOUGHT**

1. BMO seeks an order in the form set out as Schedule “A” to this Notice of Application:
  - (a) directing that the claims (the “**BMO Claims**”) asserted against or by BMO in Supreme Court of British Columbia Action No. S245023, styled as *Forseed Haro Holdings Ltd. v. Bank of Montreal et al.* (the “**Forseed Action**”) are to be severed

and heard with the claims asserted in the within petition proceeding (the “**Receivership Proceedings**”); and

- (b) establishing a litigation process and schedule for the determination of the BMO Claims in the Receivership Proceedings.
2. BMO may seek such additional relief as counsel may advise and this Court finds to be appropriate in the circumstances.

## **Part 2 FACTUAL BASIS**

### Overview

1. This application seeks an order severing the BMO Claims and directing that they be tried together with the claims in the Receivership Proceedings. BMO proposes that the BMO Claims be adjudicated in accordance with the expedited litigation process and schedule set out in the Case Plan Proposal. Since both actions share a common factual matrix and concern overlapping and intertwined legal issues, this relief is in the interests of justice and will provide for the fastest, most economical, and fairest determination of both proceedings.

### Background

2. Forseed Haro Holdings Ltd. (“**Forseed**”), 1104227 B.C. Ltd. (“**110**”), and Terrapoint Developments Ltd. (“**Terrapoint**”) are limited partners of Haro-Thurlow Street Limited Partnership (“**HTLP**”), which owns land located in downtown Vancouver (the “**Property**”).
3. BMO entered into a Credit Agreement, dated August 21, 2018 (as subsequently amended, the “**Credit Agreement**”), with HTLP and certain of its affiliates (the “**Borrowers**”), pursuant to which BMO agreed to advance a loan to the Borrowers in the amount of \$94,000,000 (the “**Loan**”). The Loan is secured by:
- (a) a first ranking mortgage of the Property;
  - (b) a general security agreement executed by the Borrowers granting a charge in favour of BMO in respect of all of the Borrowers’ personal property related to the Property;
  - (c) a guarantee by Cloudbreak Holdings Ltd. (“**Cloudbreak**”) and CM (Canada) Asset Management Co. Ltd. (“**CM**”, and together with Cloudbreak, the “**CM Group**”);
  - (d) a limited guarantee by Terrapoint;
  - (e) a limited guarantee by Forseed; and
  - (f) pledges of cash collateral by, among others, Forseed and 110.

4. In particular, Forseed:
  - (a) executed the first amendment to the Credit Agreement under which it was agreed that Forseed would guarantee HTLP's obligations to BMO up to \$13,625,000 and execute a cash collateral agreement securing a deposit of not less than \$13,625,000 in an account or GIC;
  - (b) executed a guarantee in favour of BMO limited to the amount of \$13,625,000 (the "**Forseed Guarantee**") and limited in recourse to funds to be pledged in favour of BMO; and
  - (c) executed a pledge of cash collateral in favour of BMO under which Forseed pledged as security to BMO all funds on deposit in a specified account (the "**Forseed Cash Collateral**").
5. In July 2023, the Borrowers defaulted under the terms of the Credit Agreement.
6. In August 2023, BMO made demand for payment to the Borrowers and all guarantors. BMO also gave notice of its intention to enforce its security interests under the Credit Agreement, including against the Property and the cash collateral pledged by the Respondents.
7. In October 2023, BMO took steps to enforce against the security. Both the Forseed Cash Collateral (\$13,625,000) and part of the cash collateral pledged by 110 (\$1,375,000) was applied to the amount owing to BMO under the Credit Agreement.

