

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

B E T W E E N :

CAISSE POPULAIRE POINTE-AUX-ROCHES-TECUMSEH INC.

Plaintiff

- and -

**G.I. FARMS INC., VANTEC USA ONTARIO INC., 2287188 ONTARIO INC., 2027512
ONTARIO INC. and 1690169 ONTARIO INC.**

Defendants

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985. c.B-3, AS AMENDED, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

**AMENDED
FACTUM OF THE RECEIVER
(Distribution and Discharge Order)
(returnable July 16, 2021)**

LERNERS LLP
225 King Street West, Suite 1500
Toronto, ON M5V 3M2

Domenico Magisano LS#: 45725E
Tel: 416.601.4121
E-mail: dmagisano@lerners.ca

Spencer Jones LS#: 77350U
Tel: 416.601.2358
Email: sjones@lerners.ca

Lawyers for the Receiver

TO: THE ATTACHED SERVICE LIST

SERVICE LIST

TO: **HARRISON PENSA LLP**

450 Talbot Street
London, ON N6A 4K3

K. Daniel Reason

Tel: 519.661.6725
Fax: 519.667.3362
E-mail: dreason@harrisonpensa.com

Lawyers for the Applicant

AND TO: **KOZLOWSKI & COMPANY**

5065 Forest Hill Drive
Mississauga, ON L5M 5A7

Christopher Kozlowski

Tel: 905.569.9400
Fax: 905.608.9400
E-mail: kozandcom@gmail.com

Lawyers for the Respondents

AND TO: **BDO CANADA LIMITED**

25 Main Street West, suite 805
Hamilton, ON L8P 1H1

Christopher Mazur

Tel: 905.524.1008
Fax: 905.570.0249
E-mail: cmazur@bdo.ca

Darren Griffiths

Tel: 905.524.1008
Fax: 905.570.0249
E-mail: dgriffiths@bdo.ca

Receiver of the Respondents

AND TO: **KIRWIN PARTNERS LLP**

423 Pelissier Street
Windsor, ON N9A 4L2

Nick Soulliere / Paul Layfield

Tel: 519.255.9840
Fax: 519.255.1413
E-mail: nsoulliere@kirwinpartners.com / playfield@kirwinpartners.com

Lawyers for 2547950 Ontario Inc. and Stefano Riolo

AND TO: **YOKER & AROCA PROFESSIONAL CORPORATION**
1357 Ottawa St
Windsor, ON N8X 2E9

Stephen Yoker
Tel: 226.674.1120
Fax: 226.674.1121
E-mail: steve@legalfocus.ca

Lawyers for G.I. Farms Inc. regarding G.H.C Greenhouse Construction Ltd. claim

AND TO: **FARHAT & ASSOCIATES LAW FIRM**
1 Hanna Street West
Windsor, ON N8X 1C7

Ryan T. MacKenzie
Tel: 519.255.4382
Fax: 519.915.7349
E-mail: rmackenzie@farhatlaw.ca

Lawyers for G.H.C. Greenhouse Construction Ltd.

AND TO: **CANADA REVENUE AGENCY**
c/o Department of Justice
Ontario Regional Office
the Exchange Tower, Box 36
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Diane Winters
E-mail: diane.winters@justice.gc.ca

AND TO: **MINISTRY OF FINANCE**
Legal Services Branch
33 King Street West, 6th Floor
Oshawa, ON L1H 8H5

Insolvency Unit
E-mail: insolvency.unit@ontario.ca

AND TO: **2286514 ONTARIO INC.**
1813 Talbot Road, Box 359
Ruthven, ON N0P 2G0

Frank Porrone
E-mail: fporrone40@gmail.com

AND TO: **G.I. FARMS INC.**
2980 South Talbot Road
Cottam, ON N0R 1B0

Frank Porrone
E-mail: fporrone40@gmail.com

PART I - INTRODUCTION

1. BDO Canada Limited, in its capacity as receiver (“**BDO**” or the “**Receiver**”) of the undertaking, property, and assets of G.I. Farms Inc. (“**G.I. Farms**” or the “**Debtor**”), brings this motion for, *inter alia*, an order:

