

No. 18-592741-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

STRONACH CONSULTING CORP.

Applicant

- and -

BIONX CANADA INC.

Respondent

**FACTUM OF THE MOVING PARTY GENERAL MOTORS LLC and
GENERAL MOTORS COMPANY OF CANADA**

March 9, 2018

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TO: **Service List**

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I. OVERVIEW

1. General Motors LLC and General Motors Company of Canada (collectively "**GM**") bring the underlying motion for an order for the possession of certain identified tooling and equipment. The tooling and equipment at issue is located at the premises of GM's former parts supplier, BionX Canada Inc. ("**BionX**") and its related entity, Magna Enclosures.
2. 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.
3. In February of 2018, GM terminated its contractual relationship with BionX. Immediately thereafter, Grant Thornton Limited became the court-appointed receiver (the "**Receiver**") of BionX. The Receiver is not operating BionX and it intends to conduct a sales process.
4. Following the Receiver's appointment, GM worked with the Receiver to identify the tooling and equipment that GM fully paid for and that is the sole property of GM.
5. Despite the parties' efforts, the Receiver maintains that it will not allow GM to remove any of the tooling and equipment, including the tooling and equipment that GM paid BionX for in full.
6. GM needs the tooling and equipment to mitigate its damages and resource to another supplier. Conversely, the Receiver does not require the identified tooling and equipment to reconcile the amounts it alleges GM owes to BionX. The balance of convenience favours the granting of the requested order.

II. THE FACTS

A. The Parties

7. GM LLC is a corporation incorporated pursuant to the laws of the State of Delaware in the United States of America. GM LLC is an original equipment manufacturer.¹
8. GM Canada is a corporation incorporated pursuant to the laws of the province of Ontario. GM Canada is an affiliate of GM LLC. GM Canada is also an original equipment manufacturer.²

¹ GM Motion Record, dated February 26, 2018, Tab 2, Affidavit of Scott T. Wilson, sworn February 26, 2018 (the "**Wilson Affidavit**"), para. 3.

² Wilson Affidavit, para. 4.

9. BionX is a corporation incorporated pursuant to the laws of the province of Ontario. BionX previously manufactured, among other things, electric drive systems for electronic bicycles ("**E-Bikes**"). BionX carried on business from premises (the "**BionX Premises**") located at 455 Magna Dr., Aurora, Ontario. BionX also used facilities at the premises (the "**Magna Premises**") of Magna Enclosures, which is municipally located at 521 Newpark Blvd., Newmarket, Ontario, L3Y 4X7 (collectively with the BionX Premises the "**Premises**").³
10. Grant Thornton Limited is the Receiver of BionX.⁴

B. The E-Bikes Program

11. In 2015, GM decided to create an electric bicycle program, manufacture E-Bikes, and enter into the competitive E-Bikes market.⁵
12. To facilitate the manufacturing of the E-Bikes, GM collaborated with a Chinese based manufacturer, (the "**Chinese Manufacturer**") to manufacture and assemble the frames for the E-Bikes.⁶
13. In addition to the Chinese Manufacturer, GM contracted with BionX to be the supplier of, among other things, the motor assembly drive units (the "**Drive Units**") for the E-Bikes.⁷

C. The Contractual Relationship with BionX

14. On March 8, 2016, GM issued BionX the first purchase order for BionX to manufacture, among other things, the E-Bike propulsion system and supply the Drive Units.⁸
15. GM, subsequently, issued BionX three additional purchase orders on September 22, 2017, September 26, 2017 and October 17, 2017 for BionX to supply, among other things, 8,000 Drive Units.⁹
16. The four purchase orders (the "**Purchase Orders**") issued by GM to BionX are identified as 4300237222, 4300557102, 470021739 and 4300554647. The Purchase Orders included the GM General Terms and Conditions (the "**Terms and Conditions**").¹⁰

³ Wilson Affidavit, para. 5.

⁴ Wilson Affidavit, para. 35.

⁵ Wilson Affidavit, para. 6.

⁶ Wilson Affidavit, para. 7.

⁷ Wilson Affidavit, para. 8.

⁸ Wilson Affidavit, para. 9, Ex. A, Tab 1, Purchase Order, dated March 8, 2016.

⁹ Wilson Affidavit, para. 9, Ex. A, Tabs 2-4, Purchase Order, dated September 22, 2017, September 26, 2017, and October 17, 2017.

¹⁰ Wilson Affidavit, para. 10, Ex. A, Tabs 1 to 4, the Purchase Orders.

17. The Terms and Conditions governed the contractual relationship between BionX and GM.¹¹

D. The Tooling and Equipment used by BionX

18. BionX utilized certain specialized tooling and equipment (the "**Tooling and Equipment**") to manufacture the Drive Units for the E-Bikes.¹²
19. BionX purchased the Tooling and Equipment from suppliers pursuant to tooling purchase orders issued by GM. GM then reimbursed BionX for the cost to purchase the Tooling and Equipment.¹³
20. BionX stored the Tooling and Equipment at the BionX Premises and the Magna Premises.¹⁴
21. Pursuant to the Terms and Conditions, GM provided BionX with the Tooling and Equipment to allow BionX to fulfil its contractual obligations under the Purchase Orders.¹⁵
22. The Terms and Conditions provide, however, that the Tooling and Equipment shall be and remain the sole property of GM, and all right, title and interest in the Tooling and Equipment shall remain with GM.¹⁶
23. In particular, the Terms and Conditions provide that:

All supplies, materials, tools, jigs, dies, gauges, fixtures, molds, patterns, equipment and other items furnished by Buyer [GM], either directly or indirectly, to Seller [BionX] 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 (Buyers Property)...Buyer shall have the right to enter Sellers premises at all reasonable times to inspect such property and Sellers records with respect thereto. Upon the request of Buyer, Buyer's Property shall be immediately released to Buyer or delivered to Buyer by Seller... Seller waives any lien or other rights that Seller might otherwise have on any of Buyer's Property for work performed on such property or otherwise.¹⁷

E. The Breakdown in the Contractual Relationship

24. On September 22, 2017, GM issued purchase order 4300557102 to BionX that required BionX to deliver 8,000 Drive Units by December 31, 2018.¹⁸

¹¹ Wilson Affidavit, para. 11.

