



COURT FILE NUMBER 2101-05682

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

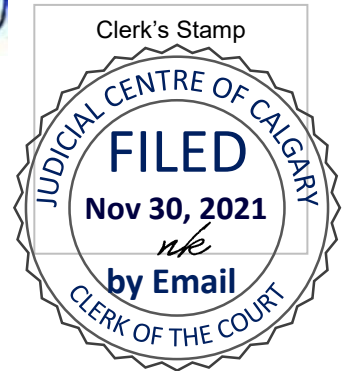
PLAINTIFF ATB FINANCIAL

DEFENDANTS W.A. GRAIN HOLDINGS INC., 1309497 ALBERTA LTD. (o/a W.A. GRAIN & PULSE SOLUTIONS), NEW LEAF ESSENTIALS (WEST) LTD., NEW LEAF ESSENTIALS (EAST) LTD. and 1887612 ALBERTA LTD.

APPLICANT BDO CANADA LIMITED, in its capacity as receiver and manager of W.A. GRAIN HOLDINGS INC., 1309497 ALBERTA LTD. (o/a W.A. GRAIN & PULSE SOLUTIONS), NEW LEAF ESSENTIALS (WEST) LTD., NEW LEAF ESSENTIALS (EAST) LTD. and 1887612 ALBERTA LTD.

DOCUMENT **BRIEF OF THE RECEIVER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT MLT AIKINS LLP
Barristers and Solicitors
2100, 222 3rd Avenue S.W.
Calgary, Alberta T2P 0B4
Phone: 403.693.5420
Fax: 403.508.4349
Attention: Ryan Zahara
File: 128056.00003



Justice Sidnell
COM
Dec 10, 2021

TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	BACKGROUND	1
	(a) Licence Suspension and Appointment of Receiver.....	1
	(b) Removal and Sale of Inventory	3
	(c) Sale of Processing Plants	3
C.	ISSUE	4
D.	LAW AND ARGUMENT	4
	(a) Priority of Claims from Primary Elevator Receipt Holders.....	4
	(b) Priority of Claims under Section 81.2 of the BIA.....	6
	(c) Proposed Distribution to Secured Creditors.....	8
	(d) Proposed Allocation of Costs	9
E.	RELIEF REQUESTED	11
	LIST OF AUTHORITIES	12

A. INTRODUCTION

1. This Brief is submitted on behalf of BDO Canada Limited, in its capacity as receiver and manager (the “**Receiver**”) of W.A. Grain Holdings Inc., 1309497 Alberta Ltd. (o/a W.A. Grain & Pulse Solutions) (“**130 Alberta**”), New Leaf Essentials (West) Ltd., New Leaf Essentials (East) Ltd. and 1887612 Alberta Ltd. (collectively, “**WA Grain**” or the “**Company**”), in support of its application (the “**Application**”) for approval of the following:

- (a) the Receiver’s proposed claims procedure respecting the claims of grain producers holding Primary Elevator Receipts (the “**Priority Producer Creditors**”) and the subsequent distribution of proceeds from Like Grain (as defined below) to the Priority Producer Creditors (or their representative) with proven claims;
- (b) the Receiver’s proposed distribution to creditors holding Grain Receipts (as defined below) that filed valid claims under section 81.2 of the *Bankruptcy and Insolvency Act* (the “**BIA**”)¹ from the funds realized from the sale of all of the Company’s inventory;
- (c) the Receiver’s proposed disallowance of claims filed by Priority Producer Creditors under section 81.2 of the BIA;
- (d) the Receiver’s proposed distribution of proceeds realized from the sale of 130 Alberta’s grain plants, the inventory and accounts receivable collections as an interim distribution; and
- (e) the Receiver’s proposed allocation of costs and disbursements between the Company’s creditors, all as outlined in the Third Report of the Receiver, dated November 30, 2021 (the “**Third Report**”).

B. BACKGROUND

(a) Licence Suspension and Appointment of Receiver

2. WA Grain purchased grain from producers or resellers for its processing plants located in Alberta, Saskatchewan and Prince Edward Island. WA Grain would clean and process the grain products and then sell them across Canada, the United States, the Middle East

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), at **TAB 1** of the Authorities.

and Asia. WA Grain's grain products included green and yellow peas, chickpeas and lentils for human consumption and pet food.²

