

**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

**FACTUM OF BDO CANADA LIMITED, IN ITS CAPACITY AS COURT APPOINTED
RECEIVER OF G.I. FARMS INC.
(returnable March 22, 2018)**

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PART I - INTRODUCTION

1. By Order of the Honourable Justice Mitchell dated May 30, 2016, BDO Canada Limited ("**BDO**") was appointed as non-CCAA Monitor (in this capacity, the "**Monitor**") of the property, assets and undertaking of all of the Defendants in this proceeding (the "**Monitoring Order**"). The Monitoring Order's powers were expanded by subsequent Orders of the Honourable Justice Hebner and the Honourable Justice Templeton, however the Monitoring Orders did not provide BDO with the authority to take possession of the Defendants' assets¹.
2. On December 20, 2017, the Court appointed BDO as receiver (in this capacity, the "**Receiver**") of much of the property, assets and undertaking of GI Farms Inc. (the "**Debtor**"). The Order appointing the Receiver was entered on December 22, 2017 (the "**Appointment Order**")².
3. Following the Appointment Order, the Receiver was advised that the directing minds of the Debtor were Frank Porrone and Vlad Marchuk³.
4. The Debtor's primary asset is real property municipally known as 2980 Talbot Road South, Kingsville, Ontario (the "**Property**"). Property has two large structures on it: The first is a home that the Receiver understands to be occupied by Mr. Porrone and his family (the "**Porrone Home**") and the second is a 20 acre greenhouse structure together with a 30,000 square foot warehouse

¹ Motion Record of the Receiver, returnable March 22, 2018 ("**RMR**") Tab 2, First Report of the Receiver, dated March 15, 2018 ("**First Report**"), pp 11-2, paras 3 - 5

² RMR, Tab 2, First Report, p 12, para 6

³ RMR, Tab 2, First Report, p 15, para 13

attached to it (the “Greenhouse”)⁴. Of note, the Appointment Order precludes the Receiver from taking possession of the Porrone Home and permits Mr. Porrone and his family to remain in the Porrone Home providing they adhere to certain provisions in the Appointment Order⁵.

5. On this motion, the Receiver seeks various relief as more particularly described in paragraph 10 of the Appointment Order. This factum will focus on three specific prayers for relief therein. Namely:

(a) requiring Mr. Porrone and his family to vacate the Porrone Home by April 15, 2018 and provide possession of the Porrone Home to the Receiver;

(b) an Order directing the Deposit (as hereinafter defined) be delivered to the Receiver forthwith; and

(c) approving the Receiver’s proposed marketing plan as detailed in the First Report.

PART II - THE FACTS

6. The Receiver was appointed over the Debtor’s property, assets and undertaking (and specifically the Porrone Home), pursuant to the Appointment Order. The Appointment Order was preceded by BDO’s appointment as the Monitor of all of the Defendants. As described above, BDO’s powers as the Monitor were expanded on two separate occasions, largely as a result of a lack of cooperation from the Defendants⁶.

⁴ RMR, Tab 2, First Report, p 15, para 14

⁵ RMR, Tab 2, First Report, p 11, para 3, & Appendix “A” Appointment Order, paras 4 - 7

⁶ RMR, Tab 2, First Report, pp 11-12, para 5

7. The Plaintiff ultimately proceeded with its application for the Appointment Order. On December 20, 2017 the Court issued reasons appointing the Receiver and on December 22, 2017 the Court entered the Appointment Order.
8. At the hearing to appoint the Receiver, GI Farms' counsel presented both the Plaintiff and the Court with an executed agreement of purchase and sale (the "APS") between the Debtor, as vendor, and 8040478 Canada Limited ("804"), as purchaser. Subsequent to the Appointment Order, the Receiver discovered that 804 is related to an entity known as the Cross-Pacific Group which is either owned or controlled by Vlad Marchuk.
9. The APS, purportedly accepted by the Debtor on December 14, 2017, contemplated a purchase price (subject to a number of conditions) of \$19,230,000, a closing date of March 15, 2018 and a "non-refundable" deposit of \$50,000 (the "Deposit"). As will be described in further detail below, the APS did not close and, notwithstanding the non-refundable nature of the Deposit, it was never provided to the Receiver⁷.

Interactions with Frank Porrone following the Appointment Order

10. In its capacity as the Monitor, BDO was authorized to retain Elite Security Canada ("Elite") to monitor the Property and specifically ensure that assets were not removed from the Property. After its appointment as the Receiver, BDO asked Elite to commence 24 hour surveillance of the Property. Elite was

⁷ RMR, Tab 2, First Report, pp 26-27, paras 57 & 59

instructed that while they were to secure the Property and the Greenhouse, they were not to have any involvement with the Porrone Home⁸.