¹² Wilson Affidavit, para. 12.

¹³ Wilson Affidavit, para. 12.

¹⁴ Wilson Affidavit, para. 13, Ex. A, Tab 5, Spreadsheet Describing the Tooling and Equipment and Location.

¹⁵ Wilson Affidavit, para. 15.

¹⁶ Wilson Affidavit, para. 15, Ex. A, Tabs 1 to 4, the Purchase Orders.

¹⁷ Wilson Affidavit, Ex. A, Tabs 1-4, the Purchase Orders, section 19 of the Terms and Conditions,

¹⁸ Wilson Affidavit, para. 17, Ex. A, Tab 2, Purchase Order dated September 22, 2017.

25. On November 1, 2017, GM sent an email to Fred Gingl ("**Fred**"), the Chief Executive Officer of BionX, and Paul Gingl ("**Paul**"), the Chief Operating Officer of BionX, to request confirmation that BionX was ready to meet the monthly ramp schedule in order to deliver the 8,000 Drive Units by December 31, 2018.¹⁹
26. On November 2, 2017, Paul sent me an email to confirm that BionX agreed to the monthly ramp plan schedule and BionX would start production by January of 2018. BionX would be manufacturing and supplying GM with 100 Drive Units in January.²⁰
27. Despite BionX's confirmation that it could manufacture the necessary Drive Units, in January of 2018, BionX advised GM that it did not have the financial resources to deliver under the Purchase Orders.²¹
28. On February 1, 2018, GM representatives met with Fred, and other BionX representatives, to discuss BionX's performance issues and its unwillingness or inability to meet its contractual obligations under the Purchase Orders.²²
29. At the meeting, GM indicated to BionX that it considered BionX to be in default of its contractual obligations under the Purchase Orders. Further, GM advised BionX that it would hold BionX accountable for damages incurred, including lost volume and higher costs flowing from urgent resourcing.²³
30. Following the meeting, GM sent BionX a letter advising, among other things, that BionX is in material breach of its contractual obligations under the Purchase Orders, insolvent, and is refusing to provide GM with the necessary assurances that it can deliver the Drive Units.²⁴

F. GM terminates its Contractual Relationship with BionX

31. By February 23, 2018, BionX had failed to remedy its defaults or initiate the supply of the Drive Units. Accordingly, on February 23, 2018, at 9:54 a.m. GM's legal counsel sent a letter (the "**Termination Letter**") to BionX to advise it that GM:

¹⁹ Wilson Affidavit, para. 18, Ex. A, Tab 6, Email dated November 1, 2017, from Scott Wilson to Fred and Paul Gingl.

²⁰ Wilson Affidavit, para. 19, Ex. A, Tab 7, Email dated November 2, 2017, from Paul Gingl to Scott Wilson.

²¹ Wilson Affidavit, paras. 20 to 24, Ex. A, Tabs 8, 9, 10, 11 and 12.

²² Wilson Affidavit, paras. 25 and 26.

²³ Wilson Affidavit, para. 27.

²⁴ Wilson Affidavit, para. 28.

- a) is terminating the Purchase Orders;
- b) is terminating its contractual relationship with BionX; and
- c) will be attending at the Premises on Monday, February 26, 2018, to remove the Tooling and Equipment.²⁵

32. On February 23, 2018, at 8:04 p.m., Fred sent an email in response to the Termination Letter. The email advises, among other things, that:

- a) BionX agreed it is required under the Terms and Conditions to release to GM the Tooling and Equipment furnished by GM, or for which GM reimbursed BionX;
- b) Fred was uncertain if GM had reimbursed BionX for all of the Tooling and Equipment and required additional time to review BionX's records; and
- c) GM could attend on Monday, February 26, 2018, to review the Tooling and Equipment in order for the parties to determine what GM could later remove from the Premises.²⁶

G. The Receiver is appointed over BionX

33. On February 23, 2018, at 6:06 p.m. GM received an application record from Stronach Consulting Corp. ("**Stronach**"), that disclosed Stronach would be bringing an application on February 27, 2018 to seek the Court appointment of the Receiver over BionX. The application record confirmed that BionX consented to the appointment of the Receiver and that the Receiver would seek to conduct a sales process of BionX.²⁷

34. On February 24, 2018, GM's legal counsel sent the Receiver an email to confirm that:

- a) the Tooling and Equipment remains the property of GM;
- b) GM would pay any amount owing on the Tooling and Equipment into Court;
- c) GM would attend on February 26, 2018, at the Premises to take an accounting of the Tooling and Equipment; and
- d) GM would coordinate with the Receiver to attend at the Premises during the week of February 26th to remove the Tooling and Equipment.²⁸

²⁵ Wilson Affidavit, para. 30.

²⁶ Wilson Affidavit, para. 32, Ex. A, Tab 15, email dated February 23, 2018, from Fred Gingl to Kim Ferreira.

²⁷ Wilson Affidavit, para. 35, Ex. A, Tab 17, Notice of Application.

