FORCE FILED

No. S-240493
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FOX ISLAND DEVELOPMENT LTD. and ADVANCE VENTURE HOLDING CO., LTD.

PETITIONERS

AND:

KENSINGTON UNION BAY PROPERTIES NOMINEE LTD. (formerly known as 34083 YUKON INC.), KENSINGTON UNION BAY PROPERTIES LIMITED PARTNERSHIP, KENSINGTON UNION BAY PROPETIES GP LTD., INTERNATIONAL TRADE CENTER PROPERTIES LTD., SUNWINS ENTERPRISE LTD., MO YEUNG CHING also known as MICHAEL CHING, MO YEUNG PROPERTIES LTD., SFT DIGITAL HOLDNGS 30 LTD., HOTEL VERSANTE LTD., BEEM CREDIT UNION, MORTEQ LENDING CORP., CHUN YU LIU, 1307510 B.C. LTD., JEFF RAUCH, RCC HOLDINGS LTD. and HEUNG KEI SUNG

RESPONDENTS

NOTICE OF APPLICATION

Name of Applicants:	Kensington Union Bay Properties Nominee Ltd., Kensington Union Bay Properties Limited Partnership, Kensington Union Bay Properties GP Ltd., International Trade Centre Properties Ltd., Sunwins Enterprise Ltd., Mo Yeung Ching, Mo Yeung Properties Ltd., SFT Digital Holdings 30 Ltd., and Hotel Versante Ltd. (the "**Applicants**")
To:	Fox Island Development Ltd. and Advance Venture Holding Co. Ltd., Beem Credit Union, Morteq Lending Corp., Chun Yu Liu, 1307510 B.C. Ltd., Jeff Raunch, RCC Holdings Ltd., and Heung Kei Sung
And to:	Deloitte Restructuring Inc. (the "**Receiver**")

TAKE NOTICE that an Application will be made by the Applicants to Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia V6Z 2E1 on October 23, 2025 at 10:00 a.m. for the Order(s) set out in Part 1 below.

The Applicant estimates that the Application will take one day.

☒ This matter is not within the jurisdiction of an Associate Judge.

Part 1: ORDER(S) SOUGHT

1. A declaration that the agreements or arrangements with respect to interest in the Forbearance Extension Agreement, the Supplemental Forbearance Extension Agreement, and the Interim Loan contravene section 347(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*];

2. An order varying paragraphs 7 and 9 of the order *nisi* made February 29, 2024 (the "**Order *Nisi***"), to reduce the amount of money due and owing to the Petitioners to an amount the court deems just in the circumstances; and

3. Special costs of this application.

Part 2: FACTUAL BASIS

Overview

1. The Applicants are borrowers and guarantors under the Senior B Loan Agreement:

    a. Kensington Union Bay Properties Nominee Ltd., Kensington Union Bay Properties Limited Partnership, Kensington Union Bay Properties GP Ltd., International Trade Centre Properties Ltd., (collectively, the "**Borrowers**") borrowed funds from Fox Island Development Ltd. and Advance Venture Holding Co., Ltd. (the "**Petitioners**") under a loan agreement dated June 14, 2021 (the "**Original Senior B Loan Agreement**"),[1] which was amended and/or supplemented by subsequent agreements between the parties (collectively, as amended, the "**Senior B Loan Agreement**"); and

    b. Hotel Versante Ltd., Sunwins Enterprise Ltd., Mo Yeung Properties Ltd., SFT Digital Holdings 30 Ltd., and Mo Yeung (Michael) Ching are guarantors under the Senior B Loan Agreement (the "**Guarantors**").[2]

2. On February 29, 2024, the Petitioners obtained the Order *Nisi* in relation to various loans under the Senior B Loan Agreement. The Order *Nisi* granted the Petitioners exclusive conduct of sale of the ITC Property (defined below), which was conducted in the sole discretion of the Petitioner for approximately a year until the Receiver was appointed in March 2025.

3. The Applicants apply to vary the Order *Nisi*, on the basis that the judgment amount includes interest at an unlawful rate, contrary to section 347 of the *Criminal Code*, as it stood on July 30, 2023 and September 30, 2023. By seeking to enforce an illegal agreement, and by using the court's process to recover unlawful interest through the Order *Nisi*, the Petitioners are engaging in an abuse of the court's process.

