File No. CI 24-01-45057

**THE KING'S BENCH**
**WINNIPEG CENTRE**

IN THE MATTER OF: *The Family Farm Protection Act*, Chapter F15, C.C.S.M.

AND IN THE MATTER OF: An Application for Leave under Section 9 thereof to commence or continue certain actions or proceedings to realize or otherwise enforce a right, title or interest in farmland under Section 8 thereof.

BETWEEN:

**BANK OF MONTREAL,**

Applicant,

- and -

**GENESUS INC. and CAN-AM GENETICS INC.,**

Respondents.

---

**BRIEF OF THE APPLICANT**

**BEFORE THE HONOURABLE MR. JUSTICE BOCK**

**HEARING DATE: THURSDAY, FEBRUARY 15, 2024 AT 10:00 A.M.**

---


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(File No. 638/400)



FILED FEB 13 2024


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## PART I

## LIST OF DOCUMENTS

1. Notice of Application, filed February 12, 2024;
2. Affidavit of Ed Barrington, affirmed February 9, 2024, filed February 12, 2024, in Manitoba Court of King's Bench File No. CI 24-01-45056

## PART II

## LIST OF AUTHORITIES

**TAB**

1. *The Family Farm Protection Act*, C.C.S.M., Chapter F15, sections 8, 9, and 34(2)
2. *Court of King's Bench Rules,* ManReg 553/88, Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended
3. *Arborg Credit Union Limtied v McIvor*, 2011 MBQB 264
4. *Callidus Capital Corp v Carcap Inc.*, 2012 ONSC 163
5. *Alexander v 2025610 Ontario Ltd.*, 2012 ONSC 3486

## PART III

## POINTS TO BE ARGUED

### Introduction

1. This Application is related to the Notice of Application filed in the Manitoba Court of King's Bench as Court File No. CI 24-01-45056 (the "**Receivership Proceedings**"). In the Receivership Proceedings, the Applicant seeks an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 55 of *The Court of King's Bench Act*, C.C.S.M. c. C280, that BDO Canada Limited be appointed Receiver and Manager (the "**Receiver**"), without security, of all of the assets, undertakings and properties of Genesus Inc. ("**Genesus**"), Can-Am Genetics Inc. ("**Can-Am**"), and Genesus Genetics, Inc. ("**GGI**") relating to, acquired for, or used in relation to a business carried on by the Debtors, and including all proceeds thereof.

2. BMO holds, *inter alia*, mortgage security with respect to farm property owned by the Respondents, Genesus and Can-Am (collectively, the "**Debtors**"), as more particularly described below.

3. Accordingly, the Applicant requests that this Application be heard by this Honourable Court immediately before the hearing of the Applicant's application in the Receivership Proceedings. Further, the Applicant intends to rely upon the Affidavit of Ed Barrington, affirmed February 9, 2024, and filed February 12, 2024, in the Receivership Proceedings (the "**Barrington Affidavit**"), in support of the within Application.

**Argument**

4. The Applicant submits that the Court ought to proceed to hearing on an urgent basis, and grant leave under *The Family Farm Protection Act*, CCSM c F15 (the "**FFPA**"), for the Applicant to commence proceedings under the Genesus Mortgages and Can-Am Mortgages, as those terms are defined in the Notice of Application herein.

5. Pursuant to section 34 of the FFPA, service of documents which are required to be served under the FFPA may be effected by a form of substitutional service:

> **Substitutional service**
> **34(2)** Where a person is unable to effect service of a document upon a person under subsection (1), substitutional service thereof may be made in such a manner as a judge may direct.

**FFPA, subsection 34(2) [TAB 1]**

6. Further, and notwithstanding the ordinary requirements for service pursuant to the *King's Bench Rules*, this Court has authority to abridge time requirements, validate defective service, and to dispense with service where necessary in the interests of justice.

***Court of King's Bench Rules*, ManReg 553/88**
**Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended [TAB 2]**

7. As such, the Applicant submits that, to the extent it may be necessary, service of the Notice of Application and supporting materials herein ought to be abridged and/or validated.

8. In determining whether leave ought to be granted under sections 9 to commence or continue certain actions or proceedings to realize or otherwise enforce a right, title or interest in farmland under section 8 of the FFPA, the Court may consider any factor, condition or circumstance it considers relevant:

**Factors to be considered by the court**
**9(4)** When making a decision under subsection (3.1), the court may consider any factor, condition or circumstance it considers relevant, including the following:

> (a) whether any agreement might be reached between the applicant and the affected farmer with respect to the issues giving rise to the application without the necessity of further proceedings;
>
> (b) whether the affected farmer is likely to receive financial assistance or concessions from any creditor or from any other source in an effort to satisfy the issues giving rise to the application;
>
> (c) the effect of factors beyond the control of the affected farmer which may account for the issues giving rise to the application, including any general or local adverse agricultural, economic and climatic conditions such as an inability to market agricultural products, depressed prices for agricultural products, high costs of production, hail, flood, drought, frost or agricultural pests;
>
> (d) the financial capacity of the affected farmer and the affected farmer's farming operation to meet existing and anticipated cash flow requirements;
>
> (e) the value and condition of the farmland which is described in the application, including its state of cultivation;
>
> (f) the impact of the loss of the farmland which is described in the application on the ongoing viability of the affected farmer's farming operation;
>
> (g) the impact of the loss of the farmland which is described in the application on the affected farmer, the affected farmer's family and the community of which the affected farmer is a part;
>
> (h) the farming and financial management skills of the affected farmer;
>
> (i) whether the affected farmer is making a sincere and reasonable effort to meet the obligations incurred by the affected farmer in respect of the affected farmer's farming operation.

**FFPA, subsection 9(4) [TAB 1]**

9. Additionally, the Manitoba Court has set out factors to be considered in applications for leave under the FFPA, including:

(a) Whether there is any indication that the mortgagor will ever be able to repay the debt;

(b) Whether it is likely that the mortgagor will be able to receive financial assistance or concessions from any other source;

(c) Whether the debt far exceeds the value of the lands in question; and

(d) Whether the mortgagor has presented, or attempted to present, a viable plan as to how he would be able to arrange his affairs to accommodate the mortgagee.

***Arborg Credit Union Limtied v McIvor*, 2011 MBQB 264 at para 17 ("*Arborg Credit Union*")[TAB 3]**

10. Notwithstanding that the *Arborg Credit Union* case was decided before amendments to the FFPA were made in 2021, the factors set out therein remain relevant for the Court's consideration.