3. WA Grain owned and operated six grain processing plants located in Vanguard, Saskatchewan (the "**Vanguard Plant**"); Pambrun, Saskatchewan (the "**Pambrun Plant**"); Ponteix, Saskatchewan (the "**Ponteix Plant**") (collectively, the "**Saskatchewan Plants**"); Bashaw, Alberta (the "**Bashaw Plant**"); Bowden, Alberta (the "**Bowden Plant**") (collectively, the "**Processing Plants**"); and Slemon, Prince Edward Island (the "**PEI Plant**"). The Processing Plants exclude the PEI Plant because it is subject to a separate receivership order.³
4. The Processing Plants were regulated and licensed by the Canadian Grain Commission (the "**CGC**"). Through 130 Alberta, WA Grain held Primary Elevator Licences and Grain Dealer Licences issued by the CGC at each Processing Plant (collectively, the "**Grain Licences**").⁴
5. On April 19, 2021, the CGC suspended all of the Grain Licences until April 30, 2021, restricting any movement of inventory onto or off of the Processing Plants and their respective grain elevators.⁵ On April 30, 2021, the CGC would decide to either cancel, amend or reissue the Grain Licences following its audit of the grain and unsettled Primary Elevator Receipts and Grain Receipts issued to any producers.⁶
6. On April 26, 2021, the Receiver was appointed as receiver and manager over all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof of the Company, excluding the PEI Plant, as set out in the April 26, 2021 receivership order of Justice Mah of the Alberta Court of Queen's Bench (the "**Receivership Order**").⁷
7. On May 1, 2021, the CGC granted 130 Alberta, through the Receiver, conditional Grain Licences (the "**Conditional Licences**") allowing the Receiver to remove and sell, but not

² Third Report of the Receiver, dated November 30, 2021 (the "**Third Report**"), at para 5.

³ Third Report, at para 6.

⁴ Third Report, at para 7.

⁵ Third Report, at para 8.

⁶ Third Report, at para 8.

⁷ Third Report, at para 1.

accept, inventory at the Processing Plants. The Conditional Licences were renewed monthly through to August 31, 2021.⁸

(b) Removal and Sale of Inventory

8. On June 10, 2021, Justice Lema granted an Order approving an Inventory Sale Agreement (the “**ISA**”) between the Receiver and Bridge Agri Partners Inc. (“**Bridge Agri**”). Under the ISA, Bridge Agri agreed to weigh and remove all of 130 Alberta’s inventory located at the Processing Plants subject to the Conditional Licences (the “**Elevator Inventory**”).⁹
9. The Receiver engaged Cotecna Canada Inc. (“**Cotecna**”), an entity approved by the CGC, to grade the Elevator Inventory as it was removed by Bridge Agri. Cotecna provided weekly reports specifying the type of commodity removed, the weight, grade and applicable dockage for each prior week’s removals (the “**Grain Audits**”).¹⁰
10. By August 11, 2021, pursuant to the ISA, Cotecna removed and graded all Elevator Inventory and Bridge Agri paid for all Elevator Inventory. The Receiver maintains the proceeds realized from the sale of the Elevator Inventory (the “**Elevator Inventory Proceeds**”) and the other proceeds of grain that were located at third party facilities and the PEI Plant (the “**Non-Elevator Inventory Proceeds**”, and together with the Elevator Inventory Proceeds, the “**Inventory Proceeds**”) in its trust account.¹¹

(c) Sale of Processing Plants

11. On June 10, 2021, Justice Lema also granted an Order (the “**SSP Order**”) approving the Receiver’s proposed sale and solicitation process (“**SSP**”).¹²
12. Pursuant to the SSP Order, the Receiver marketed the Bashaw Plant, Bowden Plant and the Saskatchewan Plants.¹³ Through the SSP, the Receiver generated and accepted the following Asset Purchase Agreements (collectively, the “**APAs**”) to purchase each of the Processing Plants from the following parties:

⁸ Third Report, at para 9.

⁹ Third Report, at para 14.

¹⁰ Third Report, at para 14.

¹¹ Third Report, at para 15.

¹² Third Report, at para 11.

¹³ Second Report of the Receiver, dated September 10, 2021 (the “**Second Report**”), at paras 11-12.

- (a) APA from Global Food and Ingredients Inc. to purchase the Bowden Plant;
 - (b) APA from 2371394 Alberta Ltd. to purchase the Bashaw Plant; and
 - (c) APA from GP Acres Grain Inc. to purchase the Saskatchewan Plants.¹⁴
13. On September 23, 2021, Justice Dario granted three separate Sale Approval and Vesting Orders (the “**Processing Plant SAVOs**”) approving each of the APAs and vesting title of the Processing Plants with their respective purchaser.¹⁵
14. To date, the Receiver retains all proceeds generated from the sale of the Processing Plants (the “**Processing Plant Funds**”) in its trust account.

