Court File Nos. BK-25-03207793-0033 and BK-25-03207766-033

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF 11449346 CANADA INC. OF THE TOWN OF SMITH FALLS, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF 12574764 CANADA LTD. OF THE TOWN OF SMITH FALLS, IN THE PROVINCE OF ONTARIO

RESPONDING FACTUM OF THE TRUSTEE IN BANKRUPTCY (CROSS-MOTION BY SURGENOR)

October 15, 2026

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TO: **Service List**

PART I. OVERVIEW

1. On August 25, 2025, 11449346 Canada Inc. ("**P3**") and 12574764 Canada Ltd ("**United Edge**" and, together with P3, the "**Companies**") were deemed to have made assignments in bankruptcy. Albert Gelman Inc. (the "**Trustee**"), the trustee in bankruptcy of the Companies, has since developed a distribution scheme (the "**Secured Claim Distribution Scheme**") for secured creditor claims to the proceeds of the Companies' assets. The Trustee seeks approval of the Secured Claim Distribution Scheme in this motion.

2. On August 28, 2026, Surgenor National Leasing Limited ("**Surgenor**"), a secured creditor of P3, commenced a cross-motion attacking the Secured Claim Distribution Scheme and taking the position that Surgenor owns the proceeds to its collateral (the "**Surgenor Collateral**"). The Trustee accepts that Surgenor has a valid secured claim in connection with the Surgenor Collateral and the Trustee seeks authorization to make payment to Surgenor in connection with the same. However, Surgenor's position in this cross-motion, being that it retained ownership of the Surgenor Collateral and therefore is entitled to 100% of the proceeds of the same, is patently flawed for two reasons:

(a) Surgenor is estopped from taking the position that it owns the Surgenor Collateral or its proceeds:

(i) Surgenor did not file the required "Reclamation of Property" form in connection with the Surgenor Collateral, which is required by the *Bankruptcy and Insolvency Act* (the "***BIA***") where a party wishes to assert ownership of an asset possessed by the trustee. Instead,

Surgenor filed a proof of claim in connection with the Surgenor Collateral, taking the position that it was owed a fixed sum of money in respect of its security interest. Surgenor is now estopped from taking a contrary position, being that it owns the proceeds of the Surgenor Collateral; and

(ii) The Surgenor Collateral was sold pursuant to an approval and vesting order (the "**AVO**") of this Court, which necessarily determined that P3 had, and could convey, title to the Surgenor Collateral to a purchaser. Surgenor is therefore estopped from taking a contrary position, which would amount to a collateral attack on the AVO; and

(b) Even if Surgenor was not estopped from taking the position it now does, the lease between Surgenor and P3 (the "**Surgenor Lease**") was clearly in the nature of a financing transaction, where P3 had all the benefits and burdens of ownership in the Surgenor Collateral, which collateral merely served as security for a fixed payment obligation (as opposed to a rental transaction where ownership of the collateral remained with Surgenor).

3. Based on the above, the Trustee requests and recommends that the Court dismiss Surgenor's motion in its entirety, with costs payable to the Trustee.

PART II. FACTS

4. The Trustee relies on its general recitation of the facts contained in its factum dated July 29, 2026.

A. Sale of the Surgenor Collateral

5. On July 30, 2025, as part of proposal proceedings in respect of the Companies, the Court granted (1) the AVO approving the sale of all of the Companies' assets to a purchaser and (2) an ancillary relief order (the "**ARO**") authorizing the Trustee to make payments from the sale proceeds on account of its fees, the fees of its counsel, the fees of the Companies' counsel and amounts outstanding to the debtor-in-possession financier, all in accordance with those parties' Court-ordered super-priority charges.[1]

6. Among others, the AVO approved the sale of the Surgenor Collateral, which collateral was leased to P3 by Surgenor pursuant to the Surgenor Lease dated August 28, 2023.

7. The motion materials, AVO and ARO were served on Surgenor by courier to Surgenor's address for service under its *Personal Property Security Act ("**PPSA**")* registration against P3.[2] Surgenor specifically acknowledges having received a copy of the issued AVO on July 31, 2025.[3]

8. On August 11, 2025, the parties completed the sale of the Companies' assets and, as contemplated by the ARO, the Trustee subsequently paid its fees, the fees of it's

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[1] First Report of the Trustee, July 20, 2026 ["**First Report**"] at para 17, Trustee's Motion Record ["**TMR**"], Tab 2, p. 20.