11. In this case, the Court should exercise its discretion to grant leave under the FFPA, taking into consideration the following:

(a) The Debtors, Genesus Inc. ("**Genesus**") and Can-Am Genetics Inc. ("**Can-Am**") are the registered owners of farmland (the "**Farmland**") against which the Applicant, Bank of Montreal ("**BMO**") holds real property mortgages, which are registered in priority to every other caveat and non-financial encumbrance, except as follows:

(i) Mortgage No. 4434702/1 registered against Genesus' Title No. 2698800/1 in favour of FCC; and

(ii) Mortgage No. 1105775/5 registered against Genesus' Title No. 2712003/5 in favour of FCC;

**Barrington Affidavit, para 30 Exhibit "GG", para 33 Exhibit "HH" and para 34**

(b) Genesus and Can-Am operate large-scale commercial farming operations from the Farmland, with 61 employees employed in Genesus' Manitoba facilities, and 13 employees employed in Can-Am's Manitoba facilities as at September 30, 2024. As of January 2024, there is a total of 17,702 live hogs in Genesus' and Can-Am's Manitoba facilities;

**Barrington Affidavit, paras 5-6**

(c) The Debt outstanding to BMO is significant and it is not evident that the value of the Farmland will be sufficient to pay out BMO in full;

(d) On or about June 16 and July 6, 2023, BMO made demand and served Notices of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act* and Notices of Intent by Secured Creditor pursuant to *The Farm Debt Mediation Act* upon the Debtors;

**Barrington Affidavit, para 37**

(e) On September 30, 2023, the parties entered into the terms of a Forbearance Agreement, with independent legal advice, pursuant to which, *inter alia*:

(i) The Debtors acknowledged the Debt, the validity of BMO's Security, that default had been made thereunder, and that BMO was entitled to enforce its Security;

(ii) BMO would not proceed to take further steps to recover payment of the Debt, or to enforce its Security, until 11:59 p.m. on January 15, 2024 (the "**Forbearance Term**"), provided that all terms and conditions of the Forbearance Agreement are complied with;

(iii) The Debt shall be due and payable in full on January 15, 2024, at the end of the Forbearance Term;

(iv) In consideration of the Forbearance Agreement and as security for the repayment of the Debt owing, Genesus and Can-Am agreed to provide BMO with an all obligations second mortgage against all of the land and premises owned by Genesus and Can-Am (the "**Second Mortgage**"). The Second Mortgage shall be a Demand Mortgage in the sum of $8,000,000.00, subordinate only to first mortgages to FCC, and subject to provision of a Forbearance Agreement between FCC and the Debtors, in a form satisfactory to BMO at its sole

(v) Upon expiry of the Forbearance Term, in the absence of payment the Debt in full, BMO may immediately proceed to take such steps as it deems necessary to recover payment of the Debt, including enforcement of its Security, without further notice;

**Barrington Affidavit, paras 39-40 Exhibit "KK"**

(f) It was a further term of the Forbearance Agreement that the Debtors acknowledged and agreed that they shall not take any proceedings under the BIA or the CCAA (or any other proceedings in which a stay of proceedings against creditors may be ordered) without the consent of BMO in advance which would have the effect of delaying or staying BMO's right to immediately enforce the Security;

**Barrington Affidavit, paras 39-40 Exhibit "KK"**

(g) Further, and pursuant to the Forbearance Agreement, Genesus and Can-Am executed a Consent to Judgment and Consent Receivership Order;

**Barrington Affidavit, paras 39-40 Exhibit "KK"**

(h) The Forbearance Agreement expired on January 15, 2024, and the Respondents failed to repay the Debt to BMO in full. BMO is accordingly permitted to proceed to take such steps as it deems necessary to recover payment of the Debt owing to it by Genesus and Can-Am, including enforcement of its Second Mortgage;

**Barrington Affidavit, paras 39-40 Exhibit "KK"**

(i) BMO is entitled to appoint a receiver over Genesus and Can-Am upon default, pursuant to the loan agreements and general security agreements entered into by those parties;

(j) Since the expiry of the Forbearance Term, Genesus and Can-Am continue to operate without regard to BMO's Security, particulars of which are:

(i) Genesus is operating on a day-to-day basis without any apparent internal cash-flow budgeting;

(ii) Gensus is using any available funds to pay supplier invoices or to purchase feed;

(iii) Gensus is unable to accurately project when receivables will be collected;

(iv) Genesus continues to have significant difficulties in meeting its bi-weekly payroll obligations;

(v) Genesus' BMO account is often in an overdraft position;

(vi) Genesus' inventory had dropped in value from approximately $4,700,000.00 to $1,900,000.00, primarily due to the sale of the St. Andrews Property;

(vii) Six Canadian vehicles, eight U.S. vehicles, and four trailers owned by Genesus were sold, with the proceeds of sale therefrom being used by Genesus to fund its operations;

(viii) There are potential buyers interested in purchasing property owned by Genesus, however Genesus has not received any formal offer to purchase that property;

(ix) GGI's operations in the U.S. are limited, with little to no ongoing activity;

(x) Genesus sold its "Bagot" inventory and used the proceeds to pay its operating expenses; and

(xi) Without advance notice to BDO or BMO, Genesus sold its "Durand Gilt" inventory and paid the proceeds thereof to a creditor;

(xii) Genesus' "Martin Sow" inventory was taken by a third party creditor of Genesus, who was in possession of that inventory, and was sold by the creditor to pay down the debt owing to them by Genesus.

**Barrington Affidavit, paras 52-56**

12. In the case of *Callidus Capital Corp v Carcap Inc.*, 2012 ONSC 163, the Court found that the respondents in that case had been in default and had failed to honour the terms of the Forbearance Agreement. The parties lost all faith in the respondents' management, which is a factor that supports the appointment of a receiver. The respondents' conduct provided cause for concern and the security was declining in value with the creditors' rights being eroded. The Court stated:

> 53 Given the respondents failure to come up with even a rudimentary restructuring plan, it is time for the receiver to take control, and manage the businesses to the extent necessary to result in orderly liquidation to protect the interests of all stakeholders.

