

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERICAL LIST)**

STRONACH CONSULTING CORP

Applicant

-and-

BIONX CANADA INC

Respondent

**FACTUM OF THE APPLICANT
(Returnable March 14, 2018)**

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TO: THE SERVICE LIST

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I. INTRODUCTION

1. This motion is a priority dispute between General Motors of Canada Company ("**GM Canada**") and the senior secured creditor of BionX Canada Inc. ("**BionX**"), Stronach Consulting Corp. ("**SCC**"). The key issue in this motion is whether title to certain personal property has been transferred from BionX to GM Canada. If title to the property remains with BionX, then it is subject to SCC's security interest.

2. GM Canada (together with GM LLC, "**GM**") entered into a web of contracts evidencing an agreement (the "**GM Agreement**") for BionX to design and produce a custom "mid-drive" electric propulsion system for bicycles. In addition to contemplating the purchase of property and transfer of title through ordinary course payment and delivery, the GM Agreement contained a provision that provided that title to personal property owned by BionX and used in that project (the "**Parts**" and "**Production Tooling**", each defined in greater detail below) would be transferred to GM if and when GM reimbursed BionX (the "**Buyer's Property Provision**",

defined in greater detail below). Property reimbursed by GM would then be held by BionX as a bailment and could be repossessed by GM at any reasonable time.

3. In part, as a result of the GM Agreement, BionX became insolvent. As a result, SCC brought an application for, and was granted, an order appointing Grant Thornton Limited (“**GTL**”) as receiver over BionX’s assets (the “**Receiver**”).

4. In its factum (the “**GM Factum**”), GM asserts that it currently holds title to certain Parts pursuant to the Buyer’s Property Provision. GM submits that it has satisfied the terms of the Buyer’s Property Provision by paying certain invoices and accordingly seeks an order (the “**GM Order**”) for the immediate possession of the applicable Parts. The GM Order does not address possession of Production Tooling, as defined herein.

5. SCC opposes the relief sought by GM on the basis that title to the Parts did not pass to GM because the payment made by GM under the invoices does not constitute “reimbursement” as required by the Buyer’s Property Provision. SCC submits that the term “reimbursement” contemplates the full costs of the research and development that went into the creation of the Parts – GM cannot simply partially pay the purchase price of individual final products and receive the benefit of the engineering design and development work performed by BionX and financed by SCC. Accordingly, this factum is filed by SCC in response to the motion brought by GM for the GM Order (the “**GM Motion**”).

II. BACKGROUND & FACTS

6. All capitalized terms that are not defined herein are to be given the meaning ascribed to them in the First Report of the Receiver dated March 12, 2018 (the “**First Report**”), the Affidavit of Scott T. Wilson sworn February 26, 2018 (the “**Wilson Affidavit**”) or the Affidavit of Scott T. Wilson sworn March 8, 2018 (the “**Supplemental Wilson Affidavit**”) in respect of the GM Motion.

(a) Appointment of Receiver and GM Motion

7. BionX is a company incorporated under the laws of Ontario and operated as a designer and manufacturer of electronic propulsion systems for bicycles.

First Report of the Receiver dated March 12, 2018 at para 8 [**First Report**]

8. On February 27, 2018, on an Application brought by SCC (the “**Receivership Application**”) the Ontario Superior Court of Justice (the “**Court**”) granted an order appointing GTL as Receiver.

First Report, para 2.

9. On February 26, 2018, one day before the Receivership Application, GM served notice of the GM Motion, returnable the next day. The GM Motion was adjourned to permit the Receiver to review the allegations set out in the Wilson Affidavit and form a position with respect to GM’s claim. At that time, all parties, including SCC, reserved their rights in respect of the GM Motion.

First Report, para 46.

(b) GM Project

10. BionX’s business had two main divisions, (a) the production of hub-based electric bicycle conversion kits that could be used to convert a conventional bicycle into an electronic bicycle and (b) the engineering, design and development (“**ED&D**”) of a “mid-drive” electric propulsion system (the “**Drive Unit**”) for bicycles manufactured by GM (the “**GM Project**”) pursuant to the GM Agreement.

First Report, para 11.

