

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF EASTERN MEAT SOLUTIONS INC.,
SIERRA CUSTOM FOODS INC., SIERRA SUPPLY CHAIN
SERVICES INC., SIERRA REALTY CORPORATION, RVB
HOLDINGS INC., VANDEN BROEK HOLDINGS (2008)
INC., SIERRA REALTY CALGARY CORPORATION AND
EASTERN MEAT SOLUTIONS (USA) CORP.**

Applicants

**FACTUM OF THE LC APPLICANTS
(Motion for Interim Injunction Returnable November 21, 2024)**

November 21, 2024

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Corporation

PART I - OVERVIEW

1. Sierra Winds Business Park Inc. (“**SWBP**”) entered into a Pre-Lease Contract (as defined below) dated March 10, 2023, with Sierra Realty (Calgary) Corporation (“**Sierra Realty**”). Pursuant to that agreement, SWBP agreed that it would, in the future, lease a building that was not yet built.
2. Sierra Realty is part of a group of companies that sought protection pursuant to the *Companies’ Creditors Arrangement Act*. An Initial Order was granted in this proceeding on May 21, 2024.
3. The Pre-Lease Contract was terminated by mutual consent of the parties on or before February 28, 2024.
4. Within the CCAA proceeding, and for greater certainty, Sierra Realty also disclaimed the Pre-Lease Contract with SWBP effective July 5, 2024. SWBP did not file any objection to this disclaimer within the time period prescribed under the CCAA, or at all. The building was never built. The “Term” of the Pre-Lease Contract as defined therein never commenced.
5. Prior to terminating and disclaiming the Pre-Lease Contract, Sierra Realty’s related party, Eastern Meat Solutions Inc. (“**Eastern Meat**” and together with Sierra Realty, the “**LC Applicant**”), obtained from Bank of Montreal (“**BMO**”) the Standby Letter of Credit No. BMT0697221OS for \$1,500,000 issued on November 20, 2023 (the “**LC**”) on behalf of Sierra Realty, as contemplated by the Pre-Lease Contract to secure a future security deposit. As the Pre-Lease Contract was terminated by mutual agreement of the parties, the

LC was never delivered. The LC had also not been delivered at the time the Pre-Lease Contract was disclaimed within the CCAA proceeding.

6. The LC's expiry date was November 19, 2024, though it was subject to automatic renewal. SWBP did not know of the existence of the LC. When the LC Applicant advised BMO of its request to cancel or not renew the LC, BMO wrote to SWBP by notice dated October 9, 2024, to advise it of the pending non-renewal of the LC (the "**Notice of Non-Renewal**"). It also later provided SWBP with a copy of the LC, contrary to the LC Applicant's instructions.
7. Once aware of the LC, SWBP made two attempts to draw on the LC (each a "**Draw Request**"): one on November 13, 2024 that did not even include a copy of the LC (the "**Initial Draw Request**"), and a second on November 19, 2024 (the date the LC was due to expire) that purported to include a copy of the "original" LC (the "**Amended Draw Request**").
8. The Draw Requests sought to draw \$1,495,000 on the LC. SWBP did not claim the full amount of \$1,500,000 because it thought it could circumvent the terms of the LC and the requirement to deliver the original LC by making a partial draw, knowing that it did not have possession of the original LC.
9. BMO waited until the morning of November 20, 2024, before advising the LC Applicant of the Amended Draw Request and of its intention to honour that Draw Request and pay out on the LC "within 48 hours", necessitating this urgent motion.

10. On this motion, the LC Applicant seeks an injunction restraining BMO from paying out funds pursuant to the LC pending a final determination of SWBP's right to seek payment pursuant to the LC and the Pre-Lease Contract. In the alternative, the LC Applicant seeks an order that any funds paid pursuant to the LC be paid to the court-appointed Monitor, to be held in trust, pending a final determination of the parties' respective entitlements.
11. In addition, the LC Applicants seek disclosure from BMO of all of its communications with SWBP related to the LC as well as all supporting documentation provided by SWBP in support of the Draw Request. BMO's dealings with the LC Applicant in relation to the LC raise serious concerns, which include disclosure of the LC to SWBP and a lack of transparency when dealing with the LC Applicant even when it has been put on notice of a fraudulent Draw Request under the LC. Disclosure of the documentation requested from BMO is required in order to allow the LC Applicants to defend against the fraud arising from the improper Draw Requests.