***Callidus Capital Corp. v Carcap Inc.*, 2012 ONSC 163 [TAB 4]**

13. Similarly, in the case of *Alexander v 2025610 Ontario Ltd.*, 2012 ONSC 3486, the Court stated:

> 49 The respondents, by their conduct, turned their backs on their obligations under the Forbearance Agreement, thereby disentitling themselves to the benefit of the forbearance afforded by the applicants. The applicants understandably have lost confidence in the respondents' willingness to comply with the terms of the Forbearance Agreement and want the benefit of a court-appointed receiver to

obtain timely directions and approvals in the realization process for the benefit of all creditors.

***Alexander v 2025610 Ontario Ltd.*, 2012 ONSC 3486 at para 49 [TAB 5]**

14. In all of the circumstances, BMO says it is reasonable and just for the Court to grant leave for it to proceed to commence enforcement of its remedies under the Can-Am Mortgages and the BMO Mortgages, without further delay. The parties intended, by the terms of the Forbearance Agreement, which expired on January 15, 2024, that BMO would be entitled to take immediate steps to enforce its Security and to rely upon the Consent Receivership Order over all of the assets of Genesus, Can-Am and GGI, including the Farmland.

15. It is just and convenient that leave be granted, and that the Farmland subject to the Genesus Mortgages and the Can-Am Mortgagees be subject to any receivership order which may be granted by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF FEBRUARY, 2024

**PITBLADO LLP**

Per: ______________________________
Catherine E. Howden / Madison Laval
Counsel for the Applicant

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# TAB 1

## DIVISION II
## ACTIONS OR PROCEEDINGS REQUIRING LEAVE OF THE COURT

### Actions or proceedings requiring leave

**8(1)** No person shall commence or continue any action or proceeding to realize upon or otherwise enforce

(a) a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein; or

(b) a judgment or an attachment obtained on the basis of a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein;

whereby a farmer could be deprived of the ownership or the possession of farmland of which the farmer is the registered owner or of which the farmer is the purchaser under an agreement for sale, without first obtaining leave of the court under this Part.

### Specific actions requiring leave

**8(2)** Without limiting the generality of subsection (1)

(a) no person shall commence or continue any action or proceeding on the basis of a mortgage, an encumbrance or a security agreement, or any provision contained therein

(i) for sale or other disposition of farmland; or

(ii) for foreclosure of an estate, interest or claim in or to farmland; or

(iii) for the appointment of a receiver or a receiver and manager of farmland; or

(iv) for possession of farmland; or

(v) for any other relief as may be available to such person and permitted by law in respect of farmland;

without first obtaining leave of the court under this Part;

(b) no person shall apply to a district registrar pursuant to

(i) section 135 of *The Real Property Act* for an order authorizing the sale of farmland; or

(ii) section 138 of *The Real Property Act* for an order authorizing the foreclosure of an estate, interest or claim in or to farmland whereby a farmer could be deprived of the ownership or the possession of farmland of which the farmer is the registered owner or of which the farmer is the purchaser under an agreement for sale;

without first obtaining leave of the court under this Part;

(c) no district registrar shall issue

(i) an order authorizing the sale of farmland pursuant to section 135 of *The Real Property Act*; or

(ii) an order authorizing the foreclosure of an estate, interest or claim in or to farmland pursuant to section 139 of *The Real Property Act*;

until leave of the court has been obtained under this Part;

(d) no person shall appoint any person as a receiver or a receiver and manager of farmland without first obtaining leave of the court under this Part;

(e) no person shall accept an appointment as a receiver or a receiver and manager of farmland until leave of the court has been obtained under this Part;

(f) no receiver or receiver and manager shall take possession of, enter upon or occupy farmland for the purposes of carrying on a farming operation on the farmland or otherwise interfere with a farming operation being carried on by a farmer until leave of the court has been obtained under this Part;

(g) no person shall commence or continue any action or proceeding for cancellation of an agreement for sale of farmland, or for possession of the farmland which is the subject of an agreement for sale of farmland, or for any other relief as may be available to such person and permitted by law in respect of farmland on the basis of an agreement for sale, without first obtaining leave of the court under this Part; and

(h) no person shall commence or continue any action or proceeding for sale or other disposition of farmland on the basis of a judgment or an attachment obtained on the basis of a mortgage, an encumbrance, a security agreement or an agreement for sale, or any provision contained therein, without first obtaining leave of the court under this Part.

### Actions or proceedings in progress

**8(3)** This Part applies to all actions or proceedings commenced prior to the coming into force of this Act.

### Non-compliance with this Part

**8(4)** Any action or proceeding which is commenced or continued after the coming into force of this Act without first obtaining leave of the court as required by this Part is a nullity.

S.M. 1995, c. 33, s. 8.

## DIVISION III
## LEAVE OF THE COURT

### Application for leave

**9(1)** Any application under this Part shall be made to a judge in the form prescribed by the regulations, shall set forth the name of the affected farmer, the relief sought and the legal description of the farmland in respect of which such relief is sought, and, unless otherwise ordered by the court, shall be filed in the judicial centre where the affected farmer resides or carries on a farming operation.

**9(2) and (3) [Repealed] S.M. 2021, c. 48, s. 8.**

Disposition

9(3.1) On hearing an application, the court may

(a) adjourn for such period or periods considered appropriate, if the court is not satisfied that it is just and equitable to grant the relief sought at that time;

(b) make an order granting leave for the purposes of section 8, if the court is satisfied that it is just and equitable to do so; or

(c) make an order for any other procedural relief that the court considers appropriate.

### Factors to be considered by the court

**9(4)** When making a decision under subsection (3.1), the court may consider any factor, condition or circumstance it considers relevant, including the following:

(a) whether any agreement might be reached between the applicant and the affected farmer with respect to the issues giving rise to the application without the necessity of further proceedings;

(b) whether the affected farmer is likely to receive financial assistance or concessions from any creditor or from any other source in an effort to satisfy the issues giving rise to the application;

(c) the effect of factors beyond the control of the affected farmer which may account for the issues giving rise to the application, including any general or local adverse agricultural, economic and climatic conditions such as an inability to market agricultural products, depressed prices for agricultural products, high costs of production, hail, flood, drought, frost or agricultural pests;

(d) the financial capacity of the affected farmer and the affected farmer's farming operation to meet existing and anticipated cash flow requirements;

(e) the value and condition of the farmland which is described in the application, including its state of cultivation;

(f) the impact of the loss of the farmland which is described in the application on the ongoing viability of the affected farmer's farming operation;

(g) the impact of the loss of the farmland which is described in the application on the affected farmer, the affected farmer's family and the community of which the affected farmer is a part;

(h) the farming and financial management skills of the affected farmer;

(i) whether the affected farmer is making a sincere and reasonable effort to meet the obligations incurred by the affected farmer in respect of the affected farmer's farming operation.

