CITATION: Re Earth Boring Co. Limited et al., 2026 ONSC 1242
COURT FILE NO.: CV-25-00741419- 00CL
DATE: 20260302

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EARTH BORING CO. LIMITED, YARBRIDGE HOLDINGS INC., TROLAN INVESTMENTS LTD., AND YARFIELD SERVICES LIMITED, Applicants

BEFORE: W.D. Black J.

COUNSEL: *Domenico Magisano and Matthew J. McGuckin*, for the Applicant, Earth Boring Co.

Stephane MacLean, for Tulloch Geomatics Inc.

Heather Fisher, for the Monitor, BDO Canada Ltd.

HEARD: February 25, 2026

ENDORSEMENT

Overview

[1] This motion raises interesting issues about competing claims relative to an amount held in escrow.

Relevant Background Facts

[2] The background facts are largely uncontested.

[3] On October 25, 2022 Earth Boring (in this endorsement I will use this and other terms as defined in the parties' materials) retained Tulloch to provide surveying services in connection with the South Georgetown Servicing Watermain project.

[4] A payment dispute arose concerning Tulloch's invoices for the Project totaling just over $350,000.

[5] On May 31, 2024, Tulloch commenced an Adjudication under Part II.1 of the *Construction Act*. On August 2, 2024, Adjudicator Reynolds released her decision ordering Earth Boring to pay Tulloch $337,390.62.

[6] Earth Boring sought leave to judicially review the Adjudication Order, and advised Tulloch of Earth Boring's intention to commence proceedings against Tulloch relative to alleged Deficiencies.

[7] In the circumstances, the parties negotiated and entered into the Tolling Agreement and the Escrow Agreement.

[8] The Tolling Agreement provided, among other things, that any Potential Claims (broadly defined to capture all manner of claims and/or potential claims) were tolled for one year from the effective date (or earlier if terminated on 30 days' notice).

[9] The Escrow Agreement, dated November 29, 2024, features prominently in the argument of this motion. It provided for the release of the Escrow Funds (the $337,390.62) if: there was an agreement in writing between Earth Boring and Tulloch authorizing the Escrow Agent to release the Escrow Funds; or if there was an issued and entered Order from the Divisional Court in Earth Boring's judicial review application and a resolution of further appeals (if any) arising from the Divisional Court's decision.

[10] There is something of a debate between the parties as to whether or not the Escrow Funds were also impressed with a trust, discussed in more detail below, but it is clear and common ground that the language of the Escrow Agreement itself did not expressly create a trust.

[11] I should perhaps note that, at the time of the Adjudication and the negotiation and execution of the Escrow Agreement, both parties were represented by other counsel.

[12] Earth Boring's then counsel, the Torkin Manes firm, agreed to serve as the Escrow Agent, and held the Escrow Funds in an Escrow Account.

[13] In late 2024 and early 2025, when Earth Boring was being asked for and did in fact provide the Escrow Funds, there was an exchange of emails between the parties' then counsel, in which Mr. Scane at Torkin Manes said (on December 5, 2024): "I will let you know when funds hit our trust account in advance of opening an interest bearing escrow account" and in which Mr. Johnson at the firm then representing Tulloch responded (on January 7, 2025): "Can you please advise if the escrow funds have been paid to your firm's trust account?"

[14] Sometime later, in mid-January of 2025, Torkin Manes provided a document showing the opening and transfer of the Escrow Funds into the Escrow Account, which transfer was "from [a] mixed use trust account."

[15] Counsel for Tulloch made a pitch (in fairness not a strenuous one) suggesting that the use of a trust account along the funds' way to the Escrow Account is significant and to an extent corroborates the intention that the Escrow Funds were impressed with a trust. I do not put much weight on that proposition. In my view the short-term payment of funds into and transfer of funds out of a firm trust account, particularly a "mixed use" one, is simply "business as usual" for a law firm and does not by itself prove anything about an intention to create a trust (or not). There are cases, discussed below, in which an explicit and intentional deposit of funds into a dedicated trust account carries significant evidentiary weight, but in my view those cases and conclusions arise in different and distinguishable circumstances, and do not bear much on the determination here.