11. The Receiver also retained the services of Chris Uszynski and Casey Versnel to act as property managers for the Property⁹.
12. In the days following the Court granting the Appointment Order, Mr. Porrone initiated three separate confrontations with Elite regarding access to the Greenhouse. On two of those occasions, Mr. Porrone only retreated to the Porrone Home when Elite stated that they were being left with no choice but to call local authorities. On one of those instances Mr. Porrone and a gentlemen only known as "Raphael" attempted to force their way into the Greenhouse¹⁰.
13. In addition to Mr. Porrone's interactions with Elite, Mr. Uszynski advised the Receiver that on December 22, 2017 he observed Mr. Porrone following him and his wife and taking pictures of them while they were at a retail establishment in a town near the Property¹¹.
14. While Mr. Porrone's confrontations with the Receiver's representatives subsided in 2018, Mr. Porrone's lack of cooperation with the Receiver, failure to comply with the Appointment Order and obfuscation of the Receiver's attempts to resolve issues tied to the Greenhouse have continued.

⁸ RMR, Tab 2, First Report, p 16, paras 18 & 19

⁹ RMR, Tab 2, First Report, p 18, para 25

¹⁰ RMR, Tab 2, First Report, pp 16-17, paras 21 - 23

¹¹ RMR, Tab 2, First Report, p 18, para 25

15. For example, paragraph 7 of the Appointment Order permits the Receiver access to the Porrone Home every other Wednesday to ensure that the Porrone Home is maintained in accordance with the terms in the Appointment Order. Since the Appointment Order, the Receiver has only been granted infrequent access to the Porrone Home and has provide a variety of excuses for not granting access¹².
16. In addition, Mr. Porrone and his counsel, Daniel Freiheit of Lion Law, have sent numerous e-mails to the Receiver and its counsel regarding purported invasions of privacy by the Receiver's representatives. The Receiver took every e-mail seriously, asking Mr. Porrone and/or Mr. Freiheit for particulars and then investigating each occurrence. In every instance, Mr. Porrone could not provide specifics of his allegations and in at least one instance, the conduct he complained of was directly attributed to "Raphael", the individual who accompanied Mr. Porrone to the Greenhouse in December 2017¹³.
17. Finally, Mr. Porrone has repeatedly inserted himself into the Receiver's attempts to sell the Property by making unfounded statements that could chill the marketplace. For example, Mr. Porrone asked the Receiver for supervised access to the Greenhouse which was provided by the Receiver. Once he exited the Greenhouse he contacted both the Plaintiff and Mr. Marchuk (the principal of 804) suggesting post Appointment Order damage to the Greenhouse. The

¹² RMR, Tab 2, First Report, pp 19-21, paras 28 - 36

¹³ RMR, Tab 2, First Report, p 21, paras 37 - 39

Receiver disputes Mr. Porrone's assertions, but cannot determine whether Mr. Porrone's comments to Mr. Marchuk contributed to 804 not closing on the APS¹⁴.

18. The Receiver served its motion record via e-mail to many of the stakeholders (including Mr. Porrone who is currently not represented by counsel). Within 15 minutes of the Receiver serving its motion record, Mr. Porrone had e-mailed the entire service list again making allegations regarding damage to the Greenhouse¹⁵.
19. Given the foregoing each of the Mortgagees have specifically requested that the Receiver have Mr. Porrone and his family removed from the Porrone Home. It is their belief that his actions are artificially devaluing the Property and thus adversely affecting their recovery¹⁶. Given Mr. Porrone's actions to date, the Receiver agrees with the Mortgagees assessment.

Payment of Deposit to the Receiver

20. As described above, 804 purportedly provided the Debtor with the Deposit, which was non-refundable. Following the Appointment Order, the Receiver's counsel contacted counsel to the Debtor and requested that the Deposit be paid to the Receiver forthwith as it was now property that ought to be in possession of the Receiver and, in any event, is non-refundable¹⁷.

¹⁴ RMR, Tab 2, First Report, pp 22-23, paras 43 - 45

¹⁵ E-mail from Frank Porrone to service list dated March 15, 2018. To be made available at the hearing.

