

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2026 ABKB 175

Date: 20260309
Docket: 2501 06120
Registry: Calgary

Between:

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c-C36, as Amended

And in the Matter of a Plan of Compromise or Arrangement of Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

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**Endorsement
of the
Honourable Justice Michael J. Lema**

I. Introduction

[1] Is SPDI "entitled" within the meaning of s 73 of the *Law of Property Act* to pay off the balance of a mortgage in the circumstances here?

[2] The answer is no, as explained below.

II. Background

[3] SPDI owns a commercial property in Calgary.

[4] It entered into a long-term lease of the property with West Market Square Inc.

[5] SPDI is a 50 per cent shareholder in WMS. Sunterra Enterprises Inc. is the other (50 per cent) shareholder.

[6] WMS borrowed monies from Alberta Treasury Branches, secured in part on a mortgage of WMS's leasehold interest.

[7] At SEI's request, WMS borrowed additional monies from ATB for SEI's purposes.

[8] SPDI agreed to this, taking a pledge of SEI's shares in WMS as security for SEI's promise to repay those funds to ATB.

[9] SPDI, WMS, and ATB made a "tri-party agreement" defining their relationships in respect of the share pledge.

[10] SEI defaulted in repaying those monies, triggering ATB to seek repayment of all monies advanced to WMS.

[11] ATB has applied to appoint a receiver of WMS (decision heard and reserved on March 4, 2026).

[12] Also on March 4, 2026, SPDI applied for an order declaring that s 73 of the *Law of Property Act* applies to SPDI's recent tender of what it describes as full payment (i.e. tendered) to ATB of all monies owing by WMS to ATB.

[13] Flowing from such a declaration and, if granted, from clearance of ATB's claims against WMS, it seeks the assignment of ATB's secured position against WMS.

[14] SEI and other Sunterra entities are currently under CCAA protection.

[15] WMS is not currently under such protection; however, also on March 4, 2026, Sunterra applied for a declaration that WMS come into the CCAA proceeding and be sheltered by the CCAA stay of proceedings (recently extended on March 4, 2026 to May 1, 2026). That decision is also under reserve.

[16] This decision focuses on the s 73 LPA issue.

III. Legislation

[17] Here is s 73 LPA:

(1) When a mortgagor becomes entitled to pay off the balance owing on the mortgage, the mortgagor may require the mortgagee on receiving payment, instead of giving a discharge, to transfer the mortgage to a third party and the mortgagee is bound to transfer the mortgage as the mortgagor directs.

(2) When a person

(a) becomes entitled or obligated to pay off the balance owing on a mortgage, and

(b) pays to the mortgagee the balance owing on the mortgage,

the mortgagee on receiving the payment, instead of giving a discharge, is bound on the request of the person who made the payment to transfer the mortgage as the person who made the payment directs.

(3) Any waiver or release of the rights, benefits or protection given by this section is against public policy and void.

[18] SPDI invokes ss. 73(2). (WMS is the mortgagor here, not SPDI; accordingly, ss 73(1) is inapplicable.)

IV. Analysis

[19] SPDI asserts it is “entitled” to pay off the balance owing on WMS’s mortgage to ATB. Here are its key arguments:

Section 73 creates a mandatory right to assignment upon payment. When a person **entitled or obligated to pay off a mortgage** pays the balance owing, the mortgagee is *bound*, upon request, to transfer the mortgage as directed rather than provide a discharge [footnote 36 citing ss. 73(2) *LPA*]. Section 73(3) further provides that any waiver of this right is against public policy and void.

SPDQ falls squarely within the class of persons entitled under section 73. SPDI is the fee simple owner of the Lands encumbered by the leasehold mortgage structure, is a party to the Tri-Party Agreement, and is a surety for the Indebtedness. SPDI is therefore both a “mortgagor” under section 73(1) and a “person” entitled or obligated to pay under section 73(2) [footnote 37 citing a commitment letter dated October 27, 2023, Exhibit “J” of the First Affidavit [of Peter Livaditis, sworn February 4, 2026], defining the “Project Lands” as the same lands of which SPDI is the fee simple owner at page 12, and Supplemental Affidavit [of Mr. Livaditis, sworn February 19, 2026] at paragraphs 24 and 21].

