COURT FILE NO.: M/M/114/12

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

-and -

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LANDDRILL INTERNATIONAL INC. (A BRITISH COLUMBIA CORPORATION), LANDDRILL INTERNATIONAL LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL ATLANTIC LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL CONTRACT MINING LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL INTERNATIONAL MEXICO S.A. DE C.V. (A MEXICAN CORPORATION), LANDDRILL INTERNATIONAL LLC (A MONGOLIAN CORPORATION) and LANDDRILL INTERNATIONAL INC. (A BARBADOS CORPORATION)

(collectively, the Applicants),

# BRIEF OF MOTION

FILED ON BEHALF OF GOLD CANYON RESOURCES INC.

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# INDEX

## PART I – FACTS

1. Gold Canyon Resources Inc. ("**Gold Canyon**") and Landdrill International Ltd. ("**Landdrill**") entered into a Memorandum of Agreement (the "**Agreement**") in May 2011.

2. Quinton Hennigh ("**Hennigh**"), the technical advisor to Gold Canyon, negotiated the Agreement with Mr. Ronald G. Goguen ("**Goguen**"), the President of Landdrill.

> *See Affidavit of Quinton Hennigh, sworn to September 19, 2012 ("Hennigh Affidavit") at paragraph 3.*

3. The Agreement provided that Landdrill would perform certain services for Gold Canyon. Gold Canyon would pay a security deposit of $100,000.00 to Landdrill to be held in trust.

> *See Affidavit of Ronald A. Schmitz, sworn to September 14, 2012 ("Schmitz Affidavit") at paragraph 3-4.*

4. Gold Canyon received an invoice, dated May 27, 2011 (the "**Invoice**"), pursuant to the Agreement in the amount of $300,000.00. The Invoice provided that the money was to be held in accordance with the Agreement.

> *See Schmitz Affidavit at paragraph 5-6.*

5. Hennigh was sent a copy of the Invoice which he forwarded to Ron Schmitz ("**Schmitz**"), the Executive Vice-President and Corporate Secretary of Gold Canyon, for payment without reading it. He indicated the Invoice was time sensitive and it needed to be paid to get Landdrill on site by June 2011.

> *See Hennigh Affidavit at paragraph 7.*

6. By May 31, 2012 Gold Canyon had paid the Invoice.

*See Hennigh Affidavit at paragraph 10.*

7. Hennigh had been advised that Landdrill would commence work no later than June 2011. In mid-June 2011, Goguen advised Hennigh that they were waiting for the delivery of the new drills from the manufacturer and assured that they would meet the late June commencement deadline.

*See Hennigh Affidavit at paragraph 10-11.*

8. By the end of June 2011, Landdrill had not commenced drilling and advised they would not be able to commence drilling operations until mid-August 2011.

9. As a result of the delayed start date Gold Canyon had to contact their existing drill contractor to commence barge drilling on an urgent basis, as investors had anticipated that barge drilling would be commenced in June.

*See Hennigh Affidavit at paragraph 12.*

10. In mid-September, 2011, Landdrill inquired about access to the drilling site. Hennigh advised there were only four weeks left to the summer drilling season and that Landdrill had let them down, but they may still be considered for Gold Canyon's winter drilling work.

*See Hennigh Affidavit at paragraph 14.*

11. In November 2011, bids were submitted for Gold Canyon's winter drilling work. Landdrill was notified and submitted a bid. Landdrill did not win the bid and therefore was not awarded the contract.

*See Hennigh Affidavit at paragraph 15.*

12. In December 2011, Schmitz began the process of retrieving Gold Canyon's security deposit from Landdrill, paid pursuant to the Invoice. During this process Hennigh realized Gold Canyon mistakenly paid $200,000.00 to Landdrill. This mistake was induced by the amount Landdrill provided on the Invoice.

*See Hennigh Affidavit at paragraph 16.*

13. At a meeting in January 2012 between Hennigh, Schmitz and Goguen, Goguen advised that Landdrill was no longer holding the security deposit in trust for Gold Canyon. He did not provide information as to what Landdrill had done with the funds. However, Goguen offered to provide to Gold Canyon a drill rig in lieu of repayment.