11. The GM Agreement includes the following documents:

- (a) *Statement of Development Work* (the “**SODW**”) – The SODW sets out the request from GM for the design of a Drive Unit and early prototype of same;

- (b) *Purchase Orders: 4300237222, E4300554647, and E4300557102* (the “**Parts POs**”) – Each of the Parts POs was a contract for the ED&D of agreed upon prototypes and the purchase of other parts that relate to different stages in the GM Project. The inventory that GM sought to purchase pursuant to the Parts POs is referred to herein as the “**Parts**”. Each Parts PO sets out, among other things, the aggregate price GM agrees to pay for the Parts listed (the “**Purchase Price**”). The Parts POs are composed of the Beta Program PO, Gamma Program PO and Drive Unit PO, each as defined below;
- (c) *General Terms and Conditions referenced in and appended to the Parts POs* (the “**Parts Terms and Conditions**”) – The Parts Terms and Conditions were non-negotiable contractual terms imposed on BionX by GM. The Parts Terms and Conditions contained the Buyer’s Property Provision which provided that title to Parts in the possession of BionX that is “reimbursed” by GM would transfer to GM. The Parts Terms and Conditions were identical in each of the Parts POs with the exception of a section titled Special Terms and Conditions;
- (d) *Purchase Order 4700021739* (the “**Production Tooling PO**”) – The Production Tooling PO was a contract for the purchase of production tooling to be used in connection with the GM Project either by purchasing them from third party suppliers, or developing them in-house;
- (e) *General Terms and Conditions appended to the Production Tooling PO* (the “**Production Tooling Terms and Conditions**”) – the Production Tooling PO had distinct terms and conditions governing the transfer of title to the Production Tooling from BionX to GM;
- (f) a Trademark Licence Agreement executed October 2, 2017 granting BionX a license to use GM trademarks; and

- (g) a Technology Licence Agreement executed October 16, 2017 granting BionX a license to use certain GM intellectual property.

First Report, para 11 and Appendices 3, 4, 5, 6 and 7.

12. In December 2015, GM sent BionX the SODW, requesting a quote for the ED&D of the Drive Unit including (i) a new e-machine; (ii) gear train; (iii) inverter for the system; (iv) battery pack and power supply; (v) battery charger; and (vi) system software. The original contract was awarded to BionX in February 2016. From that time until the Receivership was commenced on February 27, 2018, the operations of BionX, including all ED&D related to the GM Project, was financed by advances from SCC in the aggregate amount of \$11,044,823.34.

First Report at para 14.

i. Beta Program and Invoices 1 to 18

13. The purpose of the Beta Program was to ED&D working prototype Drive Units with batteries and charger assemblies (the “**Beta Parts**”) to ensure design validation of the GM Project.

First Report, para 15.

14. While operating, BionX issued 23 invoices to GM in respect of the Beta Program (the “**Invoices**”). Each of the Invoices relates to Parts PO 4300237222 (the “**Beta Program PO**”). The Receiver understands that the Invoices are “progress billings” for the entirety of the Beta Program (i.e., costs are billed on a periodic basis, and not on an itemized basis). As a result, the Receiver understands that the costs on a single Invoice, in most cases, relate to the ED&D of assets on other Invoices (i.e., each invoice is related to one another as they are all for the completion of the Beta Program PO).

First Report, paras 16, 18.

15. GM has paid for Invoices 1 to 18. GM submits that, on this basis, it holds title to all of the Parts it claims are related to Invoices 1 to 18 (the “**Invoices 1 to 18 Parts**”).

Affidavit of Scott T. Wilson sworn March 8, 2018, para 6. [Supp. Wilson Affidavit]

ii. The Gamma Program

16. The Gamma Program was commenced by the issuance of Parts PO E4300554647 (the “**Gamma Drive Unit PO**”) for the development of 110 Drive Units including batteries and charger assemblies (the “**Gamma Parts**”).

First Report, para 24.

17. The purpose of the Gamma Program, through the issuance of the Gamma Drive Unit PO, was to develop a limited number of “production intent” Drive Parts that could be installed on electric bicycle frames being manufactured by a third party supplier sourced by GM. BionX was required to develop “production intent” tooling and processes to manufacture and assemble the Gamma Parts.

First Report, para 26.

18. BionX produced and delivered certain Gamma Parts to GM. These delivered Gamma Parts are not in dispute in the GM Motion.

First Report, para 28.

iii. The Production Tooling

19. On September 22, 2017, GM issued Parts PO E4300557102 (the “**Drive Unit PO**”) for the development of 8,000 Drive Units including batteries and charger assemblies. To fulfill the Gamma Drive Unit PO and the Drive Unit PO, a new production assembly line, including new production tooling to be used by BionX and tooling to be used by suppliers of BionX to make certain parts for the assembly of the Gamma Parts and Drive Units (collectively, the “**Production Tooling**”) was required.