SPDI has delivered a formal, unconditional tender of the full Payout Amount. The funds are held in its counsel’s trust account, available for immediate release. **The statutory conditions are met.** [SPDI brief, paras 48-50] [emphasis added]

[20] I first note that “entitled” means “the right to do or receive something”: *Welsh v Ontario*, 2020 ONCA 210 (para 3). SPDI did not offer its own definition of “entitled” or argue that it should be interpreted otherwise i.e. than as having a right to do something i.e. here, a right to pay off ATB’s mortgage balance.

[21] I turn to the circumstances identified by SPDI as giving it entitlement here.

[22] The parties to the commitment letter are ATB, which prepared it, and WMS, which accepted it. SPDI is not a party to the commitment-letter agreement.

[23] SPDI is referred to once in the commitment letter, namely, in paragraph 6 (catalogue of security documents i.e. in subparagraph (e): “Solicitor-prepared Tri-Party Agreement for consent to Leasehold Mortgage between [SPDI], Borrower [i.e. WMS], and Lender [i.e. ATB]).

[24] That reference does not make SPDI liable, directly or indirectly, for the borrowed funds.

[25] The commitment letter contemplates at various points that WMS’s obligations may be guaranteed for one or more guarantors (e.g. reference in subparagraph 8(g) to “each Guarantor (if any).” “Guarantor” is a defined term in the commitment letter:

“Guarantor” means any party that has provided a guarantee in favour of Lender [ATB] with respect to the Borrowings hereunder. [para 15 (Definitions)]

[26] SPDI provided no evidence that it provided a guarantee here.

[27] Lastly, SPDI emphasized the definition of “Project Lands”:

“Project Lands” means the lands legally described as Plan 9911775, Block 3 and municipally located at 1851 Sirocco Dr. SW Calgary AB.

[28] Per PDI this is the legal description and municipal address of the property on which the shopping centre in question is located.

[29] No party disputed that that is so or that SPDI is the fee-simple owner of that property.

[30] However, ATB’s mortgage here is not registered against SPDI’s fee-simple title, instead against the ground lease held by WMS.

[31] Imprecision in the Project Lands definition (i.e. showing as the centrepiece legal interest of ATB’s security the fee-simple title i.e. instead of (as it should) the ground lease) does not make SPDI a party to the ATB-WMS lending arrangements, constitute SPDI a guarantor or other surety for WMS’s obligations, or otherwise assist SPDI in making its s 73 LPA case here.

[32] To summarize here: nothing in the commitment letter shows or signals that SPDI is “entitled or obligated” to pay the ATB mortgage balance within the meaning of s 73 LPA.

[33] I next reproduce the two cited paragraphs from Mr. Livaditis’s February 19, 2026 affidavit (paras 21 and 24):

I understand from counsel that the Applicant, SPDI, is a “mortgagor” or “person entitled to redeem” within the meaning of Section 73 of the *Law of Property Act* because (a) Fee Simple Owner: The Applicant, SPDI’s fee simple title is encumbered by the Tri-Party Agreement with ATB, attached hereto and marked as Exhibit “W”, which attempts to restrict SPDI’s ability to terminate the Lease; and (b) Surety/Guarantor: The Applicant, SPDI is a guarantor/surety for the debt. The ATB Commitment Letter ... at page 12, defines the Project Lands as the same lands in Exhibit “T”, wherein SPDI is the sole owner in fee simple. This Project Lands are pledged to secure the Borrower, WMS’s debt, as stated at paragraph 6(b) and (c). 6(e) also indicate that a Tri-Party Agreement providing ATB with a Leasehold Mortgage between SPDI, WMS, and ATB.

...

