

COURT FILE
NUMBER 2201-01016

COURT COURT OF KING'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE CALGARY
IN THE MATTER OF THE RECEIVERSHIP
OF ROBUS RESOURCES INC.

APPLICANT PAMOCO RESOURCES LTD.

DOCUMENT **REPLY BRIEF OF PAMOCO RESOURCES LTD.**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION MILLER THOMSON LLP
3000, 700-9th Avenue S.W.
Calgary, AB, Canada T2P 3V4
Attention: James W. Reid

OF PARTY FILING
THIS DOCUMENT Telephone: 403.298.2418 Fax: 403.262.0007
E-mail: jwreid@millerthomson.com
File No.: 0273785.0001

Clerk's Stamp

TABLE OF CONTENTS

| | | |
|------|---|-----------|
| I. | OVERVIEW | 3 |
| II. | FACTS | 3 |
| III. | LAW AND ARGUMENT | 4 |
| | A. The Tangibles Transaction was Rational and made Good Business Sense | 4 |
| | B. The Consideration for the Tangibles Transaction was Valid | 6 |
| | C. The Tangibles Transaction is a Conveyance not a Security Arrangement..... | 9 |
| | D. Pamoco took possession of the Tangibles | 10 |
| | E. The Debtor is not in Legal Possession of the Tangibles for section 26 of the Sale of Goods Act to Apply | 11 |
| | F. The Application is brought in Good Faith and with Just Cause..... | 12 |
| IV. | CONCLUSION | 13 |
| | TABLE OF AUTHORITIES | 15 |

I. OVERVIEW

1. This Reply Brief of Law is filed by Pamoco Resources Ltd. ("**Pamoco**") in response to:
(i) the Brief of Argument of Robus Services LLC (the "**Lender Brief**"); and (ii) the Bench Brief of Alvarez & Marsal Canada Inc., in its capacity as receiver (the "**Receiver Brief**"), each dated January 13, 2023.
2. This Reply Brief responds to the arguments of the Senior Lender and Receiver as follows:
 - (a) the Tangibles Transaction was rational and commercially reasonable at the time it was entered into;
 - (b) there was valid and sufficient consideration given for the Tangibles;
 - (c) the facts show that the Tangibles Transaction was a sale, not a security arrangement;
 - (d) Pamoco did take possession of the Tangibles;
 - (e) the Debtor is not in legal possession of the Tangibles for section 26(1) of the *Sale of Goods Act* to apply; and
 - (f) Pamoco is acting in good faith and with due diligence in bringing the Application.
3. Capitalized terms used herein and not otherwise defined shall have the meanings given to them in the Brief of Law filed by Pamoco on January 10, 2023 (the "**Pamoco Brief**").

II. FACTS

4. The facts relevant to the Application are set out in detail in the Affidavit of Terry O'Connor sworn January 9, 2023 (the "**O'Connor Affidavit**") and the Pamoco Brief. Additional facts relevant to respond to the Senior Lender Brief and the Receiver Brief are set out in the responses to the arguments made in the Lender Brief and the Receiver Brief below.

III. LAW AND ARGUMENT

A. The Tangibles Transaction was Rational and made Good Business Sense

5. The Senior Lender argues that the Court should not accept the validity of the Tangibles Transaction on the basis that it is a commercially unreasonable transaction.¹ To the contrary, when the Tangibles Transaction is considered in the circumstances of the time in which it was entered into, it is completely logical and commercially rational.
6. At the time the Tangibles Transaction was agreed to, in January 2019, Mr. O'Connor had a secured personal loan outstanding to the Debtor for approximately \$2,100,000, documented pursuant to a Bridge Loan Agreement dated December 9, 2016.²
7. Pamoco also had secured loans outstanding with the Debtor totalling approximately \$700,000, as documented pursuant to demand promissory notes.³
8. Further, the Debtor had asked Pamoco to pay the Acquisition Advances for Robus to acquire mineral rights interest in certain other petroleum and natural gas producer companies with interests on the leased lands.⁴
9. Thus, at the time of the Tangibles Transaction:
 - (a) Pamoco and Mr. O'Connor already had security over all of the assets and properties of the Debtor;
 - (b) the O'Connor Loans and the Pamoco Loans were in default;
 - (c) oil prices were approximately half of what they are today devaluing oil and gas assets, including the Tangibles; and
 - (d) Robus had coming due accounts payable to its contractors and suppliers.⁵
10. Mr. O'Connor and Pamoco were already extremely financially exposed, and there was no additional security the Debtor could grant to it. In the circumstances, it is understandable why Mr. O'Connor and Pamoco were not willing to extend any more credit to the Debtor to make the Robus AP Payments in exchange for security.