²⁸ Wilson Affidavit, para. 36, Ex. A, Tab 18, Email dated February 24, 2018, from Kim Ferreira to Michael Creber.

35. On February 25, 2018, counsel for the Receiver sent an email in response. The email advised, among other things, that the Receiver understood that GM would attend at the Premises on Monday, February 26, 2018, to "*look at the tooling and equipment your client claims is its property, but not touch or label anything.*"²⁹
36. Counsel for BionX sent an email shortly thereafter that confirmed the Receiver's comments reflected BionX's understanding.³⁰
37. Counsel for GM then sent an email to counsel for the Receiver and BionX to confirm that GM would attend at the Premises on the morning of February 26, 2018, to inspect and taken an accounting of the Tooling and Equipment.³¹
38. On February 27, 2018, the Court granted the order to appoint the Receiver over BionX.³²
39. After its appointment, the Receiver advised GM that it required additional time to review the assets of BionX to determine whether the Tooling and Equipment did in fact belong to GM.³³

H. The Receiver and GM review the Tooling and Equipment

40. From February 27, 2018 to March 5, 2018, GM representatives attended at the Premises and worked diligently with the Receiver to identify the Tooling and Equipment, reconcile payment of the Tooling and Equipment, and prepare the Tooling and Equipment for GM removal.³⁴

I. The Invoices 1 to 18 Tooling and Equipment

41. During GM's attendance at the Premises, GM and the Receiver reviewed, reconciled, and confirmed, among other things, that GM made payment for BionX invoices 1 to 18 ("**Invoices 1 to 18**"). BionX issued Invoices 1 to 18 to GM, from April 2016 to October 31, 2017. Invoices 1 to 18 relate to, among other things, completed pieces of the Tooling and Equipment.³⁵

²⁹ Wilson Affidavit, paras. 37 and 38, Ex. A, Tab 19 and 20, Emails from Steve Weisz and Jane Dietrich to Kim Ferreira.

³⁰ Wilson Affidavit, para. 38.

³¹ Wilson Affidavit, para. 39.

³² Supplemental Affidavit of Scott T. Wilson, sworn March 8, 2018 ("**Suppl. Wilson Affidavit**"), para. 2, Ex. A, Tab 1, Appointment Order.

³³ Suppl. Wilson Affidavit, para. 3.

³⁴ Suppl. Wilson Affidavit, para. 4.

³⁵ Suppl. Wilson Affidavit, para. 5.

42. GM issued payment to BionX for Invoices 1 to 18 from April 2016 to December 12, 2017 and reimbursed BionX in full for the Tooling and Equipment ("**Invoice 1 to 18 Tooling and Equipment**") identified by Invoices 1 to 18.³⁶
43. Pursuant to the Terms and Conditions, upon GM reimbursing BionX for the cost of the Invoice 1 to 18 Tooling and Equipment, GM becomes the sole owner of the tooling and equipment.³⁷

J. The Amount the Receiver Says is Owing

44. On March 5, 2018, counsel for the Receiver sent GM's counsel an email. In the email, counsel advised that the Receiver was seeking additional information regarding Stronach Consulting Group's claim that GM owed the amount of \$4,416,491 (the "**Disputed Payable**") to BionX for "*the tooling and equipment and other commitments*". In support of the amount, counsel attached a statement with supporting documentation (the "**Supporting Documents**").³⁸
45. The Supporting Documents do not reference any amount owed by GM to BionX for the Invoice 1 to 18 Tooling and Equipment or make any claims for amounts owing under Invoices 1 to 18.³⁹
46. On March 5, 2018, GM's counsel sent the Receiver two emails that advised:
- a) the Disputed Payable referenced by the Receiver included items outside of the Tooling and Equipment, which is not at issue in its motion;
 - b) GM disputed many aspects of the Disputed Payable and that GM had a significant damage claim that had to be taken into consideration against the Disputed Payable;
 - c) the Receiver and GM could deal with the Disputed Payable and the setoff claim on a separate motion; and
 - d) GM had prepared an updated spreadsheet (the "**Updated Spreadsheet**") to reflect payment and amounts owing for the Tooling and Equipment, which GM sought to remove.⁴⁰

³⁶ Suppl. Wilson Affidavit, paras. 6 and 7, Ex. A, Tab 2, Updated Spreadsheet Describing the Tooling and Equipment, Payment and Location.

³⁷ Suppl. Wilson Affidavit, para. 9, Ex. A, Tab 3, Section 19 of the Terms and Conditions.

³⁸ Suppl. Wilson Affidavit, para. 10 and 11, Ex. A, Tab 4 and 5.

³⁹ Suppl. Wilson Affidavit, Ex. A, Tab 5, BionX- Documentation re Outstanding GM Payments.

⁴⁰ Suppl. Wilson Affidavit, para. 12, Ex. A, Tab 6, Emails dated March 5, 2018, from Kim Ferreira to Steven Weisz.