The ATB Indebtedness is secured not only by recent instruments, but by a continuous chain of security dating back to 2009 (Exhibit “T” – Land Titles Search). I note that Clause 6 of the Commitment Letter ... page 3/12, expressly focuses on Security Documents “currently held.” The Mortgage Amending Agreement in 6(c) and the General Assignment of Leases and Rents in 6(d) and the Tri Party Agreement in 6(e) match the Title Search in Exhibit “T” and links the active security to the 2009 to 2011 instruments. These are not new security, but older security which ATB is relying on. Accordingly, the assignment of these specific instruments is required to preserve the priority of the security. [paras 21 and 24]

[34] None of this evidence assists SPDI in showing or signalling status under s. 73 *LPA*.

[35] SPDI's fee-simple ownership does not make it a party, express or implicit, to the lending arrangements on the ground lease here. Or otherwise create obligation or entitlement, within the meaning of s 73 *LPA*, to pay off ATB's mortgage.

[36] In any case, SPDI did not explain why.

[37] As well, SPDI's fee-simple title is not encumbered by any of ATB's security or at least not in the sense of exposing that title to ATB enforcement action if WMS defaults.

[38] It is true that, under the Tri-Party Agreement, SPDI's enforcement rights triggered by WMS defaults under the ground lease are deferred until ATB is notified of them and given an opportunity to cure them. However, if the defaults are not cured within specified periods, SPDI can enforce its rights against WMS.

[39] In other words, WMS's defaults are either cured (by itself or by ATB) and, if not, SPDI's security rights can be enforced.

[40] The limited deferral of SPDI's enforcement rights is not a material encumbrance on SPDI's fee-simple title. In any case, the deferral provisions do not make SPDI a mortgagor to ATB or a guarantor or other surety of WMS's debts to ATB.

[41] In fact, the Tri-Party Agreement gives ATB various rights, which SPDI recognizes, to enforce against the ground lease. For example, if ATB foreclosed on the ground-lease mortgage and sought to assign the unexpired portion to a third party, SPDI agreed that it would not unreasonably withhold consent to a proposed assignee.

[42] More generally, the Tri-Party Agreement comprehensively defines the rights and obligations of ATB, WMS, and SPDI respecting the ground-lease mortgage.

[43] Nowhere does it state or suggest that SPDI is obliged in any way to ATB in respect of the monies advanced to WMS or that it has a right to clear the mortgage balance in any circumstance.

[44] Finding an implicit right to clear the ATB balance would cut against its express provisions empowering ATB to take enforcement steps against the ground lease i.e. with nothing stating or showing that SPDI could impair or neutralize any such steps by paying off the mortgage itself.

[45] As well, SPDI did not explain how, even when the historical security documents are factored in, its fee-simple title is materially shadowed by ATB's security or that SPDI has any obligation for or entitlement to pay ATB's balance in any circumstance.

[46] SPDI did not point to any evidence that ATB has demanded or requested that SPDI pay WMS's balance e.g. somehow implicitly recognize SPDI as a guarantor or other surety.

[47] SPDI did not offer any other bases for being considered as a guarantor or other surety or for otherwise being "obligated or entitled" to clear ATB's mortgage balance.

V. Conclusion

[48] SPDI is not a mortgagor within the meaning of ss 73(1) *LPA*.

[49] Neither is it “entitled or obligated”, within the meaning of ss 73(2) *LPA*, to clear WMS’s debt to ATB.

[50] Accordingly, I decline to grant the declaration requested by SPDI.

[51] Incidentally, if SPDI had had status under either subsection, I would have found that the tendering of the mortgage balance and the calling for the assignment of ATB’s security would have fallen outside the scope of the *CCAA* stay here, with such steps representing simply the substitution of one secured creditor for another.

[52] I thank the parties for their helpful written and oral submissions.

Heard via Webex on the 4th day of March, 2026.

Dated at Calgary, Alberta this 9th day of March, 2026.

Michael J. Lema
J.C.K.B.A.

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