PART II – THE FACTS

Pre-Lease Contract was Disclaimed Prior to Commencement of Term

12. SWBP and Sierra Realty entered into a document entitled a "lease agreement" dated as of March 10, 2023 (the "**Pre-Lease Contract**").¹
13. By mutual agreement of the parties, the Pre-Lease Contract was terminated on or before February 28, 2024. This termination was thereafter confirmed effective as of July 5, 2024,

¹ Pre-Lease Contract, Exhibit "A" to the Affidavit of Robert Vandenbroek affirmed November 21, 2024 (the "**Vanden Broek Affidavit**"), Motion Record of the LC Applicants, Tab 2A.

pursuant to a Notice to Disclaim delivered by Sierra Realty to SWBP on June 5, 2024, within this CCAA proceeding.²

14. Sierra Realty was never an occupant of the building contemplated under the Pre-Lease Contract. In fact, construction of the building contemplated in the Pre-Lease Contract was not commenced or completed.³

LC Applicant Obtained a Letter of Credit But Did Not Deliver It

15. The LC Applicant obtained the LC from BMO.⁴ The amount of the LC was \$1,500,000 and its purpose was to have it available to fulfil future security deposit obligations under the Pre-Lease Contract.
16. The LC, with an expiry date of November 19, 2024, named SWBP as the beneficiary and Eastern Meat on behalf of Sierra Realty as the applicant. SWBP later amalgamated with and is now Woolsey Equities Inc. (the “**Purported Beneficiary**”).⁵
17. The terms of the LC stated that it could only be drawn upon against presentation of two documents: (i) a beneficiary’s certificate confirming Sierra Realty’s failure to fulfill its obligations under the Pre-Lease Contract, and (ii) the original LC (the “**Presentation Documents**”). There were additional terms in the LC that restricted the beneficiary’s

² Notice to Disclaim, Exhibit “B” to the Vanden Broek Affidavit, Motion Record of the LC Applicants, Tab 2B.

³ Vanden Broek Affidavit at para. 9, Motion Record of the LC Applicants, Tab 2.

⁴ Letter of Credit, Exhibit “C” to the Vanden Broek Affidavit, Motion Record of the LC Applicants, Tab 2C.

⁵ Vanden Broek Affidavit at para. 46, Motion Record of the LC Applicants, Tab 2.

ability to draw on the LC, and that provided for certain circumstances in which facsimile copies could be presented.⁶

18. As the Pre-Lease Contract was terminated before the “Term” (as defined in the Pre-Lease Contract) began, or construction of the building was commenced or completed, the LC was never delivered or disclosed to SWBP or the Purported Beneficiary.⁷

BMO Advises SWBP of LC and Refuses to Cancel It

19. The LC Applicant formally requested the cancellation of the LC from BMO, both prior to the commencement of the CCAA proceeding and again in late September 2024. BMO refused to cancel the LC at the request of the LC Applicant without issuing a notice of non-renewal to the beneficiary under the LC.⁸
20. BMO disclosed the existence of the LC to SWBP by delivering the Notice of Non-Renewal.⁹ Following this disclosure, BMO informed the Monitor (not the LC Applicant) that SWBP had made a Draw Request.¹⁰
21. Despite requests by the LC Applicant for further details pertaining to the communications between SWBP and BMO, BMO only provided the Notice of Non-Renewal and declined to share any additional communications it had had with the Purported Beneficiary.¹¹

⁶ Vanden Broek Affidavit at para. 12, Motion Record of the LC Applicants, Tab 2.

⁷ Vanden Broek Affidavit at para. 13, Motion Record of the LC Applicants, Tab 2.

⁸ Vanden Broek Affidavit at paras. 19-22, Motion Record of the LC Applicants, Tab 2.

⁹ Notice of Non-Renewal, Exhibit “G” to the Vanden Broek Affidavit, Motion Record of the LC Applicants, Tab 2G.

¹⁰ Vanden Broek Affidavit at para. 26, Motion Record of the LC Applicants, Tab 2.

¹¹ Vanden Broek Affidavit at para. 28, Motion Record of the LC Applicants, Tab 2.