¹ Lender Brief at paras 35-42.

² O'Connor Affidavit at para 20, Exhibit H.

³ O'Connor Affidavit at para 17, Exhibit F.

⁴ O'Connor Affidavit at para 24.

⁵ O'Connor Affidavit at para 26.

11. Therefore the Debtor offered to sell to Pamoco its interests in the Tangibles in satisfaction of the Acquisition Advances and in exchange for Pamoco making the upcoming Robus AP Payments. The Debtor expressly acknowledged the value of this transaction to be \$90,000.⁶ This is a perfectly logical business arrangement that was required for the Debtor to meet its obligations as they became due, and for it to continue operating.
12. In challenging the commercial rationale for the Tangibles Transaction, the Receiver argues the Tangibles Transaction “was prejudicial to Robus and its creditors”.⁷ Pamoco disagrees.
13. At the time of the Tangibles Transaction there were no other secured creditors, and the unsecured trade creditors were being paid by Pamoco as part of the consideration for the Tangibles Transaction. Robus benefited by being able to stay solvent and continue operating. The Receiver does not identify any stakeholders that were prejudiced by the Tangibles Transaction.
14. The Senior Lender and the Receiver also challenge the reasonability of the Tangibles Transaction on the basis that the Debtor’s purported book value of the Tangibles is over \$1,500,000, whereas the consideration for the Tangibles Transaction was \$90,000.⁸
15. The Debtor’s valuation of the Tangibles in its books and records is not reliable. In the Second Report of the Receiver (the “**Second Report**”) the Receiver states that it has not performed an audit, review, or verification of the Debtor’s books and records.⁹ Further, the Receiver notes that the books and records of the Debtor are incomplete.¹⁰
16. In addition, it is not apparent that the Debtor’s books and records value of the Tangibles takes into account the fact that much of the equipment is out of service, and the vast majority is not being used by the Debtor who is currently only operating two oil and gas wells.¹¹

⁶ O’Connor Affidavit at Exhibit N.

⁷ Receiver Brief at para 64.

⁸ Receiver Brief at para 17, 78(k); Lender Brief at para 36; O’Connor Affidavit at Exhibit N.

⁹ Second Report at para 8.

¹⁰ Second Report at para 27.

¹¹ Second Report at para 11.

17. When considering the Tangibles Transaction at the time it was entered into, it is apparent that the transaction made sound commercial sense to both the Debtor and Pamoco. As previously stated in the Pamoco Brief, Courts avoid disturbing the bargain parties have struck.
18. The Senior Lender and the Receiver seek to undermine Mr. O'Connor's evidence on the rationale for the Tangibles Transaction despite never having sought to question Mr. O'Connor on his evidence. The Receiver has only met with Mr. O'Connor one time, in a joint meeting, so the Receiver has hardly had an opportunity to adequately understand Mr. O'Connor's version of the circumstances surrounding the Tangibles Transaction.
19. Mr. O'Connor is a highly regarded businessman in Central Alberta who has built a 50-year-old oilfield service and supply company. Mr. O'Connor has been providing financial and operational support for the Debtor since its commencement, and continues to visit the leased premises where the Tangibles are located to inspect and maintain the property.
20. Despite the efforts of the Senior Lender and the Receiver to discredit Mr. O'Connor, his evidence is first hand, uncontested, and should be accepted.¹²