**9(5) to (8) [Repealed] S.M. 2021, c. 48, s. 8.**

Costs of the application

9(9) At the discretion of the judge hearing the application, the court may order any party to the application to pay the whole or any portion of the costs of such application.

**Appeals only on questions of law**

**9(10)** An appeal lies to the Court of Appeal on a question of law from an order of the court made pursuant to this section.

## PART VIII
## GENERAL PROVISIONS

...

**Substitutional service**

**34(2)** Where a person is unable to effect service of a document upon a person under subsection (1), substitutional service thereof may be made in such a manner as a judge may direct.

# TAB 2

## Court of King's Bench Rules, M.R. 553/88

### COURT MAY DISPENSE WITH COMPLIANCE

**2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

...

### EXTENSION OR ABRIDGMENT

**General powers of court**

**3.02(1)** The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

**Expiration of time**

**3.02(2)** A motion for an order extending time may be made before or after the expiration of the time prescribed.

**Consent in writing**

**3.02(3)** A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

...

### SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

**Where order may be made**

**16.04(1)** Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

...

## VALIDATING SERVICE

**16.08(1)** Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

...

## SERVICE OF NOTICE

**Required as general rule**
**37.06(1)** The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

**Notice not required**
**37.06(2)** Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

**Consent order without notice of motion**
**37.06(2.1)** The court may make an order on consent without a notice of motion being filed.

**Interim order without notice**
**37.06(3)** Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

**Service of order**
**37.06(4)** Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

**Where notice ought to have been served**
**37.06(5)** Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person.

**Time for service**
**37.06(6)** Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

# TAB 3

Date: 20111102
Docket: CI 08-01-57926
(Winnipeg Centre)
Indexed as: Arborg Credit Union Ltd. v. McIvor et ux
Cited as: 2011 MBQB 264

2011 MBQB 264 (CanLII)

# COURT OF QUEEN'S BENCH OF MANITOBA

| **BETWEEN:** | | **COUNSEL:** |
|---|---|---|
| ARBORG CREDIT UNION LIMITED, | ) | For the Applicant: |
| | ) | Brooks G. Mack |
| Applicant, | ) | |
| | ) | |
| - and - | ) | For the Respondents: |
| | ) | John L. Sinclair |
| DAVID WILLIAM McIVOR and | ) | |
| MARGARET VERNA JOAN McIVOR, | ) | |
| | ) | Judgment delivered: |
| Respondents. | ) | November 2, 2011 |

## McKELVEY J.

[1] Arborg Credit Union Limited ("Arborg") is seeking, by way of notice of application filed April 30, 2009, the following relief:

1. An order of the Court granting the Applicant leave to commence or continue certain actions or proceedings to realize or otherwise enforce a right, title or interest in farmland under Section 8 of *The Family Farm Protection Act*, and specifically, leave to commence and continue sale proceedings under mortgages given by the Respondents, David William McIvor and Margaret Verna Joan McIvor, said mortgages registered as Instruments No. 2728658, 3058075 and 3057083 in the Winnipeg Land Titles Office;

2. An order of the Court granting the Applicant leave to commence and continue any other proceedings permitted under the said Mortgages given by the Respondents to the Applicant;

2011 MBQB 264 (CanLII)

## BACKGROUND

[2] The respondents ("the McIvors") granted two mortgages in favour of Arborg, one in May, 2002, which was amended pursuant to a memorandum of agreement in October, 2004, and one in October, 2002. The mortgages were registered against 15 farm properties: parcels 1 to 6 in the names of David William McIvor and Margaret Verna Joan McIvor, and parcels 7 to 15 in the name of David William McIvor. The mortgages have served to secure the repayment of various debts which are owed by the McIvors to Arborg. There has been no payment accepted by Arborg with respect to the indebtedness since April 11, 2008. The McIvors have experienced financial issues as a consequence of flooding on their farmland. On August 12, 2008, Arborg applied for leave to commence or continue certain actions or proceedings to realize or otherwise enforce a right, title or interest in farmland under section 8 of ***The Family Farm Protection Act***, C.C.S.M. c. F15 ("the ***Act***"). On December 8, 2008, the Manitoba Farm Mediation Board filed with the court a report indicating that in its opinion Arborg had fulfilled its requirements as set out in the ***Act***.

[3] As of October 4, 2011, the aggregate indebtedness with respect to the mortgages was $811,214.78. This figure is comprised of the following amounts:

Loan 12

| | |
|---|---|
| Arrears of principal: | $17,305.29 |
| Arrears of interest: | 3,211.42 |
| Total: | $20,516.71 |

Loan 14

| | |
|---|---|
| Arrears of principal: | $433,935.26 |
| Fees: | 913.91 |
| Arrears of interest: | 65,336.76 |
| Total: | $500,185.93 |

Loan 20

| | |
|---|---|
| Arrears of principal: | $281,960.62 |
| Arrears of interest: | 8,551.52 |
| Total: | $290,512.14 |

(See affidavit of Philip Bauernhuber, sworn October 5, 2011.)

[4] Arborg contends that the farm properties subject to the mortgages have a total value of approximately $935,000.00.

[5] The respondent, David William McIvor ("McIvor"), on July 31, 2010, swore an affidavit indicating that he owns a family farm operation in the Fisher Branch area, of the Province of Manitoba, together with his wife and son.

2011 MBQB 264 (CanLII)

The McIvors both own and lease land and currently have 4,567 cultivated acres. The land in question has been subjected to widespread flooding in recent years, which has negated the ability of the McIvors to successfully farm certain properties. McIvor indicated that he has retained the services of Don Gibb and his son, David Gibb, of Northern Plains Financial Group Ltd. as farm advisors with respect to the farm operation and to evaluate the debt issues.

[6] McIvor contends that, in accordance with financial statements prepared by Northern Plains Financial Group Ltd., his and his son's net worth, as of May 1, 2010, was $1,399,839.00, and his and his son's projected net worth for the period May 1, 2010 to April 30, 2011, was $1,550,709.00. (See affidavit of McIvor, sworn July 31, 2010, paragraph 7.)