47. On March 6, 2018, the parties attended at a chambers appointment to address GM's underlying motion. The Receiver advised that it had reviewed the Updated Spreadsheet.
48. The Receiver thought that it made sense for the Receiver and GM to again attend at the Premises and reconcile the amounts owed. GM agreed to the Receiver's suggestion.⁴¹

K. Receiver Refuses to Release the Tooling and Equipment that GM owns

49. On the afternoon of March 6, 2018, GM representatives attended at the Premises with the Receiver's representative. The parties reviewed, among other things, the Updated Chart and identified all of the payments made by GM, including the payments made by GM under Invoices 1 to 18. The Receiver agreed that GM owed no amounts under Invoices 1 to 18.⁴²
50. The Receiver, however, advised GM that it would not permit GM to remove any of the Tooling and Equipment, unless GM paid the Disputed Payable in full.⁴³

L. GM requests only the Invoice 1 to 18 Tooling and Equipment

51. On March 7, 2018, counsel for GM sent an email to the Receiver and its counsel. In the email, counsel advised the Receiver that when the parties attend before the Court on March 9, 2018, that GM will only seek an Order to permit GM to remove the Invoice 1 to 18 Tooling and Equipment. Counsel confirmed that GM paid BionX for the Invoice 1 to 18 Tooling and Equipment, attached an updated spreadsheet to confirm the date of the invoices and corresponding GM payment, and, accordingly, asked that the Receiver consent to the removal of the Invoice 1 to 18 Tooling and Equipment.⁴⁴
52. On March 8, 2018, counsel for the Receiver responded to advise, among other things, that the Receiver would not consent to the limited relief requested.⁴⁵

M. Balance of Convenience and Irreparable Harm

53. If the Receiver prevents GM from gaining possession, custody, and control of the Invoice 1 to 18 Tooling and Equipment then this will cause GM monumental and irreparable damage.⁴⁶

⁴¹ Suppl. Wilson Affidavit, para. 13.

⁴² Suppl. Wilson Affidavit, para. 14.

⁴³ Suppl. Wilson Affidavit, para. 15.

⁴⁴ Suppl. Wilson Affidavit, para. 16, Ex. A, Tab 7, Email dated March 7, 2018 from Kim Ferreira to Steven Weisz.

⁴⁵ Suppl. Wilson Affidavit, para. 17, Ex. A, Tab 8, Email dated March 8, 2018, from Steven Weisz to Kim Ferreira.

⁴⁶ Wilson Affidavit, para. Suppl. Wilson

54. GM is under contract with the Chinese Manufacturer to deliver the Drive Units for incorporation into the E-Bikes. The Chinese Manufacturer has reserved production time to manufacture and assemble the complete E-Bikes. Accordingly, GM needs to recover, at the very least, the Invoice 1 to 18 Tooling and Equipment to resource the supply of the Drive Units to an alternate supplier.⁴⁷
55. If GM fails to deliver the Drive Units to Chinese Manufacturer, then this will cause a breakdown in the manufacturing relationship with Chinese Manufacturer and threaten GM's ability to deliver the E-Bikes to the commercial market.⁴⁸
56. Further, the Receiver has advised the Court that BionX is no longer in operation and the Receiver intends to conduct a sales process of its assets. The Receiver cannot sell the Invoice 1 to 18 Tooling and Equipment, or any of the Tooling and Equipment, to any other party as it is unique to GM. Accordingly, it has no value to the Receiver or in the sales process.⁴⁹
57. There is no benefit for the Invoice 1 to 18 Tooling and Equipment to remain at the Premises. The Receiver does not require this tooling to determine what amounts might remain owing on the balance of the BionX invoices.⁵⁰

III. ISSUES AND LEGAL ARGUMENT

58. Under Rule 44.01, GM may obtain an interim order for recovery of personal property (otherwise known as a replevin order) on a motion, supported by an affidavit that sets out:
- a) a description of the property sufficient to make it readily identifiable
 - b) the value of the property
 - c) the plaintiff is the owner or lawfully entitled to possession of the property;
 - d) 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.

⁴⁷ Wilson Affidavit, para. 40 to 42.

⁴⁸ Wilson Affidavit, para. 42.

⁴⁹ Suppl. Wilson Affidavit, para. 24.

⁵⁰ Suppl. Wilson Affidavit, para. 25.

59. The affidavit evidence, including the Purchase Orders, provide the requisite description of the property and its value. In addition, GM has provided the description and location of the Invoice 1 to 18 Tooling and Equipment.⁵¹
60. Accordingly, to succeed on its motion for interim recovery, GM must demonstrate that:
- a) There are 'substantial grounds' for the GM's assertion that it is the legal owner or entitled to possession of the Tooling and Equipment;
 - b) There are 'substantial grounds' for its claim that the Tooling and Equipment is being unlawfully detained; and
 - c) The balance of convenience favours GM.⁵²
61. GM is able to satisfy the balance of the requirements to obtain the motion for interim recovery.

A. There are 'Substantial Grounds' that GM is entitled to possession

62. The 'substantial grounds' standard lies between the "*strong prima facie* case" test and "*substantial issue*" test used in injunction cases. In *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.* the court held that the 'substantial grounds' test "requires a high degree of assurance that the plaintiff will be successful at trial."⁵³
63. Cases where there is clear documentation supporting the moving party's position of ownership are more likely to meet the 'substantial grounds' test.⁵⁴ Where there are clear contracts or other documents that show ownership or entitlement to possession, Ontario courts have found that the 'substantial grounds' test is satisfied:
- a) In *E-Zee Rent-To-Own Inc. v. Hopkins*, the Court found the substantial grounds test was met where a rental agreement provided that on termination, the plaintiff was entitled to immediate possession of the property.⁵⁵

⁵¹ Suppl. Wilson Affidavit, Ex. A, Tab 2, Updated Spreadsheet Describing the Tooling and Equipment, Payment and Location.

⁵² *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.* (1996), 45 C.P.C. (3d) 244 (Ont. Gen. Div.) at paras 11, 17 ("*Clark Door*") and 18; *Baca v. Tatarinov*, 2017 ONSC 2935 at para. 27.

⁵³ *Clark Door*, *supra* note at para. 23.

⁵⁴ *Ibid.* at para. 24.

