

COURT FILE NUMBER 1901-08251

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT NATIONS FUND I, LLC

RESPONDENT BEARSTONE ENVIRONMENTAL SOLUTIONS INC.

DOCUMENT **NOTICE OF APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT  
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File No. 43436-12

**Attention: Jeffrey Oliver/Danielle Marechal**

**NOTICE TO RESPONDENTS:**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date: January 23, 2020

Time: 10:30 AM

Where: Calgary Law Courts

Before Whom: The Honourable Mr. Justice C.M. Jones

Go to the end of this document to see what you can do and when you must do it.

**Remedy claimed or sought:**

- 1. An Order substantially in the form of Schedule "A", attached hereto:

- (a) If necessary, abridging the time for service of this Application and supporting Second Report (the “**Second Report**”) of KPMG Inc. (“**KPMG**”) in its capacity as receiver and manager (in such capacity, the “**Receiver**”) of the assets, properties and undertakings of Bearstone Environmental Solutions Inc. (“**Bearstone**”) and declaring service to be good and sufficient;
- (b) Approving the accounts of the Receiver for fees and disbursements as set out in the Second Report, without the necessity of a formal passing of accounts;
- (c) Approving the accounts of the Receiver’s legal counsel, Cassels Brock & Blackwell LLP, for fees and disbursements as set out in the Second Report, without the necessity of a formal passing of accounts;
- (d) Approving the Receiver’s activities from the date of the First Report of the Receiver, including the Statement of Receipts and Disbursements as attached to the Second Report;
- (e) Declaring that the Receiver is authorized to make further distributions as outlined in paragraph 8 below;
- (f) Declaring that the Receiver is permitted to include the Lien Fund (as that term is defined below) as part of any distribution made to Nations;
- (g) Declaring that the Bradvin Lien (as defined below) is invalid;
- (h) Discharging the Receiver as the court appointed receiver and manager of the assets, undertakings and properties of Bearstone and declaring that the Receiver has satisfied its obligations under and pursuant to the terms of the Receivership Order (as defined below) granted in the within proceedings, up to and including the date hereof;
- (i) Declaring that the Receiver is not liable for any act or omission on its part, including without limitation, any act or omission pertaining to the discharge of its duties in the within proceedings, save and except the usual exclusions, and declaring that any claims against the Receiver in connection with the performance of its duties are stayed, extinguished and forever barred; and

- (j) Authorizing the Receiver to assign Bearstone into bankruptcy.
2. Such further and other relief as this Honourable Court deems just.

**Grounds for making this application:**

**Background**

3. On August 6, 2019 on application by Nations Fund I, LLC ("**Nations**"), this Honourable Court granted an order (the "**Receivership Order**") appointing KPMG as receiver and manager of the current and future assets, undertakings and properties of Bearstone.

**Discharge of Receiver, Second Interim Distribution and Final Distribution**

4. Since its appointment, the Receiver has performed its mandate as Receiver under the Receivership Order, including the liquidation of the Bearstone's assets, and there is no further property remaining to be realized upon.
5. As at December 31, 2019, the Receiver is holding approximately \$776,000 in cash on hand.
6. The Receiver is aware of, *inter alia*, the following secured claims, charges and liens against Bearstone:
- (a) a secured claim by Nations;
  - (b) an alleged lien claim in the amount of \$9,668.40 by Bradvin Trailer Sales Ltd. ("**Bradvin**");
  - (c) a claim by Canada Revenue Agency ("**CRA**") for GST arrears of approximately \$110,000; and
  - (d) a claim by the British Columbia Ministry of Finance ("**BC Ministry of Finance**") for PST arrears of approximately \$22,000.
7. The Receiver has obtained an opinion from its legal counsel (subject to the usual assumptions and qualifications) that Nations holds valid and enforceable security interests in the personal property of Bearstone described in the Nations security documents and

this Honourable Court has previously authorized the Receiver to make ongoing interim distributions to Nations (the “**Interim Distributions**”) subject to certain holdbacks.