[16] Returning to the relevant aspects of the chronology, on April 15, 2025, Earth Boring commenced the NOI Proceeding under the *BIA*.

[17] Two days later, on April 17, 2025, the NOI Proceeding was converted to the CCAA Proceeding. As Earth Boring fairly notes, the Insolvency Proceedings (both the NOI and the CCAA Proceedings) included a stay of any claims and/or enforcement steps against Earth Boring.

[18] Also on April 17, 2025, the same day that the NOI Proceeding was converted to the CCAA Proceeding, the Divisional Court released an endorsement dismissing Earth Boring's application for leave for judicial review of the Adjudication Order. On April 25, 2025, the Divisional Court issued its order confirming the decision reflected in its April 17, 2025 endorsement.

[19] I should note, as will be evident, that Earth Boring had no advance notice of the timing for the release of the Divisional Court decision. Moreover, as Earth Boring's counsel observed, the $337,390.62 at stake in that setting was a very modest amount relative to the overall amounts Earth Boring owed its creditors, and would not have provided much incentive or "moved the needle" in that context.

[20] Subsequently, the shares of Earth Boring and certain other companies were sold pursuant to a Subscription Agreement, and this court approved this sale pursuant to an RVO dated September 15, 2025.

[21] Tulloch's claims against Earth Boring are "Excluded Liabilities" (each an "Excluded Liability") as defined in the Subscription Agreement. Under paragraph 6 of the RVO, Excluded Liabilities were transferred to ResidualCo, which was subsequently adjudged bankrupt.

[22] On the other hand, also pursuant to the RVO, the Escrow Funds were a Retained Asset under the Subscription Agreement and remained with Earth Boring in its newly constituted form as Newco.

[23] Earth Boring emphasizes that Tulloch was aware, as Tulloch acknowledges, of the Insolvency Proceedings, was in communication with the Monitor's counsel and Earth Boring's insolvency counsel relative to the Escrow Funds, and chose not to oppose the RVO motion or even to seek clarification regarding the status of the Escrow Funds prior to the closing of the Subscription Agreement.

The Issues

[24] In keeping with the ordinary course, after the closing of the Subscription Agreement, approved distributions were made in the CCAA Proceeding. The available funds were insufficient to retire Earth Boring's secured debt and left no recovery for any unsecured creditors.

[25] The parties formulate the issues on this motion largely consistently, albeit with their own slants.

[26] Earth Boring frames the issues as: whether or not Tulloch's claim is subject to the Stay; whether the Escrow Funds are a Retained Asset under the Subscription Agreement and thus payable to NewCo; and, if not payable to NewCo, are the Escrow Funds an Excluded Asset that should be remitted to ResidualCo's trustee in bankruptcy.

[27] For its part, Tulloch contends that the determinative issue on this motion is whether the Escrow Funds were the property of Earth Boring when it filed its NOI.

[28] Tulloch maintains that, if the Escrow Funds were not the property of Earth Boring "in the absolute sense" at the time the NOI was filed, they should be released to Tulloch as Tulloch's property under the triggering terms of the Escrow Agreement.

[29] Earth Boring responds that "even when funds have been segregated on account of a possible creditor claim, it does not give that creditor – here Tulloch – a higher priority in an insolvency proceeding." In other words, Earth Boring asserts, if that creditor has not completed its enforcement prior to the debtor obtaining creditor protection, then enforcement of the debt must cease, and the funds in question remain part of the debtor's estate.

[30] Here, Earth Boring argues, at the time the NOI Proceeding was commenced on April 15, 2025, Tulloch was not in a legal position to enforce, much less complete enforcement with respect to the Adjudication Order. Tulloch was an unsecured judgment creditor, whose enforcement efforts were interrupted and halted by court order, as a result of which the Escrow Funds remained Earth Boring's property.

Three Strains of Caselaw

[31] A determination of the issues in this motion requires the court to consider the potential application of three strains of caselaw that have developed over many years in similar circumstances to those at hand.