4. To remedy this abuse of process, and prevent further abuse, the Applicants seek an order to vary the sum due and owing as of February 29, 2024 in the Order *Nisi* to exclude amounts charged in violation of section 347 of the *Criminal Code*.

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[1] Affidavit #1 of Mo Yeung (Michael) Ching, made October 15, 2025 ("**Ching #1**") at paras. 4–5, Ex. A [Original Senior B Loan Agreement].
[2] Ching #1 at para. 7.

Senior B Loan Agreement and Security

5. The Original Senior B Loan Agreement was amended and/or supplemented by subsequent agreements between the parties:

   a. an amending agreement dated March 7, 2022 (the "**First Amending Agreement**");[3]

   b. an amending agreement dated September 7, 2022 (the "**Second Amending Agreement**");[4]

   c. a forbearance and amending agreement dated February 28, 2023 (the "**Third Amending Agreement**");[5]

   d. a forbearance extension agreement dated July 30, 2023 (the "**Forbearance Extension Agreement**");[6] and

   e. a forbearance extension supplemental agreement dated September 30, 2023 (the "**Supplemental Forbearance Extension Agreement**").[7]

6. As security for the obligations of the Borrowers under the Senior B Loan Agreement, the Borrowers granted various security (the "**Security**") in favour of the Petitioners, including a mortgage registered on September 29, 2021 over various lands and premises including the lands and premises located in Richmond, B.C. with the following legal descriptions:[8]

   PID: 030-794-851
   Air Space Parcel 2 Section 21 Block 5 North Range 6 West New Westminster District Air Space Plan EPP73985

   PID: 029-611-598
   Lot 1 Section 21 Block 5 North Range 6 West New Westminster District Air Space Plan EPP73985

   (together, the "**ITC Property**").

7. Hotel Versante Ltd. operates a hotel known as the Versante Hotel on the ITC Property, with a civic address of 8499 Bridgeport Road, Richmond, B.C. (the "**Hotel Operation**").[9]

8. The Borrowers also granted the Petitioners a mortgage registered April 30, 2021 over certain lands which are part of a multi-stage real estate development project called the Union Bay Estates Development, located in the Comox Valley on the east coast of Vancouver Island and planned in conjunction with the Comox Valley Regional District:[10]

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[3] Ching #1, Ex. B [First Amending Agreement].
[4] Ching #1, Ex. C [Second Amending Agreement].
[5] Ching #1, Ex. D [Third Amending Agreement].
[6] Ching #1, Ex. E [Forbearance Extension Agreement].
[7] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement].
[8] Ching #1 at para. 8, Ex. G.
[9] Ching #1 at para. 9.
[10] Ching #1 at para. 10, Ex. G.

a. a parcel of 583 acres of land for future development, legally described as:

PID: 028-731-492

Lot 1 District Lot 154 Nanaimo District Sections 31 and 32 Township 1 and District Lot 28 Nelson District Plan EPP15509 Except Plans EPP56910, EPP95931 and EPP103248

b. a parcel of 136 acres of land intended to be developed primarily into residential developments, legally described as:

PID: 028-731-549

Lot 4, Sections 31 and 32 Township 1 and District Lot 28 Nelson District Plan EPP15507 Except Plans EPP78068 and EPP103248

Amounts Advanced Under the Senior B Loan Agreement

9. Under section 2.1 of the Senior B Loan Agreement, the Petitioners agreed to make available to the Borrowers a non-revolving, term loan in the aggregate principal amount of up to CAD$43,000,000 (defined as the "**Loan**"), to be divided in tranches.[11]

10. Under section 2.4 of the Senior B Loan Agreement, interest rates varied by tranche and over time; however, the calculation method was the same:

> ... in all cases, calculated daily and compounded monthly, not in advance, from the applicable date on which such tranche is advanced, until and including the date when the Loan Amount is paid in full, both before and after default, demand, maturity and judgment. Interest shall accrue on overdue interest at the same rate and in the same manner.[12]

11. The Loan is part of, but not coextensive with, the "Loan Amount", which defined as the aggregate of: (1) the principal balance of the Loan then outstanding; (2) all interest which as been accrued on the then outstanding principal balance of the Loan; and (3) all other monies the due and owing by the Borrowers at that time under the Senior B Loan Agreement or otherwise in connection with the Loan.[13]