⁵⁵ [2009] O.J. No. 1139 (S.C.J.) at para. 14.

- b) In *Abolins v. Greendale Farm & Garden Ltd.*, the Court found that the 'substantial grounds' test was made out based on the wording of written contracts and leases which gave the moving party a right to possession.⁵⁶
 - c) In *Clark Doors* the Court relied on purchase orders which stated that the tooling/dies at issue were the property of the moving party.⁵⁷
 - d) In *Terraflux Geosynthetic Inc. v. Mansteel New Liskard Inc.* the Court was confronted with a fight over material used for installation of a pond. The Court found that the substantial grounds test was met because the invoice stated that "title to [the goods] remains with the sellers until this account is paid in full" and the issues of credibility were not enough to displace this evidence.⁵⁸
 - e) In *Businex Business Centers (Can.) Inc. v. TR Services Ltd.*, the Court relied on language in rental contracts that gave a supplier the right to remove products upon repudiation.⁵⁹
64. The Purchase Orders and the Terms and Conditions make clear that the Invoice 1 to 18 Tooling and Equipment remains the property of GM. In particular, section 19 of the Terms and Conditions provides that:
- All supplies, materials, tools, jigs, dies, gauges, fixtures, molds, patterns, equipment and other items furnished by Buyer [GM], either directly or indirectly, to Seller [BionX] 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 (Buyers Property)...Buyer shall have the right to enter Sellers premises at all reasonable times to inspect such property and Sellers records with respect thereto. Upon the request of Buyer, Buyer's Property shall be immediately released to Buyer or delivered to Buyer by Seller... Seller waives any lien or other rights that Seller might otherwise have on any of Buyer's Property for work performed on such property or otherwise.⁶⁰
65. In addition, GM paid BionX the amounts under Invoices 1 to 18 in full. GM made the payments to BionX from April 2016 to December 12, 2017. The Receiver has identified

⁵⁶ *Abolins v. Greendale Farm & Garden Ltd.*, [2005] O.J. No. 1616 (S.C.J.) at para. 26.

⁵⁷ *Clark Doors*, supra note at paras. 27-29 and 36.

⁵⁸ [2015] ONSC 2236 (S.C.J.) at paras. 17 and 51-53.

⁵⁹ [1993] O.J. No. 996 (Gen. Div.) at paras. 6 and 14.

⁶⁰ Wilson Affidavit, Ex. A, Tabs 1 to 4, Purchase Orders and Terms and Conditions; Suppl. Wilson Affidavit, Ex. A, Tab 3, Terms and Conditions.

no amounts owing under these invoices. Accordingly, pursuant to the Terms and Conditions, GM is the sole and rightful owner of the Invoice 1 to 18 Tooling and Equipment and it should be immediately released to GM.⁶¹

B. The Receiver will not return the Tooling and Equipment

66. Since the appointment of the Receiver, GM has diligently worked with the Receiver to reconcile any amounts owing for the Tooling and Equipment.
67. In addition, GM has limited the relief sought on its motion to seek an Order allowing GM to remove only the Invoice 1 to 18 Tooling and Equipment, which GM demonstrated to the Receiver, it paid for in full.
68. Despite GM's efforts, the Receiver refuses to allow GM to remove any Tooling and Equipment. The Receiver is not operating the business and there is no rational or compelling reason for it to withhold the Invoice 1 to 18 Tooling and Equipment. Conversely, GM cannot mitigate its damages without the Invoice 1 to 18 Tooling and Equipment.

C. The Balance of Convenience Favours GM

69. The Court must consider the equities and the balance of convenience before granting a replevin order. The Court must consider the effects of both granting the interim order and denying the interim order.
70. Assessing balance of convenience is necessarily contextual. Courts have considered whether the moving party needs the goods to generate income or fulfill other pending contracts⁶², whether the party detaining the property can even use it based on the current situation⁶³ and whether in the case of default under contracts there is any likelihood that the default will continue.⁶⁴
71. Here the balance of convenience favours GM:
 - a) GM needs the Invoice 1 to 18 Tooling and Equipment to ensure that an alternative supplier can provide the Drive Units that BionX did not provide under the Purchase Orders. The Invoice 1 to 18 Tooling and Equipment are vital for a resource supplier

⁶¹ *Ibid.*

⁶² *Baca v. Tatarinov*, 2017 ONSC 2935 at para. 34.

⁶³ *Knew Order Co. v. 2291955 Ontario Inc.*, 2012 ONSC 3091 (S.C.J.) at para. 27.

⁶⁴ *Abolins v. Greendale Farm & Garden Ltd.*, [2005] O.J. No. 1616 (S.C.J.) at para. 27.

to manufacture the Drive Units that GM is obligated to provide to the Chinese Manufacturer. Any further delay resourcing the supply of Drive Units to an alternate supplier threatens the relationship with the Chinese Manufacturer, which will cause GM monumental and irreparable damage. This is not an idle concern. Delays from BionX has already cost GM the ability to introduce the E-Bikes at the European Bike Show.⁶⁵

- b) Further, there is no evidence that the Receiver intends to use any of the Equipment and Tooling and especially the Invoice 1 to 18 Tooling and Equipment. The Receiver intends to conduct a sales process and BionX will no longer be in a position to manufacture parts in the near future. In addition, all of the Tooling and Equipment is specific to GM and, accordingly, has no value to any potential buyers in the sales process.

- 72. GM has an ongoing use and a time sensitive need for the Invoice 1 to 18 Tooling and Equipment. If the Invoice 1 to 18 Tooling and Equipment remains at the Premises it will continue to sit in the warehouse untouched and unused. The balance of convenience requires that a Court grant the return of the Invoice 1 to 18 Tooling and Equipment to GM.

