



No. H240524
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROYAL BANK OF CANADA

PETITIONER

AND:

WHITEWATER CONCRETE LTD.,
WHITEWATER DEVELOPMENTS LTD.,
ROBERT KYLE SMITH,
CRAIG SMITH,
KRYSTLE HOLDINGS LTD.,
BASTIAN HOLDINGS LTD.,
145 GOLDEN DRIVE LTD.,
BARRY CHARLES HOLDINGS LTD.,
BECISON HOLDING CORPORATION,
G.I.H. PROPERTIES LTD.,
MCVICAR & COMPANY HOLDINGS INC.,
TNL DEVELOPMENTS LTD.,
AMAN GILL,
PETER CHAPPELL,
SANDRA CHAPPELL and
TERESA GAUTREAU

RESPONDENTS

APPLICATION RESPONSE

Application Response of: Deloitte Restructuring Inc., Court Appointed Receiver of
Whitewater Concrete Ltd., Whitewater Developments Ltd., and
145 Golden Drive Ltd.

THIS IS A RESPONSE TO the Notice of Application of the Respondent, Business Development Bank of Canada (“**BDC**”) filed September 19, 2025.

The Application Respondent estimates that the application will take 2.5 hours.

Part 1: ORDERS CONSENTED TO

1. The Application Respondent consents to the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

2. The Application Respondent opposes the granting of the orders set out in paragraphs 1 – 5 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

3. The Application Respondent takes no position on the granting of the orders set out in NIL of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

Background

4. Pursuant to an Order (the “**Receivership Order**”) of the Supreme Court of British Columbia (the “**Court**”) dated July 2, 2024 (the “**Date of Receivership**”), Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as receiver (in such capacity, the “**Receiver**”) without security, of certain lands, other assets and property (the “**Golden Property**”) of 145 Golden Drive Ltd. (“**145**” or “**Golden**”). The Court proceedings in which the Receiver was appointed are referred to herein as the “**Receivership Proceedings**”.
5. The Receivership Order also appointed Deloitte as the Receiver without security of all of the current assets, claims, and choses in action (the “**Operating Companies’ Assets**”) of Whitewater Concrete Ltd. (“**Concrete**”) and Whitewater Developments Ltd. (“**Developments**” and together with Concrete, “**Whitewater**” or the “**Operating Companies**”). Whitewater and 145 are collectively referred to herein as the “**Debtors**”.
6. Capitalized terms used but not otherwise defined in this Response have the same meaning given to them in the Receiver’s Second Report to Court dated August 26, 2025 (the “**Second Report**”).

The Receiver’s Activities

7. Since issuing the Second Report, the Receiver has:
 - (a) retained final copies of Golden’s accounting software and cancelled the software license;
 - (b) completed various estate accounting matters including reconciling GST collections and bank reconciliations;
 - (c) corresponded with legal counsel regarding questions posed by purchaser with respect to the sale of 145 Golden Drive (the “**Transaction**”);
 - (d) made an interim distribution to Business Development Bank of Canada (“**BDC**”) on September 8, 2025 for \$20,989,966 from the Transaction proceeds (the “**First**”).

BDC Distribution”) pursuant to the Order granted September 4, 2025 (the **“Golden Interim Distribution Order”**); and

- (e) prepared a Supplement to the Second Report.

The BDC Application

8. Following the Golden Interim Distribution Order and the First BDC Distribution, BDC filed its Notice of Application (the **“BDC Application”**) on September 19, 2025. The BDC Application follows the Golden Interim Distribution Order whereby the First BDC Distribution out of the Golden receivership was made net of the following amounts:
 - (a) \$353,427 in transfers from the Golden receivership trust account to the Concrete receivership trust account during the period from January to July 2025 to cover the unfunded professional fees and costs related to the Whitewater receiverships (the **“Concrete Transfers”**); and
 - (b) \$650,000 in holdback amounts to cover \$500,000 in estimated current and future Receiver’s fees in the Receivership Proceedings, \$100,000 in post-receivership obligations, and \$50,000 in pre-receivership statutory claims (the **“Holdback”**).
9. The BDC Application seeks, among other things, the following Orders:
 - (a) that the costs of the Receivership Proceedings be allocated between the two asset pools which include the Golden Property and the Operating Companies’ Assets (the **“Cost Allocation Request”**);
 - (b) that the Receiver forthwith transfer or pay the Concrete Transfers to the Golden receivership account and distribute those funds to BDC; and
 - (c) that the Receiver forthwith pay to BDC the full amount of the Holdback held in the Golden receivership account.
10. As outlined in the Second Report, BDC was owed approximately \$27.5 million as at April 16, 2025 (the **“BDC Debt”**) which was made up of the BDC Direct Debt of \$11.4 million, the Whitewater Guarantee of \$3.4 million, and the Lougheed Guarantee of \$12.7 million. After the First BDC Distribution, the Receiver estimates that BDC is owed approximately \$7.5 million with accrued interest and other costs (the **“BDC Remaining Debt”**). The BDC Remaining Debt is secured by the Lougheed Guarantee which is supported by a first charge on 27222 Lougheed Highway, Maple Ridge, BC (the **“Lougheed Property”**).
11. The Receiver understands that BDC issued demand for repayment of the BDC Debt by letters dated September 9, 2024 and that no enforcement steps have been taken by BDC pursuant thereto.