12. Section 11 of the Senior B Loan Agreement provided that, notwithstanding anything contained in the Agreement, the parties agreed that no "interest" shall be paid or payable to the Lenders in connection with the "credit advanced" in respect of the Loan at an annual rate of interest greater than that rate which is one (1%) percent per annum less than the "criminal rate" of interest.[14]

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[11] Ching #1, Ex. A [Original Senior B Loan Agreement] at pp. 13 – 14, s. 2.1, as amended by Ching #1, Ex. C [Second Amending Agreement] at p. 84, s. 5(c).
[12] Ching #1, Ex. A [Original Senior B Loan Agreement] at pp. 15–16, s. 2.4.
[13] Ching #1, Ex. A [Original Senior B Loan Agreement] at p. 6, s. 1(ll).
[14] Each of "interest", "credit advanced", and "criminal rate" in this section have the meaning defined by section 347 of the *Criminal Code*: Ching #1, Ex. A [Original Senior B Loan Agreement] at pp. 46–47, s. 11.

13. The Borrowers defaulted under the terms of the Senior B Loan Agreement by failing to make payments when due.

14. Under the Third Amending Agreement, the Petitioners agreed to forbear from making demand on the Loan and enforcing their Security during the Forbearance Period, then defined as March 7, 2023 through July 31, 2023.[15]

15. The Third Amending Agreement also imposed an obligation on the Borrowers and the Guarantors to "irrevocably consent" to an order nisi with a shortened redemption period and to an order for conduct of sale in favour of the Petitioners in any foreclosure proceedings brought by the Petitioners under the Senior B Loan Agreement.[16]

Forbearance Extension Agreement and Supplemental Forbearance Extension Agreement

16. By July 2023, the Applicants had identified and negotiated a potential refinancing and had received from an interested party a firm offer to purchase the Hotel Operation and the ITC Property. However, the Applicants required additional time to complete the refinancing and potential sale and pay out the funds owed to the Petitioners under the Senior B Loan Agreement.[17]

17. The Applicants sought an extension of the forbearance period from the Petitioners to enable them to complete the refinancing and sale. Although the Petitioners agreed to provide a three-month forbearance extension, they proposed terms which (as noted below) included $16.5 million in fees.[18]

18. The Petitioners refused to negotiate the terms of the extension, leaving the Applicants in a challenging situation: they either agreed to the aggressive extension terms that would give them more time to obtain refinancing and sell the Hotel Operation and ITC Property, or the Petitioners would initiate foreclosure proceedings.[19]

19. Under the Forbearance Extension Agreement:

    a. the Borrowers and Guarantors acknowledged that, as of April 30, 2023, the Borrowers were indebted to the Petitioners for the balance under each tranche of the Loan (including accrued and unpaid interest) in the aggregate amount of $42,710,052.56;[20]

    b. the Borrowers agreed to make certain payments by certain dates, with the last payments coming due on October 30, 2023;[21]

    c. during the Forbearance Extension Period (*i.e.*, between April 30, 2023 and October 30, 2023), interest shall continue to accrue on the outstanding balance of each

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[15] Ching #1, Ex. D [Third Amending Agreement] at p. 111, s. 4.
[16] Ching #1, Ex. D [Third Amending Agreement] at p. 111, s. 3.7.
[17] Ching #1 at paras. 14–16.
[18] Ching #1 at paras. 16–17.
[19] Ching #1 at paras. 17–18.
[20] Ching #1, Ex. E [Forbearance Extension Agreement] at pp. 133–134, s. 2.2(a).
[21] Ching #1, Ex. E [Forbearance Extension Agreement] at pp. 136–139, ss. 3.1–3.4.

tranche of the loan at 30% per annum, which interest would be waived if certain repayment conditions were met;[22]

d. the Petitioners agreed to forbear from making demands on the Loan and enforcing their Security during the Forbearance Extension Period;[23]

e. the Borrowers agreed to pay the Petitioners additional fees in consideration for the extension of the forbearance period, namely:

   i. an additional forbearance fee in the amount of $15,500,000 (the "**Additional Forbearance Fee**"); and

   ii. an additional commitment fee in the amount of $1,050,000 (the "**Additional Commitment Fee**");

which fees were non-refundable, considered immediately owing and payable, and formed part of the Loan Amount until paid;[24]

f. the Borrowers and Guarantors agreed to "irrevocably consent" to an order nisi with a 10 day redemption period and an order for conduct of sale in favour of the Petitioners in any foreclosure proceedings brought by the Petitioners in respect of the Senior B Loan Agreement.[25]

20. The Additional Forbearance Fee and the Additional Commitment Fee were "interest", within the definition of section 347(2) of the *Criminal Code*, as it stood on July 30, 2023.

