

COURT FILE NUMBER 25-2996918
COURT COURT OF KINGS BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PROCEEDINGS IN THE MATTER OF THE BANKRUPTCY OF
NOMODIC MODULAR STRUCTURES INC.,
AITHRA PROJECTS INC. and NOMODIC
MODULAR STRUCTURES (ONTARIO) LTD.
APPLICANT FTI CONSULTING CANADA INC., in its capacity
as the Court-appointed Trustee in Bankruptcy of
NOMODIC MODULAR STRUCTURES INC.,
AITHRA PROJECTS INC. and NOMODIC
MODULAR STRUCTURES (ONTARIO) LTD.
DOCUMENT **APPLICATION FOR ADVICE AND
DIRECTIONS**
ADDRESS FOR SERVICE AND CONTACT MLT AIKINS LLP
Barristers and Solicitors
INFORMATION OF PARTY 2100, 222- 3rd Avenue S.W.
FILING THIS DOCUMENT Calgary, Alberta T2P 0B4
Phone: 403.693.5420 / 4311
Fax: 403.508.4349
Attention: Ryan Zahara / Kaitlin Ward
File: 0052752.00007



NB
C32024

COM April 5, 2024

NOTICE TO THE RESPONDENTS:

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 attend Court by videoconference or phone when the application is heard as shown below:

Date: April 5, 2024
Time: 2:00 p.m.
Where: Calgary Courts Centre – via WebEx
Before: The Honourable Justice E.J. Sidnell

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

COURT FILE NUMBER 25-2997457 B201-997457

COURT COURT OF KINGS BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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C32039

Apr 5, 2024
COM

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COURT FILE NUMBER 25-2997541 B201-997541

COURT COURT OF KINGS BENCH OF ALBERTA

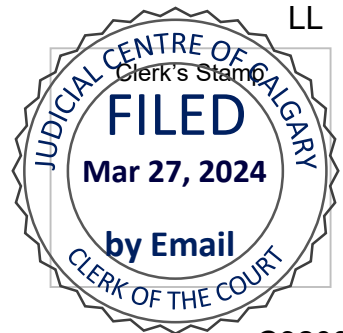
JUDICIAL CENTRE CALGARY

PROCEEDINGS IN THE MATTER OF THE BANKRUPTCY OF
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APPLICANT FTI CONSULTING CANADA INC., in its capacity
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LL

C32035

Apr 5, 2024
COM

NOTICE TO THE RESPONDENTS:

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Remedy claimed or sought:

1. The Applicant, FTI Consulting Canada Inc. (“**FTI**” or the “**Trustee**”), in its capacity as the court-appointed Licensed Trustee in Bankruptcy of Nomodic Modular Structures Inc. (“**Nomodic**”), Aithra Projects Inc. and Nomodic Modular Structures (Ontario) Ltd. (collectively, the “**Nomodic Companies**”), brings this application (the “**Application**”) for advice and directions respecting entitlement to certain funds as between a secured creditor’s interest of ATB Financial (“**ATB**”) and a potential property or trust claim by Northern Vision Development Limited Partnership (“**NVD**”).
2. The Trustee also applies for an Order:
 - (a) declaring service of this Application to be good and sufficient, and abridging the time for notice of this Application to the time actually given, if necessary;
 - (b) approving the Trustee’s interim distribution of certain of the disputed funds to either ATB or NVD, if necessary; and
 - (c) such further and other relief as counsel may request and this Honourable Court deems just and appropriate.

Grounds for making this application:

Background

3. Prior to its assignment into bankruptcy, the Nomodic Companies carried on business in construction management for prefabricated modular structures, primarily in British Columbia, Alberta, and Ontario. The Nomodic Companies’ recent projects included dismantling a temporary work camp along the Coastal GasLink project in British Columbia; two projects for the British Columbia Housing Management Commission; and a housing project in Sudbury, Ontario.
4. Due in part to global supply chain issues caused largely from the impacts of the COVID-19 pandemic, costs and turn-around times to source construction materials greatly increased. The Nomodic Companies were party to several fixed priced contracts that limited their ability to pass along the increased costs to clients. The Nomodic Companies

further experienced a number of cost overruns in completing projects, and due to certain outstanding deficiencies, were unable to collect remaining holdback receivables.