22. The LC Applicant challenged the validity of any Draw Request, arguing that the Payment Preconditions could not have been met since the lease had been disclaimed, no obligations existed under the Pre-Lease Contract, and SWBP was unaware of the LC's existence prior to BMO's disclosure.¹²
23. The LC Applicant emphasized that allowing a Draw Request would contravene the LC's terms and create prejudice to the LC Applicant. The LC Applicant demanded that BMO decline any Draw Request and sought a response outlining BMO's position.
24. This position was also shared directly with SWBP by the LC Applicant.¹³

BMO Discloses and Signals Intent to Honour Draw Request on LC

25. On November 18, 2024, BMO's counsel advised the LC Applicant that BMO intended to assess and potentially honour a Draw Request in the ordinary course, despite the many concerns raised by the LC Applicant, including advising BMO of the LC Applicant's position that the Draw Request was fraudulent.¹⁴
26. BMO confirmed receiving the Initial Draw Request by facsimile from the Purported Beneficiary for \$1,495,000, close to the LC's full value, which raised further concerns that SWBP was seeking to fraudulently circumvent the requirement to present the original LC, which it did not have possession of.¹⁵

¹² Vanden Broek Affidavit at paras. 29-30, Motion Record of the LC Applicants, Tab 2.

¹³ Vanden Broek Affidavit at para. 33, Motion Record of the LC Applicants, Tab 2.

¹⁴ Vanden Broek Affidavit at para. 35, Motion Record of the LC Applicants, Tab 2.

¹⁵ Vanden Broek Affidavit at para. 38, Motion Record of the LC Applicants, Tab 2.

27. BMO or its representatives disclosed the LC to SWBP, contrary to prior confirmation that it would keep the CCAA Applicants' (which included the LC Applicant's) information confidential.¹⁶
28. The LC Applicant's counsel requested disclosure of the Initial Draw Request and related documents, reiterating that the Payment Preconditions had not been met and asserting that the request was fraudulent.¹⁷
29. Despite initial reluctance, BMO provided the Initial Draw Request, revealing that it had been made by the Purported Beneficiary.¹⁸
30. The LC Applicant's counsel maintained that the Initial Draw Request was fraudulent and warned the Purported Beneficiary against attempting to draw on the LC. The Purported Beneficiary's designated account for the funds to be received is also held with BMO, raising further concerns on the part of the LC Applicant about BMO's potential conflict of interest and its duty of confidentiality to the LC Applicant as the Applicants' lender.¹⁹
31. The LC expired on November 19, 2024. On November 20, 2024, BMO informed the LC Applicant's counsel that it had received the Amended Draw Request the previous day, which was purportedly compliant with the LC's terms, and that BMO intended to make payment within 48 hours.²⁰

¹⁶ Vanden Broek Affidavit at para. 39, Motion Record of the LC Applicants, Tab 2.

¹⁷ Vanden Broek Affidavit at para. 41, Motion Record of the LC Applicants, Tab 2.

¹⁸ Vanden Broek Affidavit at para. 45, Motion Record of the LC Applicants, Tab 2.

¹⁹ Vanden Broek Affidavit at para. 49, Motion Record of the LC Applicants, Tab 2.

²⁰ Vanden Broek Affidavit at para. 50, Motion Record of the LC Applicants, Tab 2.

32. BMO did not initially provide details or explain how the Amended Draw Request met the LC's Payment Preconditions. A copy of the Amended Draw Request was later provided, revealing that it included a facsimile of a photocopy of the LC marked "original", which the Purported Beneficiary could only have obtained from BMO and which is false on its face as the LC Applicant holds the original LC.²¹

PART III – THE ISSUE

33. The issue on this motion is whether BMO should be enjoined from paying the Purported Beneficiary pursuant to the LC or, in the alternative, whether BMO should be directed to make any payments pursuant to the LC to the Monitor in trust to be held pending a final determination of the parties' respective rights pursuant to the LC.

PART IV – LAW AND ANALYSIS

A. The Applicable Legal Test

34. The applicable test on a motion for an interlocutory injunction to restrain payment under a letter of credit on the ground of fraud by the Purported Beneficiary of the credit is a strong *prima facie* case of fraud, established on a balance of probabilities.²²
35. Courts can look to either the tendered documents or the underlying contract to detect fraud.²³ Fraud in this context does not refer to fraud in the criminal sense and carries with

²¹ Amended Draw Request, Exhibit "R" to the Vanden Broek Affidavit, Motion Record of the LC Applicants, Tab 2R.