First Report, paras 26, 30 and 32.

20. On October 17, 2017, GM issued the Production Tooling PO for the development of the Production Tooling for a total value of US\$702,200. BionX has not issued any invoices in respect of the Production Tooling or Production Tooling PO and GM has made no payments in respect of same.

First Report, para 33.

(c) GM Claim and termination of the GM Agreement

21. As a result of its financial difficulties and unfavourable economics with respect to the GM Project, BionX entered into discussions with GM to renegotiate the GM Agreement. These discussions culminated in a meeting on February 1, 2018 where GM indicated that (a) it would not renegotiate the terms of the GM Agreement and (b) it would commence a claim against BionX for approximately US\$5.3 million (the “**GM Claim**”). That same day, GM delivered a letter to BionX alleging that BionX had defaulted under the GM Agreement.

First Report, para 39 and Appendix 2: Affidavit of John Simonetti sworn February 23, 2018.

22. On February 23, 2018, GM sent a further letter to BionX terminating the GM Agreement (the “**Termination Letter**”).

Supp. Wilson Affidavit, para 31.

23. On February 24, 2018, counsel to GM wrote to GTL demanding the return of the Parts (the “**February 24 Email**”). As this was prior to the appointment of GTL as Receiver, counsel to GTL responded that it had not been appointed but understood that an arrangement for the inspection, but not the labelling or removal of equipment, had been reached with BionX. This understanding was confirmed by Jane Dietrich in her capacity as counsel to BionX.

First Report, Appendix 10: Pre-Receivership correspondence between BTZ Law and GM.

(d) The GM Evidence and Factum

24. The GM Factum makes two incorrect or unsupported factual assertions that require correction as they directly relate to the legal issues raised by the GM Motion.

(a) At paragraph 2 of the GM Factum it states:

BionX previously manufactured parts identified as drive units for GM. BionX utilized certain specialized tooling and equipment, **supplied by GM**, to manufacture the drive units.

Factum of the Moving Party General Motors LLC and General Motors Company of Canada at para 2. [**GM Factum**] [emphasis added]

There is no citation to any affidavit for this evidence and no evidence of Parts or Production Tooling supplied by GM to BionX in the record.

(b) At paragraph 19 of the GM Factum it states:

BionX purchased the Production Tooling and Equipment from suppliers pursuant to the tooling purchase orders issued by GM. GM then **reimbursed BionX for the cost to purchase** the Production Tooling and Equipment.

GM Factum at para 19. [emphasis added]

This statement cites paragraph 12 of the Wilson Affidavit, however paragraph 12 of the Wilson Affidavit states:

BionX is a corporation incorporated pursuant to the laws of the Province of Ontario. BionX carries on business from the Premises and designs electric propulsion systems for bicycles. BionX is a supplier of component parts to GM.

Wilson Affidavit, para 12.

The statement appears to refer to Mr. Wilson's conclusion at paragraph 7 of the Supplemental Wilson Affidavit that GM has reimbursed BionX by paying Invoices 1 to 18. As discussed further below, this statement apparently conflates a partial payment of the Purchase Price with the reimbursement of costs. There is no evidence in the record that GM has made any payment in respect of BionX's costs.

III. ISSUES

25. The fundamental issue that arises in the GM Motion is whether the term "reimbursed" in the Buyer's Property Provision was satisfied by GM's partial payment of the Purchase Price, or whether the term "reimbursed" required the payment of all costs associated with the Parts. However, in order to properly address the position taken by GM in its factum, the Court must resolve the following issues:

- (a) Are section 104 of the *Courts of Justice Act* (the “**CJA**”), Rule 44.01 of the *Rules of Civil Procedure* (“**Rule 44.01**”) and the test thereunder applicable to this proceeding?
- (b) If not, what is the proper procedure?
- (c) Has title to the Production Tooling passed to GM?
- (d) What is the proper interpretation of the Parts POs?
 - i. When does title pass under the Buyer’s Property Provision?
 - ii. Has GM “reimbursed” BionX for the Parts?
- (e) Can GM now acquire title under the GM Agreement?