21. The effective annual rate of interest under the Forbearance Extension Agreement as a result of the Additional Forbearance Fee, the Additional Commitment Fee, and the 30% interest on each tranche of the loan is 690%.[26]

22. Consequently, the Forbearance Extension Agreement was an agreement or arrangement by which the Petitioners were to receive interest at a criminal rate, *i.e.*, an effective annual rate of interest exceeding sixty percent of the credit advanced.

23. In the Supplemental Forbearance Extension Agreement, the Petitioners agreed to accept the sum of $6,400,000 (defined as the "**Equivalent Interest Payment**") on or before October 30, 2023 in lieu of the interest that would otherwise have accrued during the Forbearance Extension Period.[27]

24. The Equivalent Interest Payment was "interest", within the definition of section 347(2) of the *Criminal Code*, as it stood on September 30, 2023.

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[22] Ching #1, Ex. E [Forbearance Extension Agreement] at p. 139, s. 3.5.
[23] Ching #1, Ex. E [Forbearance Extension Agreement] at p. 140, s. 4.
[24] Ching #1, Ex. E [Forbearance Extension Agreement] at p. 142, ss. 6.1–6.3
[25] Ching #1, Ex. E [Forbearance Extension Agreement] at pp. 139–140, s. 3.7.
[26] Affidavit #1 of Van Bui, made October 17, 2025, Ex. A [Bui Report] at p. 4.
[27] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 167, s. 4.3.

25. The effective annual rate of interest under the Supplemental Forbearance Extension Agreement as a result of the Additional Forbearance Fee, the Additional Commitment Fee, and the Equivalent Interest Payment is 174%.[28]

26. Consequently, the Supplemental Forbearance Extension Agreement was an agreement or arrangement by which the Petitioners were to receive interest at a criminal rate, *i.e.*, an effective annual rate of interest exceeding sixty percent of the credit advanced.

Interim Loan

27. In the Supplemental Forbearance Extension Agreement, the Petitioners also agreed to make available to the Borrowers a separate, non-revolving short-term loan (the "**Interim Loan**"), which was to be used for the sole purpose of financing the repayment of a separate loan arrangement, described as the Senior A Indebtedness.[29]

28. The key terms of the Interim Loan were:

    a. the principal amount of the Interim Loan was to be calculated based on the amount of Senior A Indebtedness, certain funds already held in trust, and certain reserve funds;[30]

    b. the term of the Interim Loan began on the date of advance and ended no later than November 7, 2023;[31]

    c. the Interim Loan was to be secured by the Security, plus additional security;[32]

    d. interest on the Interim Loan was to accrue at the following rates, calculated daily and compounded monthly:[33]

        i. 0% per annum from the date of advance up to and including October 30, 2023; and

        ii. 27% per annum plus the then applicable Rate Premium (*i.e.*, 0.75%) from October 31, 2023 until the Interim Loan and interest thereon have bee repaid in full; and

    e. the Borrowers agreed to pay the Petitioners additional fees in consideration for the Interim Loan:[34]

        i. an additional commitment fee in the amount of $131,000 (the **"Interim Loan Commitment Fee**"); and

        ii. an usage fee in the amount of $59,000 (the "**Interim Loan Usage Fee**");

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[28] Bui Report at p. 4.
[29] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 164, s. 3.1(a).
[30] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 164, s. 3.1(b).
[31] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at pp. 164–165, ss. 3.1(a), (c), (e), and (f).
[32] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 165, s. 3.1(d).
[33] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 165, s. 3.1(e).
[34] Ching #1, Ex. F [Supplemental Forbearance Extension Agreement] at p. 165, s. 3.1(g).

which fees were non-refundable and considered immediately earned and payable as of the date of the agreement.

29. On November 1, 2023, the Petitioners advanced the Interim Loan in the principal amount of $5,592,887.84.[35] As such, the term of the Interim Loan was November 1–7, 2023.

30. The Interim Loan Commitment Fee and the Interim Loan Usage Fee were "interest", within the definition of section 347(2) of the *Criminal Code*, as it stood on September 30, 2023.