5. On September 25, 2023, the Nomodic Companies' primary secured creditor, ATB, issued demand letters along with Notices of Intention to Enforce Security under section 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**") to the Nomodic Companies. At the time, the Nomodic Companies had no further access to their operating line of credit and insufficient operating cash flow to continue their operations. As a result, the Nomodic Companies decided to cease operations, terminate all employees, and make a voluntary petition into bankruptcy.
6. On October 6, 2023 (the "**Bankruptcy Date**"), FTI was appointed as Trustee of the Nomodic Companies pursuant to the Order of the Honourable Justice D.B. Nixon (the "**Bankruptcy Order**"). Since the Bankruptcy Date, FTI has administered the bankruptcy estate in the normal course. The Trustee has held the first meeting of creditors, met with inspectors and mailed notices, among other statutory requirements.
7. All of the Nomodic Companies' property is encumbered in favour of various secured creditors, including the Canada Revenue Agency, ATB, Business Development Bank of Canada and other potential lienholders or trust claimants.

NVD Claim

6. The Trustee received a Proof of Claim from NVD dated December 1, 2023, advancing a property or trust claim in the amount of \$2,405,490.71, with an estimated unsecured claim of \$1,000 to maintain its position as an unsecured creditor (the "**NVD POC**").
7. Further details of the NVD POC are set out in the Affidavit of Michael Hale, sworn December 1, 2023, attached at Appendix "E" to the First Report, and the Affidavit of Ken Volk, sworn December 4, 2023, attached at Appendix "F" to the First Report (the "**Volk Affidavit**").
8. In sum, the NVD POC asserts a property or trust claim, which has two components: (1) a portion of the funds in the RBC Account (as defined below) in the approximate amount of \$765,000; and (2) funds that were subject to the Champion Cheque (as defined below) in the amount of \$1,639,158.54.

Limited Notice to Proceed regarding Hyatt Place Hotel Project

9. On or around December 7, 2022, NVD and Nomodic entered into a Limited Notice to Proceed (the “**LNTP**”) for the purchase, fabrication, delivery and installation of 117 modular hotel rooms as part of the larger Hyatt Place hotel project in Whitehorse, Yukon (the “**Hyatt Project**”).
10. The parties entered into the LNTP so they could begin work in the absence of a full agreement, or a Definitive Agreement, as defined in the LNTP. Pursuant to the LNTP, NVD advanced a pre-payment in the amount of \$3,750,774 to Nomodic (the “**Pre-Payment**”), which was paid to Nomodic’s bank account with Royal Bank of Canada (the “**RBC Account**”).
11. The RBC Account was purportedly set up specifically for the LNTP, but there were certain unrelated transfers between the RBC Account and Nomodic’s main operating account with ATB. NVD maintains that it required Nomodic to hold the Pre-Payment funds in a segregated account that would accrue interest, which was to be returned to NVD as a fee. However, the Trustee is not aware of a formalized agreement providing for these terms, or that Nomodic paid any fees to NVD.
12. According to NVD, the LNTP did not authorize Nomodic to use the Pre-Payment for any other purpose except as expressly set out in the LNTP. NVD and Nomodic did not enter into a Definitive Agreement.
13. Also around December 6, 2022, Nomodic and Champion Canada International ULC (“**Champion**”) entered into a separate Limited Notice to Proceed (the “**Champion LNTP**”), pursuant to which, Nomodic subcontracted the fabrication services of the Hyatt Project to Champion.
14. Pursuant to the Champion LNTP, Nomodic transferred approximately \$2.1 million of the Pre-Payment to Champion to hold manufacturing space, produce a show suite and purchase long lead time items, among other project requirements.