¹⁶ RMR, Tab 2, First Report, pp 21-22, paras 40 & 41

¹⁷ RMR, Tab 2, First Report, pp 26-27, para 59

21. The Debtor's counsel advised that \$35,000 of the Deposit had been delivered, at Mr. Porrone's instructions, to 2286514 Ontario Inc. ("228") on account of services rendered to the Debtor and the remainder was being held by Mr. Freiheit's firm on account of his firm's professional fees¹⁸.
22. On further inquiry by the Receiver, it was discovered that Chrystie Porrone, Frank Porrone's wife, is the Officer and Director of 228. The basis for payment to Ms. Porrone's company was a non-descript invoice, most of which related to payments that were not due until the return date of the Application to appoint the Receiver. No further explanation or documentation has been provided to support the services rendered by 228 to the Debtor¹⁹.
23. Further, as the Deposit would not have been deposited until December 14, 2018, the payment by Mr. Freiheit's firm must have occurred between December 14, 2018 (the date that the Deposit was available to the Debtor) and December 20, 2018 (the date that the Court granted the Plaintiff's application to appoint the Receiver). Put differently, it is probable that Mr. Porrone instructed the Debtor's counsel to pay 228 (ahead of all other creditors) while the Court had reserved on the Application to appoint the Receiver.
24. Receiver's counsel also asked Mr. Freiheit whether the \$15,000 being held by his firm on account of professional fees was for fees incurred prior to the

¹⁸ RMR, Tab 2, First Report, pp 26-27, para 59

¹⁹ RMR, Tab 2, First Report, p 27, paras 60 - 62

Appointment Order or was being held in trust on account of fees and disbursements to be incurred after the Appointment Order²⁰.

25. The distinction is relevant as Mr. Freiheit's firm could claim set-off if the funds were with respect to pre-Appointment Order fees and disbursements. However, after the Appointment Order was granted, the funds in question would vest in the Receiver and there would be an open question as to how the Debtor could instruct counsel post-receivership, particularly as it pertains to using the Debtor's assets²¹.
26. Mr. Freiheit advised that the funds in his trust account represented a retainer against fees and disbursements that had yet to be incurred²². Accordingly, these funds ought to be remitted to the Receiver.

Proposed Marketing Plan

27. Since serving the First Report the Receiver can confirm that the APS did not close, nor did 804 request an extension of time to close the APS. The Receiver is treating the APS as at an end.
28. The Receiver outlines its proposed sales process at paragraphs 90 through 102 of the First Report. As described in the First Report, the Receiver considered three types of sales processes, namely: (i) sale through a commercial real estate

²⁰ RMR, Tab 2, First Report, p 28, para 64

²¹ RMR, Tab 2, First Report, p 28, para 65

²² RMR, Tab 2, First Report, p 28, para 64

agent; (ii) an “invitation for offers” process administered directly by the Receiver; and (iii) a stalking horse bid process²³.

29. As the Greenhouse is not fully constructed, the Receiver also considered whether to market the Property with the Greenhouse as is, or alternatively, whether there would be value in completing the Greenhouse should one of the mortgagees be willing to fund said efforts²⁴.
30. In order to assess, the various sales options the Receiver obtained: (i) estimates to complete construction; (ii) appraisals for the Property; (iii) listing proposals from commercial realtors; and (iv) engineering reports with respect to the Property and the Greenhouse. All of the documents are produced to the Court as part of the Confidential Brief²⁵.
31. The Receiver, was advised that none of the mortgagees wanted to fund the costs associated with completing the Greenhouse. Accordingly, the Receiver is proceeding with a sale of the Property and the Greenhouse in its current condition. The Receiver then discussed the various sales options with the mortgagees of the Property. Each of the mortgagees were offered an opportunity to review the documents contained in the Confidential Brief providing that they first execute a non-disclosure agreement and confirm that they would not be a bidder in the sales process. This step was taken to ensure that a

²³ RMR, Tab 2, First Report, p 34, para 93

²⁴ RMR, Tab 2, First Report, p 34, para 91

²⁵ RMR, Tab 2, First Report, p 34, paras 91 & 94

mortgagee who wishes to be a bidder in the sales process does not receive information in advance of other potential bidders²⁶.

32. The Receiver, after consultation with the mortgagees, is seeking approval for an "invitation for offers" sales process to be conducted by the Receiver directly. The key dates in the Receiver's proposed sales process is contained at paragraph 102 of the First Report. It is the Receiver's hope that a definitive agreement of purchase and sale can be reached by mid-June 2018²⁷.