D. No Security is Required

- 73. As part of granting a Rule 44 order, the Court may require the posting of security of as much as twice the amount of the property at issue or such other amount that the Court deems just.
- 74. It is to be noted that there is a broad residual discretion under Rule 44 to make whatever order is just. However, the Rule specifically contemplates that the party obtaining possession may be required to post security. Whether the security is in fact required and, if so, the amount of the security to be ordered is within the discretion of the judge hearing the motion.
- 75. In many cases, where the entitlement and balance of convenience is clear, the court has waived this requirement. In *Abolins v. Greendale Farm & Garden Ltd.*, where the Court was satisfied with an undertaking as to damages.⁶⁶ Similarly, in *Knew Order Co. v.*

⁶⁵ Wilson Affidavit, para. 43.

⁶⁶ [2005] O.J. No. 1616 (S.C.J.) at para. 29

2291955 Ontario Inc., the Court determined that security was not necessary because there were "no serious, irreversible consequences to protect or indemnify against."⁶⁷

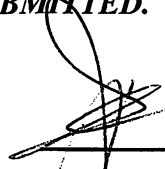
76. GM has demonstrated to the Receiver that it paid BionX invoices 1 to 18. The Receiver does not identify any amounts owing under these invoices and GM is the rightful owner of title to the Invoice 1 to 18 Tooling and Equipment. Accordingly, the Court should not require GM s to post any security, as it owes no amounts for the Invoice 1 to 18 Tooling and Equipment.
77. Further, the Receiver will suffer no damages if GM's limited request to allow it to remove the Invoice 1 to 18 Tooling and Equipment.
78. In addition, GM has advised the Receiver that while it disagrees with the Disputed Payable (which does not relate to the Invoice 1 to 18 Tooling and Equipment) GM remains prepared to work with the Receiver to determine what amounts, if any, remain owing on the balance of the Tooling and Equipment that will remain at the Premises. GM, however, is entitled under the Terms and Conditions to assert, and have considered, its set-off claim from the damages caused to it by BionX's breach of contract.

IV. RELIEF SOUGHT

79. GM requests an Order in the form attached

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 8, 2018



KIM FERREIRA

Of counsel for General Motors LLC and General
Motors Company of Canada

⁶⁷ 2012 ONSC 3091 (S.C.J.) at para. 29,

located at the premises (the "**BionX Premises**") of BionX, municipally known as 455 Magna Dr., Aurora, Ontario and the premises (the "**Magna Premises**") of Magna Closures, municipally known as 521 Newpark Blvd., Newmarket, Ontario, L3Y 4X7 (the BionX Premises and Magna Premises are collectively referred to herein as the "**Premises**");

4. **THIS COURT ORDERS** that GM is not required to post security for the Invoice 1 to 18 Tooling and Equipment.
5. **THIS COURT ORDERS** that all right, title and interest in and to the Invoice 1 to 18 Tooling and Equipment vests absolutely in the GM, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice McEwen dated February 27, 2018; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system (all of which are collectively referred to as the "**Encumbrances**") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Invoice 1 to 18 Tooling and Equipment are hereby expunged and discharged as against the Invoice 1 to 18 Tooling and Equipment;
6. **THIS COURT ORDERS** that BionX, the Receiver and any person(s) appearing to be in control of the Premises shall immediately release and deliver up the Invoice 1 to 18 Tooling and Equipment to GM;
7. **THIS COURT ORDERS** that BionX, the Receiver, and any person(s) appearing to be in control of the Premises shall allow GM and/or its authorized representatives immediate access to the Premises to inspect, account for, load, remove and transport Invoice 1 to 18 Tooling and Equipment from the Premises without restriction;
8. **THIS COURT ORDERS** that BionX, the Receiver, and any person(s) appearing to be in control of the Premises shall allow GM and/or its authorized representatives immediate access, following the granting of this Order, to the Premises at any time, and on any day, with or without the assistance of the Receiver, the police, and any police service or peace officer may be notified and requested to attend at the Premises to keep the peace at the

execution of this Order but the presence of the police shall not be for the purpose of compelling or requiring entry to the Premises and any police service or peace officer in attendance shall retain his or her discretion to decide whether to arrest or remove any person pursuant to this Order;

9. **THIS COURT ORDERS** that BionX, the Receiver, and any person(s) appearing to be in control of the Premises shall take all necessary and reasonable steps to preserve and protect the Tooling and Equipment until such time as GM or its representatives have safely and in orderly fashion inspected, accounted for, loaded and removed the Invoice 1 to 18 Tooling and Equipment from the Premises;
 10. **THIS COURT ORDERS** that BionX, the Receiver, and any person(s) appearing to be in control of the Premises shall provide all reasonable and necessary assistance to GM in its efforts to take possession of the Invoice 1 to 18 Tooling and Equipment;
 11. **THIS COURT ORDERS** that this Order shall be without prejudice to GM's rights to make a claim against BionX in, but not limited to, the Receivership in respect of the damages caused to GM by BionX, including for, among other things, the legal fees incurred by GM to recover the Invoice 1 to 18 Tooling and Equipment.
-

Schedule "A"

BETA ED&D PURCHASES CONTRACT - SPOT BUY PO #4300237222

Inventory

Dedicated GM Equipment & Tools / BETA tools (Line Item 5000410)

GM Owned Tooling
(pick up)