IV. LAW AND ARGUMENT

26. SCC takes the following positions with respect to the issues on the GM Motion:

- (a) Section 104 of the CJA, Rule 44.01 and the test thereunder are inapplicable to the current proceeding because GM has not commenced an action and is not seeking interim relief;
- (b) The applicable procedure is for GM to bring a motion in this receivership seeking a declaration regarding its interest in the Parts;
- (c) GM has not made any payments in respect of the Production Tooling, accordingly, title to the Production Tooling has not passed to GM;
- (d) The proper characterization of the Parts POs is as follows:
 - i. Under the Buyer’s Property Provision title to a Part would pass to GM when GM reimbursed BionX for all of the costs associated with the Part including the ED&D and the costs of manufacturing; and

ii. GM did not (and has not) reimbursed BionX. GM only partially paid the Purchase Price (as opposed to reimbursement amount) of the Beta Program PO. Accordingly, title did not pass to GM; and

(e) GM has no existing right to acquire title to the Parts at this time because the GM Agreement has been terminated.

(a) Section 104 of the CJA, Rule 44.01 and the test thereunder are inapplicable

27. GM has brought its motion pursuant to section 104 of the CJA and Rule 44.1 of the Rules of Civil Procedure. SCC submits that this legislation, and the test set out thereunder, are inapplicable in the current circumstances.

28. Rule 44.01 sets out the evidentiary requirements for an interim order for the recovery of possession of personal property under section 104 of the CJA.

Rules of Civil Procedure, Rule 44.01

29. Section 104 of the CJA provides:

Interim order for recovery of personal property

104 (1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

Damages

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 104 [Emphasis added]

30. In this instance, GM has not commenced an action against BionX for the recovery of possession of the Parts and then brought a motion for interim relief while a final adjudication of the parties rights in the action is pending; rather, GM is seeking what amounts to a final decision in respect of the *in rem* rights of the parties and an order for possession of **and title** to the Parts specified in the GM Order. Indeed, the draft GM Order includes a statement at paragraph 3 that “GM is entitled to **its** personal property being the Invoice 1 to 18 Production Tooling and Equipment” and, at paragraph 5 an order vesting the “Invoice 1 to 18 Production Tooling and Equipment” (as defined in the GM Order) in GM, free and clear of all encumbrances.¹

Draft GM Order, Stronach Consulting Corp. Book of Authorities, Tab 1. [SCC BOA] [emphasis added]

31. This distinction is not merely technical. Rule 44.01 and section 104 of the CJA contemplate interim relief whereas the GM Motion effectively seeks summary judgment.

32. The distinction between the facts at hand and the proper application of Rule 44.01 is apparent in the decision of Justice Molloy in *Clarke Doors of Canada Ltd. v. Inline Fiber Glass Ltd.* cited at tab 4 to GM’s Brief of Authorities, where Justice Molloy held:

While the case law consistently identifies “substantial grounds” as the proper test, it is not immediately obvious where the test fits into the broad spectrum. **Obviously since the order is only for interim property pending trial, the degree of proof is less than would be required on a motion for summary judgment. No final disposition of rights is being made.**

Clarke Doors of Canada Ltd. v. Inline Fiber Glass Ltd. 1996 CarswellOnt 193 at para 18, Brief of Authorities of the Moving Party General Motors LLC and General Motors of Canada Corp., Tab 4 [emphasis added]

33. In its factum, GM has not referred to any cases where Rule 44.01 and section 104 of the CJA are applied in the context of a Receivership. SCC is not aware of any such authority.

¹ SCC notes parenthetically that the vesting order at paragraph 5 of the draft GM Order is inconsistent with GM’s position that title to certain Parts has already passed to GM and accordingly encumbrances of BionX’s property do not attach to those parts.

(b) GM should bring a motion for a declaration regarding its interest

34. As noted above, it is clear from the terms of the draft GM Order that GM is not seeking interim relief but rather a final adjudication of its rights to the Invoices 1 to 18 Parts. Consequently, the GM Motion is properly characterized as a priority dispute to determine whether title to the Invoices 1 to 18 Parts passed to GM prior to the termination of the GM Agreement or remains with BionX, and accordingly is subject to SCC's security interest.

35. The Receiver's evidence is uncontroverted that the Invoices 1 to 18 Parts are developed by and in the possession of BionX. In addition, Section 18 of the Parts Terms and Conditions provides that property for the production of the Parts that is furnished by the Seller is "Seller's Property". On this basis, SCC submits that there is a *prima facie* case that BionX is the owner of the Parts and Production Tooling.