[7] In 2011, McIvor and his son met with the Manitoba Agricultural Services Corporation ("the MASC") with a view to securing financing from that organization to pay out the farm debt and to formulate a viable plan to continue the farming operation. There have also been consultations with experts in the farming community and with the Farm Debt Mediation Service, a program offered by Agriculture and Agri-Food Canada. The MASC evaluated the projected net annual farm income for 2012 as being $599,436.25 with total farm expenses set at $543,606.00. These figures serve to support a gross profit margin for the period of $55,830.25. (See affidavit of McIvor, sworn September 19, 2011, paragraphs 7 and 10. The

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supporting documentation relating to the projections is attached as an exhibit.)

[8] McIvor also attested that there is income from the cattle side of the farming operation and from a trucking business. Reference was also made to a crop insurance claim on 360 acres of wheat for which compensation is expected. (See affidavit of McIvor, sworn July 31, 2010, paragraphs 11 and 13.)

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[9] On September 8, 2011, the McIvors filed a statement of claim (court file no. CI 11-01-73853) as against Arborg seeking general damages for breach of contract and breach of fiduciary duty. The statement of claim is premised on advice that Arborg provided to the McIvors in 2008 that:

> 6. … they would not qualify for crop insurance for the intended crop to be seeded by the Plaintiff and that any crop insurance the Plaintiffs had would be revoked and that if the Plaintiff ever had a claim, it would be of no value. The Defendant as a credit union owed a duty to exercise the skills, care and diligence which may be reasonably expected of a lending institution of ordinary competence measured by the professional standard of the time.
>
> 7. In April 2008 the Plaintiffs made their payments and attempted to make the Fall 2008 payments in the Spring of 2009 when they received their crop insurance payment. The Defendant refused to accept said payments thereby breaching the fiduciary duty it had to the Plaintiffs. The Plaintiffs made further attempts in Summer and Fall 2009 to make the requisite payments which were not accepted by the Defendant.

[10] The McIvors have contended in the statement of claim that Arborg breached its fiduciary duty by virtue of endeavoring to realize upon the

mortgages under section 8 of the ***Act*** and by its refusal to accept tendered mortgage payments.

[11] Arborg has categorically denied the allegations of the McIvors in a statement of defence filed September 27, 2011. The denials have included the contention that it has appropriately pursued its contractual and common law rights in all of the circumstances.

[12] McIvor has submitted, as outlined in his September 19, 2011, affidavit, that there is a new farm plan in place to deal with the debt owed to Arborg. This plan includes the sale of identified properties to his son, a sale of other properties to the public, as well as a sale of identified equipment at an auction. As indicated, McIvor and his son have had meetings with representatives of the MASC to obtain financing to pay out the farm debt and to formulate a viable plan to continue the farming operation.

[13] McIvor contends that, with a refinancing plan in place, along with the allegations contained in the statement of claim, Arborg's motion for leave to commence mortgage enforcement proceedings should be dismissed. McIvor relies upon the decision of Oliphant J. in ***Virden Credit Union Ltd. v. Harvey*** (1989), 60 Man. R. (2d) 204 (Q.B.). It is asserted that the McIvors' legal action against Arborg pursuant to the statement of claim should first be determined before a consideration of

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the merits of the mortgage enforcement proceedings. McIvor argues that it would not be just and equitable to allow Arborg to commence such proceedings at this time.

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[14] Arborg submits that while a plan has been put forward for the purposes of arranging the McIvors' financial affairs, it fails to account for all of their debts, including one recently incurred in the amount of $325,000.00 (Viterra). Indeed, Viterra has a registered judgment against one or more of the parcels of land owned by the McIvors relating to this debt. It was argued that there was no indication as to how that particular judgment would be dealt with in the plan as outlined in McIvor's September 19, 2011, affidavit. (There is a reference to the Viterra debt in the MASC documentation.) Arborg argues that the "plan" is simply not viable, nor is there sufficient money available to service the existing debt. Indeed, the earlier 2010 "plan" referenced in McIvor's July 31, 2010, affidavit has never come to fruition or yielded any payments towards the indebtedness.

[15] Arborg relies upon the decisions in ***Canadian Imperial Bank of Commerce v. Maguet*** (1988), 53 Man. R. (2d) 226 (Q.B.), ***Virden Credit Union Ltd., supra***, and ***Royal Bank of Canada v. Andres et al.*** (1988), 54 Man. R. (2d) 211 (Q.B.) and (1988), 56 Man. R. (2d) 263 (Q.B.). Arborg's position is based upon the fact that while the McIvors have put forth a plan to arrange their financial affairs, there has been a

failure to produce any funds in accordance with that plan. Additionally, the existence of the statement of claim is not an absolute bar to the court granting the application. Arborg contends entitlement to the relief presently sought before the court.

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## THE LAW

[16] The following sections of the ***Act*** are relevant to this application:

**Objects of the Act**

**2** The objects of this Act are

(a) to afford protection to farmers against unwarranted loss of their farming operations during periods of difficult economic circumstances;

(b) to preserve the agricultural land base of Manitoba and to ensure that farmland is farmed and managed during periods of difficult economic circumstances;

(c) to preserve management skills of farmers during periods of difficult economic circumstances;

(d) to preserve the human resources of the agricultural community of Manitoba; and

(e) to preserve the existing lifestyle of farm communities in Manitoba and the tradition of locally owned and managed family farms.

**Actions or proceedings requiring leave**

**8(1)** No person shall commence or continue any action or proceeding to realize upon or otherwise enforce

(a) a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein; …

**Specific actions requiring leave**

**8(2)** Without limiting the generality of subsection (1)

(a) no person shall commence or continue any action or proceeding on the basis of a mortgage, an encumbrance or a security agreement, or any provision contained therein

(i) for sale or other disposition of farmland; or

(ii) for foreclosure of an estate, interest or claim in or to farmland; or

(iii) for the appointment of a receiver or a receiver and manager of farmland; or

(iv) for possession of farmland; or

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(v) for any other relief as may be available to such person and permitted by law in respect of farmland;

without first obtaining leave of the court under this Part;

(b) no person shall apply to a district registrar pursuant to

(i) section 135 of *The Real Property Act* for an order authorizing the sale of farmland; or

(ii) section 138 of *The Real Property Act* for an order authorizing the foreclosure of an estate, interest or claim in or to farmland whereby a farmer could be deprived of the ownership or the possession of farmland of which the farmer is the registered owner or of which the farmer is the purchaser under an agreement for sale;

without first obtaining leave of the court under this Part;

(c) no district registrar shall issue

(i) an order authorizing the sale of farmland pursuant to section 135 of *The Real Property Act*; or