C. ISSUE

15. This brief address the following issues:
- (a) the priority of claims advanced by grain producers holding Primary Elevator Receipts;
 - (b) the priority of claims advanced by grain producers under section 81.2 of the BIA;
 - (c) the appropriate distribution amongst the Company’s secured creditors; and
 - (d) the appropriate allocation of costs of the Receivership proceedings against the remaining assets monetized by the Receiver.

D. LAW AND ARGUMENT

(a) Priority of Claims from Primary Elevator Receipt Holders

16. The Receiver proposes distributing funds realized from the sale of Like Grain (as defined below) from the Inventory Proceeds in priority to grain producers holding Primary Elevator Receipts (“**PERs**”) that would otherwise entitle the grain producers to the return of the available Like Grain.
17. Under the *Canada Grain Act* (the “**Grain Act**”), when grain producers deliver grain to a licensed primary elevator, the producer will receive a Primary Elevator Receipt

¹⁴ Second Report, at paras 13-26.

¹⁵ Third Report, at para 13.

(“**PER**”) pending payment for the grain.¹⁶ Consequently, PERs are issued as proof of delivery, and entitle the holder to payment or return of grain of the same kind, grade and quantity (“**Like Grain**”) as the grain referred to in the PER.¹⁷

18. If grain producers deliver grain to a third party storage facility, they receive a grain receipt (“**Grain Receipt**”). Pursuant to the Grain Act, Grain Receipts are issued as evidence of a sale.¹⁸
19. A PER is proof of delivery, and grain producers holding a PER retain a proprietary interest in the delivered grain until either: (a) the producer surrenders the PER in exchange for payment, or (b) Like Grain is returned to the PER holder.¹⁹
20. By the time the Receiver was appointed on April 26, 2021, the Company had sold, removed or distributed more Like Grain than was available to return to all PER holders. Upon suspending the Grain Licences, the CGC prepared an audit of PERs (the “**PER Audit**”), which identified \$5.57 million owing to PER holders.²⁰ Based on the data generated from the Grain Audits and information from the CGC’s PER Audit, the Receiver has initially identified approximately \$1.5 million of Like Grain from the Elevator Inventory Proceeds available at the date of the Receiver’s appointment that could be used to satisfy claims of PER holders (the “**Like Grain Funds**”).²¹
21. Section 67 of the BIA provides that the property of the bankrupt otherwise divisible among the bankrupt’s creditors does not include any property held by the bankrupt in trust for any other person.²² 130 Alberta did not take title of any grain delivered pursuant to a PER, and the PER holders maintain an ownership interest in the Like Grain. As such, the proceeds realized from the Like Grain are not available to 130 Alberta’s creditors.
22. The Receiver is proposing to distribute the Like Grain Funds up to the full amount available for each Like Grain category, and then on a pro rata basis (if there is insufficient Like Grain Funds to satisfy each PER for that type of Like Grain) to the

¹⁶ *Canada Grain Act*, RSC 1985, c G-10 (the “**Grain Act**”), at s 61(2), at **TAB 2** of the Authorities.

¹⁷ *Grain Act*, at s 2, at **TAB 2** of the Authorities.

¹⁸ *Grain Act*, at s 2, at **TAB 2** of the Authorities.

¹⁹ *Grain Act*, at s 65(3), at **TAB 2** of the Authorities.

²⁰ Third Report, at para 18.

²¹ Third Report, at para 22 and Appendix “A”.

²² BIA, at s 67(1), at **TAB 1** of the Authorities.

Priority Producer Creditors. The Like Grain Funds will be distributed to the Priority Producer Creditors in priority to the claims of other secured creditors, as the Priority Producer Creditors maintain a proprietary interest in the available Like Grain and the Like Grain Funds do not form part of the property of the estate.²³

23. In order to fully assess and finally determine the quantum of claims of Priority Producer Creditors, the Receiver proposes running a short claims process in conjunction with the CGC, whereby:
- (a) the CGC will issue a claims package to all known Priority Producer Creditors (the “**Priority Producer Claims**”) as soon as reasonably possible;
 - (b) the CGC will forward all Priority Producer Claims, including the PERs and signed Producer Acknowledgments, to the Receiver, who will review the Priority Producer Claims, including each Primary Elevator Receipt;
 - (c) the Receiver will then provide the CGC with a detailed breakdown of the amounts owing to each Priority Producer Creditor with a proven claim; and
 - (d) with this Court’s approval, the Receiver will distribute, in one payment, the amount of funds payable to the Priority Producer Claims to the CGC for the CGC to distribute to the Priority Producer Creditors.²⁴

(b) Priority of Claims under Section 81.2 of the BIA

24. After its distribution of Like Grain Funds to the Priority Producer Creditors, the Receiver is proposing to distribute funds from the Non-Elevator Inventory Proceeds in priority to grain producers with valid claims under section 81.2 of the BIA.
25. Under section 81.2 of the BIA, where a grain producer has sold and delivered an agricultural product to a purchaser within 15 days before a receiver is appointed over the purchaser, that grain producer has a claim for all amounts unpaid on the products sold and delivered in those 15 days, which is secured by a charge over all of the inventory of the purchaser as of the date of the Receivership Order. This security

²³ Third Report, at para 16.