[2] Affidavit of Service of Natalie Wood, July 25, 2025, Exhibit D to the Affidavit of Antonella Maddalena sworn August 28, 2026 ["**Antonella Affidavit"**], Surgenor's Motion Record ["**SurMR**"], Tab 2, p. 35; Affidavit of Service of Candace Baumtrog, July 29, 2025, Exhibit E to Antonella Affidavit, SurMR, Tab 2, Exhibit E, p. 41; Letter from Companies' Counsel, July 31, 2025, Exhibit F to the Antonella Affidavit, SurMR, Tab 2, p. 95.

[3] See Antonella Affidavit at para. 17, SurMR, p. 16.

counsel, the fees of the Companies' counsel and amounts outstanding to the debtor-in-possession financier from the sale proceeds.[4]

9. On August 18, 2025, the Trustee served motion materials in connection with its motion for a first-priority charge on the assets of the Companies for its fees and disbursements, and the fees and disbursements of its counsel, in connection with its prospective mandate as trustee in bankruptcy of the Companies. This motion also sought an order terminating the time for the Companies to make proposals such that both Companies were deemed to make assignments in bankruptcy. These motion materials were sent to Surgenor on August 18, 2025, via courier.[5]

10. On August 25, 2025, Justice Kershman granted the orders sought by the Trustee. Accordingly, the Companies were thereafter deemed bankrupt and the Trustee and its counsel were granted a first-priority charge on the assets of the Companies for their fees and disbursements. The order also authorized the Trustee to use the sale proceeds of the Companies to pay these fees and disbursements.[6]

B. Surgenor's proof of claim

11. After the bankruptcy of the Companies, the Trustee solicited proofs of claims from secured creditors, including Surgenor.

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[4] First Report at para 19, TMR, Tab 2, p. 21.

[5] Letter from R. Shah, August 18, 2025, Appendix E to the Second Supplement to the First Report, October 2, 2026 ["**Second Supplement**"], Supplemental Motion Record of the Trustee ["**SuppTMR**"], Tab 2, p. 171.

[6] Termination Order, August 25, 2025, Appendix H to the First Report, TMR, Tab 2, pp. 111-116.

12. On September 4, 2025, Surgenor submitted a proof of claim to the Trustee, asserting a secured claim in the amount of $82,256.36 and a security interest in the Surgenor Collateral.[7]

13. Surgenor never filed a "Reclamation of Property" form pursuant to section 81 of the *BIA*[8] in connection with the Surgenor Collateral or its proceeds.

14. On November 18, 2025, counsel for the Trustee confirmed receipt of Surgenor's proof of claim documents. The Trustee noted in this correspondence that all of the equipment and assets of the debtor company had been sold pursuant to the AVO, and that after evaluation by the Trustee, Surgenor may be entitled to the proceeds of the equipment in which it had security.[9]

15. The Trustee proceeded to evaluate the proof of claim of Surgenor, as well as that of other creditors, and develop the Secured Claim Distribution Scheme in reliance on same.

16. On July 21, 2026, the Trustee served motion materials in connection with its motion for approval of the Secured Claim Distribution Scheme.

17. In response, on August 28, 2026, Surgenor commenced the within cross-motion which, for the first time, challenged the propriety of the AVO, despite Surgenor having had notice of the AVO since November 2025 (at the absolute latest).

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[7] Surgenor Proof of Claim, Appendix B to the Second Supplement, SuppTMR, Tab 1, p. 18.

[8] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 81 ["***BIA***"].

[9] Emails correspondence between R. Shah and A. Maddalena, November 18, 2025, Exhibit K to Antonella Affidavit, SurMR, Tab 2, p. 131.

PART III. ISSUES

18. Surgenor's cross-motion raises three issues, which issues should be resolved as follows:

(a) Is Surgenor estopped from asserting an ownership claim in the Surgenor Collateral? – **Yes**;

(b) If not, does Surgenor have an ownership interest in its Surgenor Collateral through a "true lease"? - **No**; and

(c) Does the Trustee's Scheme of Distribution fail to consider Surgenor's purchase money security interest ("**PMSI**") in the Surgenor Collateral? - **No**

PART IV. LAW

A. Surgenor is estopped from asserting an ownership interest in its collateral

19. Surgenor is estopped from asserting an ownership interest in the Surgenor Collateral. This is because:

(a) Surgenor's own conduct and representations are inconsistent with its ownership of the Surgenor Collateral; and

(b) Surgenor's position is a collateral attack on several prior Court orders including, most centrally, the AVO that vested title to the Surgenor Collateral in the purchaser.