12. The Receiver's position with respect to the BDC Application is that it is premature, given that:
 - (a) the Receiver expects to receive a recovery from an accounts receivable (the "**Trilogy AR Recovery**") owing from Trilogy Concrete 2021 Ltd. ("**Trilogy**"), which the Receiver anticipates will significantly exceed the amount of the Concrete Transfers; and
 - (b) based on current valuations, the Receiver does not expect BDC to suffer any shortfall by virtue of its security over the Lougheed Property.

The Concrete Transfers

13. The Concrete Transfers were made in order to avoid the Receiver having to draw on the Borrowing Facility available in the Receivership Proceedings and to incur interest charges which would have been secured with a prior-ranking charge ahead of BDC. As a result, BDC and the other secured creditor, Royal Bank of Canada ("**RBC**") have benefitted from the Concrete Transfers. In making the Concrete Transfers, the Receiver considered BDC's security position, and concluded that BDC will suffer no prejudice from the Concrete Transfers given its first position mortgage security over the Lougheed Property.
14. The BDC Application includes, among other things, correspondence between the Receiver and BDC regarding the Concrete Transfers (the "**Transfer Correspondence**").
15. The Transfer Correspondence include comments that the Receiver has agreed to the return of the Concrete Transfers to the Golden trust account "in due course." The Receiver's position is unchanged in this regard, and the Receiver intends on returning the Concrete Transfer once there are sufficient funds from the Trilogy AR Recovery to do so.
16. The Concrete Transfers supported past activities of the Receiver, not future activities, and are secured under the Receiver's priority charge over BDC.

Lougheed Property Valuation

17. Colliers Macaulay Nicolls Inc. ("**Colliers**") prepared an appraisal of the Lougheed Property in August 2024, which estimated a value of \$35.8 million (the "**Lougheed Appraisal**").
18. The Receiver understands that the value included in the Lougheed Appraisal significantly exceeds the BDC Remaining Debt secured by the Lougheed Guarantee and the Lougheed Property and that the immediate release of the Holdback would be to the prejudice of Whitewater's other creditors without improving BDC's position on the Lougheed Guarantee.
19. The Receiver received an opinion of value of the Lougheed Property from Colliers dated September 23, 2025 which estimates a range of values from \$26.9 million to \$30.4 million (the "**Colliers Lougheed Value Estimate**") over a sale timeline from nine to twelve months.

Whitewater Receivership Recoveries

20. The BDC Application notes that the Receiver has not yet issued a report to Court with respect to the particulars of Concrete and Development.
21. The Receiver has not yet prepared a report given that recoveries with respect to Whitewater have been minimal to date and limited to approximately \$195,000 recovered from the Whitewater bank accounts at the Date of Receivership. The Receiver does not believe it appropriate to incur the costs to prepare a report when no particular Order is being sought, as is common practice.
22. The Receiver understands from MNP Ltd. (“MNP”), the Licensed Insolvency Trustee of Trilogy, that Concrete’s share of the total claims filed in the Trilogy bankruptcy to date is approximately 28% of the total. Based on the claims filed and Concrete’s share of the Trilogy Funds, the Trilogy AR Recovery will significantly exceed the amount of the Concrete Transfers and will be used to replenish the Golden receivership account when received. MNP has indicated that they are still finalizing the claim amounts and priorities of the claims and expect to make an application to Court to distribute the Trilogy Funds before the end of 2025.
23. Further, and as set out above, the Receiver is also attempting to collect approximately \$4.4 million in accounts receivable owing to the Operating Companies from related companies.

Part 5: LEGAL BASIS

24. The Receiver opposes BDC’s Application and submits it should be dismissed, or alternatively adjourned generally, as premature and unnecessary. In particular:
 - (a) the Receiver has complied with the governing principles of receivership law;
 - (b) the Receiver is entitled to rely on the Receivership Order, including the Receiver’s Charge granted therein;
 - (c) BDC acquiesced to the Concrete Transfers; and
 - (d) the legal principles governing allocation of costs in receiverships support the Receiver’s position.

General Principles of Receivership Proceedings

25. It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment. A receiver owes a fiduciary duty to all parties.

Forjay Management Ltd. v. 0981478 B.C. Ltd., 2018 BCSC 527 at para 21 [Forjay].

26. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty

to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties [...]. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions.

Forjay at para 22, citing Frank Bennett, *Bennett on Receiverships*, 2nd Ed. (Toronto: Carswell, 1999) at 180.

27. It is also trite law that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all interested parties. Its role is to be even handed and not prefer one party over the other.

Forjay at para 24, citing *Bank of Montreal v. Probe Exploration Inc.*, 2000 CanLII 26966 (AB CA).

28. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is "to have the receiver do the work that the court would otherwise have to do."