All values
identified in
\$CAD

	02-Mar-18	BionX Invoice	Physical count	Ready to Ship	EQUIPMENT COMPLETED AND PAID FOR:	Qty	Invoice Number	Location (as of 02MAR18)	Invoice Date	Payment Date	Balance Remaining on Supplier Invoice
A	✓	9	5	✓	Battery Testers	12	SI022804 (P10) 4	BionX	03-Mar-17	18-Apr-17	-
B	✓	✓	✓	✓	Motor Dyno, Drive Unit Performance (In-House) (Equipment Tag: Project #J5699-1)	1	SI026642 (P7) SI022805 (P11) SI023415 (P13)	BionX	28-Oct-16 06-Mar-17 10-May-17	06-Dec-16 18-Apr-17 06-Jun-17	- - -
C	✓	✓	✓	✓	Motor Dyno, Motor Performance (In-House) (Equipment Tag: Project #J5699-2)	1	SI026642 (P7) SI022306 (P8) SI025192 (P15)	BionX	28-Oct-16 20-Dec-16 31-Aug-17	06-Dec-16 31-Jan-17 19-Sep-17	- - -
Attached to equipment above	✓	✓	✓	✓	Transformer on equipment (Dyno)	1	SI023414 (P12)	Magna	10-May-17	06-Jun-17	-
	✓	✓	✓	✓	Transformer on durability test rig (Durability Test Rig& Motor Durability Rig)	2	SI022805 (P11)	Magna	06-Mar-17	18-Apr-17	-
	✓	✓	✓	✓	Transformer for Optimus Dyno on Motor Dyne at Magna	1	SI025192 (P15)	BionX	31-Aug-17	19-Sep-17	-
	✓	✓	✓	✓	Encoder on equipment motor dyne	3	SI022804 (P10)	Magna	03-Mar-17	18-Apr-17	-
	✓	✓	✓	✓	Encoder on equipment motor dyne	2	SI025192 (P15)	BionX	31-Aug-17	19-Sep-17	-
	✓	✓	✓	✓	Power Supply Motor Test Dyno	1	SI022805 (P11)	BionX	06-Mar-17	18-Apr-17	0
											0

Inventory					Material Cost Pass Through (Line Item 5000210)						
	02-Mar-18	BionX Invoice	Physical count	Ready to Ship		Qty	Invoice	Location	Invoice Date	Payment Date	Balance Remaining on Supplier Invoice
1	✓	✓	✓	✓	Drive Unit tear downs (located in BionX Benchmark Area); INCLUDES BIKE FRAMES		SI019473 (P1) - SI021722 (P7)	BionX	Spending from April 2016 ~ Dec 2016		-
1A	✓	✓	✓	✓	Benchmarking Bike A - BROSE	1	SI019473 (P1)				
1B	✓	✓	✓	✓	Benchmarking Bike B - Kalkhoff - KALKHOFF	1	SI019473 (P1)				
1C	✓	✓	✓	✓	Benchmarking Bike C - Cube Reaction Hybrid 16 - BOSCH	1	SI019473 (P1)				
1D	✓	✓	✓	✓	Benchmarking Bike D - EVO Steps MD1 - SHAMANO	1	SI019473 (P1)				
1E	✓	✓	✓	✓	Benchmarking Bike E - WL I-Rider Intercycle - YAMAHA	1	SI020279 (P3)				
1F	✓	✓	✓	✓	Benchmarking Bike F - Univega - (N/A, In tact)	1	SI020818 (P4)				
1G	✓	✓	✓	✓	Benchmarking Bike G - Victoria e-Urban - TRANS X PST	1	SI020818 (P4)				
1H	✓	✓	✓	✓	Benchmarking Bike H - Haibike Trekking - BOSCH	1	SI020818 (P4)				
1I	✓	✓	✓	✓	Computrainer for Benchmarking	1	SI019473 (P1)				
4	✓	✓	✓	✓	Gear Test Rig	1	SI023415 (P13)	BionX	10-May-17	06-Jun-17	-
5	✓	✓	✓	✓	Yokogawa Precision Power Analyzer	1	SI022307 (P9)	BionX	20-Dec-16	31-Jan-17	-