#### The Receivership Proceedings

8. On October 23, 2023, BMO commenced these proceedings seeking to enforce its security interests as well as an order appointing a receiver over the Property.
9. On December 22 and 28, 2023, BMO's application was heard by Madam Justice Fitzpatrick. At the hearing, all parties proceeded on the basis that BMO had validly applied the cash collateral.
10. On January 11, 2024, Madam Justice Fitzpatrick made an order appointing a receiver over the Property and authorizing the receiver to sell the Property (the "**Receivership Order**").
11. The Receivership Order also granted BMO judgment against the Borrowers in the amount of \$82,724,911.24, plus interests and costs. Significantly, in her reasons for judgment, Madam Justice Fitzpatrick acknowledged that BMO had applied the Forseed Cash Collateral to reduce the amount owing under the Credit Agreement by \$13,625,000. This application of funds was reflected in the judgment amount.
12. On August 23, 2024, a hearing is scheduled before Madam Justice Fitzpatrick at which the Receiver seeks approval of a transaction for the sale of the Property and distribution of certain proceeds.

The Forseed Action

13. On July 26, 2024, Forseed commenced the Forseed Action seeking, as against BMO, a discharge of its liability under the Forseed Guarantee as well as the return of the Forseed Cash Collateral by BMO or damages in lieu thereof. In the alternative, Forseed seeks judgment against 110, CM, and Terrapoint for breaches of an indemnity agreement (the “**Indemnity Claims**”). The Indemnity Claims are entirely contingent on Forseed being unsuccessful in its claims against BMO.
14. Forseed does not address the inconsistency between its position in the Forseed Action and its apparent position earlier in these proceedings, specifically that submissions and orders were made in these proceedings on the basis that BMO validly applied the Forseed Cash Collateral against the Borrowers’ indebtedness to BMO.
15. The Forseed Action is in its early stages. To date, none of the defendants have filed a response to civil claim, although BMO intends to do so on or before August 21, 2023.

The Forseed Action and the Receivership Proceedings are Interrelated

16. The BMO Claims and the issues between the BMO Claims and the Receivership Proceedings are interrelated and overlap in a number of material respects. Amongst others:
  - (a) the parties to the BMO Claims are also party to the Receivership Proceedings;
  - (b) the legal relationship between the parties in both actions arises from the same factual matrix and contractual framework such that legal determinations and evidence in one action will be relevant to the other and vice versa;
  - (c) the property and security interests at issue in the BMO Claims have a direct bearing on and will be impacted by both the sales process and the ongoing enforcement process in these Receivership Proceedings;
  - (d) the amount owing to BMO after application of the proceeds of the transaction is materially dependent on the outcome of the BMO Claims in these proceedings, and as a result so does the ongoing enforcement process in the Receivership Proceedings, which affects not only BMO but also the other stakeholders in the Receivership Proceedings; and
  - (e) the Receivership Proceedings cannot be concluded until the BMO Claims are disposed of and the enforcement process completed.
17. The commonality of the parties, claims, issues, remedies and processes that interconnect the BMO Claims and the Receivership Proceedings requires that they be adjudicated on substantially the same factual, legal, and evidentiary grounds such that joinder is appropriate.

Joinder is in the Interests of all of the Parties

18. Each of Forseed, BMO and the stakeholders in the Receivership Proceedings need to know whether Forseed is entitled to be repaid \$13,625,000, and the Receivership Proceedings cannot be properly adjudicated and concluded until this is known.
19. Delay in resolving the BMO Claims will cause prejudice because until the amount owing to BMO is known, there will be no certainty as to the necessity to advance claims against other guarantors and to enforce those claims, including realizing under other pledges of cash collateral and the mortgage of two guarantors' residence. All of this impacts the other parties to the Receivership Proceedings and, if the BMO Claims cannot be resolved quickly, will certainly delay the conclusion of the Receivership Proceedings and result in additional costs.
20. Given the stage of these proceedings, if the actions proceed separately and if the BMO Claims are heard with the Indemnity Claims, it will take months, and potentially years, to adjudicate the BMO Claims resulting in considerable delay and expense before the Receivership Proceedings can be brought to a conclusion.
21. By contrast, severing the BMO Claims and directing their adjudication through an expedited litigation process avoids these pitfalls. The BMO Claims can be resolved swiftly and cost-effectively, which will allow the Receivership Proceedings to be concluded expeditiously.
22. Hearing the BMO Claims in the Receivership Proceedings on the proposed timeline will also benefit the other defendants in the Forseed Action and is in the interests of justice. The Indemnity Claims are ancillary claims, made in the alternative to the BMO Claims and reliant on the outcome of the BMO Claims. Accordingly, there is no prejudice to having the Indemnity Claims addressed separately, and if required, following determination of the BMO Claims. In fact, resolving the BMO Claims on the expedited timeline proposed will benefit the parties to the Indemnity Claims by, potentially, avoiding unnecessary legal costs and drain on judicial resources.