²² *Bank of Nova Scotia v Angelica-Whitewear Ltd.*, [1987] 1 SCR 59, 1987 CanLII 78 at [para. 19](#), *Alberta Securities Commission v Maitland Capital Ltd.*, 2008 CanLII 32826 at [para 5](#) (Ont. SCJ) and *Thomas Hsueh v Alderland Group*, 2011 ONSC 3614 at [para 31](#).

²³ *Eurobank Ergasias S.A. v Bombardier inc.*, 2024 SCC 11 at paras [112](#), [221](#). [*Eurobank*]

it a different connotation. If a Purported Beneficiary demands payment while knowing that they have no right to be paid under the underlying contract, that conduct may amount to fraud.²⁴

36. The bar is nevertheless high and a mere absence of good faith may not be sufficient. In this context, fraud must import some aspect of impropriety, dishonesty or deceit.²⁵

B. LC Applicant Satisfies the Test of a Strong *Prima Facie* Case

37. This is not a case where there is a simple dispute about the interpretation of a provision of an agreement underlying a letter of credit. In such cases, courts often find that the dispute does not rise to the level of fraud, and thus the strong *prima facie* case has not been met.²⁶
38. In this case, however, the “Term” under the Pre-Lease Contract had not even *commenced* by its terms when the agreement was mutually terminated then subsequently disclaimed in the CCAA proceeding. The building that was the subject of the intended future lease did not, and does not, even exist.
39. This is not a case where the parties dispute the intricacies of a particular provision of a lease that has been governing their relationship for many years, where a landlord has been holding possession of a letter of credit to be used in the event of a default by its tenant.

²⁴ *Eurobank* at [para. 114](#).

²⁵ *Eurobank* at [para. 115](#).

²⁶ See i.e. *SNC-Lavalin Polska SP. Zoo c. BNP Paris Canada*, 2017 QCCS 3694 at [para. 40](#); *7636156 Canada Inc. (Re)*, 2020 ONCA 681 at [paras. 56-57](#), leave to SCC refused [2021 CanLII 32439](#).

40. It is quite the contrary. Sierra Realty never took possession of the premises, the lease Term never commenced, and the Purported Beneficiary did not even *know of the existence* of the LC until BMO breached the confidence of the LC Applicant and told the Purported Beneficiary.
41. The conduct of the Purported Beneficiary also contains badges of fraud, in that it waited until the literal expiry date of the LC to make its Amended Draw Request, it requested \$5,000 less than the full value of the LC to try to defeat the requirement that the full value could only be drawn if the Purported Beneficiary presented the original LC, and it engaged in communications with BMO leading to its receipt of a copy of the LC, the nature of which still has not been disclosed to the LC Applicant.
42. There is more than sufficient evidence for this Court to conclude that a strong *prima facie* case has been made out by the LC Applicants. An order preserving the *status quo* to permit the parties to present their respective arguments on a full record before any funds are dissipated is wholly appropriate in the circumstances.

C. In the Alternative, Payment Should be Made to the Court-Appointed Monitor

43. In the alternative, if the Court decides not to enjoin BMO from making any payment pursuant to the LC, it should order that BMO pay funds to the court-appointed Monitor, in trust, to be held pending a final determination of the parties' respective rights.
44. This will have the salutary effect of resolving BMO's involvement, subject to an order requiring it to produce its relevant documentation (as discussed below), while still

preserving the *status quo* and permitting the parties time to have their entitlements determined on a full record.

45. There is precedent for such a determination. In *Arrangement relative a FormerXBC Inc. (Xebec Adsorption Inc.)*, the supervising judge of the CCAA proceedings ordered that any payment made pursuant to the irrevocable standby letter of credit in that case be paid to the court-appointed monitor, in trust, until determination of the parties' respective rights under the LC in issue in that proceeding.²⁷

D. Production Orders

46. The LC Applicants have made repeated requests of BMO to produce all written communications with the Purported Beneficiary, the Purported Beneficiary's principal or any related parties relating to the LC. It has also requested production of any supporting documentation submitted by the Purported Beneficiary to support its Draw Requests.
47. To date, BMO has refused to produce these documents. BMO has suggested that such requests are more properly made within a litigation proceeding. The LC Applicant is therefore left with no choice but to bring this motion to obtain such disclosure.
48. The circumstances of the relationship and communications between the Purported Beneficiary and BMO, and the communications between the LC Applicant and BMO, give rise to concerns. Any communications between the Purported Beneficiary and BMO relating specifically to the LC are relevant to the *bona fides* of any claim the Purported

²⁷ *Arrangement relative a FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 836 at [para. 11](#).