31. The effective annual rate of interest on the Interim Loan, as a result of the 27.75% interest rate, the Interim Loan Commitment Fee, and the Interim Loan Usage Fee, was 1980%.[36]

32. Consequently, the Interim Loan was yet another an agreement or arrangement by which the Petitioners were to receive interest at a criminal rate, *i.e.*, an effective annual rate of interest exceeding sixty percent of the credit advanced.

33. When the parties entered into the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement, the Applicants were not aware that the interest rates in the agreements were unlawful. Had the Applicants been aware of this fact, they would not have entered into the agreements on the terms proposed.[37]

Order *Nisi* Application and Subsequent Discovery of Criminal Interest Issue

34. On January 24, 2024, the Petitioners commenced this proceeding and sought an order *nisi*.

35. On February 24, 2024, the Petitioners obtained the Order *Nisi* in this proceeding. Consistent with their obligations under the Forbearance Extension Agreement, the Applicants did not oppose the Order *Nisi*. The Applicants communicated their agreement not to file responding materials or oppose the Order *Nisi* to the Petitioners.[38]

36. The Petitioners included, as part of the balance due and owing under the Senior B Loan Agreement for the Order *Nisi*, the Additional Commitment Fee, the Additional Forbearance Fee, and the Equivalent Interest Payment. Although the Senior B Loan Agreement did not provide for interest on any of these fees, the Petitioners asserted that each of these amounts accrued interest at a rate of 30% per annum as of October 31, 2023.

37. The Petitioners also included the Interim Loan Commitment Fee and the Interim Loan Usage fee as part of the balance due and owing on the Interim Loan for the Order *Nisi*. Although the Supplemental Forbearance Agreement did not provide for interest on these fees, the Petitioners asserted that each of these amounts accrued interest at a rate of 27.75% per annum as of October 31, 2023.

38. At the time the Order *Nisi* was granted, the Applicants had not discovered the criminal interest issue. Had they done so, they would have opposed the Order *Nisi* on that basis.

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[35] Affidavit #1 of Jayda Mangat, filed February 27, 2024 [Mangat #1] at p. 10.
[36] Bui Report at p. 4.
[37] Ching #1 at paras. 22–23.
[38] Ching #1 at paras. 28–29, Ex. I.

39. The fact that the interest rate in the Forbearance Extension Agreement is unlawful came to the attention of Mr. Ching, principal of the Borrowers and Guarantors, in March 2025. Mr. Ching promptly took steps to investigate this issue and bring it to the attention of the Receiver and the Petitioners.[39]

40. On July 29, 2025, the Applicants filed a Notice of Civil Claim seeking a declaration that the interest rate in the Forbearance Extension Agreement is unlawful.[40] The Petitioners, in their Response to Civil Claim, rely on the Order *Nisi* in defence to the allegation.[41]

Part 3: LEGAL BASIS

41. The Applicants rely on Rules 1-3, 8-1, and 14-1 of the *Supreme Court Civil Rules*, sections 347, 354, and 462.31 of the *Criminal Code*, and the inherent jurisdiction of the court.

The Court has Inherent Jurisdiction to Vary the Order *Nisi*

42. Under the *functus officio* doctrine, as a general rule, once a judge has decided a matter and the judgment has been entered, they have discharged their office and have no ability to return to and correct the decision.[42]

43. However, the court has inherent jurisdiction to regulate its practice and procedures so as to prevent abuses of process and miscarriages of justice. This includes the jurisdiction to set aside an order where it would constitute a miscarriage of justice or abuse of process if allowed to stand.[43]

44. This jurisdiction is even broader where the order sought to be set aside is a consent order. Because a consent order is a "formal expression of an agreement between the parties" rather than a judicial determination of the merits of the case, a consent order may also be set aside in circumstances that would justify setting aside the underlying agreement, including "lack of authority of counsel, common mistake, fraud, collusion, duress, and illegality".[44]

45. Abuse of process is a flexible doctrine, unencumbered by the specific requirements of related doctrines like *res judicata* and issue estoppel. At its core, the doctrine is concerned with the administration of justice and fairness. It engages the court's inherent power to prevent the misuse of its proceedings in a way that would be manifestly unfair to a party or would in bring the administration of justice into disrepute.[45]

46. Whether conduct brings the administration of justice into disrepute is understood in "the long-term sense of maintaining the integrity of, and public confidence in, the justice system".[46]