*See Hennigh Affidavit at paragraph 18.*

14. On August 31, 2012, an order (the "**Initial Order**") declared that Landdrill was subject to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

*See Initial Order, Court File No. M/M/114/12.*

15. Goguen has admitted that Landdrill purchased two new "fly" rigs with Gold Canyon's funds.

*See Affidavit of Ronald J. Goguen, sworn September 12, 2012.*

## PART II – ISSUES

16. The issues are:

1. Is the security deposit paid pursuant to the agreement subject to a trust in favour of Gold Canyon?
2. Is Gold Canyon entitled to recover the additional $200,000.00 paid by mistake of fact pursuant to the Invoice dated May 27, 2011?
3. Is Gold Canyon entitled to trace into the proceeds of its funds, if the funds have been spent?
4. Is Gold Canyon entitled to a charge on the assets of Landdrill acquired with Gold Canyon's funds, if any?
5. Should the CCAA stay be lifted to allow enforcement of such charge as Gold Canyon may be granted over the assets of Landdrill?

PART III – LAW AND ARGUMENT

*Issue One:* ***Is the security deposit paid pursuant to the Agreement and the Invoice subject to a trust in favour of Gold Canyon?***

17. The security deposit paid by Gold Canyon to Landdrill pursuant to the Agreement and the Invoice of May 27, 2011, is subject to a trust in favour of Gold Canyon.

18. The Agreement states as follows:

> A security deposit in the amount of $100,000.00 is to be made prior to commencement of mobilization. This deposit will be held in trust and applied to the Contractor's last invoice...

*The "three certainties test"*

19. In Tozer *v The Bank of Nova Scotia and Atcon Group Inc. et al.*, 2012 NBCA 57, Bell J.A., affirmed the motions judge analysis at paragraph 5:

> Citing Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at p. 19-20, the motion judge observed that trusts arise either by intention, as evidenced by a person's "word or acts" or by imposition of the law. He then concluded that since the trust asserted in the present case does not arise by imposition of law, if it exists, it must be implied from the intention of the corporation. Such an intention is to be proven by establishing three essential characteristics (or "certainties"): certainty of intention to create a trust, certainty of subject matter and certainty of beneficiary. If any one of these certainties is lacking, there can be no trust.
> (emphasis added)

20. In this present matter, the certainty of subject matter and object are satisfied. The subject matter of the trust is the security deposit and the object, or beneficiary, is Gold Canyon.

21. An objective test must be used to determine whether certainty of intention is satisfied. As stated in *Tozer v The Bank of Nova Scotia and Atcon Group Inc., supra,* at paragraph 14:

> Absent an objective standard for determining the intention of the parties, the directing mind and will of a corporation who claims to be the beneficiary of a trust would be in a position to advance his or her own interests to the detriment of the corporation's creditors. The directing mind and will could bring his or her subjective view to both personal and corporate intention...

22. Bell J.A., clarified the law of trusts in New Brunswick at paragraph 19:

> I am satisfied the law with respect to the creation of trusts in New Brunswick is consistent with the law regarding the creation of contracts as set out by the Supreme Court in *V.K. Mason Construction Ltd.* the determination of whether a trust is established must be assessed on an objective basis, on a balance of probabilities.

23. The certainty of intention is satisfied when applying the objective test in the current circumstances. The Agreement expressly states that the security deposit is to be held in trust for Gold Canyon. The invoice dated May 27, 2011 stated the deposit for drill rigs was "as per contract agreement-Deposit to be deducted on last invoice". Additionally, when Gold Canyon attempted to recover the trust funds from Landdrill upon non-performance of the Agreement, Landdrill stated those funds were no longer held in trust, implying that the funds were once held in trust.

24. The security deposit paid pursuant to the Agreement satisfies the three certainties for a trust and therefore is held in trust for the purpose of Gold Canyon.

25. The security deposit is held in trust for Gold Canyon and therefore not property of Landdrill. As a result, the money held in trust should not be subject to or included in Landdrill's restructuring under the CCAA.

*Issue Two: Is Gold Canyon entitled to recover the additional $200,000.00 paid by mistake of fact pursuant to the Invoice dated May 27, 2011?*

26. Gold Canyon paid an additional $200,000 under a mistake of fact pursuant to the Invoice of May 27, 2011. Money paid under a mistake of fact is recoverable by the payer.