[32] Helpfully, the three lines were comprehensively reviewed and considered in the Court of Queen's Bench of Alberta decision of Topolniski J. in *Transtrue Vehicle Safety Inc. v. Werenka*, 2015 ABQB 197.

[33] As Her Honour colourfully noted, "Over time, a rather jumbled body of law has developed concerning contests between trustees in bankruptcy and a litigation claimant to money held in a lawyer's trust account or posted in court pending resolution of a dispute. There are three lines of authority with varying results, sometimes involving factually-like cases."

Earth Boring Relies on the First Line of Cases

[34] The first line of authority, which Topolniski J. describes as the "earliest" is essentially the basis on which Earth Boring proceeds before me.

[35] The argument starts with the language of s. 70(1) of the *BIA*, which says that:

> "Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions of other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor."

[36] Earth Boring cites the seminal Supreme Court of Canada decision in *Canadian Credit Men's Trust Association Limited v. Beaver Trucking Limited*, [1959] SCR 311 in which, as Earth Boring puts it, Judson J. for the majority "distilled the 'enforcement completion' issue to a binary question – has the execution creditor been paid prior to insolvency events supervening? If not, payment into court was insufficient to provide an execution creditor with priority to the funds and its claim needed to be adjudicated in accordance with the statutory distribution scheme."

[37] That principle from Beaver Trucking has been cited and applied in a number of subsequent cases. Notably in *Tradmor Investments Ltd. v. Valdi Food (1987) Inc.*, 1995 CanLII 7377 (ON SC); upheld on appeal 1997 CanLII 14518 (ON CA), (on which Earth Boring places particular emphasis) a landlord commenced an action for rent arrears, and the court ordered the tenant to remit security for costs. After doing so, the tenant was later adjudged to be bankrupt. The trustee for the bankrupt brought a motion seeking payment of the amount held as security. That landlord opposed the motion, claiming that it was a secured creditor and intended to proceed with the action.

[38] Justice Carruthers held, in finding for the trustee, that the funds held as security for costs remained property of the bankrupt, and that payment into court did not change the nature and status of the funds. Justice Carruthers went further to observe that a finding in favour of the landlord would effectively provide the landlord with greater rights pre-judgment than it would have post-judgment.

[39] Similarly, in *Toronto-Dominion Bank v. Phillips*, 2014 ONCA 613, the Court of Appeal for Ontario was asked to address whether an incomplete execution on a judgment created a claim over specific proceeds of a debtor who had filed a proposal pursuant to the *BIA*. Justice Pepall confirmed that execution creditors are not secured creditors and emphasized that "unless the execution has been completed by payment to the creditor, the debt of the execution creditor is treated rateably with other unsecured debt."

[40] Recently, in *Re 1631651 Ontario*, 2025 ONSC 2507, Associate Justice Rappos referred to a body of case law confirming that garnishments and other forms of enforcement do not "have precedence over the assignment in bankruptcy, even where the sheriff was on the brink of distributing funds."

[41] Earth Boring urges that "far from being 'on the brink of distributing funds' at the time of the NOI Filing, Tulloch did not have entitlement to the Escrow Funds as the application for judicial review had not been determined."

[42] In her discussion of the "first line of cases" in Werenka, among the many other cases cited by Topolniski J., Her Honour referred to *Re McDermott*, 54 CBR (NS) 37, which in my view is instructive. In that Ontario case, money had been paid into court pending appeal in circumstances in which, under the *Rules*, execution of the judgment was stayed pending appeal. The judgment creditor learned that the debtor was attempting to sell certain property, and sought an order lifting the stay. The court continued the stay and ordered the defendant to pay the sale proceeds into court 'until the disposition of the defendant's appeal. The defendant was unsuccessful on appeal, and made an assignment in bankruptcy before the creditor applied to have the money paid out of court.

[43] Rejecting claims of agency and trust, Catzman J. (as he then was) held that money paid into court remained property of the bankrupt because s. 50(1) (the predecessor to s. 70(1) of the *BIA*) "created a clear statutory preference over any judgment creditor in favour of the trustee in bankruptcy."