Beneficiary may have to funds pursuant to the LC and whether BMO has acted reasonably in deciding it would honour the Purported Beneficiary's demand for payment in the face of actual notice by the LC Applicant of fraud in respect of the Draw Requests.

49. These documents are relevant to this proceeding and should be ordered produced, forthwith.

PART V – RELIEF REQUESTED

50. For all of the foregoing reasons, the LC Applicants request that this Honourable Court grant an order substantially in the form of the draft order located at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, 2024.

November 21, 2024

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**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Case
1	<u><i>Bank of Nova Scotia v Angelica-Whitewear Ltd.</i>, [1987] 1 SCR 59, 1987 CanLII 78</u>
2	<u><i>Alberta Securities Commission v Maitland Capital Ltd.</i>, 2008 CanLII 32826 (Ont. SCJ)</u>
3	<u><i>Thomas Hsueh v Alderland Group</i>, 2011 ONSC 3614</u>
4	<u><i>Eurobank Ergasias S.A. v Bombardier inc.</i>, 2024 SCC 11</u>
5	<u><i>SNC-Lavalin Polska SP. Zoo c. BNP Paris Canada</i>, 2017 QCCS 3694</u>
6	<u><i>7636156 Canada Inc. (Re)</i>, 2020 ONCA 681</u>
7	<u><i>Arrangement relative a FormerXBC Inc. (Xebec Adsorption Inc.)</i>, 2023 QCCS 836 (CanLII)</u>

SCHEDULE “B” RELEVANT STATUTES

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Rules of Civil Procedure, RRO 1990, Reg 194

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 [\(1\)](#).

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 [\(2\)](#).

(3) Revoked: O. Reg. 231/13, s. 2.

“Party and Party” Costs

(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs. O. Reg. 284/01, s. 3.

“Solicitor and Client” Costs

(5) If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs. O. Reg. 284/01, s. 3.

Effect of Non-Compliance

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 [\(1\)](#).

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed. R.R.O. 1990, Reg. 194, r. 2.01 [\(2\)](#).

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

locally. R.R.O. 1990, Reg. 194, r. 3.01 [\(2\)](#).

Extension or Abridgment ***General Powers of Court***

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 [\(1\)](#).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 [\(2\)](#).

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court. R.R.O. 1990, Reg. 194, r. 3.02 [\(3\)](#).

Consent in Writing

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent. O. Reg. 555/96, s. 1; O. Reg. 427/01, s. 2; O. Reg. 438/08, s. 5.

Substituted Service or Dispensing with Service ***Where Order May be Made***

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service. R.R.O. 1990, Reg. 194, r. 16.04 [\(1\)](#).

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective. R.R.O. 1990, Reg. 194, r. 16.04 [\(2\)](#).

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules. R.R.O. 1990, Reg. 194, r. 16.04 [\(3\)](#).

Notice of Motion

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.01; O. Reg. 322/24, s. 4.

Jurisdiction to Hear a Motion

Jurisdiction of Judge

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 [\(1\)](#).

Jurisdiction of an Associate Judge

(2) An associate judge has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
- (b) to set aside, vary or amend an order of a judge;
- (c) to abridge or extend a time prescribed by an order that an associate judge could not have made;
- (d) for judgment on consent in favour of or against a party under disability;
- (e) relating to the liberty of the subject;
- (f) under [section 4](#) or [5](#) of the *Judicial Review Procedure Act*; or
- (g) in an appeal. R.R.O. 1990, Reg. 194, r. 37.02 [\(2\)](#); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Jurisdiction of Registrar

(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

- (a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
- (b) the consent states that no party affected by the order is under disability; and
- (c) the order sought is for,
 - (i) amendment of a pleading, notice of application or notice of motion,
 - (ii) addition, deletion or substitution of a party,
 - (iii) removal of a lawyer as lawyer of record;

- (iv) setting aside the noting of a party in default,
- (v) setting aside a default judgment,
- (vi) discharge of a certificate of pending litigation,
- (vii) security for costs in a specified amount,
- (viii) re-attendance of a witness to answer questions on an examination,
- (ix) fulfilment of undertakings given on an examination, or
- (x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

Where Motions to be Brought

37.03 Unless the court orders otherwise, all motions shall be brought in the county where the proceeding was commenced or to which it has been transferred under [rule 13.1.02](#) and, if a motion is to be heard in person, it shall be heard in that county. O. Reg. 689/20, s. 22.