27. In *Mobil Oil Canada, Ltd. v. Storthoaks (Rural Municipality),* [1976] 2 SCR 147 (QL), the Supreme Court of Canada considered the judgment of Atkinson J., of *Anglo-Scottish Beet Sugar Corp. Ltd. v Spalding Urban District Council,* [1937] 2 K.B. 607, where there was a change in the minimum quarterly payments of a contract made between the head offices and the accountants were not made aware of the change and billed at the old rate. Martland J., stated at page 7:

> ...Atkinson J. relied upon the case Kelly v Solari, [(1841) 9 M.W. 54, 152 ER 24], and at p. 613, cited the well known passage from the judgment of Baron Parke in that case, and also from the reasons of Baron Rolfe:
>
> > "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been found in the dictum of Bayley J. in the case of Milnes v. Duncan, (1827) 6 B. and C. 671; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without

reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact." Rolfe B. said: "With respect the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it."

(emphasis added)

28. A party is entitled to recover funds that have been paid by a mistake of fact even if someone else within the corporation had full knowledge of the proper amount owning.

29. The Supreme Court of Canada in *Mobil Oil Canada, Ltd., v. Storthoaks (Rural Municipality), supra,* at page 9, Martland J., accepted the following statement made by Pilcher J., in *Turvey v Dentons (1923) Ltd.,* [1953] 1 QB 218, at p. 224:

> It is, however, clear upon authority that where, as in the present case, a limited liability company is concerned and payments are made under a bona fide mistake of fact by an authorized agent of the company, <u>the fact that some other agent of the company may have had full knowledge of all the facts does not disentitle that company to recover the money so paid, provided that the agent with the full knowledge does not know that the payments are being made on an erroneous basis</u>. For this proposition I need only refer to the case of Anglo-Scottish Beet Sugar Corporation Ltd. v Spalding Urban District Council, where the facts were curiously similar to those which I have had to consider in the present case. (emphasis added)

30. Hennigh had knowledge that the negotiated security deposit was to be $100,000. However, this knowledge does not disentitle Gold Canyon from recovering the money. The money was paid by an authorized agent of Gold Canyon

under a mistake of fact. Hennigh did not know the money was being paid on an erroneous basis until December 2011.

31. In *Walsh v Quoddy Holdings Ltd.,* 2006 NBQB 356, Glennie, J., stated at paragraphs 37-38:

> 37 In *Bank of Nova Scotia v McKee's Estate and McKee,* [1982] N.B.J. No. 169; 39 N.B.R. (2d) 542, the law with regards to recovering money paid under a mistake of fact is set up further by Stevenson, J. quoting *Kerr on Fraud and Mistake (7th Ed.,)* at pp. 500, 503:
>
>> Money paid voluntarily under mistake of fact is recoverable both in law and in equity where it is against justice and conscience that the receiver should retain it, and where the mistake has not induced the receiver to alter his position.
>>
>> It is not sufficient to preclude a man from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact, or that he has been careless in omitting to use due diligence to inquire into the fact. Money, indeed, paid under a bona fide forgetfulness of facts which disentitled the receiver to receive it, may be recovered back.
>
> 38 Justice Stevenson, in paragraph 10, cites the decision of *Royal Bank v The King*, [1931] 2 D.L.R. 685 where the conditions necessary to succeed on a claim to recover money paid under mistake of fact are listed as being:
>
>> 1. That the mistake is honest. There must be on the part of the person paying the money the genuine bona fide belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have known.
>>
>> 2. The mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it.

> 3. That the facts, as they are believed to be, impose an obligation to make the payment.
>
> 4. That the receiver of money has no legal or equitable or moral right to retain the money as against the payer.

32. This test has been continually applied by the New Brunswick Courts in cases that address the issue of recovery of money paid under the mistake of fact. (see, *Bank of Nova Scotia v. McKee's Estate*, [1982] NBJ No. 169 at para. 11; *State Farm Mutual Automobile Insurance Co. v Ferguson,* [1984] NBJ No. 42 at para. 13; *Howe v Laurentian Life of Canada,* [1995] NBJ No. 201, at para. 11. )

33. In order to determine whether Gold Canyon can recover $200,000.00 that was paid under a mistake of fact the following factors must be considered:

1. *That the mistake is honest. There must be on the part of the person paying the money the genuine bona fide belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have known.*

   Gold Canyon paid the money under an honest mistake. After receiving the invoice from Landdrill, Hennigh forwarded the invoice to Schmitz to pay the invoiced funds. Schmitz was not part of the negotiations between Gold Canyon and Landdrill, and paid the money as was instructed by Hennigh and Landdrill. Schmitz was under the belief that the amount provided for in the Invoice was the correct amount.