B. The Consideration for the Tangibles Transaction was Valid

21. The Lender Brief and the Receiver Brief both claim that the Tangibles Transaction is unenforceable on account of it being made for "past consideration". The Lender Brief and the Receiver Brief fail to address the exceptions where past consideration may be sufficient consideration for an enforceable contract.¹³
22. For example, if party A commits an act and there is an implied promise from party B in return for that act, a subsequent promise to compensate party A for the past act (i.e. the past consideration) may be enforced.¹⁴
23. Canadian Courts have adopted a three part test in determining whether past consideration amounts to good consideration for a subsequent promise as follows:

(1) the act must have been done at the request of the promisor;

¹² *Prestigious Properties Inc v Cold Lake Estates Inc*, 2018 ABQB 203 at para 8 [TAB 1]; *Adelaide Capital Corp v Singh*, 208 AR 229, 56 Alta LR (3d) 159 (ABQB) at para 13 [TAB 2].

¹³ *Wilburn Properties Inc v Silver Peak Resources Ltd*, 2001 BCSC 1084 at para 82 [Wilburn] [TAB 3].

¹⁴ *Ibid*.

(2) the parties must have understood that payment would be made or some other benefit conferred; and

(3) the payment or conferment of the benefit, if it had been promised in advance, must have been legally recoverable/enforceable.¹⁵

24. The Robus AP Payments clearly meet this test.
25. First, starting in January 2019, the Debtor requested that Pamoco pay certain of the Debtor's then due or coming due accounts payable.¹⁶
26. Second, the Debtor offered to sell to Pamoco its interests in the Tangibles in exchange for Pamoco making the upcoming Robus AP Payments and discharging the Acquisition Advances liabilities.¹⁷
27. Third, the Debtor's offer was accepted and became a binding and enforceable executory agreement.¹⁸
28. In reliance on this agreement, between February 2019 and March 2019, Pamoco took an inventory of the purchased Tangibles and tagged the acquired property with a QR code linking the property to the inventory of Terroco.¹⁹ These markings remain on the property to this day.
29. With respect to the Acquisition Advances, this is not past consideration but fresh consideration. The Court of Appeal of Alberta has found that with respect to past debts, if some new factor is introduced, a court may hold that there was fresh (not past) consideration for a new promise.²⁰
30. In this case the Acquisition Advances clearly form fresh consideration for the Tangibles Transaction. The Debtor required that Pamoco pay the Robus AP Payments. In exchange for Pamoco agreeing to do so, the Debtor transferred its title in the Tangibles to Pamoco. As further consideration for this agreement, Pamoco agreed to extinguish

¹⁵ *Ibid* at para 83; *Beazer v Tollestrup Estate*, 2017 ABCA 429 at para 42 [*Beazer*] [TAB 4].

¹⁶ O'Connor Affidavit at para 26.

¹⁷ O'Connor Affidavit at para 27.

¹⁸ O'Connor Affidavit at para 27.

¹⁹ O'Connor Affidavit at paras 30 and 31, Exhibit P.

²⁰ *Beazer* at para 43 [TAB 4].

any debts the Debtor had owing to Pamoco in respect of the Acquisition Advances. The extinguishment of a debt obligation such as the Acquisition Advances by Pamoco had fresh value to the Debtor and is therefore fresh consideration.

31. The Tangibles Transaction was ultimately documented pursuant to the General Conveyance Agreement and the Conveyance Agreement.
32. Despite the uncontested evidence of Mr. O'Connor as to the consideration for the Tangibles Transaction, the Senior Lender and the Receiver ask this Court to find there was no consideration on the basis that there was no literal \$90,000 cheque made out to the Debtor.
33. In its Second Report, the Receiver goes to great lengths to explain why the \$20,000 purchase price allocation for the Tangibles in the Purchase Agreement between the Debtor and Enerplus Corporation should not be read literally. The Receiver instead explains that the "effective consideration being allocated to the Tangibles would have been \$3.46 million, not \$20,000".²¹
34. In other words, the Receiver states that it is "market standard" to not put the exact consideration amounts for Tangibles in oil and gas conveyance documents. Instead the practice is to use an agreed upon round number.²² This is exactly what the Debtor and Pamoco did in its conveyance documents.
35. The Debtor, in the General Conveyance Agreement and the Conveyance of Tangibles, unequivocally acknowledges receipt of value in the amount of \$90,000 for the Tangibles Transaction. Pamoco agrees with the Receiver's statement that parole evidence is not required in this case.²³ The conveyance documents are clear and unambiguous that consideration was provided for the Tangibles Transaction. The Court is not required to look any further than the transaction documents between these parties to find that there was consideration for the Tangibles Transaction.