1. Surgenor is estopped by its own conduct

20. Surgenor asserts that it has an ownership interest in all of the proceeds of the Surgenor Collateral and, as a result, its interest in these proceeds is not subject to any priority secured claims against P3 (such as the Trustee's fees or CRA's deemed trust).

21. This is inconsistent with Surgenor's own proof of claim and position for approximately one year.

22. On September 4, 2025, Surgenor filed proof of claim documents, which specifically identified its claim as being in the nature of a "secured" claim against P3.[10]

23. This is fundamentally inconsistent with its late-blooming assertion that it owns the Surgenor Collateral (or the proceeds thereof) because the *BIA* has an entirely separate mechanism for asserting ownership over assets possessed by a trustee in bankruptcy, being the filing of a "Reclamation of Property" form.[11] Section 81 of the *BIA* contemplates that this is the appropriate route where a party wishes to assert a proprietary interest in assets in the possession of the trustee.

24. Surgenor did not take this route in relation to the proceeds of the Surgenor Collateral. Instead, it filed a proof of claim – taking the position that they were a creditor owed a fixed sum of money by the estate, which monetary obligation was secured by the Surgenor Collateral. This is a categorically different position than an assertion of ownership of the Surgenor Collateral (in which case Surgenor would not be entitled to

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[10] Surgenor Proof of Claim, Exhibit I to Antonella Affidavit, SurMR, Tab 2, p. 124.

[11] *BIA*, s. 81(4). See also *BIA*, Form 74, "Reclamation of Property". See *Hertz v. 1593658 Ontario Inc.*, 2011 SKQB 379 at para. 31 ["***Hertz***"] and *Bank of Montreal v. Scott*, 2013 SKQB 64 at para. 8.

payment of a fixed sum, but merely the collateral itself or the proceeds of same, regardless of the quantum).

25. The law of estoppel prevents Surgenor from now taking this contrary position. The Supreme Court of Canada has described estoppel by representation as follows:

> Estoppel by representation requires a positive representation made by the party against whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it.[12]

26. This accurately summarizes Surgenor's conduct in this matter. By filing a proof of secured claim, and not filing a reclamation of property form, Surgenor represented that their position was that of a creditor of the bankrupt estate with a security interest in the Surgenor Collateral. Of course, there can be do dispute that Surgenor intended that the Trustee rely on this representation. Surgenor wanted the Trustee to assess Surgenor's claim in reliance on the proof of claim, which the Trustee proceeded to do.

27. Further, Surgenor still has not filed a Reclamation of Property Form in relation to its ownership claim, which, per s. 81 of the *BIA*, contains its own specific appeal procedure for addressing such claims.[13] Because of Surgenor's failure to do this, the Trustee has not been able to use the appropriate statutory mechanism for addressing Surgenor's purported ownership claim.

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[12] *Ryan v. Moore* 2005 SCC 38, at para 5.

[13] *Hertz* at para. 31.

28. Nearly a year after filing their proof of claim, Surgenor now takes a categorically different position: that it had an ownership interest in the Surgenor Collateral and hence owns all of the proceeds of the same.

29. In accordance with the Supreme Court's guidance, the Trustee should rightfully be able to rely on Surgenor's initial representation that Surgenor's claim was that of a secured creditor. Surgenor is therefore estopped from asserting an ownership interest in the proceeds of the Surgenor Collateral.

2. Surgenor's position is a collateral attack on previous Court orders

30. The AVO approving the sale of the Surgenor Collateral (among other assets) to the Purchaser necessarily decided that P3, not Surgenor, had title to the Surgenor Collateral.