No Submissions Relying on the Second Line of Cases

[44] Justice Topolniski then discussed the second line of authority, which is not directly applicable to the matter at hand.

Tulloch Relies on the Third Line of Cases

[45] The third strand of caselaw is the basis for Tulloch's position before me.

[46] That third line features two cases in particular, both of which Tulloch cites and relies upon.

[47] In the first of those cases, *Acepharm Inc., RE,* 1999 CarswellOnt 1904, Acepharm was in litigation with FCM concerning ownership of a property and a lease. During the course of the litigation, Acepharm and FCM entered into an agreement under which Acepharm agreed to pay and in fact paid funds into an interest-bearing trust account established by its lawyers pending the outcome of the litigation.

[48] Before the litigation was completed or decided, Acepharm was assigned into bankruptcy.

[49] The issue that the Court of Appeal for Ontario had to determine was whether the funds paid by Acepharm to its law firm pending the outcome of the litigation were still the property of Acepharm at the time of its assignment into bankruptcy, which was the position taken by Acepharm's trustee in bankruptcy.

[50] In rejecting the trustee's assertion, it is clear that the court focused in particular on the question of whether or not the funds were held in trust by Acepharm's lawyer. The court found:

> 10. The ingredients of a trust are well established: certainty of intention, subject-matter, and objects: see *Allan Realty of Guelph Ltd.*, Re (1979), 29 C.B.R. (N.S.) 229 (Ont. Bktcy.) at 241 et seq.
>
> 11. Here, on the bare terms recited above, the parties' intention was clear – to place rental payments into a trust account pending success or failure of the defendants in asserting that it was the owner rather than the tenant. The payments were the subject matter, and the object was the determination of the litigation and the payment of funds to the successful party.
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> 12. The funds were, in every sense, trust funds in the hands of the law firm. To the extent that they might be considered as held in trust by the bankrupt, the appellant was a contingent beneficiary of that trust. If the funds are not "held by the bankrupt in trust for any other person" then the only property the Trustee can reach is the bankrupt's contingent interest. That can be realized by continuing the litigation to a conclusion: see s. 67(1)(d) of the *Act*.
>
> 13. In either event, the resolution of this appeal does not depend upon a finding that the appellant is a secured creditor and Tradmor has no direct application.
>
> 14. I would therefore allow the appeal, set aside the order of Lax J., and in its place declare that the funds in question are not property of the bankrupt divisible among its creditors at this time…."

[51] Tulloch emphasizes that in overturning the lower court's decision, the Court of Appeal for Ontario rejected the position advanced by the trustee in bankruptcy, which had been summarized at paragraph 3 of the lower Court's decision (*Acepharm Inc., Re*, 1998 CarswellOnt 3520) as follows:

> "According to the Trustee, the monies are in the nature of a fund which has been established to abide the outcome of the litigation and analogous to monies which have been paid into court with no admission of liability."

[52] Tulloch argues that this characterization, rejected by the Court of Appeal, is closely analogous to the position of Earth Boring before me.

[53] To similar effect, Tulloch cites the decision of Morawetz J., as he then was, in *Greenstreet Management Inc. (Re)*, 2007 CanLII 49869 (ON SC).

[54] In that case, Greenstreet entered into an agreement to buy real estate from Bonnydon. Greenstreet paid a deposit of $250,000 to Bonnydon's solicitor in trust pending closure of the sale. The agreement did not close, and Bonnydon brought a claim against Greenstreet for allegedly breaching the agreement. The court directed that the deposit funds held by the solicitor be paid into court pending further order or final adjudication.

[55] Before trial, Greenstreet made an assignment in bankruptcy. Justice Morawetz had to determine whether the funds paid by Greenstreet to the solicitor in trust, and then paid into court

pending the outcome of litigation, were the property of Greenstreet at the time of its assignment in bankruptcy.