²¹ Second Report at paras 13-18.

²² Second Report at para 15.

²³ Receiver Brief at para 58.

C. The Tangibles Transaction is a Conveyance not a Security Arrangement

36. The Receiver argues that the Tangibles Transaction was intended to grant Pamoco with a security interest in the Tangibles, not an ownership interest.²⁴ In making this argument, the Receiver ignores the clear, uncontested evidence of Mr. O'Connor that the Tangibles Transaction was a sale agreement. In particular the uncontested evidence is that:
- (a) Pamoco and Mr. O'Connor were unwilling to extend any more credit to the Debtor.²⁵
 - (b) Both Pamoco and Mr. O'Connor already had security over all of the property of the Debtor, including the Tangibles. Further security in the Tangibles was unnecessary and provided no actual benefit to Pamoco.²⁶
 - (c) The parties had previously entered into several debt arrangements, which were documented by way of demand promissory notes and security agreements, not conveyances.
 - (d) The Tangibles are recorded in Pamoco's financial statements as equipment property.²⁷
 - (e) Pamoco took constructive possession of the Tangibles by affixing signage and QR codes identifying its ownership to the property.²⁸
 - (f) Pamoco took a fulsome inventory of the Tangibles it had acquired.²⁹
37. In addition to the foregoing, the most compelling *indicia* of the intent of the parties are the conveyance documents themselves. The language makes it clear the intention of the parties was for the Debtor to sell, assign, transfer and convey to Pamoco "all right title, estate and interest" of the Debtor in and to the Tangibles.
38. As the Receiver Brief correctly notes, "the parole evidence rule precludes the admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing."³⁰

²⁴ Receiver Brief at para 71.

²⁵ O'Connor Affidavit at para 27.

²⁶ O'Connor Affidavit at Exhibits F, G, J.

²⁷ Affidavit of John Stein Amundson (the "**Amundson Affidavit**") at para 11, Exhibit B.

²⁸ O'Connor Affidavit at para 31, Exhibit P.

²⁹ O'Connor Affidavit at para 32.

39. In this case, the intentions of the Debtor and Pamoco are clear, the Tangibles Transaction was intended to, and did, transfer title in the Tangibles to Pamoco.
40. The Lender Brief and the Receiver Brief rely on an e-mail from John Amundson to Mr. Methot as an indication that the Robus AP Payments were intended to be recorded as debts owing by the Debtor to Pamoco (the “**Amundson E-mail**”).³¹ It actually proves the opposite.
41. The Amundson E-mail shows that Mr. O'Connor never had Mr. Amundson prepare debt instruments for the Robus AP Payments, as was the past practice for debt arrangements from Pamoco. This is because the Robus AP Payments were being treated differently than a debt, they were purchase funds. After sending the Amundson E-mail, Mr. Amundson confirmed with Mr. O'Connor that the Robus AP Payments were not debts, but were purchase funds for the Tangibles.³²
42. The Receiver makes reference to several facts, which it claims are somehow *indicia* of the parties' intention to create a security interest pursuant to the Tangibles Transaction. A common sense review of the facts considered in the circumstances that the Tangibles Transaction was entered into proves otherwise.
43. Either way, the conveyance documents are clear and unambiguous as to the parties intention to transfer title to the Tangibles to Pamoco. As the Receiver notes, evidence outside the clear words of the written contract is not required.