31. The sale agreement pursuant to which the AVO was granted specifically contemplated the conveyance of title in the Surgenor Collateral to the Purchaser.[14] The AVO then specifically conveyed all of P3's "right, title and interest in and to the" Surgenor Collateral to the Purchaser and, in so doing, clearly conveyed ownership of the Surgenor Collateral to the Purchaser.[15]

32. The AVO therefore decided that it was P3 that had title to the Surgenor Collateral. This is because the Court only has jurisdiction to vest property in a party at the instance

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[14] See #70 of Sched. A to the Asset Purchase Agreement, Appendix B to the Third Supplement to the First Report of the Trustee, October 15, 2026 ["**Third Supplement**"], SuppTMR, Tab 2, Appendix B, p. 475.

[15] Approval and Vesting Order, July 30, 2025 at para. 3, Appendix E to the First Report, TMR, Tab 2, p. 83.

of a party with the actual legal right to convey such property in the first instance. As the Court of Appeal for Ontario determined in *Trick v. Trick*, section 100 of the *Courts of Justice Act*:

> …provides a court with jurisdiction to vest property in a person but only if the court also possesses the "authority to order [that the property] be disposed of, encumbered or conveyed". Thus, s. 100 [of the *Courts of Justice Act*] only provides a mechanism to give the applicant the ownership or possession of property to which he or she is otherwise entitled; it does not provide a free standing right to property simply because the court considers that result equitable.[16]

33. The AVO therefore inherently depended on a finding that P3 had title to the Surgenor Collateral. Surgenor's assertion that it has title to the Surgenor Collateral is inconsistent with this finding and therefore a collateral attack on this order.[17]

34. While Surgenor complains about the adequacy of service in connection with the AVO, the proper route to raise this complaint was through motion to set aside the AVO. Rule 37.14 of the *Rules of Civil Procedure* sets out that a party or person who is affected by an order obtained on motion without notice, or fails to appear on a motion through accident, mistake, or insufficient notice 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.[18]

35. The case law is clear that a party that wishes to set aside a motion on these grounds must move expeditiously to do so.

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[16] *Trick v. Trick*, 2006 CanLII 22926 (ON CA), at para 19.

[17] See G*arland v. Consumers' Gas Co.*, 2004 SCC 25 (CanLII), at para 71.

[18] *Rules of Civil Procedure,* RRO 1990, Reg 194, s 37.14 ["***Rules***"].

36. In this case, Surgenor acknowledges having received the AVO on July 31, 2025, approximately one year before raising any objections to the AVO.[19]

37. Previous decisions of the Court confirm that this is far too long of a delay for Surgenor to now challenge the AVO.

38. In *D'Amico v. Claveau*, the defendant moved to set aside an Order, claiming she had not been made aware of the court date, and was not properly served by the Plaintiff. There was a four-and-a-half-month delay in the defendant bringing such a motion. The Court found this period of delay to be too long and dismissed the motion.[20]

39. In *HOJ National Leasing Corp. (Re)*, the Court of Appeal upheld a motion judge's decision to dismiss a motion to vary an approval and vesting order on the grounds that the moving party did not have notice of the same. The moving party became aware of the approval and vesting order in February 2005 and waited until August 2005 to commence its motion. The Court of Appeal dismissed the appeal, finding that the moving party's delay in seeking to challenge the approval and vesting order was too lengthy.[21]

40. In the above cases, the Court refused to allow parties to challenge Court orders on the basis of insufficient notice in circumstances where parties waited 4.5 and 6 months, respectively, to bring their challenges. Surgenor waited an even longer period before attacking the AVO.

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[19] Surgenor Notice of Evaluation, Exhibit R to Antonella Affidavit, SurMR, Tab 2, p. 161; Letter to Trustee, July 28, 2026, Exhibit S to Antonella Affidavit, SurMR, Tab 2, pp. 163-170.

[20] *D'Amico v. Claveau*, 2023 ONSC 2508, at paras 22-25, 44.

[21] *HOJ National Leasing Corp. (Re),* 2008 ONCA 390, at paras. 28-30 ["***HOJ***"] citing *1064521 Ontario Ltd.*, 1998 CanLII 14641 (ON CTGD) (Gen. Div.).

41. The AVO was made in July of 2025. By its own evidence, Surgenor was made aware of these orders on July 31, 2025.[22] Surgenor did not commence its within cross motion until August 2026 – approximately one year after it became aware of the Order. During this period, stakeholders and the Trustee have reasonably acted in reliance on the AVO, including by incurring fees to develop the Secured Claims Distribution Scheme (which was based on the assumption that Surgenor did not own the Surgenor Collateral).