8. Nations is the primary secured creditor of Bearstone and a large deficiency remains owing to Nations. The Receiver is recommending a holdback, a second interim distribution and a final distribution to Nations as set out below:
  - (a) a second interim distribution of approximately \$494,000 to Nations;
  - (b) a holdback in the amount of approximately \$282,000 (the “**Holdback**”) to be retained by the Receiver to account for any claims which may have priority over the claims of Nations; and
  - (c) a final distribution to Nations consisting of any residual funds that may remain from the Holdback upon the completion of the receivership proceedings and the resolution of any priority claims.
9. The Receiver has acted honestly and in good faith and has dealt with Bearstone’s property and carried out the Receiver’s mandate in a commercially reasonable manner. Given that there are no further realizable assets remaining in the estate of Bearstone, the Receiver is seeking its discharge.

#### Bradvin Lien Claim

10. In September 2019, Bradvin was holding two pieces of Bearstone’s equipment (the “**Withheld Equipment**”) and was asserting a lien in relation to the Withheld Equipment (the “**Bradvin Lien**”). One of the pieces of the Withheld Equipment was also subject to a garage keepers’ lien registered by Bradvin against Bearstone in the Alberta Personal Property Registry.
11. In September 2019, the Receiver and Bradvin enter into discussions to attempt to determine the validity and enforceability of the Bradvin Lien. Due to (among other things) the timing of the sale of the remaining Bearstone equipment as part of the Ritchie Brother’s auction (the “**RB Sale**”), the Receiver and Bradvin did not reach a resolution in relation to the Bradvin Lien in advance of the RB Sale. To ensure that the Withheld Equipment could form part of the RB Sale, Bradvin agreed to allow the Receiver to collect the Withheld Equipment and include it in the RB Sale on the condition that proceeds of sale from the

auction in the amount of \$9,668.40 (the "**Lien Funds**") would be held by the Receiver pending further Order of this Honourable Court or an agreement between the Receiver and Bradvin. Such funds are currently being held by the Receiver.

12. The Receiver or Counsel to the Receiver made requests for documentation in support of the Bradvin Lien on September 5, 2019, September 10, 2019, September 26, 2019 and January 8, 2020.
8. Of the Bradvin Lien Funds being withheld, approximately \$8,500 relates to an alleged claim by Bradvin for amounts owing in storage fees and approximately \$1,000 relates to an alleged claim by Bradvin for amounts owing in relation to the repair or maintenance of one of the Withheld Equipment.
13. On September 11, 2019, Bradvin provided invoices relating to the alleged claim for storage amounts owing in relation to the Withheld Equipment. Upon reviewing the storage invoices, it was the preliminary view of the Receiver that these amounts were not amounts that fell within the scope of the *Garage Keepers' Lien Act* (Alberta) or the *Possessory Lien Act* (Alberta).
14. As at January 13, 2010:
  - (a) the Receiver has not received any documentation in support of the alleged lien for amounts owing in relation to the repair or maintenance of the Withheld Equipment; and
  - (b) the Receiver has not received any additional documentation in support of the alleged lien for amounts owing in relation to the storage of the Withheld Equipment.
15. As a result of the foregoing, the Receiver is seeking a declaration that:
  - (a) the Receiver is permitted to include the Lien Funds as part of any distributions made to Nations; and
  - (b) the Bradvin Lien is not valid.