2. *The mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it.*

   The money was paid directly from Gold Canyon to the receiver, Landdrill. Landdrill induced the mistake as they issued the Invoice requesting $300,000.00 as opposed to $100,000.00 as provided for in the Agreement.

3. *That the facts, as they are believed to be, impose an obligation to make the payment.*

> The money paid by Gold Canyon was not a voluntary payment. Gold Canyon was fulfilling the obligation of paying the security deposit as set out in the Agreement. The security deposit had to be paid to ensure drilling operations commenced in June 2011.

4. *That the receiver of money has no legal or equitable or moral right to retain the money as against the payer.*

> Landdrill has no legal or equitable or moral right to retain the money against Gold Canyon. It will not be inequitable for Landdrill to return the money to Gold Canyon. Additionally, it would be inequitable for Landdrill or its estate to benefit from the mistake induced by Landdrill.

34. In *Mobil Oil Canada, Ltd. v Storthoaks (Rural Municipality),* [1976] 2 SCR 147 (QL) the Supreme Court of Canada held that before money paid under a mistake of fact is recoverable, consideration must be given as to whether the receiver has been materially changed in its circumstances as a result of the money. Martland J., stated at page 13:

> In my opinion it should be open to the [receiver of the money] to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of money....The mere fact that the moneys were spend does not, by itself, furnish an answer to the claim for repayment. If the [receiver of the money] is required to refund the moneys to [the payer] it will be in the position of having had the use of the moneys, over a period, without any obligation to pay interest.

35. In *Mobil Oil Canada, Ltd v Storthoaks, supra,* at page 13, it was determined that the receiver of money did not have a material change of circumstances as a result of the receipt of the money. The money was put into the general account and used to pay general expenses. Additionally, there was no evidence the receiver undertook any special projects or financial commitments as a result of the money. At page 14, Martland J., stated:

> the [receiver of the money] had failed to establish that it had so altered its position as a result of the receipt of the payments that it would be inequitable to require it to repay.

36. Landdrill cannot avoid the obligation to return the $200,000 to Gold Canyon as there has been no material changed in its circumstances as a result of receipt of the money. Landdrill has not provided any information as to the current location of the funds. However, it is alleged that "fly rigs" were purchased. The mere fact that Landdrill may have spent the security deposit does not amount to a material change in circumstances and does not disentitle Gold Canyon from recovering the mistakenly paid $200,000.

37. Gold Canyon paid $200,000 under a mistake of fact as a result of being induced by Landdrill's Invoice. This mistake of fact did not result in a materially change of circumstances for Landdrill. As a result, Gold Canyon is entitled to recover the $200,000 that was paid by mistake.

<u>Issue Three:</u> ***Is Gold Canyon entitled to trace into the proceeds of its funds, if the funds have been spent?***

(a) Legal and Equitable Tracing

38. Gold Canyon is entitled to trace into the proceeds of its funds, if the funds have been spent.

39. In *Oosterhoff on Trusts: Text, Commentary and Materials 7th Ed.,* (2009, Thomson Reuters Canada Ltd.), at page 1213 it states:

> Proprietary claims are based on the fact that the property sought to be recovered belongs to the beneficiaries. If the trustees misappropriate the property, equity will restore it to the beneficiaries even if the property was transferred by the trustees to a third person

who is not a *bona fide* purchaser of the legal estate for value and without notice.

And this extends even to substituted property. Hence, if a trustee gave $1,000 of trust money to a friend who was not entitled to it, and the friend bought a bond with it, but subsequently cashed the bond and invested the proceeds in a guaranteed investment certificate, the beneficiaries can trace the $1,000 into the certificate and recover it. All they have to do is prove the several substitutions made with the original property.