First Report, Appendix 4: Beta Program PO.

36. Accordingly, GM bears the burden of proving that title to the Parts passed prior to the termination of the GM Agreement by GM on February 23, 2018 pursuant to the Termination Letter.

37. For greater clarity, SCC is not taking the position that the GM Motion cannot proceed because it is improperly pled; in the circumstances, all parties are aware of the issues before the Court with respect to the Buyer's Property Provision. SCC merely submits that the GM Motion be adjudicated as a priority dispute rather than using the jurisprudence relating to Rule 44.01 and section 104 of the CJA submitted in GM's factum. Accordingly, SCC supports the Receiver's decision to bring a motion for advice and directions to determine the parties' rights to the Invoices 1 to 18 Parts and any other Parts or Production Tooling claimed by GM.

First Report at para 94.

(c) Title to Production Tooling has not passed to GM

38. The Production Tooling Terms and Conditions are internally inconsistent with respect to the transfer of title. Pursuant to section 7 of the Production Tooling Terms and Conditions, title for purchases passes at the moment the risk of loss transfers pursuant to Incoterms established by the International Chamber of Commerce ("**Incoterms**"); however, section 22 of the Production Tooling Terms and Conditions stated that title passes when GM makes payment for the Production Tooling or upon completion of GM's product part approval process.

First Report, Appendix 7: Production Tooling PO dated October 17, 2017.

39. Determining which of these provisions sets out the proper characterization of the transfer of title under the Production Tooling PO is not necessary as none of the potential conditions are met.

40. It is the uncontroverted evidence of the Receiver that GM has not made any payments with respect to the Production Tooling as the only payments asserted by GM relate to Invoices 1 to 18. There is also no evidence that GM has completed its production part approval process nor is there any evidence of delivery and risk transfer under Incoterms. Accordingly, neither the terms in section 7 or 22 of the Production Tooling Terms and Conditions were met and title to the Production Tooling did not pass to GM.

(d) Interpretation of the Parts POs

41. In its factum, GM argues that it holds title to certain Parts pursuant to the Buyer's Property Provision. In response, SCC submits that (i) title could only have passed to GM pursuant to the Buyer's Property Provision if BionX was reimbursed for the Parts within the meaning of that provision; (ii) reimbursement means that **all costs** related to the Part(s) in question are paid. GM has partially paid the Purchase Price under the Beta Program PO, but did not reimburse BionX. Consequently, title to the Parts did not pass to GM.

i. Transfer of Title under Buyer's Property Provision required "reimbursement"

42. GM asserts that title to the Parts passed to GM pursuant to the Buyer's Property Provision. Section 19 of the Parts Terms and Conditions (the "**Buyer's Property Provision**") provided for the immediate transfer of title upon the "reimbursement" of BionX by GM. The Buyer's Property Provision stated:

19. BUYER'S PROPERTY:

All supplies, materials, tools, jigs, dies, gauges, fixtures, molds, patterns, equipment and other items furnished by Buyer, either directly or indirectly, to Seller to perform this contract, or for which Seller has been reimbursed by Buyer, shall be and remain the property of Buyer and held by Seller on a bailment basis ("Buyer's Property").

Wilson Affidavit, para 15.

43. Neither GM nor the Receiver have provided evidence that any of the Parts were furnished by GM. Rather, GM has submitted that it holds title to, and is entitled to possession of, the Invoices 1 to 18 Parts on the basis that it paid the amounts set out in those Invoices.

44. None of the Invoices 1 to 18 Parts were acquired from third party vendors. Rather, Invoices 1 to 18 are a partial payment of the 23 Invoices issued under the Beta Program PO. These Invoices relate to work performed in the ED&D of a prototype of the Drive Unit. Accordingly, the only question is whether, by paying Invoices 1 to 18, GM has "reimbursed" BionX for the Invoices 1 to 18 Parts. If GM did not reimburse BionX prior to the termination of the GM Agreement, then title to the Invoices 1 to 18 Parts remains with BionX and GM may make a claim in the BionX estate for breach of contract with respect to the partial payment of the Purchase Price.

ii. Reimbursement means the payment of all costs associated with a Part

45. In the Supplemental Wilson Affidavit, Mr. Wilson, after stating that Invoice 1 to 18 have been paid concludes that "GM has reimbursed BionX in full for the Production Tooling and

Equipment identified in invoices 1 to 18.” This conclusion conflates reimbursement with a partial payment of the Purchase Price.