***2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONSC 199 at para 73, quoting *Re Selkirk* (1986), 58 CBR (NS) 245 (Ont SC), at p. 246.**

29. Consistent with the foregoing duties, the Receiver has considered the respective positions of RBC and BDC. Notably:
- (a) BDC has already benefitted most from these proceedings, having been repaid in full on the BDC Direct Debt and the Whitewater Guarantee, and partially on the Loughheed Guarantee; and
 - (b) the First BDC Distribution reduced BDC's debt by approximately \$21 million, leaving the balance fully secured by its first-ranking charge over the Loughheed Property.

The Receivership Order

30. The Receivership Order expressly granted the Receiver's Charge in favour of the Receiver and its counsel, securing payment of their fees and expenses in priority to all other interests, including those of BDC.
31. This priority is essential to reflect the modern commercial realities of receiverships. As the Alberta Court of Appeal has observed, a super-priority protects receivers. The court explained:

[17] In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on

receiverships. This is in keeping with the decision in CCM Master Qualified Fund v blutip PowerTechnologies, 2012 ONSC 1750, where it was noted that in CCAA proceedings, “professional services are provided ... in reliance on super priorities contained in initial orders”. [1] We agree with the observation of Brown J at para 22 that:

... comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the BIA. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the CCAA...

Edmonton (City) v. Alvarez & Marsal Canada Inc., 2019 ABCA 109 at para 17 [Alvarez].

32. BDC is effectively seeking for the Receiver to disgorge its fees and disbursements related to Whitewater which disregards the clear language of the Receivership Order and the policy rationale underpinning the Receiver’s Charge. The Concrete Transfers funded the Receiver’s activities and are properly captured by the charge.
33. In addition, the Concrete Transfers provided a tangible benefit to BDC. Without those funds, the Receiver would have been required to borrow at interest under its borrowing charge that would also have ranked in priority to BDC’s security. By using the Concrete Transfers instead, the total amount of funds priming BDC has been materially reduced.

BDC Acquiesced to the Concrete Transfers

34. The Concrete Transfers were made with advance notice to BDC and without objection. Despite demanding repayment over a year ago, BDC chose not to enforce its security to date. Having stood by while the Receiver reduced its debt by \$21 million, BDC cannot now displace the costs of the Receivership onto others. Accordingly, BDC is estopped from what amounts to a disgorgement of the Concrete Transfers.

The Principles with Respect to Allocation

35. The general principles governing the allocation of receivership costs include, among other things, the following:
 - (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
 - (ii) costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

- (iii) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
- (iv) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;
- (v) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

***HSBC Bank of Canada v. Maple Leaf Loading Ltd.*, 2016 BCSC 361 at paras 34- 36.**

36. Accordingly, the allocation of receivership costs must be fair, case-specific, and not alter creditor priorities. Applying these principles to the present matter:
- (a) the Concrete Transfers funded the Receiver's activities, which in turn enabled the First BDC Distribution and reduced the amount ranking ahead of BDC's security;
 - (b) the BDC Application is premature in that significant recoveries are expected from the Trilogy Claim sufficient to address any allocation issues without disrupting the administration of the Receivership;
 - (c) while direct benefit to a creditor is not required, the Concrete Transfers supported the general administration of the Receivership, from which BDC has already materially benefitted; and
 - (d) the Concrete Transfers are *prima facie* fair for the reasons stated above.
37. In addition to the above, the Alberta Court of Appeal noted the following in *Alvarez*:

[16] In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (Decision at paras 136-137):

[136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.

[137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

[18] The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in JP Morgan Chase Bank NA v UTTC United Tri-Tech Corp (2006), 2006 CanLII 25352 (ON SC), 25 CBR (5th) 156 at para 45 (and cited in Caisse v River, 2013 ONSC 6809 at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

38. By bringing this application, BDC seeks to shift the full costs of administration, including potential amounts payable to the CRA and on account of payroll source deductions, onto RBC and the Receiver, despite being the creditor that has benefited most from the Receivership.

Conclusion

39. For these reasons, the Receiver submits that the BDC Application is premature and unnecessary, and ought to be dismissed or adjourned generally.

Part 6: MATERIAL TO BE RELIED ON

40. The materials and pleadings filed herein;
41. The Receivership Order granted on July 2, 2024;
42. The Receiver's First Report to Court filed May 27, 2025.
43. The Receiver's Second Report to Court filed August 26, 2025.
44. The Receiver's Supplement to the Second Report filed herein.

☒ The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

☐ The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is:

Dated at the City of Vancouver, in the Province of British Columbia, this 24 day of September, 2025.



Lawson Lundell LLP, Counsel for Deloitte Restructuring Inc., in its capacity as receiver without security, over certain lands, other assets and property of the Respondents Whitewater Concrete Ltd., Whitewater Developments Ltd., and 145 Golden Drive Ltd.

This Application Response is filed by Bryan C. Gibbons and Noor Mann, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2, e-mail address: bgibbons@lawsonlundell.com/ nmann@lawsonlundell.com ; telephone number: 604-685-3456.