PART III - ISSUES AND THE LAW

33. While there are a number of matters before the Court, the issues raised in this factum are:

- (a) Does the Receiver have the authority to take Possession of the Porrone Home and remove Mr. Porrone and his family from the Porrone Home;
- (b) Should the Deposit be remitted to the Receiver forthwith; and
- (c) Is the proposed sales process appropriate in the circumstances.

Vacant Possession of Porrone Home

34. It is a generally accepted principle that when the Court appoints the Receiver, the Receiver is entitled to take possession of the property, assets and undertaking subject to the Appointment Order. It is the exception, not the rule, that a Receiver is appointed and, at the same time, advised it may not take possession of an asset, or a particular class of assets.

²⁶ RMR, Tab 2, First Report, p 35, para 95

²⁷ RMR, Tab 2, First Report, pp 35-35, paras 98 - 102

35. The Courts have held that the Receiver's entitlement to possession includes the Receiver's right to vacant possession of residential buildings on real property subject to the Appointment Order. In *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*²⁸ the Court appointed a receiver over the property, asset, and undertaking of a number of entities, including certain real property which contained a home lived in by the principal of the corporate debtors. The Court was faced with the question of whether principal and his family should be able to remain in the home. While holding in the negative, McCarthy J. stated:

In order for the receiver to realize on the assets of the debtors, PwC should be afforded unfettered rights to manage, preserve and market the property. This requires vacant possession of the property within a reasonable period of time...²⁹

36. Later in the decision McCarthy J. held that a "reasonable period of time" was 30 days from the day that His Honour's reasons were released³⁰. Of note, the Appointment Order also contemplates providing Mr. Porrone and his family with 30 days notice to vacate the Property³¹. Finally, the Receiver's motion seeking, amongst other things, vacant possession of the Porrone Home, was served on March 15, 2018, and seeks vacant possession by April 15, 2018.

37. As a gesture of good faith, the Plaintiff's proposed form of Appointment Order permitted Mr. Porrone and his family to remain in the Porrone Home providing that they adhere to the terms of the Appointment Order, including the provisions requiring Mr. Porrone, as a Director and Officer of the Debtor, to cooperate with

²⁸ 2013 ONSC 6809 (hereinafter referred to as "*River Rock*")

²⁹ *River Rock*, para 25

³⁰ *River Rock* at para 25

³¹ RMR, Tab 2, First Report, p 11, para 3, & Appendix "A" Appointment Order, para 7

the Receiver. Mr. Porrone has not adhered to the terms of the Appointment Order and has obfuscated the Receiver's attempts to maximize recovery for the estate.

38. In instances where individuals have been permitted to remain at a premises after the appointment of a receiver, the Courts have had little tolerance for interference with the Receiver's work. In *2027707 Ontario Ltd. v. Richard Burnside & Associates Ltd.*³² the Court referenced the decision of Corbett J. in the same case where the Court first permitted, and subsequently evicted, a person living on a property in receivership. The Court found that the person residing at the Tobermory Lodge (the property subject to a receivership) "had acted in a disruptive manner, contrary to the interests of the Lodge for the purpose of impeding the receivership and as a result evicted him from the property"³³.
39. The Receiver respectfully submits that Mr. Porrone and his family were permitted to occupy the Porrone Home as a concession, not because it was their right. Since Mr. Porrone seems to be impeding the Receiver's work, it appears appropriate to remove Mr. Porrone and his family from the Porrone Home by no later than April 15, 2018.

Receiver's Entitlement to the Deposit

40. The Court has generally taken a dim view of debtors who, while subject to a monitoring order, abscond or cause funds to be diverted without full disclosure to

³² 2016 ONSC 530 (hereinafter referred to as "*Burnside*")

³³ *Burnside*, para 3

the Monitor. In these instances, the Courts have held that it has the inherent power to issue Orders against third parties and repatriate the funds in question.

41. An example of the Court's power to repatriate funds back to the Receiver is *Business Development Bank of Canada v. Aventura II Properties Inc.*³⁴. In *Aventura*, the Receiver discovered that the directing minds of the Debtor purportedly transferred corporate HST refunds to related parties without disclosing to a non-CCAA monitor. When it came to "repatriation" of the HST Refund by the debtor's principal to a related party (in that case the principal's wife), Hainey J. held that:

[the HST Funds] are assets that are subject to the Receivership Order. The Receiver is, therefore, entitled to possession of the HST Funds under the terms of the Receivership Order.