**Part 3 LEGAL BASIS**

Legal Principles and the Test for Joinder

23. The Supreme Court of Canada recently affirmed a 'single proceeding model' for resolving insolvency disputes. This calls for an equitable and orderly resolution of claims and the enforcement of stakeholder rights by means of a centralized judicial process: "The single proceeding model is intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights." The BMO Claims directly impact the conclusion of the Receivership Proceedings and, accordingly, the single proceeding model is required and applicable to the BMO Claims.

*Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at paras 54-55.

24. The court has inherent jurisdiction to control its own processes and procedures. The exercise of this jurisdiction should be informed by the purpose of the *Supreme Court Civil Rules*, BC Reg 168/2009 (the “*Rules*”), which “is to secure the just, speedy and inexpensive determination of every proceeding on its merits.”

*Rules*, 1-3(1).

25. In connection with this, the *Rules* contemplate the severance and/or joinder of claims. Pursuant to Rule 22-5(8), multiple proceedings may be consolidated and heard together:

(8) Proceedings may be consolidated at any time by order of the court and may be ordered to be tried at the same time or on the same day.

*Rules*, 22-5(8).

26. This is subject to Rule 22-5(6), which states:

(6) If a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it considers will further the object of these Supreme Court Civil Rules.

*Rules*, 22-5(6).

27. Rule 22-5(6) and 22-5(8) are often considered together and are interpreted using the same legal test. Under both Rules, the exercise of the court’s discretion is guided by an overriding concern with judicial efficiency. In particular, courts have recognized that “[s]everance may well be appropriate where the determination of one issue will render another one moot.”

*Johnston Estate v. Johnston*, 2017 BCCA 59 at para. 46 [*Johnston*];  
*British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10 at para. 72.

28. Courts apply a two-stage test to determine whether it is appropriate under Rule 22-5(8) to order multiple proceedings to be tried together.

29. The first stage requires consideration of whether the two proceedings involve common claims, disputes, and relationships. This determination is made on a review of the pleadings.

*Ecoasis Developments LLP v. Sanovest Holdings Ltd.*, 2024 BCSC 635 at para. 9 [*Sanovest*], citing *Callan v. Cooke*, 2020 BCSC 290 at paras. 122-124.

30. The second stage requires consideration of whether the proceedings are “so interwoven that separate trials at different times before different judges is undesirable and fraught with

problems and expense.” This question involves the consideration of a number of factors, including:

- (a) whether there will be savings in pre-trial procedures;
- (b) whether there will be a reduction in hearing time;
- (c) whether a party will be seriously inconvenienced by being required to attend a trial in which he or she may only have a marginal interest;
- (d) whether there will be a saving in expert time or fees;
- (e) whether there will be a disposition of the proceedings at the same time due to common issues of fact or law;
- (f) whether this will avoid a multiplicity of proceedings;
- (g) whether one proceeding is at a more advanced stage than the other;
- (h) whether the order will delay or prejudice one or more of the parties; and
- (i) whether there is a risk that separate proceedings will result in inconsistent findings on identical issues.

*Sanovest* at para. 9.