²⁴ Third Report, at para 23.

interest ranks ahead of every other claim, right, charge or security against the debtor's inventory.²⁵

26. The Receiver received 35 claims from grain producers under section 81.2 of the BIA, in the total amount of approximately \$1.4 million (the "**81.2 Claims**"). Of those 35 claims, 26 claims totaling approximately \$1.2 million were advanced by grain producers with PERs, and the remaining 9 claims totaling \$198,318 were advanced by grain producers with Grain Receipts.²⁶ As set out above, under the Grain Act, a PER is proof of delivery, not a sale, entitling the holder to the return of Like Grain, whereas a Grain Receipt is proof of a sale, and entitles the holder to payment.²⁷
27. In *R.A. Warren Equipment Ltd. v Bissett Gold Mining Co. (Receiver of)* ("**Warren**"), the Court considered a claim under section 81.1 of the BIA, which contains similar requirements as section 81.2 for claimants to sell and deliver certain products within the specified timeframe.²⁸ The Court held that a supplier must sell its goods, in addition to delivering them, in order to qualify for the priority.²⁹
28. The Court in *Warren* further held that whether a sale occurred was determined by the provincial *Sale of Goods Act*, which provides that where a sale is conditional on payment, title to the goods remains with the seller until the buyer provides payment.³⁰
29. Under the requirements of section 81.2, only grain producers with Grain Receipts are eligible for payment of their claims, as section 81.2 requires the grain to be sold and delivered to the debtor, as opposed to just delivered. Although PER holders have delivered grain to 130 Alberta, they maintain a proprietary interest in the grain and have not released that interest. Grain producers with Grain Receipts have sold and delivered grain to 130 Alberta, and those producers (the "**Priority 81.2 Creditors**") who sold and delivered their grain between April 12, 2021 and April 26, 2021 have valid claims under section 81.2 of the BIA.

²⁵ BIA, at s 81.2, at **TAB 1** of the Authorities.

²⁶ Second Report, at para 52.

²⁷ Grain Act, at s 2, at **TAB 2** of the Authorities.

²⁸ *R.A. Warren Equipment Ltd. v Bissett Gold Mining Co. (Receiver of)* (1999), 11 CBR (4th) 110 (Man QB) ("**Warren**"), at **TAB 3** of the Authorities.

²⁹ *Warren*, at para 17, at **TAB 3** of the Authorities.

³⁰ *Warren*, at para 16, at **TAB 3** of the Authorities; see also *Alberta Sale of Goods Act*, RSA 2000, c S-2, at s 3(5), at **TAB 4** of the Authorities.

30. On that basis, the Receiver proposes disallowing the 81.2 Claims advanced by PER holders, as these claimants did not sell their grain to 130 Alberta, and such claims are being captured and addressed under the Priority Producer Claims process.³¹ The Receiver further proposes paying \$198,318 from the Non-Elevator Inventory Proceeds in priority directly to the Priority 81.2 Creditors.³²

(c) Proposed Distribution to Secured Creditors

31. There are three creditors with security interests registered against the Company's assets: Farm Credit Canada ("**FCC**"),³³ ATB Financial ("**ATB**")³⁴ and Avrio Subordinated Debt General Partner II Ltd.³⁵ ("**Avrio**", and together with ATB and FCC, the "**Secured Creditors**").
32. For the reasons set out below, after distributing the Like Grain Funds to the Priority Producer Creditors, and \$198,318 of the Non-Elevator Inventory Proceeds to the Priority 81.2 Creditors, the Receiver proposes making the following distributions to the Secured Creditors:
- (a) \$1,180,000 in proceeds realized from the sale of the Vanguard Plant (exclusive of costs of \$92,714) to FCC (the "**FCC Distribution**");³⁶ and
- (b) up to \$10,000,000.00 to ATB (the "**ATB Distribution**").³⁷
33. Regarding the FCC Distribution, the Receiver and its legal counsel have reviewed FCC's security and determined FCC has priority to all proceeds realized from the sale of the Vanguard Plant pursuant to a priority agreement in place.³⁸ The Receiver is finalizing its opinion on the priority to the proceeds from the Pambrun Plant. The \$150,000 realized from the sale of the Pambrun Plant (exclusive of costs) will be addressed at a subsequent application pending the completion of a security review in respect of the Pambrun Plant.³⁹

³¹ Third Report, at para 25.