40. The Supreme Court of Canada in *Citadel General Assurance Co. v Lloyds Bank Canada,* [1997] S.C.J. No. 92, stated the principles related to tracing at paragraph 57:

> ...The principles relating to tracing at law and in equity were thus set out by the English Court of Appeal in Agip (Africa) Ltd., supra, at pp. 463-64 and 466:
>
>> Tracing at law does not depend upon the establishment of an initial fiduciary relationship. Liability depends upon receipt by the defendant of the plaintiff's money and the extent of the liability depends upon the amount received. Since liability depends upon receipt the fact that a recipient has not retained the asset is irrelevant. For the same reason dishonesty or lack of inquiry on the part of the recipient are irrelevant. Identification in the defendant's hands of the plaintiff's asset is, however, necessary. It must be shown that the money received by the defendant was money of the plaintiff. Further, the very

> limited common law remedies make it difficult to follow at law into mixed funds.
>
> Both common law and equity accepted the right of the true owner to trace his property into the hands of others while it was in an identifiable form. The common law treated property as identified if it had not been mixed with other property. Equity, on the other hand, will follow money into a mixed fund and charge the fund.

41. Landdrill held the $300,000.00 in trust for the benefit of Gold Canyon. The funds can be traced whether or not the funds were mixed with the Landdrill's own funds or remain distinct.

42. Ronald Goguen has admitted purchasing two "fly" rigs, at least in part, with Gold Canyon's money. Gold Canyon finds itself in the position of being an involuntary owner of the two "fly" rigs, to the extent of its contribution to the rigs.

(b) Remedies

43. *Oosterhoff on Trusts, supra,* at page 1213 stated that there are two remedies available when tracing is successful: (1) recovery of the property; or (2) an equitable lien or charge as a security interest that would encumber the property.

44. The English case, *Foskett v McKeown* (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97 (House of Lords) addresses trust claims and proprietary remedies. *Oosterhoff on Trusts, supra,* at page 1219 considers the following statement from Millett J.:

> Both remedies are proprietary and depend on successfully tracing the trust property into its proceeds. A beneficiary's claim against a trustee for breach of trust is a personal claim. <u>It does not entitle</u>

him to priority over the trustee's general creditors unless he can trace the trust property into its product and establish a proprietary interest in the proceeds. If the beneficiary is unable to trace the trust property into its proceeds, he still has a personal claim against the trustee, but his claim will be unsecured.

...

A more complicated case is where there is a mixed substitution. This occurs where the trust money represents only part of the cost of acquiring the new asset. As James Barr Ames pointed out in 'Following Misappropriated Property into its Product', consistency requires that, if a trustee bus property partly with his own money and partly with trust money, the beneficiary should have the option of taking a proportionate part of the new property or a lien upon it, as may be most for his advantage...

(emphasis added)

45. Based on Goguen's own uncontroverted admission, the trust funds can be traced into the "fly" rigs. It rests now with Goguen to account to Gold Canyon and identify the "fly" rigs.

46. As a result of Goguen's clear admission, it is equally clear that Gold Canyon is the holder of a proprietary interest in the "fly" rigs. As per *Foskett v McKeown, supra,* if the funds are traceable and are not mixed, Gold Canyon holds a proprietary interest in the property, distinct from Landdrill (and any creditor claiming through Landdrill). Gold Canyon is entitled to have a lien or charge, in the nature of an ownership interest, upon the drill rigs up to the $300,000 involuntarily contributed.

47. Gold Canyon's interest in the trust money is not subject to the New Brunswick *Personal Property Security Act,* SNB 1993, c P-7.1 (the "**PPSA**"), but rather the interest arises in equity. Equity continues to apply as long as it is not inconsistent with the act. Section 65(1) of the PPSA states:

> 65(1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

48. Gold Canyon's interest flows from equity whereas a potential secured creditor's interest would flow from the PPSA. It is respectfully submitted that the ownership interest of Gold Canyon cannot be encumbered by a security interest granted by Landdrill.

49. In *i Trade Finance Inc. v Bank of Montreal,* 2011 2 S.C.R. 360, the Supreme Court of Canada resolved the competing claims of i Trade, who held an equitable interest, and the Bank of Montreal, whose interest was covered by the PPSA. In this case the Bank of Montreal was given priority as they were a *bona fide* purchaser for value without notice and had a perfected interest under the PPSA, which had properly attached. However, the principles outlined in i Trade establish that a security interest governed by the PPSA will not attach to an ownership interest, such as Gold Canyon's, which arises prior in time to the PPSA security.