31. In exercising its discretion under Rule 22-5(8), the court must ultimately decide whether the degree of commonality and intertwining of issues outweighs the prejudice to the party opposing joinder. Put another way, the ultimate question is whether an order joining actions for hearing together “makes sense” and is in the interests of justice.

*Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720 at para. 38.  
*Lee v. UpMeals Technologies Inc.*, 2024 BCSC 888 at para. 52 [*Lee*],  
citing *Wu v. Li*, 2023 BCSC 1205 at paras. 19-20.

Stage One: Common Claims, Disputes and Relationships

32. With respect to the first stage of the test, there is little doubt the BMO Claims and the Receivership Proceedings share common claims, disputes, and relationships. In particular:
- (a) the parties in the BMO Claims are also party to the Receivership Proceedings, and their legal relationship in both proceedings arises from the same factual matrix and contractual framework;
  - (b) there are overlapping issues such that legal determinations and evidence tendered in one proceeding are relevant to and may impact the other proceeding; and

- (c) the core issues in both proceedings are fundamentally intertwined insofar as the outcome of the BMO Claims will inform key determinations in the Receivership Proceedings, including the amount owing to BMO, the liability of guarantors, and the length of time before the proceedings can be brought to an end.

Stage Two: Separate Trials are Not in the Interests of Justice

- 33. BMO submits that there is no prejudice to Forseed in having the BMO Claims determined in the Receivership Proceedings and on the proposed litigation timeline. However, to the extent there is any prejudice, it is outweighed by the efficiencies and benefits of proceeding as BMO proposes. Among other things:
  - (a) Madam Justice Fitzpatrick is familiar with the issues and evidence in the Receivership Proceedings, which bear directly on the matters in dispute in the BMO Claims;
  - (b) the BMO Claims are relatively straightforward and are amenable to joinder;
  - (c) the Receivership Proceedings are significantly more advanced than these proceedings, which is in its very early stages;
  - (d) evidence and legal determinations made in the Receivership Proceedings will inform the disposition of the BMO Claims and vice versa, such that hearing them separately is uneconomical and creates the risk of inconsistent findings;
  - (e) hearing both actions together will avoid parallel and overlapping proceedings and the attendant waste of time and resources;
  - (f) hearing both actions together will reduce the total hearing time needed for adjudication, preserve judicial resources, and prevent the parties from unnecessarily incurring additional costs and fees;
  - (g) joinder does not prejudice Forseed because the expedited process in the Case Plan Proposal preserves the hallmarks of litigation procedure, including complete pleadings, affidavit evidence, the opportunity to cross-examine witnesses, and written submissions; and
  - (h) the Indemnity Claims are ancillary to and independent of the BMO Claims. Due to this, directing the Claims to be heard in an expedited process in the Receivership Proceedings will benefit Forseed, 110, CM, and Terrapoint. Rather than be inconvenienced, these parties will save time and resources, and have the Indemnity Claims determined faster and more expeditiously.
- 34. For these reasons, allowing the BMO Claims and the Receivership Proceedings to proceed separately is not in the interests of justice, and would not promote the just, speedy, and inexpensive determination of the overlapping issues in both proceedings.



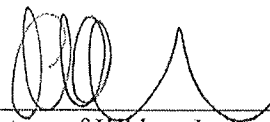
**Part 4 MATERIAL TO BE RELIED ON**

1. The Affidavit of Amanda Schneider, made on August 16, 2024; and
2. The pleadings filed in these proceedings and in the Forseed Action.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed Application Response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: August 18, 2024



Signature of Kibben Jackson/Lisa Hiebert

☐ Applicant

☒ Lawyer for Applicant

***To be completed by the court only:***

Order made

☐ in the terms requested in paragraphs ..... of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

Date:	.....
	.....
	.....
	.....
	Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Associate
	Judge

The Solicitors for BMO are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 550 Burrard Street, Suite 2900, Vancouver, BC V6C 0A3  
Telephone: +1 604 631 4786 Facsimile: +1 604 631 3232 E-mail: kjackson@fasken.com  
(Reference: Kibben Jackson/324308.00004)