(ii) an order authorizing the foreclosure of an estate, interest or claim in or to farmland pursuant to section 139 of *The Real Property Act*;

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until leave of the court has been obtained under this Part;

(d) no person shall appoint any person as a receiver or a receiver and manager of farmland without first obtaining leave of the court under this Part;

(e) no person shall accept an appointment as a receiver or a receiver and manager of farmland until leave of the court has been obtained under this Part;

(f) no receiver or receiver and manager shall take possession of, enter upon or occupy farmland for the purposes of carrying on a farming operation on the farmland or otherwise interfere with a farming operation being carried on by a farmer until leave of the court has been obtained under this Part;

(g) no person shall commence or continue any action or proceeding for cancellation of an agreement for sale of farmland, or for possession of the farmland which is the subject of an agreement for sale of farmland, or for any other relief as may be available to such person and permitted by law in respect of farmland on the basis of an agreement for sale, without first obtaining leave of the court under this Part; and

(h) no person shall commence or continue any action or proceeding for sale or other disposition of farmland on the basis of a judgment or an attachment obtained on the basis of a mortgage, an encumbrance, a security agreement or an agreement for sale, or any provision contained therein, without first obtaining leave of the court under this Part.

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**Application for leave**

**9(1)** Any application under this Part shall be made to a judge in the form prescribed by the regulations, shall set forth the name of the affected farmer, the relief sought and the legal description of the farmland in respect of which such relief is sought, and, unless otherwise ordered by the court, shall be filed in the judicial centre where the affected farmer resides or carries on a farming operation.

**Options available to the judge**

**9(8)** At the discretion of the judge hearing the application, the court may by order

(a) adjourn the hearing from time to time for such period or periods as the judge considers appropriate, if the judge is not satisfied that it is just and equitable to grant the relief sought at that time; or

(b) grant the relief sought, if the judge is satisfied that it is just and equitable to do so; or

(c) grant such other procedural relief as the judge considers appropriate.

## ANALYSIS

[17] In ***Canadian Imperial Bank of Commerce, supra***, Jewers J. set out certain factors for consideration in applications of this nature as follows:

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a) whether there is any indication that the mortgagor will ever be able to repay the debt;

b) whether it is likely that the mortgagor will be able to receive financial assistance or concessions from any other source;

c) whether the debt far exceeds the value of the lands in question;

d) whether the mortgagor has presented, or attempted to present, a viable plan as to how he would be able to rearrange his affairs to accommodate the mortgagee.

[18] These situations are always difficult to assess. That being said, significant attention must also be paid to the objectives of the ***Act***, as set out in section 2, when considering claims of this nature. Those objectives reflect a desire to preserve the farm communities and family farms during periods of difficult economic times.

[19] McIvor has filed affidavit evidence indicative of the fact that he is endeavoring to put into place a viable plan which will satisfy the debt owed to Arborg, as well as to finance the ongoing operation of his family farm. Paragraph 10 of his September 19, 2011, affidavit is demonstrative of the fact that the proposed refinancing of the family farm operation has reflected a positive working capital as well as adequate debt coverage. There is a concerning low margin of profit anticipated, albeit that was

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explained to be based upon what is described as the "conservative" estimates of the MASC. Further, additional income will be sourced from the McIvors' trucking business.

[20] The current farm plan has met with the approval of a field representative of the MASC — the body who will ultimately consider the McIvors' filed application for credit (September 16, 2011). The field representative has recommended proceeding with the plan. The projections support a plan that will satisfy the debt and accommodate a rearranging of the McIvors' financial affairs in order to continue a viable farming operation. (See Exhibits "B" and "C" of McIvor's September 19, 2011, affidavit.)

[21] The statement of claim and the circumstances involved in that claim must also be considered. As was stated by Oliphant J. in ***Bradshaw v. Spiers and Spiers*** (1987), 51 Man. R. (2d) 312 at 315-16 (Q.B.):

> [25] It is not for me, at this point in time, at least, to decide upon those issues. However, if the respondents can prove the allegations made in the statement of claim they caused to be issued, the end result could very well be that the respondents will no longer be indebted to the applicant in any amount whatsoever.

And at page 316, Oliphant J. also stated:

> [28] If I allow the applicant to proceed with the mortgage sale, the subject farmland will be lost to the respondents. The respondents have a considerable amount of equity in that farmland.

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> [29] The litigation between the parties goes to the very heart of the transaction which resulted in the mortgage upon which the applicant now wishes to proceed. In the circumstances here, I am not satisfied that it is just and equitable to allow the applicant to proceed with the mortgage sale.

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[22] The case of ***Royal Bank of Canada, supra***, involved a situation where the court permitted the mortgage sale and foreclosure proceedings to proceed. In that case, there was no indication of an ability by the respondents to ever be able to repay the debt or to receive financial assistance. The filing of a statement of claim and statement of defence in that case was not considered to be a viable reason to prevent the application from proceeding. Further, the indebtedness of those respondents exceeded, to a great extent, the value of the lands mortgaged and encumbered. That would not appear to be the case as regards the McIvors after a review of the MASC documentation. Accordingly, the case of ***Royal Bank of Canada*** is distinguishable on its facts.

## CONCLUSION

[23] McIvor has provided evidence as to his current financial position, his ability to obtain financing from other sources, and a financial plan indicative of a capability to repay the indebtedness. There is a dispute with respect to the value of the lands mortgaged and encumbered, albeit it appears that the farm properties in question are certainly worth in the area of $1,000,000.00. That amount exceeds the amount of the debt.

There is no question that the McIvors wish to continue with the family farm operation and to utilize the expertise of the identified consultants and the MASC. That being said, it is unknown whether the McIvors will ever be able to repay the debt in question. However, there may be a viable plan in place, which should be pursued and given an opportunity of success.

[24] The plan is well set out in McIvor's September 19, 2011, affidavit, accompanied by the MASC documentation. It includes a sale of properties and equipment, accompanied by meetings with financial institutions to refinance the family farm operation. There are projections in terms of operation costs, income, and a statement of assets and liabilities. It is difficult, based upon the affidavit evidence, to determine whether that plan will ultimately be viable, the actual value of the properties, as well as other aspects. However, the McIvors should be afforded additional time and an opportunity to pursue the "plan" before instituting the possibility of mortgage enforcement proceedings with an irrevocable loss of their property. That being said, they must pursue these options with haste and genuineness to comply with the "plan" and a refinancing of the debt. A failure to do so will no doubt result in a second application being brought by Arborg.