D. Pamoco took possession of the Tangibles

44. By affixing the Terroco inventory QR code to the main sign on each piece of the Tangibles equipment, Pamoco took constructive possession of the Tangibles.
45. The Lender Brief claims that actual possession of the Tangibles were “at all times in the possession of the Debtor”.³³ This is not accurate for the vast majority of the Tangibles.
46. The Tangibles are located on farmland that Enerplus Corporation holds the surface lease to.³⁴ The Debtor only has a non-operated working interest in the vast majority of

³⁰ *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 59 [TAB 5].

³¹ Second Report at Appendix D; Amundson Affidavit at Exhibit A; Receiver Brief at para 33, Lender Brief at para 27.

³² Amundson Affidavit at para 9.

³³ Lender Brief at para 49.

the wells and facilities on the leased lands, and it operates only two wells using the Tangibles. The Debtor only uses about 10% of the Tangibles for its operations.

47. Where there are many operators and interested parties on the leased premises, Pamoco's step of tagging and QR coding its property is apparent possession for anyone attending the premises.

E. The Debtor is not in Legal Possession of the Tangibles for section 26 of the Sale of Goods Act to Apply

48. As noted by this Court, the starting point in determining whether section 26 of the *Sale of Goods Act* applies is the *nemo dat* principle -- you can't sell what you don't have.³⁵
49. As noted in the Pamoco Brief, section 26(1), if it applies, is a statutory exception to the *nemo dat* principle.³⁶ It just simply does not apply in this case.
50. For section 26(1) of the *Sale of Goods Act* to apply, the Debtor must have been in possession of the Tangibles.
51. The Receiver Brief correctly points out that section 26(1) of the *Sale of Goods Act* cannot apply in this case because the Debtor only had a beneficial interest in the Tangibles, which is a chose in action that "can't be reduced to possession".³⁷
52. The Receiver Brief also correctly points out that the Debtor's "beneficial interest in the Tangibles would not fall under the definition of 'goods' under the *Sale of Goods Act*. As a result, the Receiver is of the view that section 26 of the *Sale of Goods Act* may not apply".³⁸
53. If it is agreed that the *Sale of Goods Act* does not apply, there is no alternative exception put forward by the Senior Lender or the Receiver to the *nemo dat* principle. The Tangibles sold to Pamoco cannot therefore be subject to the Senior Lender's security registration.

³⁴ First Report of the Receiver at paras 43 and 100.

³⁵ *Bank of Montreal v Mason*, 2018 ABQB 161 at para 13 [TAB 6].

³⁶ Pamoco Brief at paras 44-45.

³⁷ Receiver Brief at para 84.

³⁸ Receiver Brief at para 84.

F. The Application is brought in Good Faith and with Just Cause

54. In the Lender Brief, it is alleged that Pamoco did not act in good faith when the Senior Lender advanced its loan to the Debtor.³⁹ The Senior Lender seeks to impose a common law duty of contractual good faith on Pamoco in respect of a contract that Pamoco is not a party to, and had no part in negotiating.
55. The Senior Lender alleges that Pamoco somehow knowingly and deliberately misled it.⁴⁰ The Senior Lender however provides no evidence of any representations that were made by Pamoco to the Senior Lender to which the Senior Lender relied. In fact, the Senior Lender provides no evidence of there having been any communications between it and Pamoco period.
56. The loan payout statement and personal property registration release documents were provided to Pamoco by the Debtor's counsel for review. Pamoco reviewed these documents for the purposes of confirming the full payout of the outstanding debt obligations owing by the Debtor to Pamoco.
57. Pamoco has no knowledge of any communications, diligence, or enquiries that were made by the Senior Lender to the Debtor as it pertains to the Tangibles.
58. Notably, the definition of "Collateral" in the Senior Lender's loan agreement and security documents makes no reference to the Tangibles. It is therefore not apparent that the Debtor was in breach of any of its representations and warranties in entering into the loan agreement by not informing the Senior Lender of the Tangibles Transaction.
59. The Lender Brief seeks to impose an obligation on Pamoco, a third party to the loan agreement, to disclose the Tangibles Transaction. There is no basis at law for this.
60. Further, the loan documents make no mention of the Tangibles, and the Senior Lender has not provided any evidence of it conducting any inventory, due diligence, or making basic enquiries about this property. It is not apparent that the Senior Lender made any efforts to determine what the personal property of the Debtor may have consisted of.
61. There is simply no evidence to suggest that Pamoco has acted anything but candidly, honestly, and reasonably in bringing the Application. The Receiver acknowledges in the

³⁹ Lender Brief at paras 55-67.