(a) approving the sixth and final report of the Receiver dated June 8, 2021 (the “**Final Report**”);

(b) that the Receiver's interest in the \$70,679.90 currently paid into court in Windsor, Ontario (the “**Court Funds**”) for Court File No. CV-14-21266 be assigned to Caisse Populaire Pointe-Aux-Roches-Tecumseh Inc. (“**the Caisse**”);

(c) approving the final fees and disbursements of the Receiver and its counsel as set out in the Final Report;

(d) authorizing and approving the proposed final distribution (the “**Final Distribution**”); and,

(e) approving the discharge of the Receiver upon its completion of the Distribution and other remaining administrative duties as outlined in the Order.

PART II - THE FACTS

A. The Receiver's Appointment

2. The Debtor was the owner of certain real property located at 2980 South Talbot Road, Cottam, Ontario (the “**Property**”) and partially constructed a commercial greenhouse on the Property.¹

¹ Motion Record of the Court Appointed Receiver dated June 24, 2021 (“**MR**”), Tab 2, Sixth and Final Report of the Receiver dated June 8, 2021 (“**Final Report**”), p 10, para 6

3. The Caisse granted the Debtor certain credit facilities (the “**Credit Facilities**”) that were secured by way of a first ranking mortgage over the Property. On December 15, 2017, the Caisse brought a motion seeking to appoint BDO as receiver of the debtor’s assets, undertakings, and properties.²

4. On December 20, 2017, the Honourable Justice Templeton appointed BDO as Receiver of the Debtor (the “**Appointment Order**”). At the time of the Receiver’s appointment on December 20, 2017, the Debtor was indebted to the Caisse in the amount of \$6,338,271.52.³

B. The Denva APS

5. The Property was the Debtor’s primary asset. The Receiver extensively marketed the Property for sale and a purchaser, Denva Greenhouses Inc./Woodside Greenhouses Inc. (“**Denva**”), was identified.

6. Pursuant to an Approval And Vesting Order of the Court dated January 22, 2019, the Court approved the proposed Agreement of Purchase and Sale to Denva and provided for the vesting in Denva of the Property and related assets.⁴

7. Despite the sale of the Property, the Debtor remains indebted to the Caisse in the amount of \$3,996,790.55 as of March 18, 2021.⁵

C. G.H.C. Greenhouse Construction Claim

8. G.H.C. Greenhouse Construction (“**GHC**”) commenced an action (Court File No. CV-14-21266) against the Debtor in February 2017 (the “**GHC Claim**”).

² MR, Tab 2, Final Report, p 11, para 7

³ *Ibid*

⁴ MR, Tab 2, Final Report, p 11, paras 8-9

⁵ MR, Tab 2, Final Report, p 11, para 10

9. GHC's claim, which was advanced pursuant to the *Construction Lien Act*, included a lien on title to the Property that was discharged as a result of the Debtor posting \$70,679.90 into court in Windsor, Ontario. The Court Funds remain in possession of the court in Windsor.⁶

10. GHC's lien was registered on title to the Property after the Caisse had advanced substantially all of the indebtedness owing to it by the Debtor.

D. Activities of the Receiver

11. Since being appointed, the Receiver has:

(a) completed the closing of the Property, including the closure and final payment of various utility, insurance, security, and maintenance accounts previously established by the Receiver in order to preserve and protect the Property, and distributed \$4,085,143.75 to the Caisse on February 6, 2019;

(b) completed a further interim distribution to the Caisse in the amount of \$168,472.13 representing a post-receivership HST refund on September 19, 2019; and

(c) completed a further interim distribution to the Caisse representing the settlement of an action commenced by the Debtor prior to the receivership.⁷

12. While the Receiver has resolved many of the litigation matters involving the Debtor, it has not resolved the GHC Claim, nor come to an agreement with GHC regarding distribution of the Court Funds.