Supplemental Affidavit at para 7.

46. SCC submits that the term “reimbursed” in the Buyer’s Property Provision does not refer to a partial payment of the Purchase Price, but rather, requires GM to pay all of the costs associated with the Part it seeks title to, including the related ED&D, materials, manufacturing and labour costs.

47. The overriding purpose of contract interpretation is to determine the objective intention of the parties when the contract was formed. The foundation of contractual interpretation remains the words of the contract, given their plain and ordinary meaning and interpreted in a manner that gives meaning to all of the contract’s terms. The meaning of the words in a contract is derived from the context in which they are used; courts should read the contract in a manner that is consistent with the surrounding circumstances known to the parties at the time they entered into the contract (often referred to as the “factual matrix”).

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., [2016] 2 SCR 23, 2016 SCC 37 para 49-50, SCC BOA, Tab 2. **[Ledcor]**

Creston Moly Corp. v. Sattva Capital Corp., 2014 SCC 53 paras 47-48, SCC BOA, Tab 3.

48. The Supreme Court of Canada has held that, in circumstances where there is a standard form contract, the factual matrix is less important; however, the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates have a role in the interpretation process. The interpretation of contract should be consistent with the reasonable expectations of the parties and should not give rise to results that are unrealistic or that the parties would not have contemplated in the atmosphere in which the contract was drafted.

Ledcore at para 30-31, 50.

49. If, after applying the rules of contractual interpretation, there is still ambiguity with respect to the correct interpretation of a contract, the Court may apply the *contra proferentum* rule and construe the contract against the drafting party.

Ledcore at para 51.

50. Interpreting the Buyer's Property Provision to grant the transfer of title for a partial payment of the Purchase Price, as GM apparently asserts, would:

- (a) be inconsistent with the plain and ordinary meaning of the language of the contract;
- (b) be inconsistent with the purpose of the contract and Buyer's Property Provision;
- (c) lead to a commercially unreasonable result; and
- (d) to the extent there is any remaining ambiguity, be inconsistent with the *contra proferentum* rule.

(A) Plain and Ordinary Meaning

51. The language of the Buyer's Property Provision states that property for which BionX has been "reimbursed" by GM shall be the property of GM. SCC submits that it is unambiguous that the term reimbursement is not the same as the Purchase Price and, specifically, that the plain and ordinary meaning of "reimbursed" is payment of all of the costs incurred by BionX relating to the Part(s) in question. The quantum of reimbursement is a question of fact determined with regard to any costs incurred by BionX in the relation to the Part(s) in question, as opposed to the Purchase Price which is a contractual bargain.

52. The distinction between reimbursement and Purchase Price is clear when reading the contract as a whole. The term "reimburse" is only used in reference to a payment from GM to BionX in the Buyer's Property Provision. Other uses of the term "reimburse" appear in

paragraphs 11, 18, and 21 of the Parts Terms and Conditions and contemplate payments from BionX to GM.

First Report, Appendix 4: Beta Program PO.

53. On the other hand, the term “price” appears in each of the Parts POs, as well as paragraphs 3, 5, 8, 13, and 20 of the Parts Terms and Conditions and only refers to the quantum of a payment from GM to BionX.

First Report, Appendix 4: Beta Program PO.

54. SCC’s position regarding the plain and ordinary meaning of the term “reimbursed” is supported by the definition of “reimbursement” in numerous dictionaries, including:

- (a) The Shorter Oxford English Dictionary, which defines reimburse as:

reimburse *h verb trans.* E17.

[**ORIGIN** from **RE-** + **IMBURSE**, after French rembourser.]

Repay (a sum of money spent); repay or recompense (a person).
Also foil. by for, f of, or double obj.

LD MACAULAY His friends .. proposed to reimburse him the costs of his trial. *refl.*: SIR W. Scorr Resolving to reimburse himself for his losses.

Shorter Oxford English Dictionary, 6th ed, *sub verbo* “reimburse”.

- (b) The Canadian Law Dictionary, which defines reimbursement as:

REIMBURSEMENT. *n.* 1. **Indemnification through repayment to someone of an expense or loss incurred; repayment; refund.** Generally involves the intervention of a third person. 2. “In all examples of the word reimbursement there exists a flow of benefits between the respective parties. The person who benefits is under a legal obligation to pay back the amount expended.” *Westcoast Energy Inc. v. R.*, [1991] F.C. 302 at 319, 91 D.T.C. 5334, [1991] 1 C.T.C. 471, 41 F.T.R. 165, Denault J.