Termination of LNTP

15. On July 17, 2023, NVD issued a Termination Notice to Nomodic terminating the LNTP.

16. One of the issues to be resolved upon termination was determining the amount of the Pre-Payment that Nomodic was required to return to NVD. To do so, Champion's costs needed to be finalized before Nomodic's costs could be finalized.
17. NVD, Nomodic, and Champion eventually negotiated a Mutual Release and Settlement Agreement, executed on September 27 and 28, 2023 (the "**Settlement Agreement**"). Pursuant to the Settlement Agreement, Nomodic would refund or repay \$2,405,490.71 (the "**Settlement Amount**") of the Pre-Payment to NVD on or before October 6, 2024.
18. At the time, Champion was still holding \$1,639,158.54 of the Pre-Payment. According to Champion, the parties agreed to the Settlement Agreement on the understanding that Champion would return \$1,639,158.54 to Nomodic, after which, Nomodic would then forward \$1,639,158.54, along with the balance of the Settlement Amount, from the RBC Account to NVD.
19. After the Settlement Agreement was signed, Champion sent a cheque to Nomodic dated September 28, 2023, in the amount of \$1,639,158.54 (the "**Champion Cheque**"). ATB and Champion have each provided evidence about when the Champion Cheque was deposited.
20. ATB has provided the Trustee with a screenshot of its records indicating the Champion Cheque was deposited in the ATB Operating Account at 10:15 a.m. MT on October 6, 2023. This document is attached at Appendix "H" to the First Report.
21. Champion has provided evidence at Exhibit "E" to the Volk Affidavit of deposit markings on the Champion Cheque indicating it was deposited into the ATB Operating Account at approximately 3:34 pm MT on October 6, 2023.
22. Once the Champion Cheque was deposited, the entire balance of the Champion Cheque was then applied towards ATB's outstanding indebtedness.
23. According to the clerk's notes for the Nomodic Companies' October 6, 2023 voluntary application for a bankruptcy order (the "**Bankruptcy Application**"), Justice Nixon approved the Bankruptcy Order around 2:21 pm MT and the Bankruptcy Application was closed at 2:23 pm MT.

24. As of the Bankruptcy Date, the remaining \$766,332.17 of the Settlement Amount held in the RBC Account was frozen and subsequently transferred to the Trustee's account.

Entitlement to the Disputed Amount

25. NVD's position is that the amount of \$766,332.17 in the RBC Account, plus the amount of \$1,639,158.54 subject to the Champion Cheque, is subject to its property or trust claim. Subject to NVD's submissions on the matter, the Trustee understands NVD will seek an Order directing the Trustee to release the amount of \$766,332.16 of the Settlement Amount to NVD and directing further tracing or other remedies to recover the amount of \$1,639,158.54 swept by ATB following the Bankruptcy Date.
26. ATB's position is that it is entitled to the amount of the Champion Cheque deposited in the ATB Operating Account. The Trustee understands that ATB also believes the remaining funds in the RBC account are subject to its perfected, primary secured position over Nomodic and ATB is not stayed by the Bankruptcy Order from enforcing its security. Further details of ATB's security are set out in the Affidavit of Muhammad Ashraf, sworn October 6, 2023 and attached as Appendix "D" to the First Report.
27. The above facts are not disputed by the parties. The Trustee believes that the quantum of the NVC POC is correct and that NVD has, at a minimum, an unsecured claim, subject to the Court's determination of the priority to be accorded to the property aspect of the NVD POC. Given the nature by which the LNTP was administered, it is not clear whether NVD has a property claim that is superior to that of ATB's general security interest and the Trustee is seeking the Court's advice and directions to resolve this issue.

Applicable rules:

28. Rules 6.3, 6.9 and 11.27 of the *Alberta Rules of Court*, Alta Reg 124/2010; and
29. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

30. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, section 34; and
31. 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:

32. None.

How the application is proposed to be heard or considered:

33. By WebEx pursuant to the details enclosed hereto at Schedule "A".

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and the 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.

SCHEDULE "A" WebEx Video Conference Details

Virtual Courtroom 60 has been assigned for the above noted matter:

Virtual Courtroom Link:

<https://albertacourts.webex.com/meet/virtual.courtroom60>

Instructions for Connecting to the Meeting

1. Click on the link above or open up Chrome or Firefox and cut and paste it into your browser address bar.
2. If you do not have the Cisco Webex application already installed on your device, the site will have a button to install it. Follow installation instructions. Enter your full name and email address when prompted
3. Click on the **Open Cisco Webex Meeting**.
4. You will see a preview screen. Click on **Join Meeting**.

Key considerations for those attending:

1. Please connect to the courtroom **15 minutes prior** to the start of the hearing.
2. Please ensure that your microphone is muted and remains muted for the duration of the proceeding, unless you are speaking. Ensure that you state your name each time you speak.
3. If bandwidth becomes an issue, some participants may be asked to turn off their video and participate by audio only.
4. **Note: Recording or rebroadcasting of the video is prohibited.**
5. **Note: It is highly recommended you use headphones with a microphone or a headset when using Webex. This prevents feedback.**

For more information relating to Webex protocols and procedures, please visit:

<https://www.albertacourts.ca/qb/court-operations-schedules/webex-remote-hearings-protocol>

You can also join the meeting via the "Cisco Webex Meetings" App on your smartphone/tablet or other smart device. You can download this via the App marketplace and join via the link provided above.