[25] There is also the pending litigation between these parties based upon the crop insurance claim of 2008. Indeed, the 2007 and 2008

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flooding and the ultimate loss and crop insurance claims appear to have precipitated the breakdown in the relationship between the McIvors and Arborg. The fact that Arborg ultimately rejected any payments by McIvor in 2009 is concerning. It is hoped that there can be an acceptable level of cooperation between these parties to endeavor to make the proposed plan workable.

[26] In all of the circumstances, I am satisfied that it would be unjust and inequitable to allow the commencement or continuation of the mortgage enforcement proceedings as sought by Arborg at this time. The factors as set out in the ***Canadian Imperial Bank of Commerce*** case have been addressed and at this point satisfied. There remains a viable plan which should be pursued and acted upon. There is also the existing litigation between the parties. In terms of that litigation, the parties should consider an expedited trial pursuant to Queen's Bench Rule 20.06.

[27] The relief requested by Arborg is dismissed. The McIvors are entitled to costs, which may be spoken to if the parties cannot agree.

____________________________________J.

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# TAB 4

**CITATION:** Callidus v. Carcap, 2012 ONSC 163
**COURT FILE NO.: CV-11-00009498-OOCL**
**DATE:** 20120105

2012 ONSC 163 (CanLII)

***SUPERIOR COURT OF JUSTICE - ONTARIO***
***(COMMERCIAL LIST)***

**RE:** CALLIDUS CAPITAL CORPORATION, Applicant/Respondent by cross-application

**A N D:**

CARCAP INC. and CAR EQUITY LOANS CORP., Respondents/Applicants by cross-application

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 and Section 101 of the *Courts of Justice Act,* R.S.O. 1990 c. C.43

**AND RE:** KAPTOR FINANCIAL INC. and CARCAP AUTO FINANCING, Applicants by cross-application

**AND:**

CALLIDUS CAPITAL CORPORATION, Respondent by cross-application

**BEFORE:** MESBUR J.

**COUNSEL:** Harvey G. Chaiton and George Benchetrit for the applicant/respondent by cross-application

Mel Solmon, Fred Tayar and Colby Linthwaite for the respondents and applicants by cross-application

Robb English for the Toronto Dominion Bank

A. Kaufman for proposed Receiver, BDO Canada Ltd.

Jennifer Imrie for Third Eye Capital

**HEARD:** December 14, 2011

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**ENDORSEMENT**

**Introduction:**

[1] I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act* [1](*CCAA*) on December 14, 2011. At the end of the hearing I made the following endorsement:

For reasons to follow, an order will go in the following terms:

a) The debtors' cross application for an initial order under the CCAA is dismissed.

b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.

c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.

d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.

e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.

f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

[2] Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

[3] These are those reasons.

---

[1] R.S.C. 1985 c. C-36

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**The application and cross-application:**

[4] The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act.*[3] The TD Bank, who is the respondents' second secured lender, supported the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

[5] The respondents brought a cross-application for relief under the *CCAA.* Both Callidus and TD Bank opposed the cross-application.

**Facts:**

[6] The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

[7] The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

***Callidus provides financing***

[8] On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it

[2] R.S.C. 1985 c. B-3 as amended
[3] R.S.O. 1990, c. C-43, as amended

agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

[9] Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

[10] The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors."[4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

[11] The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading."[5]

[12] Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

[13] The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

[14] The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

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[4] Credit facility agreement paragraph 17(k)
[5] *Ibid.* paragraph 17(q)

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***Changes to the respondents' arrangements with TD Bank.***

[15] The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

[16] What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

[17] TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

***Callidus advances***

[18] Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

***The TD Bank's accommodation agreement is amended, then terminated***

[19] Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

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[20] On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

[21] By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

[22] Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

***Callidus learns of the debt with TD Bank***

[23] Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

[24] Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled – that is, paying off some specific silo investors.

[25] Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

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### *The field audit*

[26] Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

### *The Callidus demand*

[27] Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

### *The Callidus forbearance agreement and events following*

[28] On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

[29] In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

[30] The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP

corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

[31] The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

[32] Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA.*

[33] Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

[34] Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

[35] On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

[36] Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

[37] The respondents have been looking for alternate financing. They have not been able to secure any.

**Discussion:**

[38] Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just

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and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

[39] For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

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### ***Receiver?***

[40] Callidus brought its receivership application under both section 101 of the *Courts of Justice Act,* and s.47 of the *BIA.* The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA.*

[41] The question is whether it is more in the interests of all concerned to have the receiver appointed or not.[6] In order to answer the question the court must consider all the circumstances of the case, particularly:

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

c) The nature of the property and the rights and interests of all parties in relation to it.[7]

[42] Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed.[8]

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[6] *Bank of Nova Scotia v. Freure Village on Clair Creek,* 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (S.C.J.)
[7] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007 (CanLII)
[8] *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* [1995] O.J. No. 144 (O.C.J. – Gen. Div.)

[43] Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

[44] Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village,* the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

[45] This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act* or *Bankruptcy and Insolvency Act*, or both, has been met.

[46] What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

[47] Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

[48] The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

[49] The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

[50] Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

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[51] Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver. [9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining, while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

[52] The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

[53] As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

[54] At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed – even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

### ***CCAA?***

[55] The respondents took the position that granting an initial order under the *CCAA* is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

[56] The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances,

[9] *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.* [2011] O.J. No. 2954 (S.C.J.)
[10] Section 11.01(b) of the *CCAA*

the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

[57] The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Re Marine Drive Properties Ltd.* [11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Re Inducon Development Corp.,* [12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

[58] Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

[59] The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

[60] The absence of even a "germ of a plan" militates against granting relief under the *CCAA.*

[61] Finally, in considering the question of whether to grant relief under the *CCAA,* I must also look at the position of the two major secured creditors. Neither will

[11] 2009 BCSC 145
[12] [1992] O.J. No. 8 (Gen. Div.)

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support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

[62] Having considered all these factors, I decline to grant relief under the *CCAA.*

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**Conclusion:**

[63] It is for these reasons I made the order I did on December 14, 2011.

MESBUR J.