42. Given the above, it is simply too late Surgenor to seek to undermine the AVO and the parties' reliance on the same.

B. Surgenor has no ownership interest in the proceeds of its security

43. Even if Surgenor were not estopped from asserting an ownership interest in the proceeds of the Surgenor Collateral, Surgenor's ownership claim has no merit. Surgenor's lease with P3 was not a "true lease", whereby Surgenor retained title to the Surgenor Collateral, but rather a "financing lease," pursuant to which the Surgenor Collateral was merely security for P3's fixed payment obligations to Surgenor.

44. In distinguishing between a true lease and a financing lease, the case law provides that "[t]he test is whether the transaction, as a whole, in substance creates a security interest, and, in the context of a lease instrument, whether the lease is one "that secures payment or performance of an obligation."[23]

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[22] Antonella Affidavit at para. 17, SurMR, p. 16.

[23] See *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.*, 2005 CanLII 43684 (ON SC) at para 7 citing *Adelaide Capital Corp. v. Integrated Transportation Finance Inc. et al.*, 1994 CanLII 7214 (ON CTGD).

45. Surgenor's factum makes much of the fact that the Surgenor Lease states that title to the Surgenor Collateral remains with Surgenor. However, as noted above, the determination of whether a lease is a financing lease or a true lease is a question of substance.

46. Considering that substance, it is clear that the arrangement between Surgenor and P3 was such that P3 possessed all the benefits and burdens of ownership of the Surgenor Collateral and that P3 would make fixed payments to Surgenor which would culminate in P3's discharge of Surgenor's security interest in the collateral, with P3 retaining full ownership. This was not a case where P3 was merely paying Surgenor for temporary use of an asset.

47. In short, the Surgenor Lease was much more like a mortgage agreement (where P3 could discharge Surgenor's interest through payment of fixed amounts) than a rental agreement (where P3 was paying for temporary use of the Surgenor Collateral). In particular, the Trustee notes as follows:

(a) In the event P3 terminated the lease early through payment of the full balance due under the lease, Surgenor would sell the Surgenor Collateral. The proceeds of the sale of the Surgenor Collateral would be applied to this balance and, if there was a surplus, this surplus was payable to P3. This demonstrates that the party holding the residual equity interest in the Surgenor Collateral was P3, not Surgenor;[24]

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[24] See s. 6(b) of Schedule A of the Surgenor Lease, Exhibit A to the Antonella Affidavit, SurMR, Tab 2, p. 26. See also *Crop & Soil Service, Inc. v. Oxford Leaseway Ltd.*, 2000 CanLII 1838 (ON CA), at para 9.

(b) The lease enabled P3 to build up equity in the Surgenor Collateral by crediting lease payments against the amount due should P3 exercise an option to purchase. This option to purchase was not based on the fair market value of the security at the time of exercising same but rather the balance due under the lease. This suggests that the real nature of the transaction was in the nature of P3 making fixed payments to Surgenor and that, after those fixed payments were made, P3 was entitled to the Surgenor Collateral free and clear of Surgenor's interests;[25]

(c) The lease contemplated that the Surgenor Collateral would be at the risk of P3;[26]

(d) The calculation of monthly lease payments is not based on the use of the security (as would be expected in a true lease), but appears to reflect the amortization of the purchase price of the Surgenor Collateral;[27] and

(e) On default, the lease contemplates that Surgenor is entitled to return of the Surgenor Collateral, the proceeds of sale of the Surgenor Collateral *and* to the right to collect any deficiency from P3. This suggests that the Surgenor

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[25] See s. 6(a) of Schedule A of the Surgenor Lease, Exhibit A to the Antonella Affidavit, SurMR, Tab 2, p. 26. See also *Crate Marine*, 2015 ONSC 3338 at para 26(c).

[26] Surgenor Lease at paras. 14-17, Exhibit A to the Antonella Affidavit, SurMR, Tab 2, p. 24. See also *Crate Marine*, 2015 ONSC 3338 at para 26(d).

[27] See also *Baker (re),* 2022 NSSC 115 at paras 25-28.