50. A requirement for attachment under the PPSA is that the debtor must have rights in the collateral. In *i trade Finance Inc. v Bank of Montreal, supra*, the equitable interest of i Trade, which was created through a constructive trust, came into existence after the Bank of Montreal attached and perfected under the PPSA. The debtor company had rights in the shares when the Bank of Montreal pledged security in the shares.

51. The New Brunswick PPSA defines attachment under s. 12(1):

> 12(1) A security interest, including a security interest in the nature of a floating charge, attaches when
>
> (a) Value is given,
>
> (b) The debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and
>
> (c) Except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10.

52. In *Bank of Montreal v Innovation Credit Union,* [2010] 3 S.C.R. 3, the Supreme Court of Canada resolved competing claims of an unperfected PPSA interest held by the Credit Union and a perfected s. 427 *Bank Act* security interest held by the Bank of Montreal. The court concluded that the security interest registered under the *Bank Act* was invalid as the interest had already been conveyed to another creditor. Charron J., stated at paragraphs 40 and 51:

> [40] As the bank effectively acquired legal title to whatever rights the debtor held in the assigned property, it becomes necessary to determine the nature of the debtor's proprietary interest in the collateral at the time that the bank took its security interest under s. 427. [The debtor] owned the property, but he had given the Credit Union a *PPSA* security interest in the collateral in question. <u>He could not convey to the Bank any greater interest than what he himself had left in the property.</u> The question becomes: What is the nature of the interest already conveyed to the Credit Union by [the debtor] under the *PPSA*?
>
> (emphasis added)

53. In *Royal Bank of Canada v Radius Credit Union Ltd.,* [2010] 3 S.C.R. 38, the Supreme Court of Canada resolved a priority dispute between *Bank Act* security and *PPSA* security relating to after-acquired property. Charron J., held at paragraph 35:

> For the reasons explained more fully in *Bank of Montreal*, by the combined effect of ss. 427(2) and 435(2), <u>the Bank can receive no greater interest in the property than the debtor himself has</u>. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a proprietary interest in the same collateral in the nature of a fixed charge. The failure to register does not take anything away from the nature and validity of the Credit Union's prior interest.
>
> (emphasis added)

54. It is respectfully submitted that a creditor of Landdrill would be unable to perfect an interest in Gold Canyon's interest in the "fly" rigs because the interest could not attach under the PPSA. Landdrill could not convey an interest greater than it held.

***<u>Issue Four:</u> Is Gold Canyon entitled to a charge on the assets of Landdrill acquired with Gold Canyon's Funds, if any?***

55. Gold Canyon is entitled to a charge on the assets of Landdrill acquired with Gold Canyon's Funds.

56. The court is granted significant remedial jurisdiction under s. 11 of the *Companies Creditor's Arrangement Act,* RSC, 1985, c. C-36, which empowers the court to make such order as would be appropriate in the circumstances:

> s. 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under

> this Act in respect of a debtor company, the court, on application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

57. Gold Canyon paid a security deposit of $300,000 to Landdrill, in substantial part by virtue of mistake, which was subject to a trust for the benefit of Gold Canyon. Landdrill subsequently breached the trust and used the funds to acquire assets. The funds are traceable into certain assets of Landdrill.

58. Gold Canyon is entitled to an equitable charge upon the assets that were acquired with the money subject to a trust for Gold Canyon. The remedies available when tracing is successful, allow Gold Canyon to have an interest in the assets over Landdrill's creditors or be entitled to a charge on the assets proportionate to $300,000.

***<u>Issue Five:</u> Should the CCAA stay be lifted to allow enforcement of such charge as Gold Canyon may be granted over the assets of Landdrill?***

59. The CCAA stay should be lifted to allow enforcement of such charge as Gold Canyon may be granted over the assets of Landdrill.

