



COURT FILE NUMBER **2101-06388**

COURT **COURT OF KING'S BENCH OF ALBERTA**

JUDICIAL CENTRE **CALGARY**

PLAINTIFF **ATB FINANCIAL**

DEFENDANT **ALBERTA FOOTHILLS PROPERTIES LTD.**

APPLICANT **FTI CONSULTING CANADA INC., in its capacity as the Court-appointed Receiver of ALBERTA FOOTHILLS PROPERTIES LTD.**

DOCUMENT **APPLICATION FOR ADVICE AND DIRECTION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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\$50.00
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 Dec 12 2022

NOTICE TO RESPONDENT:

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

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

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

Date	December 12, 2022
Time	2:00 p.m.
Where	Via Webex https://albertacourts.webex.com/meet/virtual.courtroom60 Virtual Courtroom 60 Calgary Courts Centre
Before Whom	The Honourable Mr. Justice R. A. Neufeld

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

Remedy claimed or sought:

The Applicant, FTI Consulting Canada Inc., in its capacity as the court-appointed receiver (the "**Receiver**") of Alberta Foothills Properties Ltd. ("**AFPL**"), brings this application (the "**Application**") for:

1. Advice and directions to determine whether:
 - a. certain funds deposited by AFPL with MLT Aikins LLP in its capacity as escrow agent (the “**Escrow Agent**”) pursuant to an Escrow Agreement dated November 7, 2019 between MLT, Barbican and AFPL (the “**Escrow Agreement**”) are assets of the AFPL estate and should be paid to the Receiver for distribution to the creditors of the AFPL estate; and
 - b. whether the other parties asserting claims to the Escrow Funds have any priority over the first secured lender of AFPL, Alberta Treasury Branches (“**ATB**”).
2. An order scheduling the pre-hearing steps for the above application for advice and directions.
3. In the event a determination is made that the Escrow Agent is entitled to be paid its legal expenses (the “Legal Expenses”) in priority to other creditors of AFPL, an order directing:
 - a. the Escrow Agent to provide its unredacted invoices relating to the Legal Expenses to the Receiver for its review; and
 - b. that in the event of a dispute regarding the Legal Expenses, any such dispute will be set down for review before an assessment officer of the Court of Queen’s Bench.
4. Such further and other relief as the Receiver may request and this Honourable Court may grant.

Grounds for making this application:

Background

5. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Second Report.
6. AFPL’s primary asset is approximately 145 acres of land (the “**Property**”) located in Okotoks.
7. Prior to the Date of Appointment, AFPL:

- a. planned a seven-phase development of the Property (the “**Project**”);
 - b. granted security, including a general security agreement in favour of ATB dated August 17, 2015 (the “**GSA**”), in relation to financing obtained by AFPL from ATB;
 - c. breached the terms of its commitment letter with ATB as of March of 2018 by, among other things, failing to make payments to ATB when due and entered into a forbearance agreement, as extended and amended, with ATB providing AFPL time to address its defaults;
 - d. began discussions as of August of 2019 to obtain financing for the Project with a US based lender, Barbican, whose Canadian counsel was MLT;
 - e. paid Barbican advance fees of \$25,000 USD;
 - f. entered into a Letter of Intent with Barbican dated August 22, 2019 for Barbican to loan \$30 million to AFPL (the “Proposed Loan”);
 - g. deposited \$300,000 (CDN) with MLT on December 24, 2019 pursuant to the Escrow Agreement which appointed MLT as Escrow Agent; and
 - h. ceased loan discussions with Barbican and requested the return of the Escrow Funds from the Escrow Agent.
8. MLT paid \$50,000 (CDN) of the Escrow Funds to Barbican pursuant to a notice of lender issued by Barbican to MLT dated February 18, 2020. Accordingly, the Receiver understands that there is currently \$250,000 (CDN) remaining in a non interest bearing trust account of MLT.
 9. Barbican apparently received over \$75,000 (CDN) in total from AFPL in relation to the Proposed Loan, but no loan monies were advanced to AFPL at any time by Barbican.
 10. In August of 2020, MLT filed an originating application in its capacity as Escrow Agent and counsel for Barbican seeking release of the Escrow Funds to Barbican and payment of its invoices from the Escrow Funds.

11. Counsel for AFPL filed a cross application on September 24, 2020 seeking return of the Escrow Funds to AFPL, copies of the unredacted invoices of the Escrow Agent and an order disqualifying MLT from acting as counsel for Barbican.
12. After the Date of Appointment, the Receiver investigated whether the Escrow Funds were part of the AFPL estate. As part of its investigation, the Receiver:
 - a. obtained the pleadings, evidence and other filed materials from the Escrow Agent's Action from the parties;
 - b. retained the Receiver's Conflict Counsel;
 - c. determined that entitlement to the Escrow Funds was in dispute between the parties to the litigation, ATB, and one or two individuals (Messrs. Atkins and Saperstein) who claim to have funded the payment of the Escrow Funds to the Escrow Agent (the "**Escrow Funds Dispute**"); and
 - d. requested and collected additional information and records from the parties.
13. The Escrow Agent has not provided copies of its unredacted invoices relating to the claimed Legal Expenses to the Receiver.
14. There is clearly a dispute to entitlement to the Escrow Funds by various parties identified above. The Receiver requests the assistance of this Honourable Court to provide advice and direction to the Receiver for the resolution and adjudication of the issues in dispute.

Material or evidence to be relied on:

15. The Receivership Order, including paragraphs 3(f), (j), (n) and 28.
16. Pleadings and proceedings in the within Action;
17. Second Report of the Receiver dated September 29, 2022, to be filed concurrently with this Application; and
18. Such further and other materials or evidence as counsel may advise and this Honourable Court may permit.

Applicable rules:

19. Part 6 of the Alberta *Rules of Court*, Alta Reg 124/2010, including Rules 6.3 and 6.9; and
20. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

21. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, sections 243 and 249; and
22. 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:

23. None.

How the application is proposed to be heard or considered:

24. In person or by Webex as the Court may direct.

WARNING

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 at the time shown at the beginning of the form. If you intend 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.