Collateral was serving as security for an independent payment obligation by P3 to Surgenor.[28]

48. While the lease does state that title to the equipment is retained by Surgenor, all other components of the lease reflect a financing arrangement, rather than a true lease arrangement. Accepting Surgenor's position would be permitting form to trump substance, in direct contradiction of the case law.

49. Surgenor's remaining arguments are logically flawed and easily disposed of with reference to well established principles:

(a) Surgenor argues that, because the Surgenor Lease provided that, at the end of the lease's term, P3 had to return the Surgenor Collateral to Surgenor unless P3 exercised an "end-of-term buy-back," Surgenor retained a residual ownership interest in the Surgenor Collateral. This buy back mechanism, in fact, supports the opposite conclusion. At the end of the lease's term, P3 had to pay Surgenor $25,000. P3 was able to satisfy this either through (1) a cash payment, in which case Surgenor's interest in the Surgenor Collateral was discharged or (2) returning the Surgenor Collateral to Surgenor and then paying the difference between the sale value of the Surgenor Collateral and $25,000. Under this mechanism, the real obligation of P3, is in the nature of payment, not the return of the collateral. In the event the collateral is worth less than $25,000, then P3 was required to pay

[28] See Surgenor Lease, paragraph 11 (Default), and paragraph 14 (All Risk), Exhibit A to the Antonella Affidavit, SurMR, Tab 2, p. 24 and paragraphs 3 and 6 of Schedule A to the Surgenor Lease, Exhibit A to the Antonella Affidavit, SurMr, Tab 2, p. 26. See also *Crate Marine*, 2015 ONSC 3338 at para 26.

further amounts to satisfy its obligations to Surgenor.[29] This demonstrates that the Surgenor Collateral was only acting as security; and

(b) Surgenor relies on the fact that it is in "the business of leasing motor vehicles" and "enters into such leases in the ordinary course of business" to support its preferred interpretation of the Surgenor Lease.[30] This argument suffers from two flaws:

(i) Surgenor appears to be making the argument that, because its past leases are true leases, and the Surgenor Lease is in a similar form, the Surgenor Lease must also be a true lease. This reasoning is flawed because it, tautologically, assumes that Surgenor's other leases are in the nature of true leases. The Court has no basis to accept this conclusion and Surgenor's bald assertion in this respect does not obviate the need for the Court to assess the substance of the transaction as between Surgenor and P3 (not as between Surgenor and other parties, in respect of which the Court has no evidence); and

(ii) What Surgenor may have understood its leasing model to be in the course of its dealings with other parties is irrelevant to the interpretation of the Surgenor Lease. Contractual interpretation is an objective exercise that is based on the circumstances known to the

[29] Schedule B to the Surgenor Lease, Exhibit A to the Antonella Affidavit, SurMR, Tab 2, p. 27.

[30] Factum of Surgenor National Leasing Limited, August 28, 2026, at para 5.

parties at the time the contract was agreed. A party's subjective intent is irrelevant.[31] This also means that Surgenor's general business practices are irrelevant. There is no evidence that these practices were communicated to or known by P3.

50. Given that the Surgenor Lease clearly contemplated that P3 would retain the residual equity interest in the Surgenor Collateral, the equipment was properly considered part of P3's estate.

C. The Secured Claim Distribution Scheme properly considered Surgenor's PMSI claim

51. Surgenor objects to the Secured Claim Distribution Scheme on the basis that it fails to recognize that Surgenor has a first ranking PMSI in the Surgenor Collateral, under the *PPSA*.

52. The Trustee acknowledges that Surgenor has a first ranking PMSI interest in its collateral, which interest is subject only to Court ordered priority charges and the CRA's deemed trust claim.

53. The Secured Claim Distribution Scheme allocates a portion of P3's sale proceeds to the Surgenor Collateral (among P3's other assets) and then contemplates payment of that amount to secured creditors in accordance with their appropriate priority.

54. This is precisely what Surgenor argues is the "correct sequence" for distribution of the proceeds of the Surgenor Collateral at paragraph 54 of its factum, being to:

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[31] *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 at para. 54 (SCC).