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[39] Ching #1 at paras. 31–35, Exs. K & J.
[40] Ching #1 at para. 36, Exs. M & N.
[41] Ching #1 at para. 37, Ex. O.
[42] *Esteghamat-Ardakani v. Taherkhani*, 2023 BCCA 290 [*Taherkhani*] at para. 81.
[43] *Taherkhani* at paras. 86–87; *Green Arms v. Shahabaldin*, 2023 BCCA 340 at para. 38.
[44] *Taherkhani* at paras. 92–93.
[45] *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 at paras. 33–34.
[46] *R v. Grant*, 2009 SCC 32 at para. 68; see also its application in *Este v. Esteghamat-Ardakani*, 2017 BCSC 878 (aff'd 2018 BCCA 290).

47. As set out below, the circumstances of this case justify the court's exercise of its inherent jurisdiction to vary the Order *Nisi*, to prevent the abuse of the court's process.

The Interest Rate Charged under the Forbearance Extension Agreement, Supplemental Forbearance Extension Agreement, and the Interim Loan is Unlawful

48. Section 347 of the *Criminal Code* makes it illegal to (1) enter into an agreement or arrangement to receive interest at a criminal rate, and (2) receive payment of interest at a criminal rate.

49. Section 347 of the *Criminal Code* (at the relevant time) is violated where a credit agreement expressly imposes an annual rate of interest above 60%, or if the agreement requires payment of interest charges over a period which necessarily gives rise to an annual rate exceeding the legal limit.[47]

50. "Interest" is defined broadly in section 347(2) of the *Criminal Code* as "the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement". This provision has been interpreted to include many different types of fees, including commitment fees, late fees, administrative fees, processing fees, and fees for extensions.[48]

51. Each of the Additional Commitment Fee, Additional Forbearance Fee, Equivalent Interest Payment, Interim Loan Commitment Fee, and Interim Loan Usage Fees constitute "interest" under section 347(2) of the *Criminal Code*.

52. Under the Forbearance Extension Agreement:

    a. the "credit advanced" was $45,984,825.63 (*i.e.*, the sum of the outstanding balance under each tranche of the Loan as of April 30, 2023 plus interest accrued to July 30, 2023);[49]

    b. the term was approximately three months, being July 30, 2023 to October 30, 2023 (*i.e.*, the extended forbearance period);

    c. the effective rate of interest, by virtue of the Additional Commitment Fee, Additional Forbearance Fee, and the 30% interest charged on each tranche of the Loan, was 690%.

53. Further, under the Supplemental Forbearance Extension Agreement, the terms of the Third Amending Agreement and Forbearance Extension Agreement were amended such that:[50]

    a. the "credit advanced" was $42,710,052.56 (*i.e.*, the sum of the outstanding balance under each tranche of the Loan as of April 30, 2023);

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[47] *Degelder Construction Co. v. Dancorp Developments Ltd.*, 1998 CanLII 765 (SCC), [1998] 3 SCR 90 at para. 29.
[48] *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 at para. 146.
[49] Bui Report at p. 11.
[50] Bui Report at pp. 4, 12.

b. the term was approximately six months, being April 30, 2023 to October 30, 2023;

c. the effective rate of interest, by virtue of the Additional Commitment Fee, Additional Forbearance Fee, and Equivalent Interest Payment, was 174%.[51]

54. In respect of the Interim Loan, the terms were such that:

a. the "credit advanced" was $5,592,887.84 (*i.e.*, the amount actually advanced, as calculated by the Petitioners);[52]

b. the term was approximately seven days, being November 1–7, 2023;

c. the effective rate of interest, by virtue of the Interim Loan Commitment Fee, the Interim Loan Usage Fee, and the 27.75% interest rate, was 1980%.[53]

55. The Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement thus constitute agreements or arrangements to receive interest at a criminal rate, contrary to section 347(1) of the *Criminal Code*. Such agreements are contrary to public policy and will generally not be enforced by the court.[54]

The Additional Forbearance Fee and Additional Commitment Fee Should Be Struck, or Alternatively, Read Down, and the Order *Nisi* Varied Accordingly