Assignment in Bankruptcy

16. As set out in more detail in the Second Report, the Receiver intends to assign Bearstone into bankruptcy. The Receiver believes it is appropriate under the circumstances and it is permitted to do so for, *inter alia*, the following reasons:
- (a) Paragraph 3(s) of the Receiver Order authorizes the Receiver, upon application to the Court on notice to all interested parties, to assign Bearstone into bankruptcy or obtain a bankruptcy order against Bearstone, where the Court is of the opinion that it is proper and in the best interest of the estate;
  - (b) Paragraph 29 of the Receivership Order provides that nothing in the Receivership Order shall prevent the Receiver from acting as the trustee in bankruptcy of Bearstone;
  - (c) Bearstone is currently in receivership and is considered an insolvent person within the meaning of the *Bankruptcy and Insolvency Act (Canada)*. Bearstone has failed to meet its obligations generally as they became due, in that Bearstone has failed to meet its obligations to Nations and others, which obligations exceed \$1,000; and
  - (d) Nations has requested and is supportive of the Receiver's intention to assign Bearstone into bankruptcy in order to convert the CRA and BC Ministry of Finance claims into unsecured claims.

#### Actions of the Receiver

17. The Receiver's actions and activities as described in the Second Report are lawful and proper and consistent with its powers and duties under the Receivership Order.

#### Approval of Fees and Disbursements of Receiver and its Legal Counsel

18. The professional fees and disbursements of the Receiver from July 1, 2019 to September 20, 2019 were previously approved by this Honourable Court.
19. The professional fees and disbursements of counsel to the Receiver from June 10, 2019 to August 31, 2019 were previously approved by this Honourable Court.

20. The unpaid accounts of the Receiver total approximately \$96,429 in fees and disbursements for the period commencing September 21, 2019 and ending December 31, 2019.
21. The accounts of counsel to the Receiver total approximately \$38,571 in fees and disbursements for the period commencing September 1, 2019 and ending December 31, 2019
22. Furthermore, the Receiver's Counsel has estimated further fees in the amount of \$15,000 from January 1, 2020 onwards in order to complete the Receivership and the Bankruptcy, should Bearstone be assigned into Bankruptcy.
23. The receiver and counsel to the Receiver have agree to limit the aggregate total of the above noted unpaid professional fees and disbursements to a maximum of \$150,000, excluding GST.
24. The invoices rendered by the Receiver and its counsel are reasonable and were validly incurred in accordance with the provisions of the Receivership Order.

**Material or evidence to be relied on:**

25. Receivership Order granted by the Honourable Madam Justice B.E.C. Romaine on August 6, 2019;
26. Sale Approval and Vesting Order granted by the Honourable Madam Justice B.E.C. Romaine on August 6, 2019;
27. Order Approving Auction Agreement granted by the Honourable Madam Justice C. Dario on October 7, 2019
28. Order – Interim Distribution, Activities and Fees granted by the Honourable Madam Justice C. Dario on October 7, 2019;
29. Sealing Order granted by the Honourable Madam Justice C. Dario on October 7, 2019;
30. First Report of the Proposed Receiver dated July 17, 2019;
31. Second Report of the Proposed Receiver dated July 29, 2019;

32. Confidential Supplement to the Second Report of the Proposed Receiver dated July 29, 2019;
33. First Report of the Receiver dated October 2, 2019;
34. Supplemental Report to the First Report of the Receiver dated October 8, 2019;
35. Second Report of the Receiver dated January 13, 2020; and
36. Such further and other materials as counsel may advise and this Honourable Court may permit.

**Applicable rules:**

37. The *Alberta Rules of Court*, including Rules 1.2, 1.3, 1.4, 6.1, 6.2, and 6.3; and

**Applicable Acts and regulations:**

38. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (as amended);
39. *Judicature Act*, RSA 2000, c J-2;
40. *Business Corporations Act*, RSA 200, c B-9;
41. *Personal Property Security Act*, RSA 2000, c P-7;
42. *Garage Keepers' Lien Act*, RSA 2000, c G-2; and
43. Such further and other acts and regulations as counsel may advise and this Honourable Court may permit.

**Any irregularity complained of or objection relied on:**

44. None.

**How the application is proposed to be heard or considered:**

45. In person.

<b>WARNING</b>
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If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.