(a) Identify the Surgenor Collateral and its gross proceeds;

(b) Deduct properly ranking realization and preservation costs attributable to the Surgenor Collateral (and any prior-ranking charge)

(c) Pay Surgenor's PMSI obligation from the net proceeds of the Surgenor Collateral; and,

(d) Remit only remaining surplus proceeds to the subordinate waterfall.[32]

55. The Trustee completely agrees with this analysis and has implemented it in the Secured Claim Distribution Scheme:

(a) The Trustee determined the portion of the proceeds attributable to the Surgenor Collateral by comparing the appraised value of the Surgenor Collateral to the appraised value of P3's other assets. In this case, the Trustee determined that the proceeds of the Surgenor Collateral represented 13.5% of the total proceeds generated by P3;[33]

(b) The Trustee deducted (1) its own fees and those of its counsel and (2) CRA's deemed trust claim from the total P3 proceeds *pro rata*, because these amounts attach to all of P3's assets and are in priority to all other claims against P3's assets.; and

[32] Factum of Surgenor National Leasing Limited, August 28, 2026, at para. 54

[33] See Figure 1 in the Third Supplement, SuppTMR, Tab 1, p. 431.

(c) After deducting these priority amounts from the proceeds, the amount of money left over represents the remaining proceeds. Surgenor is entitled to these monies.[34]

56. While Surgenor complains that the Trustee has improperly "pooled" P3's assets in connection with the foregoing analysis, this is a misunderstanding and mischaracterization of the Secured Claim Distribution Scheme. The Trustee's fee charge and the CRA's deemed trust apply to *all* of P3's assets. Accordingly, the Trustee was required to deduct these amounts from the gross proceeds generated by the sale of P3's assets.

57. After applying this deduction, the Trustee then divided the remaining proceeds between the various assets that made up P3's estate in accordance with their relative value. The alternative to this would have been to, first, divide up the proceeds between the assets according to their relative value *and then* to subtract the Trustee's fees and CRA deemed trust on a *pro rata* basis. However, this would have resulted in an identical result.

58. Surgenor therefore has no basis to complain about the Secured Claim Distribution – it is entirely consistent with its rights and priority at law.

PART V. ORDER SOUGHT

59. The Trustee requests that the Court dismiss Surgenor's motion in its entirety and award the Trustee's its costs of the same on a substantial indemnity basis.

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[34] Third Supplement at para. 36, SuppTMR, Tab 3, p. 432.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October 2026.

Ryan Shah/Pooja Patel

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1064521 Ontario Ltd. (1998),* 1998 CanLII 14641 (ON CTGD)
2. *Adelaide Capital Corp. v. Integrated Transportation Finance Inc. et al.,* 1994 CanLII 7214 (ON CTGD)
3. *Baker (re),* 2022 NSSC 115
4. *Bank of Montreal v. Scott*, 2013 SKQB 64
5. *Crate Marine,* 2015 ONSC 3338
6. *D'Amico v. Claveau,* 2023 ONSC 2508
7. *Eli Lilly & Co. v. Novopharm Ltd.,* 1998 CanLII 791
8. *Hertz v. 1593658 Ontario Inc.*, 2011 SKQB 379
9. *HOJ National Leasing Corp. (Re),* 2008 ONCA 390
10. *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.,* 2005 CanLII 43684 (ON SC)
11. *Ryan v. Moore,* 2005 SCC 38
12. *Crop & Soil Service, Inc. v. Oxford Leaseway Ltd.*, 2000 CanLII 1838 (ON CA)
13. *Trick v. Trick,* 2006 CanLII 22926 (ON CA)

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date October 15, 2026

Pooja Patel

Pooja Patel

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 81.

Persons claiming property in possession of bankrupt

81 (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

How claim disposed of

(2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee' decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.

Onus on claimant

(3) The onus of establishing a claim to or in property under this section is on the claimant.

Require proof of claim

(4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.

No other proceeding to be instituted

(5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.

Rights of others not extended

(6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.

***Bankruptcy and Insolvency General Rules*, CRC, c 368, s 2**

General

2 Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the *Interpretation Act*, and must be used in proceedings under the Act.

***Rules of Civil Procedure,* RRO 1990, Reg 194, s 37.14**

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.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

Court File No. BK-25-03207793-0033 and BK-25-03207766-033

IN THE MATTER OF THE BANKRUPTCY OF 11449346 CANADA INC.
IN THE MATTER OF THE BANKRUPTCY OF 12574764 CANADA LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

RESPONDING FACTUM OF THE TRUSTEE IN BANKRUPTCY (CROSS-MOTION BY SURGENOR)

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