Canadian Law Dictionary, 4th ed, *sub verbo* “reimbursement” [**emphasis added**]

(c) The Black's Law Dictionary which defines reimbursement as:

reimbursement, n. (16c) 1. Repayment. 2. Indemnification. —
reimburse, vb.

Black's Law Dictionary, 10th ed, *sub verbo* "reimbursement".

55. On this basis, SCC submits that the language in the Buyer's Property Provision unambiguously required the payment of all costs (i.e., all out-of-pocket expenses) incurred by BionX relating to the Part(s) in question including, in this case all ED&D and manufacturing costs, before title to the Part would pass from BionX to GM.

(B) Purpose of the Parts POs and Buyer's Property Provision

56. SCC submits that there is no ambiguity with respect to the meaning of "reimbursed" and the factual matrix is of diminished importance in the context of a standard form contract. To the extent it is helpful in properly interpreting the Buyer's Property Provision, SCC submits that the purpose of the Parts POs and the Buyer's Property Provision support its interpretation of the Buyer's Property Provision.

57. The purpose of the Parts POs (and the Parts Terms and Conditions, which are incorporated by reference) is to govern the ED&D and purchase of the Parts by GM at the Purchase Price and to delineate the rights and duties of the parties in so doing. In the context of a novel made-for-purpose technology, such as this case, the number of units ordered in the Parts POs provides the seller with assurance that it can recover its costs in developing the product over a large number of units sold. In other words, when a seller is asked to design and engineer a novel product (especially when that product can only be sold to a single buyer), it is commercially significant to the seller how many units the buyer is agreeing to purchase.

58. Within the Parts Terms and Conditions, the Buyer's Property Provision is not intended to operate as the ordinary course mechanism for the sale of the Parts for the Purchase Price set out in the applicable Parts PO. Rather it has two purposes:

- (a) it ensures that GM retains title to property that it has transferred to, or bought from a third party and provided to, BionX on a bailment basis. This is indicated through the language “furnished by [GM], either directly, or indirectly, to [BionX]... shall ... remain the property of [GM] and held by [BionX] on a bailment basis”. This language is not engaged by the facts in the current case; and
- (b) it grants GM an option to buy BionX’s personal property and take title *in situ* so that it can protect the production and future manufacturing of the Parts. This is distinct from purchasing parts in the ordinary course for the Purchase Price stated in the applicable Parts PO. In order for a Part to become “Buyer’s Property” as defined in the Buyer’s Property Provision, GM must reimburse BionX for all of the costs associated with that Part. This ensures that BionX is not out-of-pocket for the costs associated with acquiring or creating the property GM is obtaining title to.

(C) Commercially unreasonable results

59. Interpreting the Buyer’s Property Provision to grant the transfer of title upon the partial payment of the Purchase Price would lead to a commercially unreasonable result as contracts for the supply of novel equipment require significant amounts of inventory to be sold in order to recoup the costs of ED&D.

60. BionX intended to sell the Drive Units it developed for a profit. This profit would not be realized on the sale of an individual Part, but on the completion of the GM Agreement as a whole. The ED&D of the Drive Units is a significant portion of the expense attributable to the Parts.

61. If this Court holds that the Buyer’s Property Provision permitted GM to acquire title to the Invoice 1 to 18 Parts by making a partial payment of the Purchase Price, GM would obtain the benefit of the ED&D performed by BionX and funded by SCC in the form of prototypes.

62. If this interpretation of the Parts POs prevails it would be effectively impossible for suppliers entering into similar standard form terms and conditions to profit from their inventions and the costs of ED&D will be borne by those seller's creditors to GM's benefit.

(D) Contra preforentum

63. Finally, the Parts Terms and Conditions are properly characterized as standard form contracts (also known as contracts of adhesion) imposed on BionX by GM. If there is any remaining ambiguity with respect to the interpretation of the Buyer's Property Provision, the *contra preforentum* rule applies, and the ambiguity is to be construed in favour of BionX.

(e) GM has no continuing right to acquire title under the terminated GM Agreement

64. Paragraphs 93 and 94 of the First Report state:

[T]here is a legitimate argument that BionX is the owner of the Disputed Beta Assets and that until GM pays for all of the 23 invoices (rather than 1-18) GM does not own the Disputed Beta Assets.