⁴⁰ Lender Brief at para 58.

Second Report that “Pamoco may have arguments to support the Alleged Pamoco Claim”.⁴¹

62. Pamoco informed the Receiver of its ownership interest in the Tangibles early on in this proceeding. Pursuant to the express instructions of the Receiver’s counsel’s June 17, 2022 letter, Pamoco attended the application for the sale of the Tangibles to assert its claim.⁴² Pamoco is now brining the Application in the short timeline directed by this Court.
63. Pamoco has clearly acted in good faith and with due diligence in bringing the Application by following the express directions of the Receiver and the Court.

IV. CONCLUSION

64. At the time it was entered into, the Tangibles Transaction was rational, made good business sense, and was for fair market value. The Tangibles Transaction provided benefits to both parties, including the Debtor, as it allowed the Debtor to meet its financial obligations to its trade creditor and continue to operate.
65. The consideration for the Tangibles Transaction was valid. The consideration for the Tangibles Transaction was not past consideration, and the Debtor expressly acknowledges receipt of consideration for the Tangibles Transaction.
66. The Tangibles Transaction was a conveyance, not a security arrangement. The parties had previously entered into multiple debt and security arrangements, which were documented by way of demand promissory notes and general security agreements pursuant to their respective standard business practices. The deviation from such methods of documentation and opting instead to execute the conveyance documents is definitive *indicia* that the intent of the parties was to sell the Debtor’s beneficial ownership interest in the Tangibles to Pamoco.
67. Pamoco took constructive possession of the Tangibles. Pamoco asserted its ownership interest by affixing the Terroco QR code on the front of each piece of the Tangibles equipment. As a result, possessory actions were administered.

⁴¹ Second Report at para 67.

⁴² O’Connor Affidavit at Exhibit U.

68. It is acknowledged by the Receiver that section 26 of the *Sale of Goods Act*, does not apply in the circumstances of this case. There is no alternative exception to the *nemo dat* principle that would make the conveyed Tangibles subject to the Senior Lender's security interests in the Debtor's personal property.
69. Pamoco has acted in good faith in bringing forth the Application. Pamoco did not deliberately mislead any party with respect to ownership of the Tangibles. Pamoco has acted candidly, honestly, and reasonably in the pursuit of its ownership claim in the Tangibles.
70. Based on the reasons set out herein and the Pamoco Brief, Pamoco requests that this Honourable Court grant the relief requested in its Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF JANUARY, 2023.

MILLER THOMSON LLP

Per: 

James W. Reid
Counsel for the Applicant, Pamoco
Resources Ltd.

TABLE OF AUTHORITIES

| TAB NO. | AUTHORITY |
|---------|--|
| 1. | <u><i>Prestigious Properties Inc v Cold Lake Estates Inc</i>, 2018 ABQB 203.</u> |
| 2. | <u><i>Adelaide Capital Corp v Singh</i>, 208 AR 229, 56 Alta LR (3d) 159 (ABQB).</u> |
| 3. | <u><i>Wilburn Properties Inc v Silver Peak Resources Ltd</i>, 2001 BCSC 1084.</u> |
| 4. | <u><i>Beazer v Tollestrup Estate</i>, 2017 ABCA 429.</u> |
| 5. | <u><i>Sattva Capital Corp v Creston Moly Corp</i>, 2014 SCC 53.</u> |
| 6. | <u><i>Bank of Montreal v Mason</i>, 2018 ABQB 161.</u> |