[56] The trustee in bankruptcy argued that the deposit funds were the property of the bankrupt. As Morawetz J. recorded:

> "[9] The Trustee submits that what is at issue is the application of the legal principle that where funds are paid into court by a party who subsequently becomes bankrupt before entitlement to the funds is finally adjudicated, the funds are the property of the bankrupt and, notwithstanding the pending litigation, must be paid to the trustee in bankruptcy to be distributed to the bankrupt's creditors in accordance with their respective entitlements under bankruptcy law."

[57] Contrary to this position, the court held that the deposit funds were not the property of Greenstreet at the time of its assignment in bankruptcy. Justice Morawetz found that once the deposit funds had been paid to Bonnydon's solicitor in trust, the funds could no longer be considered the property of Greenstreet in the "absolute sense." That is, Greenstreet had no unilateral right to obtain or demand the return of the deposit funds. His Honour wrote:

> "[27] In my view, once the Deposit Proceeds had been paid over to Bonnydon's solicitors in trust, the Deposit Proceeds could no longer be considered property of Greenstreet in the absolute sense. Pursuant to the terms of the APS and the Order of Master Haberman, Greenstreet had no unilateral right to obtain the Deposit Proceeds or to call for the return of the Deposit Proceeds. The required ingredients for a trust – certainty of intention, subject matter and object were present. As a consequence of establishing the trust, Greenstreet no longer had control over the Deposit Proceeds. Greenstreet only had a contingent interest in the Deposit Proceeds. The interest that vested in the Trustee was this contingent interest, which does not give the Trustee the absolute right to the Deposit Proceeds. The Deposit Proceeds could only be returned to Greenstreet in the event of a finding of default by Bonnydon or by mutual consent of the parties."

[58] Justice Morawetz found, as part of his analysis, that the subsequent transfer of the funds from the lawyer's trust account into court served only to substitute the Accountant of the Superior Court for the lawyer's trust account, and did not change the trust nor the parties' contingent interest in the funds.

Discussion and Application of Caselaw

[59] It is evident, in my view, that in both *Acepharm* and *Greenstreet* the finding that the funds at issue in each case had become the subject of a trust was critical to the court's conclusion.

[60] That is, in *Acepharm* it is clear that the court's conclusion was significantly driven by the finding that the funds at issue were "in every sense, trust funds in the hands of the law firm."

[61] Similarly, in *Greenstreet*, Morawetz J. places particular emphasis on the creation of a trust, finding that "once the Deposit Proceeds were paid over to Bonnydon's solicitors in trust," those funds "could no longer be considered property of Greenstreet in the absolute sense."

[62] There is uncontroverted evidence before me from Earth Boring that it never intended for the Escrow Funds to constitute a trust. While one might look askance at such an assertion in the circumstances at hand, in my view an argument that the Escrow Agreement here constitutes or establishes a trust in any event falls short at the first hurdle: the question of certainty of intention.

[63] The Escrow Agreement does not mention the idea of a trust. While that too is not definitive, I accept that the Escrow Agreement was struck as an alternative to Earth Boring paying the adjudication amount into court, which may have been required for Earth Boring to obtain a stay of the Adjudication Order.

[64] In that regard, Earth Boring references the email endorsement of Myers J.in the context of scheduling proceedings in the Divisional Court relative to Earth Boring's application for leave for judicial review, in which His Honour says: "A stay is especially troubling under the court's case law related to this type of statutory interim adjudication. If a stay is considered, the court will often require security to be posted as a condition of a stay."

[65] With respect to Tulloch's reliance on *Acepharm* and *Greenstreet*, Earth Boring emphasizes that both decisions turned in large measure on the specific (and undoubted) creation of a trust in each case.

[66] Earth Boring points out in addition that, as confirmed in its evidence, the Escrow Agreement was "part of a larger interim arrangement between the parties that not only addressed the judicial review, but also preserved rights with respect to [Earth Boring's] claim on the Deficiencies."

[67] Earth Boring submits that "the law is settled that funds paid into court, that were not impressed with a trust at the time they were paid into court, do not give the claimant a heightened priority to those funds."