...There will need to be a determination by the Court as to the ownership of the Disputed Assets. This will involve the Court determining whether GM is required to reimburse BionX for the entirety of the GM Agreement, for each Purchase Order governing the Disputed Assets (which includes the costs of developing the Disputed Assets under the applicable Purchase Order) or whether GM is only required to reimburse BionX for the physical assets listed on a particular invoice without taking into account the costs of developing, engineering and testing those assets.

First Report, paras 93-94.

65. SCC disagrees that the Court will be required to make any assessment beyond the ownership of the Disputed Assets (as defined in the First Report). GM's own evidence is that it terminated the GM Agreement pursuant to the Termination Letter on February 23, 2018. Therefore, GM has no continuing right to enforce the Buyer's Property Provision (or any other provisions under the GM Agreement). Accordingly, if this Court is satisfied that GM did not pay the reimbursement cost, it is not necessary to determine what the reimbursement costs would have been nor does GM now have a right to acquire the Beta Parts by paying the remainder of

the Purchase Price under the Beta Program PO. GM can now only acquire Parts or Production Tooling by purchasing them from the Receiver.

66. In conclusion, SCC takes the position that title to the Invoices 1 to 18 Parts (and any other Parts or Production Tooling sought by GM) did not pass to GM prior to the termination of the GM Agreement because GM did not reimburse BionX in respect of same. As the GM Agreement is now terminated, GM no longer has a right to obtain title on the terms set out therein and the Parts are property in the BionX estate.

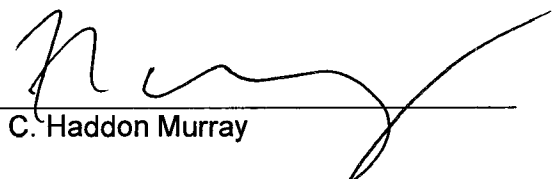
V. RELIEF REQUESTED

67. For the foregoing reasons, SCC respectfully requests that this Court deny the relief sought by GM. In addition, SCC seeks its costs in the GM Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Toronto, Province of Ontario, this 13th day of March, 2018.

STIKEMAN ELLIOTT LLP

Per:


C. Haddon Murray
Counsel for Stronach Consulting Corp

SCHEDULE “A”

LIST OF AUTHORITIES

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1.	Draft GM Order
2.	<i>Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.</i> , [2016] 2 SCR 23, 2016 SCC 37
3.	<i>Creston Moly Corp. v. Sattva Capital Corp.</i> , 2014 SCC 53
4.	<i>Shorter Oxford English Dictionary</i> , 6 th ed, v. 2, (2007) Oxford University Press
5.	<i>Canadian Law Dictionary</i> , 4 th ed, (2011) Thomson Reuters Canada Limited
6.	<i>Black’s Law Dictionary</i> , 10 th ed, (2014) Thomson Reuters

SCHEDULE “B”

RELEVANT STATUTES

Rules of Civil Procedure, R.R.O. 1990, reg 194.

MOTION FOR INTERIM ORDER

44.01 (1) An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

- (a) a description of the property sufficient to make it readily identifiable;
- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.
R.R.O. 1990, Reg. 194, r. 44.01 (1).

(2) The notice of motion shall be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice. R.R.O. 1990, Reg. 194, r. 44.01 (2).

ORDER TO CONTAIN DESCRIPTION AND VALUE OF PROPERTY

44.02 An interim order for recovery of possession of personal property shall contain a description of the property sufficient to make it readily identifiable and shall state the value of the property. R.R.O. 1990, Reg. 194, r. 44.02.

DISPOSITION OF MOTION

Where Made on Notice

44.03 (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
- (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the

plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (1).

Where Made Without Notice

(2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,

(a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff; or

(b) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (2).

CONDITION AND FORM OF SECURITY

44.04 (1) Where an interim order for the recovery of possession of personal property requires either party to give security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay when ordered to do so, and pay any damages and costs the opposite party has sustained by reason of the interim order. R.R.O. 1990, Reg. 194, r. 44.04 (1).

(2) Where the security is by bond, the bond shall be in Form 44A and shall remain in force until the security is released under rule 44.06.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 104

Interim order for recovery of personal property

104 (1) **In an action in which the recovery of possession of personal property** is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

Damages

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

STRONACH CONSULTING CORP.
Applicant

and

BIONX CANADA INC.
Respondent

Court File No.: CV-18-592741-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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