60. In *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, the court considered lifting the stay of proceedings under the CCAA. Pepall J., stated at paragraph 27:

> The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.* [[2009] O.J. No. 3579]:
>
> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order

> lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including consideration of the balance of convenience, the relative prejudice to the parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, (2007), 33 C.B.R. ($5^{th}$) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> (emphasis added)

61. Pepall J., also identified situations where a stay has been lifted in the CCAA context. It was stated at paragraph 26:

> In *Canwest Global Communications Corp.*, I had occasion to address the issue of lifting a stay in a *CCAA* proceedings. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp*. and by Professor McLaren in his book,*"Canadian Commercial Reorganization: Preventing Bankruptcy"*. The included where:
>
> (a) a plan is likely to fail;
> (b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> (c) the applicant shows necessity for payment;
> (d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
> (e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
> (f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
> (g) there is a real risk that a creditor's loan will become unsecured during the stay period;
> (h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
> (i) it is in the interests of justice to do so.

62. Gold Canyon is an involuntary owner of an interest in the “fly” rigs and such of its funds as may remain. The stay operates to the prejudice of Gold Canyon as, among other things, its assets and remaining funds are subject to the various charges applicable in the CCAA proceedings, including the DIP charge. The depletion of Gold Canyon’s assets serve no purpose for Gold Canyon as it is an involuntary participant, which granted no credit or terms to Landdrill, and has no interest in the ongoing operations of Landdrill or its restructuring efforts.

## PART IV – RELIEF SOUGHT

63. Gold Canyon requests that this Honourable Court make an order:

a. declaring that the Applicants hold or held the sum of $100,000, as an in trust deposit for the benefit of Gold Canyon and $200,000, as and by way of mistake by Gold Canyon, such mistake having been induced by the Applicants (or one of them);

b. declaring the whole of the $300,000 aforesaid (in aggregate, the "**Funds**") to be the sole and absolute property of Gold Canyon;

c. ordering the Applicants to account for and forthwith pay over the Funds to Gold Canyon;

d. in the alternative, ordering the Applicants to account for the Funds and to forthwith pay over such of the Funds as remain in the hands of the Applicants (or any of them) and further ordering the Applicants to identify the proceeds of the Funds (the "**Proceeds**") and declaring that there shall be a charge against the Proceeds (the "**Replacement Charge**") in priority to all Encumbrances and the Charges (as such terms are defined in the initial order of this Court in these proceedings dated August 31, 2012 (the "**Initial Order**"));

e. directing that the Replacement Charge shall be enforceable as against the Proceeds forthwith and that the stay of proceedings provided for in the Initial Order is lifted in so far as is required to enforce the Replacement Charge.

All of which is respectfully submitted this 25 day of September, 2012.

George L. Cooper of
Cox & Palmer
Solicitors for Gold Canyon Resources Inc.

## SCHEDULE "A" – LIST OF AUTHORITIES


1. *Tozer v The Bank of Nova Scotia and Atcon Group Inc. et al.*, 2012 NBCA 57.

2. *Mobil Oil Canada Ltd. v Storthoaks (Rural Municipality),* [1976] 2 SCR 147 (QL).

3. *Walsh v Quoddy Holdings Ltd.*, 2006 NBQB 356.

4. *Bank of Nova Scotia v McKee's Estate,* [1982] NBJ No. 169.

5. *State Farm Mutual Automobile Insurance Co. v Ferguson,* [1984] NBJ No. 42.

6. *Howe v Laurentian Life of Canada,* [1995] NBJ No. 201.

7. *Oosterhoff on Trusts: Text, Commentary and Materials 7th Ed.,* (2009, Thomson Reuters Canada Ltd.).

8. *Citadel General Assurance Co. v Lloyds Bank Canada,* [1997] S.C.J. No. 92.

9. *Foskett v McKeown* (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97 (House of Lords).

10. *i Trade Finance Inc. v Bank of Montreal,* 2011 2 S.C.R. 360.

11. *Bank of Montreal v Innovation Credit Union,* [2010] 3 S.C.R. 3.

12. *Royal Bank of Canada v Radius Credit Union Ltd.,* [2010] 3 S.C.R. 38.

13. *Personal Property Security Act,* SNB 1993, c P-7.1.

14. *Companies Creditor's Arrangement Act,* RSC, 1985, c. C-36.

16. *Canwest Global Communications Corp. (Re),* 2011 ONSC 2215.