56. Where a contract calls for an illegal interest rate, the court has "considerable discretion" to choose an appropriate remedy depending on the context of the case. There are generally three remedies available:

a. void the contract *ab initio* and deny the lender all recovery;

b. strike out, or "blue pencil" a term or terms in the contract to sever the illegal interest from the principal owed, allowing the lender to recover only the principal; or

c. provide "notional severance" and read down the interest rate to a lawful one.[55]

57. The appropriate remedy depends on the context. Relevant factors include: (i) whether the purpose or policy of section 347 would be subverted by severance; (ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) the potential for the debtor to enjoy an unjustified windfall.[56]

58. As the appropriate remedy is fact-specific, the Applicants propose that the question of remedy ought to be determined by the court on full submissions, after the Petitioners have

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[51] Bui Report at pp. 4, 13.
[52] Mangat #1 at p. 10.
[53] Bui Report at pp. 4, 13–14.
[54] *Top Line Industries Ltd. v. International Paper Industries Ltd.*, 2000 BCCA 23 [*Top Line*] at para. 11.
[55] *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2020 BCCA 70 at paras. 52–54; see also: *Georgas v. Ball*, 2024 BCSC 958 [*Georgas*] at para. 101.
[56] *Georgas* at para. 102, citing *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at paras. 6, 24, and 40–46.

tendered their evidence on knowledge of the illegality and the surrounding circumstances and the Applicants have had an opportunity to seek cross-examination on that evidence.

59. The circumstances in this case justify the exercise of the court's inherent jurisdiction to vary the Order *Nisi* to exclude amounts charged under the unlawful agreement. In particular:

a. The Order *Nisi*, as it stands, creates a situation where the court itself is made an instrument of enforcing obligations arising out of an illegal agreement. This is contrary to the rule of law, as recognized by the Court of Appeal.[57]

b. If the Order *Nisi* remains unaltered, and the Petitioners subsequently receive further payment out of court, there is a risk that the court will enable a further violation of section 347 of the *Criminal Code*, as the Petitioners may "receive" interest exceeding the criminal rate in breach of the *Criminal Code*.

Further, by commencing this proceeding to collect on funds of which "all or part" were obtained by or derived from offences under *Criminal Code*, the Petitioners are attempting to use this court's process to obtain the proceeds of crime, contrary to section 354 of the *Criminal Code*.

Varying the Order *Nisi* will ensure the court's process cannot be used in this manner.

c. The Applicants were not aware—either at the time of the underlying agreements or the Order *Nisi* application—that the interest rates were unlawful. Upon identifying the issue, the Applicants have taken prompt steps to bring this issue before the court.

d. Although the Order *Nisi* is not expressed as a consent order, it is—in effect—a "formal expression of an agreement between the parties": the Order *Nisi* proceeded unopposed further to discussions between the Applicants and the Petitioners on the terms of the order, and further to the Applicants' agreement under the Senior B Loan Agreement to consent to an Order *Nisi* and an order for sale. The Applicants would not have consented to an Order *Nisi* which included unlawful amounts, had they been aware of the criminal rate issue.

e. There is no prejudice to the Petitioners, or any other party, in varying the Order *Nisi*. The variation is limited to what is necessary to remedy the illegality and abuse of process. It does not undermine other terms of the Order *Nisi* or the steps taken in reliance on the Order *Nisi*. It will not delay the impending sale of the ITC Property or the distribution of funds from the sale, as the principal amount owing under the agreements will most likely exceed the funds available for distribution.

f. Conversely, the court's refusal to vary the Order *Nisi* would prejudice both:

i. the Applicants, as the inclusion of unlawful interest substantially increases the amounts owing to the Petitioners; and

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[57] *Top Line* at paras. 15–16. See also: *Mira Design Co. Ltd. v. Seascape Holdings Ltd.*, 1981 CanLII 721 (BC SC) at para. 9.

ii. the administration of justice, as permitting the court's processes to be used to enforce an unlawful agreement would bring the administration of justice into disrepute.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Jayda Mangat, made February 27, 2024;

2. Affidavit #1 of Mo Yeung (Michael) Ching, made October 15, 2025;

3. Affidavit #1 of Van Bui, made October 16, 2025;

4. The pleadings and proceedings within; and

5. Such further and other material as counsel may advise and this honourable court may permit.

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).

Date: October 17, 2025

Signature of ☐ Applicant
☒ Lawyer for Applicant
Hein Poulus, K.C. / Edith Chen / Saheli Sodhi

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 ☐ Judge ☐ Associate Judge

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