13. The Receiver, in consultation with the Caisse, has agreed to assign the Receiver's interest, if any, in and to the GHC Claim to the Caisse. The Caisse will determine, at its sole

⁶ MR, Tab 2, Final Report, pp 14-15, paras 32-37

⁷ MR, Tab 2, Final Report, pp 11-12, paras 11-19

cost and expense, whether to proceed with the GHC Claim, and/or seek a release of the Court Funds.

14. The Caisse is the only secured creditor with an economic interest in the Court Funds.

15. Beyond the GHC Claim, the only remaining activities for the Receiver include approval and payment of the final distribution to the Caisse, the payment of fees and disbursements of the Receiver, and the payment of the Receiver's counsel's, Lerners LLP, fees and disbursements.⁸

PART III - ISSUES AND THE LAW

A. The Assignment of the Court Funds

16. The Receiver seeks an Order that the Debtor's interest in the GHC Claim be assigned to the Caisse so that it may pursue the interest in the Court Funds directly. Otherwise, the Receiver would need to bring a motion in Windsor to have the Court Funds released, all of which is either payable to GHC or the Caisse. Both the Caisse and the Receiver agree that this would not be a cost effective remedy to the issue.

17. As noted, the Caisse is a secured creditor of the Debtor. Pursuant to s. 62(1)(a) of the *Personal Property Security Act*, the Caisse has a right to take possession of any collateral by any method provided by law upon default under a security agreement.⁹ The Court Funds should be recognized as collateral as defined by the PPSA.¹⁰ The granting of the requested assignment would confirm the rights of the Caisse as enumerated by the PPSA to take possession of the Court Funds while permitting GHC to advance its claim (if any) to the Court Funds.

⁸ MR, Tab 2, Final Report, p 15, para 38

⁹ R.S.O. 1990, c. P.10 at s. 62(1)(a) (the "PPSA")

¹⁰ Ibid at s. 1

18. This court has the inherent jurisdiction to make the requested assignment. The Ontario Divisional Court has found that “things in action” in the definition of “property” in s. 2 of the *Bankruptcy and Insolvency Act*¹¹ is sufficiently broad to include choses in action and can be assignable by statute.¹² The definition states:

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;¹³

19. The Court found that a genuine pre-existing commercial interest will suffice for the assignment. The commercial interest is in the financial sense, and need not arise from commercial dealings in the narrow sense.¹⁴

20. A creditor of a bankrupt has been found to have sufficient financial interest in an action to permit the assignment of interest in same where they would be able to compensate for the loss they have incurred.¹⁵ An assignment to a third party will not lead to a conclusion that such an assignment is champertous and should not be allowed, provided that the party to which the interest is assigned has sufficient commercial interest.¹⁶

21. Similarly, courts have granted receiver’s motions to assign a bankrupt’s interest in actions where there is a sufficient financial interest and the court is satisfied of the potential benefit of the assignment for the receivership.¹⁷

22. As a secured creditor, the Caisse seeks to recoup some of its losses through the payout of the Court Funds, which it states are collateral and in priority to any claim by GHC. The

¹¹ (R.S.C., 1985, c. B-3) (the “BIA”)

¹² *Caisse Populaire Vanier Ltee v. Bales*, (Gen. Div.) 1991 CanLII 7294 (ON SC) at p 11-12 [“**Caisse Populaire Vanier Ltee**”]

¹³ BIA at s. 2

¹⁴ *Supra*, note 11

¹⁵ *Ibid*

¹⁶ *Berry v. Cypost Corp.*, 2004 BCSC 189 at para 13

¹⁷ *Astra Credit Union Ltd. v. Protos International Inc.*, 2006 MBQB 174 at paras 43-48

Caisse's status as a secured creditor is sufficient to establish a commercial interest necessary to allow for an assignment. The Caisse's interest in the Court Funds are to reduce its loss, not to pursue for profit, and thus there can be no claims of champerty.