[68] Apart from its argument that the court should find (or infer) a trust here, which as set out above I do not accept, Tulloch argues that Morawetz J.'s analysis in *Greenstreet* applies with equal force to the Escrow Funds at issue, regardless of whether those funds were impressed with a trust. That is, Tulloch asserts, Earth Boring's interest in the Escrow Funds, like Greenstreet's interest in the trust funds in that case, was "no more than a contingent interest, which interest was dependent on the outcome of its Motion for Leave."

[69] To address this contention, I return to Topolniski's decision in *Werenka*.

[70] In Her Honour's discussion under the heading "Resolving the Conflicting Logic" Topolniski J. first notes the overriding objective of interpreting statutory provisions in a manner that gives effect to the purpose and overall intention of the legislation.

[71] Justice Topolniski returns, in that context, to the language of s. 70 of the *BIA*, and confirms -and I agree - that it "provides that an unsecured creditor is only entitled to the judgment amount if the judgment has been fully executed by the time of the bankruptcy. An assignment into bankruptcy takes precedence over any unexecuted judgment or order."

[72] Her Honour then notes, again unassailably in my view, that s. 67 of the *BIA* provides (in s. 67(a)) that "a Bankrupt's estate does not include any property that the bankrupt holds in trust for another."

[73] Justice Topolniski continues that "The intent of this provision [s. 67] is relatively apparent when the bankrupt is a traditional trustee holding, for example, a real estate vendor holding a deposit from a purchaser or a broker holding stocks for her client." Her Honour posits that "It becomes less clear when the property is paid into court or a lawyer's trust fund pending the resolution of a dispute or litigation."

[74] "Does the simple fact of deposit with a lawyer," Her Honour queries, "automatically mean that there is a "trust" for the purposes of s. 67 of the *BIA*?"

[75] To answer her own question, Topolniski J. notes that "according to Acepharm and Greenstreet, Posted Money deposited with the Clerk of the Court is treated differently, depending on its initial characterization. If it was simply deposited with the Clerk of the Court pursuant to a Court Order, the Clerk is a "mere repository" not a trustee. However, if it was initially deposited with a lawyer as true trust money, that characteristic continues if it is later transferred to the Clerk of the court."

[76] Critically, in my view, Her Honour goes on to observe:

> "[69] The authorities ruling that ownership of Posted Money must be determined by resolution of the litigation on the basis of it being a 67(a) "trust" for whoever the ultimate victor might be run afoul of s. 70.
>
> [70] If the litigation is pursued to judgment and the Posted Money paid without fully executing on the judgment, the creditor is bootstrapped to a better position than a pre-bankruptcy judgment creditor holding an unexecuted judgment. The effect operates to the detriment of the other creditors and violates the *BIA*'s foundational principles of creditor equality and rateable distribution of a bankrupt's property. I therefore conclude that if bankruptcy intervenes before the matter is adjudicated and judgment is executed, s. 70 applies and the trustee in bankruptcy should prevail."

[77] I agree, and find that the judgment in the case before me – the decision of the Divisional Court dismissing Earth Boring's leave application on April 17, 2025 – was not executed as of Earth Boring's NOI Proceeding on April 15, 2025.

[78] Returning to *Werenka*, after setting out the analysis excerpted above, Topolniski J. allowed that while "Perhaps facially harsh to the solvent litigant, the result is consistent with the principles of statutory interpretation and in the context of ss. 67 and 70."

[79] Finally, Topolniski J. agrees with the losing party's acknowledgement in the case before her that "absent a trust in its favour, the evidence establishes that the Settlement constitutes a preference."

[80] I recognize, on the facts of this case, and in particular because the NOI Proceeding was commenced only two days before the Divisional Court's dismissal of Earth Boring's leave application, that finding for Earth Boring here may seem "facially harsh."

Conclusion

[81] However, acknowledging the harshness, I find that, consistent with the overarching purposes of the bankruptcy regimen, the appropriate result here is to direct the Escrow Agent to release the funds to NewCo, in keeping with the scheme devised and approved within the CCAA proceedings.

W.D. Black J.

Date: March 2, 2026