6		✓			Power Supplies [T-Metrics Lambda 50-30-LAN (on durability rigs) \$23,096 (2,887)	8	SI022804 (P10)	BionX	03-Mar-17	18-Apr-17	-
8		✓	✓	✓	Dyno - environmental test assembly station (17,390) (holds drive unit)	1	SI025517 (P16)	Magna	14-Sep-17	12-Dec-17	-
9	✓	✓	✓	✓	SLS models	1	SI022805 (P11)	BionX	06-Mar-17	18-Apr-17	-
10	✓	✓	✓	✓	Bosch bikes - (5) Cube Touring Hybride 400 Blue & Blue	5	SI025517 (P16)	BionX	14-Sep-17	12-Dec-17	-
11	✓	✓			10 samples of each cover including cost of coil	1	SI022805 (P11)	BionX	06-Mar-17	18-Apr-17	-
12	✓	✓			SLA model battery components Optimus show bike (4) end caps / (6) cell holders	10	SI022307 (P9)	BionX	20-Dec-16	31-Jan-17	-
20	✓	✓	✓	✓	floating gear ring test	1	SI022804 (P10)	BionX	03-Mar-17	18-Apr-17	-
22	✓	✓	3	✓	OPTC000210 (7) Can USB adaptor	7	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
23	✓	✓	✓	✓	miniature triaxial accelerometer @ EOL	1	SI023414 (P12)	BionX	10-May-17	06-Jun-17	-
32	✓				(3) Can USB adaptors	3	SI022805 (P11)	BionX	06-Mar-17	18-Apr-17	-
33	✓	✓	✓		BMX Singl Cassette Cogs Steel 15 Tooth, Sugino Track Chain Ring Black on dyno 4 & 5	14	SI025191 (P14)	BionX	31-Aug-17	19-Sep-17	-
34	✓	✓			OPTC0000289 - adapter stand - dyno showbike motor	1	SI023415 (P13)	BionX	10-May-17	06-Jun-17	-
37					CAN USB adaper includes drivers & 2 cables	2	SI023414 (P12)	BionX	10-May-17	06-Jun-17	-
38		✓			Misc items - Control cards with piccolo, debug probes	1	SI022804 (P10)	BionX	03-Mar-17	18-Apr-17	-
41	✓	✓	✓	✓	OPTA000003 Ultra-Linear Measurement Condenser Microphone Electronics	3	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
42	✓	✓	✓	✓	Misc items - Control cards with piccolo, debug probes	1	SI022805 (P11)	BionX	06-Mar-17	18-Apr-17	-
43	✓	✓	✓	✓	OPTA000003 Phantom power supply - NVH Test Equip	3	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
44		✓			BAC TTL Communication Harness - NVH Test Equip	2	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
46		✓	✓		OPTA000003 Acoustical wedge foam panels (glued into cabinet; permanently affixed)	12	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
47	✓	✓	✓	✓	Premium phantom cables xlr female to bnc male unbalanced cable	3	SI026114 (P18)	BionX	31-Oct-17	12-Dec-17	-
48	✓	✓	✓	✓	Ricardo units ** CONSIGNMENT **	4	N/A	BionX	CONSIGNMENT		-
50	✓	✓	✓	✓	GM Bike Frame ** CONSIGNMENT **	1	N/A	BionX	CONSIGNMENT		-
53	✓	✓	✓		Beta Drive Units - Completed Development Validation	26	SI025192 (P15)	BionX	31-Aug-17	19-Sep-17	-
											-

Total

-

GM Owned Manufacturing Tools PO# #4300237222 SODW Defined: Section 11

[illegible]

SCHEDULE "A"

List of Authorities

1. *Abolins v. Greendale Farm & Garden Ltd.*, [2005] O.J. No. 1616 (S.C.J.)
2. *Baca v. Tatarinov*, 2017 ONSC 2935
3. *Businex Business Centers (Can.) Inc. v. TR Services Ltd.*, [1993] O.J. No. 996 (Gen. Div.)
4. *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.* (1996), 45 C.P.C. (3d) 244 (Ont. Gen. Div.)
5. *E-Zee Rent-To-Own Inc. v. Hopkins* [2009] O.J. No. 1139 (S.C.J.)
6. *Knew Order Co. v. 2291955 Ontario Inc.*, 2012 ONSC 3091 (S.C.J.)
7. *Terrafix Geosynthetic Inc. v. Mansteel New Liskard Inc.*, [2015] ONSC 2236 (S.C.J.)

SCHEDULE "B"

STATUTES AND REGULATIONS

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

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. R.S.O. 1990, c. C.43, s. 104.

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

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).

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. R.R.O. 1990, Reg. 194, r. 44.04 (2).

(3) Where the bond is to be given by a person other than an insurer licensed under the Insurance Act to write surety and fidelity insurance, the person giving the bond shall first be approved by the court. R.R.O. 1990, Reg. 194, r. 44.04 (3); O. Reg. 570/98, s. 2.

SETTING ASIDE ORDER

44.05 The court on motion may set aside or vary an interim order for the recovery of possession of personal property or stay enforcement of the order. R.R.O. 1990, Reg. 194, r. 44.05.

RELEASE OF SECURITY

44.06 Any security furnished pursuant to an order made under rule 44.03 may be released on the filing of the written consent of the parties or by order of the court. R.R.O. 1990, Reg. 194, r. 44.06.

DUTY OF SHERIFF

44.07 (1) Before proceeding to enforce an interim order for the recovery of possession of personal property, the sheriff shall ascertain that any security required by the order has been given. R.R.O. 1990, Reg. 194, r. 44.07 (1).

(2) The sheriff shall serve the order on the defendant when the property or any part of it is recovered or as soon thereafter as is possible. R.R.O. 1990, Reg. 194, r. 44.07 (2).

(3) Where the sheriff is unable to comply with the order, or it is dangerous to do so, the sheriff may move for directions from the court. R.R.O. 1990, Reg. 194, r. 44.07 (3).

(4) The sheriff shall, without delay after attempting to enforce the order and in any event within ten days after service of the order, report to the plaintiff on what property has been recovered and, where the sheriff has failed to recover possession of all or part of the property, on what property has not been recovered and the reason for his or her failure to recover it. R.R.O. 1990, Reg. 194, r. 44.07 (4).

WHERE DEFENDANT PREVENTS RECOVERY

44.08 Where the sheriff reports that the defendant has prevented the recovery of all or part of the property, the court may make an order,

- (a) directing the sheriff to take any other personal property of the defendant, to the value of the property that the sheriff was prevented from recovering, and give it to the plaintiff; and
- (b) directing the plaintiff to hold the substituted property until the defendant surrenders to the plaintiff the property that the sheriff was prevented from recovering. R.R.O. 1990, Reg. 194, r. 44.08.

STRONACH CONSULTING CORP.
Applicant

-and- BIONX CANADA INC.
Respondent

No. CV-18-592741-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDINGS COMMENCED IN
TORONTO

FACTUM
OF THE MOVING PARTIES GENERAL MOTORS LLC AND
GENERAL MOTORS OF CANADA COMPANY

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Lawyers for General Motors LLC
and General Motors of Canada Company

RCP-E 4C (May 1, 2016)