23. The Receiver submits that the Caisse has a recognized commercial interest in the Court Funds, this Court has the jurisdiction to assign the Receiver's interest in the Court Funds, and that doing so would be the most cost effective manner of resolving this remaining issue.

B. The Receiver's and the Receiver's Counsel's Fees

24. The fees of the Receiver and its counsel, Lerner LLP, should be approved.

25. In determining whether to approve the fees of a receiver and its counsel, the court should consider whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable. Value provided should pre-dominate over the mathematical calculation reflected in the time/hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished.¹⁸

26. As noted in the Final Report, counsel for the Receiver has, among other things, settled three litigation claims involving the Debtor and negotiated a potential resolution of the final remaining claim involving GHC.

27. The Receiver and its counsel's fees and disbursements are fair, reasonable, justified, and accurately reflect the work done by the Receiver and its counsel in the circumstances. The Receiver and its counsel have successfully sold the main asset of the Debtor, the Property, and distributed the funds received to the Caisse. Additionally, all remaining litigation involving the Debtor has been, or will soon be, resolved.

¹⁸ *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras 33 and 45

28. The Caisse, as the only party with an economic interest in the Debtor's estate, does not oppose approval of the Receiver and its counsel's fees and disbursements.

C. Discharge of the Receiver

29. As described in the Final Report, and upon approval of the Final Distribution as detailed therein, the Receiver has substantially completed its mandate as contemplated by the order appointing it and the BIA.

30. Prior to filing the discharge certificate, the Receiver will complete its final activities including:

- (a) ensuring the Receiver's interest in the Court Funds is assigned and released to the Caisse;
- (b) filing the Final Report pursuant to the BIA;¹⁹ and
- (c) coordinating payment of the Final Distribution.

31. Upon payment of the Final Distribution, there will be no remaining material assets subject to this receivership. It is appropriate the Receiver be discharged. There is no opposition to the requested order.

32. The discharge of a receiver is intended to bring finality to the receivership proceedings, and can be granted where there still remains ancillary work to be completed. The discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver.²⁰

¹⁹ BIA, at s. 246

²⁰ *West Face Capital Inc. v. Chieftain Metals Inc.*, 2020 ONSC 5161 at para 20

PART IV - ORDER REQUESTED

33. The Receiver is seeking a Distribution and Discharge Order substantially in the form attached at Tab 3 to the Receiver's Motion Record, including the following terms of distribution:

- (a) the Caisse is assigned the Receiver's interest in the \$70,679.90 currently paid into court in Windsor, Ontario for Court File No. CV-14-21266.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of July, 2021.



Domenico Magisano / Spencer Jones
Lerners LLP

Counsel for the Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Astra Credit Union Ltd. v. Protos International Inc.*, 2006 MBQB 174
2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
3. *Berry v. Cypost Corp.*, 2004 BCSC 189
4. *Caisse Populaire Vanier Ltee v. Bales*, (Gen. Div.) 1991 CanLII 7294 (ON SC)
5. *West Face Capital Inc. v. Chieftain Metals Inc.*, 2020 ONSC 5161

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Personal Property Security Act, R.S.O. 1990, c. P.10

"collateral" means personal property that is subject to a security interest; ("bien grevé")

62 (1) Upon default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

CAISSE POPULAIRE POINTE-AUX-
ROCHES-TECUMSEH INC.
Plaintiff

and

G.I. FARMS INC., VANTEC USA ONTARIO
INC., 2287188 ONTARIO INC., 2027512
ONTARIO INC. and 1690169 ONTARIO
INC.
Defendants

Court File No. CV-869/21

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Proceeding commenced at **LONDON**

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LERNERS LLP
225 King Street West, Suite 1500
Toronto, ON M5V 3M2

Domenico Magisano LS#: 45725E
Tel: 416.601.4121
E-mail: dmagisano@lernalers.ca

Spencer Jones LS#: 77350U
Tel: 416.601.2358
Email: sjones@lernalers.ca

Lawyers for the Receiver