Motions — To Whom to be Made

37.04 A motion shall be made to the court if it is within the jurisdiction of an associate judge or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Hearing Date for Motions

Where no practice direction

37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions. O. Reg. 770/92, s. 10; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Exception, lengthy hearing

(2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

Urgent motion

(3) An urgent motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Content of Notice

37.06 Every notice of motion (Form 37A) shall,

- (a) state the precise relief sought;
- (b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

- (c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

Service of Notice

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 [\(1\)](#); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 [\(2\)](#).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 [\(3\)](#).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

- (a) dismiss the motion or dismiss it only against the person who was not served;
- (b) adjourn the motion and direct that the notice of motion be served on the person; or
- (c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 [\(5\)](#).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 [\(6\)](#); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

Filing of Notice of Motion

37.08 (1) Where a motion is made on notice, the notice of motion shall be filed with proof of service at least seven days before the hearing date in the court office where the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.08 [\(1\)](#); O. Reg. 171/98, s. 13; O. Reg. 438/08, s. 34.

(2) Where service of the notice of motion is not required, it shall be filed at or before the hearing. R.R.O. 1990, Reg. 194, r. 37.08 [\(2\)](#).

Abandoned Motions

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 [\(1\)](#).

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 [\(2\)](#).

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 [\(3\)](#).

Material for Use on Motions

Where Motion Record Required

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or associate judge hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 [\(1\)](#); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Contents of Motion Record

(2) The motion record shall contain, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the notice of motion;
- (c) a copy of all affidavits and other material served by any party for use on the motion;
- (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and
- (e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 [\(2\)](#).

Responding Party's Motion Record

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
- (b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 [\(3\)](#); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

Material may be Filed as Part of Record

(4) A notice of motion and any other material served by a party for use on a motion may be filed, together with proof of service, as part of the party's motion record and need not be filed separately. R.R.O. 1990, Reg. 194, r. 37.10 [\(4\)](#).

Transcript of Evidence

(5) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by [rule 34.18](#). R.R.O. 1990, Reg. 194, r. 37.10 [\(5\)](#).

Factum

(6) A party may serve on every other party a factum that meets the requirements of [rule 4.06.1](#). O. Reg. 14/04, s. 18; O. Reg. 300/24, s. 8.

(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).

(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).

(9) Revoked: O. Reg. 394/09, s. 15 (3).

Refusals and Undertakings Chart

(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

- (a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out,
 - (i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,
 - (ii) the question number and a reference to the page of the transcript where the question appears, and
 - (iii) the exact words of the question; and
- (b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,
 - (i) the answer provided, or
 - (ii) the basis for the refusal to answer the question or satisfy the undertaking. O. Reg. 132/04, s. 8; O. Reg. 438/08, s. 35 (5, 6).

Confirmation of Motion

37.10.1 (1) A party who makes a motion on notice to another party shall confer or attempt to confer with the other party and shall, not later than 2 p.m. five days before the hearing date,

- (a) give the registrar a confirmation of motion (Form 37B) by,
 - (i) sending it by e-mail to the court office, or
 - (ii) leaving it at the court office; and
- (b) send a copy of the confirmation of motion to the other party by e-mail. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (1); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (1, 3).

Failure to Send Copy of Confirmation

(2) If a party fails to send a copy of the confirmation of motion to a responding party in accordance with clause (1) (b), the responding party may, not later than 10 a.m. four days before the hearing date,

- (a) give the registrar a confirmation of motion (Form 37B) by,
 - (i) sending it by e-mail to the court office, or
 - (ii) leaving it at the court office; and
- (b) send a copy of the confirmation of motion to the moving party by e-mail. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (2); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (2, 3).

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

- (a) give the registrar a corrected confirmation of motion (Form 37B) by,
 - (i) sending it by e-mail to the court office, or
 - (ii) leaving it at the court office; and
- (b) send a copy of the corrected confirmation of motion to the other party by e-mail. O. Reg. 14/04, s. 19; O. Reg. 689/20, s. 23 (3); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (3).

Effect of Failure to Confirm

(4) If no confirmation is given under subrule (1), the motion shall not be heard and is deemed to have been abandoned, unless the court orders otherwise. O. Reg. 537/18, s. 7 (2).