## APPENDIX

### THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☒ case plan orders: other
- ☐ experts
- ☐ none of the above

Schedule "A"

No. H230802  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BANK OF MONTREAL

PETITIONER

AND:

HARO-THURLOW STREET PROJECT LIMITED  
PARTNERSHIP, HARO AND THURLOW GP LTD., HARLOW  
HOLDINGS LTD., 1104227 B.C. LTD., CLOUDBREAK  
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TERRAPOINT DEVELOPMENTS LTD., KANG YU ZOU, WEI  
DONG, WEI ZOU, XIA YU, and TREASURE BAY HK LIMITED

RESPONDENTS

BEFORE	)	THE HONOURABLE MADAM	)	
	)	JUSTICE FITZPATRICK	)	August 23, 2024
	)		)	

CASE PLAN ORDER

AT A CASE PLANNING CONFERENCE conducted on August 23, 2024, by Madam Justice Fitzpatrick, in the presence of those counsel enumerated in Schedule "A" attached hereto;

THIS COURT ORDERS that:

1. The claims asserted by the Plaintiff, Forseed Haro Holdings Ltd. ("**Forseed**"), against the Defendant, Bank of Montreal ("**BMO**"), and any counterclaim by BMO against Forseed in Supreme Court of British Columbia Action No. S245023, styled as *Forseed Haro Holdings Ltd. v. Bank of Montreal et al.* (the "**BMO Claims**"), are to be severed from the claims brought by or against the other defendants in those proceedings.
2. The BMO Claims are to be joined and heard together with the claims asserted in the within petition proceedings (the "**Receivership Proceedings**").
3. To adjudicate the BMO Claims, Forseed and BMO will comply with an expedited litigation process, which includes the following case plan deadlines and procedures:

- a. Forseed shall deliver its reply and response to counterclaim, if any, by no later than August 28, 2024.
  - b. BMO shall deliver a notice of application in the Receivership Proceedings seeking the determination of the BMO Claims (the “**Application**”) and affidavit evidence in support of the Application, by no later than September 20, 2024.
  - c. Forseed shall deliver its application response to the Application (the “**Response**”) and affidavit evidence in support of the Response, by no later than October 11, 2024.
  - d. BMO shall deliver its reply to Forseed’s Response (the “**Reply**”) and affidavit evidence in support of such Reply, if any, by no later than October 18, 2024.
  - e. Cross-examinations on affidavits, if so desired by a party, shall be completed on or before November 1, 2024, and will be limited in duration to a maximum of one half-day for each of BMO and Forseed.
  - f. BMO and Forseed shall deliver further affidavits, if any, by no later than November 8, 2024.
  - g. BMO and Forseed shall deliver written submissions, if any, by no later than November 15, 2024.
  - h. Subject to agreement of the parties or order of the court, the Application shall be heard over two days, between November 18 and November 22, 2024.
  - i. Following the outcome of the Application, BMO, Forseed and the remaining defendants in these proceedings shall determine a process for the resolution of remaining issues, if any.
4. Any material or affidavits filed in this proceeding and any of the related actions of which Madam Justice Fitzpatrick is or subsequently becomes seized may be relied upon in each of these proceedings for all purposes, without prejudice to any issues as to the admissibility or reliability of any evidence contained in such affidavits.
  5. The terms of this Order may be relaxed or varied by the consent of BMO, Forseed and the Receiver, or by order of this Court, provided that any party seeking to vary this Case Plan Order shall provide at least two clear business days’ notice.
  6. The need for endorsement of this order by counsel appearing at this case planning conference, other than counsel for the Petitioner, BMO, is hereby dispensed with.

The following parties approve the form of this Case Plan Order:

\_\_\_\_\_  
Signature of Kibben Jackson  
Lawyer for the Petitioner, Bank of Montreal

By the Court

\_\_\_\_\_  
Registrar

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