³² Third Report, at para 16(d).

³³ Third Report, at para 30.

³⁴ Third Report at para 33.

³⁵ Third Report, at para 37.

³⁶ Third Report, at para 31.

³⁷ Third Report, at para 36.

³⁸ Third Report, at para 30.

³⁹ Third Report, at para 32.

34. Regarding the ATB Distribution, the Receiver and its legal counsel have reviewed ATB's security and determined ATB has priority to all proceeds realized from the sale of the Bashaw Plant and the Bowden Plant, the remaining Inventory Proceeds and the accounts receivable collections.⁴⁰
35. Regarding the Ponteix Plant, the proceeds are payable to Avrio, who agreed to hold any such funds in trust for ATB, pursuant to a priority agreement. However, the Receiver has determined the allocated costs exceed the proceeds realized on the Ponteix Plant, and there will be no distributions to any creditors from the sale of the Ponteix Plant as a result of such allocation.⁴¹

(d) Proposed Allocation of Costs

36. The Receiver proposes that the fees and costs associated with addressing the Priority Producer Claims be paid out of the Like Grain Funds prior to any distribution to the Priority Producer Creditors; the fees and costs associated with the Vanguard Plant, in the amount of \$92,714, be set off against the proceeds payable to FCC; and the fees and costs associated with the balance of the administration of the estate be paid from the remaining residual funds otherwise payable to ATB.
37. Subsection 243(6) of the BIA allows the court to make any order respecting payment of fees and disbursements of the Receiver that it considers proper.
38. In *Royal Bank of Canada v Atlas Block Co.* ("**Atlas Block**"), the Court set out the general principles governing the allocation of a receiver's costs:
- (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
 - (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
 - (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost effective and would drive up the overall cost of the receivership;

⁴⁰ Third Report, at para 35.

⁴¹ Third Report, at para 39.

(iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.⁴²

39. In *Atlas Block*, the receiver proposed allocating costs between two secured creditors based on the costs directly related to either BDC or RBC's asset realization, and costs shared between BDC and RBC realization activities.⁴³ The receiver proposed allocating the shared costs based *pro rata* on realizations, which the Court upheld as reasonable in the circumstances.⁴⁴
40. The Receiver and its legal counsel have attempted to allocate their time and expenses in relation to addressing the claims of Priority Producer Creditors and attending to the sale of the Processing Plants.
41. The Receiver has further broken down the costs associated with each Processing Plant, and proposes allocating those costs to either FCC or ATB, based on which creditor has priority over which Processing Plant. The allocation of costs approximates the time spent on each asset (where such allocation was possible), and where there are multiple creditors claiming against a pool of proceeds, share those costs *pro rata* amongst all of the creditors receiving a distribution from those assets.
42. The Receiver consulted with the CGC, ATB and FCC regarding its proposed allocation of costs, and the parties have not advised of any contrary position.

⁴² *Royal Bank of Canada v Atlas Block Co.*, 2014 ONSC 1531 ("*Atlas Block*"), at para 43, at **TAB 5** of the Authorities.

⁴³ *Atlas Block*, at para 40, at **TAB 5** of the Authorities.

⁴⁴ *Atlas Block*, at para 48, at **TAB 5** of the Authorities.

E. RELIEF REQUESTED

43. The Receiver respectfully requests that this Honourable Court approve the Receiver's proposed distributions; the Receiver's proposed allocation of proceeds and costs realized or named in the within Receivership proceedings; and the Receiver's fees and disbursement and actions set out in the Third Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of November, 2021.

MLT AIKINS LLP



Ryan Zahara/Kaitlin Ward
Counsel for BDO Canada Limited, in its capacity as
Receiver

LIST OF AUTHORITIES

<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3.....	TAB 1
<i>Canada Grain Act</i> , RSA 1985, c G-10.....	TAB 2
<i>R.A. Warren Equipment Ltd. v Bissett Gold Mining Co. (Receiver of)</i> (1999), 11 CBR (4 th) 110 (Man QB)	TAB 3
<i>Sale of Goods Act</i> , RSA 2000, c S-2.....	TAB 4
<i>Royal Bank of Canada v Atlas Block Co.</i> , 2014 ONSC 1531.....	TAB 5