Costs

(5) If a motion is deemed to have been abandoned under subrule (4) and the responding party gave a confirmation of motion in accordance with subrule (2), the responding party may be heard on the costs of the abandoned motion on the hearing date scheduled for the abandoned motion. O. Reg. 537/18, s. 7 (2).

Hearing in Absence of Public

37.11 (1) A motion may be heard in the absence of the public where,

- (a) the motion is to be heard and determined without oral argument;

- (b) because of urgency, it is impractical to have the motion heard in public;
- (c) the motion is to be heard by telephone conference or video conference;
- (d) the motion is made in the course of a pre-trial conference or case conference; or
- (e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 [\(1\)](#); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.

(2) The hearing of all other motions shall be open to the public, except as provided in [section 135](#) of the *Courts of Justice Act*, in which case the presiding judge, associate judge or officer shall endorse,

- (a) on the notice of motion leave for a hearing in the absence of the public; or
- (b) on a separate document in accordance with [subrule 59.02 \(2\)](#), with necessary modifications. O. Reg. 689/20, s. 24; O. Reg. 383/21, s. 15.

37.12 Revoked: O. Reg. 288/99, s. 15.

Hearing without Oral Argument

Consent motions, unopposed motions and motions without notice

37.12.1 (1) Where a motion is on consent, unopposed or without notice under [subrule 37.07 \(2\)](#), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).

(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

(2.1) In the case of a motion on consent in the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought on the motion shall also be filed with the notice of motion. O. Reg. 82/17, s. 3.

(3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

Opposed Motions in Writing

(4) The moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

- (a) the motion shall be made on at least fourteen days notice;
- (b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
- (c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2); O. Reg. 689/20, s. 25.

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

- (a) a consent to the motion;
- (b) a notice that the responding party does not oppose the motion;
- (c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or
- (d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

Disposition of Motion

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

- (a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 [\(1\)](#).

(2) A judge who hears a motion may,

- (a) in proper case, order that the motion be converted into a motion for judgment; or
- (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 [\(2\)](#).

(3) Where on a motion a judge directs the trial of an issue, [subrules 38.10 \(2\)](#) and [\(3\)](#) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 [\(3\)](#).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to a motion under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 7; O. Reg. 111/21, s. 4.

Setting Aside, Varying or Amending Orders ***Motion to Set Aside or Vary***

37.14 (1) A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 [\(1\)](#); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 [\(2\)](#).

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or associate judge, at a place determined in accordance with [rule 37.03](#) (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 [\(3\)](#); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

(a) to the judge who made it, at any place; or

(b) to any other judge, at a place determined in accordance with [rule 37.03](#) (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 [\(4\)](#); O. Reg. 689/20, s. 26.

Order Made by Associate Judge

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of an associate judge may be made,

(a) to the associate judge who made it, at any place; or

(b) to any other associate judge or to a judge, at a place determined in accordance with [rule 37.03](#) (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 [\(5\)](#); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

(a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

(b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 [\(6\)](#); O. Reg. 82/17, s. 4, 17.

Motions in a Complicated Proceeding or Series of Proceedings

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and [rule 37.03](#) (where motions to be brought) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 [\(1\)](#); O. Reg. 292/99, ss. 2 (3), 4; O. Reg. 689/20, s. 27.

(1.1) A judge who is directed to hear all motions under subrule (1) may refer to an associate judge any motion within the jurisdiction of an associate judge under [subrule 37.02 \(2\)](#) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(1.2) A judge who is directed to hear all motions under subrule (1) and an associate judge to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 [\(2\)](#); O. Reg. 438/08, s. 37 (2).

Prohibiting Motions without Leave

37.16 On motion by any party, a judge or associate judge may by order prohibit another party from making further motions in the proceeding without leave, where the judge or associate judge on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Motion before Commencement of Proceeding

37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

Courts of Justice Act, RSO 1990, c C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EASTERN MEAT SOLUTIONS INC., SIERRA CUSTOM FOODS INC., SIERRA SUPPLY CHAIN SERVICES INC., SIERRA REALTY CORPORATION, RVB HOLDINGS INC., VANDEN BROEK HOLDINGS (2008) INC., SIERRA REALTY CALGARY CORPORATION AND EASTERN MEAT SOLUTIONS (USA) CORP.

Court File No. CV-24-00720622-00CL

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