For these reasons the Receiver's motion to repatriate the HST Funds is granted.³⁵

42. The facts in *Aventura* are virtually identical to the facts as between Mr. Porrone, the Debtor and their transfer of \$35,000 to Ms. Porrone and her company, 228. Specifically, the principal of the Debtor made a payment to his spouse (or, in this instance, his spouse's company) without disclosing that payment to the Monitor. After its appointment, the Receiver discovers the payment and demands return of the payment. A court order directing 228 to remit to the Receiver the \$35,000 paid to it by the Debtor (while the Plaintiff's receivership application was under reserve no less) is appropriate in the circumstances.

³⁴ 2016 ONSC 1545, aff'd 2016 ONCA 300 (hereinafter referred to as "*Aventura*")

³⁵ *Aventura*, paras 20 & 21

43. According to Mr. Freiheit, the balance of the Deposit (being \$15,000) is being held in his firm's trust account as a retainer for future legal fees and disbursements that have not been incurred and, given the Appointment Order, likely will not be incurred by the Debtor. Accordingly, it is respectfully submitted that these funds be remitted to the Receiver as well.

Sales Process Approval

44. As described above and in the First Report, the Receiver is recommending an "invitation for offers" process wherein the Receiver will, with the assistance of its Transaction Advisory Services practice group, market and solicit offers for the Debtor's assets, including the Property. The Receiver is not proposing to complete construction of the Greenhouse prior to embarking on a sales process.

45. The Receiver is recommending this form of sales process based on its discussions with the mortgagees together with its assessment of the information contained in the Confidential Brief. Among the Receiver's considerations were:

(a) the mortgagees are not inclined to fund continued construction of the Greenhouse at this time and there is no certainty that completing construction would yield a higher net realization for the stakeholders³⁶;

(b) the Greenhouse is a unique asset with a limited number of potential purchasers which the Receiver believes it can reach with the assistance of its Transaction Advisory Services practice group³⁷;

(c) the Property is not a revenue generating asset at this time and there are significant expenses in maintaining the Greenhouse and the Property.

³⁶ RMR, Tab 2, First Report, p 34, para 91

³⁷ RMR, Tab 2, First report, p 35, para 98

Accordingly, the Receiver is proposing an efficient marketing process that contemplates offers by May 31, 2018³⁸; and

(d) the Receiver believes that its costs will be significantly less than paying a commercial realtor its standard commission rates to market and sell a property of this nature.

46. In *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*³⁹ Brown J. (as he was then) articulated a three part test that Courts should consider when reviewing a sales process in a receivership. The principles enunciated in CCM have been cited with approval by other Courts in Canada as well⁴⁰. Brown J. held that the Court should assess⁴¹:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

47. In CCM, the Court specifically noted that the lack of funding can be an important factor in assessing the method and length of a proposed sales process⁴². The fact that the Property is not an income generating asset and the Receiver is incurring significant expenses in maintaining the Property and the Greenhouse militate in favour of an quick and cost effective sales process. This is particularly so when the primary asset is unique in nature with a relatively small group of prospective purchasers.

³⁸ RMR, Tab 2, First Report, p 36, para 102

³⁹ 2012 ONSC 1750 (hereinafter referred to as "*CCM*")

⁴⁰ see, for example, *Re: Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at paras 20 and 21

⁴¹ *CCM* para 6

⁴² *CCM* para 14

48. For the foregoing reasons it is respectfully submitted that the proposed sales process meets the criteria as outlined by Brown J. in CCM and should be approved.

PART IV - ORDER REQUESTED

49. The Receiver respectfully requests an Order substantially in the form attached at Tab 3 of its motion record. Specifically, the Receiver seeks, amongst other things:

- (a) vacant possession of the Porrone Home;
- (b) payment of the Deposit forthwith; and
- (c) approval of the sales process as outlined at paragraphs 90 through 102 of the First Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2018.



Domenico Magisano
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Lawyer for BDO Canada Limited, in its capacity
as Court Appointed Receiver of G.I. Farms Inc.

SCHEDULE "A"
AUTHORITIES

1. *Caisse Desjardins de Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809
2. *2027707 Ontario Ltd. v. Richard Burnside & Associates Ltd.*, 2016 ONSC 530
3. *Business Development Bank of Canada v. Aventura II Properties Inc.*, 2016 ONSC 1545, aff'd 2016 ONCA 300
4. *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750
5. *Re: Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107

CAISSE POPULAIRE POINT-AUX-ROCHES-TECUMESH INC.
Plaintiff

and

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Defendants

Court File No.: 35-1842432T

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

Proceeding commenced at **LONDON**

**FACTUM OF THE COURT APPOINTED RECEIVER
(RETURNABLE MARCH 22 ,2018)**

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