Released: 20120105

# TAB 5

**CITATION:** Alexander v. 2025610 Ontario Limited, 2012 ONSC 3486
**COURT FILE NO.:** CV-12-9732-00CL
**DATE:** 20120618

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**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** Keith Alexander, Arthur Barkin, Marshall Barkin, Harvey Frisch, Eric Grossman, Robert Grossman, Stanley Grossman, Tom Koffler, Avi Ritter, Mark Simon, Judith Sporn, Stephen Stark, Michael Steinberg, John Uster, Steven Warsh and David Yarmus, Applicants

**AND:**

2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc., Respondents

**BEFORE:** D. M. Brown J.

**COUNSEL:** J. Larry, for the Applicants

A. O'Brien, for the Respondents

W. Jaskiewicz, for Bibby International Trade Finance

R. English, for Toronto Dominion Bank

D. Stewart, for SF Partnership LLP

**HEARD:** June 8, 2012

## REASONS FOR DECISION

## I. Application for the appointment of a receiver

[1] Eric Inspektor and his family control and manage a group of companies called the "Kaptor Group". That Group included the respondents, 2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc. It used to include CarCap Inc. and Car Equity Loans Corp, but those companies were placed into receivership last December and their assets sold pursuant to court order this past March.

[2] The applicants invested money in 2025610 Ontario Limited ("202") and Kaptor Financial Inc. ("KFI"). Neither is engaged in active business.[1] The respondent, Insignia Trading Inc., carries on business as the distributor of household merchandise, and it looked, in part, to 202 and KFI for funds to finance its operations.

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[3] The applicants seek the appointment of a receiver over all the respondents alleging, in the case of 202 and KFI, defaults under loan agreements, and in the case of all three respondents breaches of an April 17, 2012 Forbearance Agreement. The respondents opposed the appointment of a receiver.

[4] For the reasons set out below, I grant the application.

## II. Evidence

### A. Overview

[5] According to Robert Grossman, who filed the affidavit on behalf of the applicants, KFI financed the operations of the CarCap Companies, which are now in receivership. The applicants were amongst the persons who invested money in KFI. Mr. Grossman deposed that KFI owes the applicants about $8 million which now is in default.

[6] 202 owns 48% of KFI's equity with 60% of its voting rights. Individual investors, including some of the applicants, own the remaining 52% equity in KFI carrying 40% of the voting rights. Some of the applicants loaned 202 approximately $7 million which they contend is now in default.

[7] Eric Inspektor controls 202 and has managed KFI.

[8] KFI owns 60% of Insignia, with the remaining equity held by two children of Eric Inspektor, Russel and Darren Inspektor.

[9] Mr. Grossman deposed that the applicants have not been able to ascertain what has happened to the approximately $15 million which they have invested in 202 and KFI.

### B. Loans and security

#### Loans to KFI

[10] Loans by the applicants to KFI were secured by short term and/or convertible debentures requiring monthly interest payments. KFI ceased paying interest at the end of August, 2011, putting it in default of the terms of the debentures. Mr. Grossman filed proof of the registration under the *PPSA* of his security interest given by the debentures. The debentures provided that in

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[1] Respondents' Factum, para. 69.

the event of default the creditor could apply to court for the appointment of a receiver. On December 28, 2011, Robert Grossman, and other applicants, served KFI with Notices of Intention to Enforce Security under section 244(1) of the *Bankruptcy and Insolvency Act*. Notwithstanding those demands, KFI has not repaid the debts owed.

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**Loans to 202**

[11] Loans by the applicants to 202 were by way of demand promissory notes with fixed repayment dates. Evidence was filed of demands on some of those notes for which principal had not been repaid by the stipulated date.

[12] In August, 2011, some applicants loaned $1.45 million to 202 pursuant to a Co-Tenancy Agreement amongst the investors, 202, Mr. Inspektor and his wife, Lynette Inspektor. The Co-Tenancy Agreement stipulated that the funding to 202 was for the purpose of assisting "it in providing short term funding against a portfolio of car loans". On December 28, 2011 certain of the applicant investors demanded repayment of their investments because they had "learned that the monies they advanced were not, in fact, used for the purpose of funding car loans as required by the Co-Tenancy Agreement."

**Insignia**

[13] The applicants did not loan money to Insignia. The evidence showed that Insignia owed KFI somewhere between $2 million and $8.2 million.

[14] Mr. Grossman deposed that some investors had loaned money to 202 for the express purpose of financing inventory purchases by Insignia, but the evidence filed related to investors who were not named applicants.

[15] Nevertheless, it is clear from an "Investor Package" dated January 18, 2012 prepared by Mr. Inspektor for "The Kaptor Group" that he treated the respondents as a closely linked and integrated group of companies for the purpose of presenting a work-out plan to those who had invested in all three respondents. Mr. Inspektor admitted the fact of the inter-company indebtedness in his May 31, 2012 affidavit.

**C. The Monitoring and Forbearance Agreement**

[16] In early April, 2012 the applicants informed the respondents that they intended to seek the appointment of a receiver and provided the respondents with a draft Notice of Application and the affidavit of Mr. Grossman sworn April 2, 2012.

[17] Negotiations ensued resulting in an April 17, 2012 monitoring and forbearance letter agreement amongst the applicants, 202, KFI and Insignia (the "Forbearance Agreement"). The Forbearance Agreement also was signed by Eric Inspektor, Lynette Inspektor, Darren Inspektor and Russel Inspektor in their personal capacities. Under the Forbearance Agreement 202, KFI and Insignia consented to the appointment of Soberman Inc. as Monitor over each of them. The respondents agreed to fund the Monitor. The Monitor's mandate included conducting a forensic

audit of the respondents and securing "complete and unfettered access" to the respondents' business premises, securing "complete, unfettered access" to "all books and records" of the respondents. The respondents agreed to disclose all their bank accounts to the Monitor, and 202 and KFI agreed to add the Monitor as one of the two signatories required on all cheques. As well, Insignia agreed to provide the Monitor with a weekly operating budget which "shall be approved by the Investor Group, acting reasonably". Limits were placed on the respondents' ability to incur debt or dispose of assets.

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[18] Concurrent with entering into the Forbearance Agreement the respondents, through their counsel, signed a Side Letter which stated, in part:

> The parties understand and agree that in the event that there is a breach of any term of the Letter Agreement that is not cured within 3 days of receiving notice thereof, the Investor Group may commence proceedings in the Ontario Superior Court of Justice under the *Bankruptcy and Insolvency Act* and/or the *Courts of Justice Act* to appoint a receiver over the assets, undertakings and property of any one or more of 202, Kaptor Financial and Insignia.
>
> It is further agreed that each of 202, Kaptor Financial and Insignia will sign a consent to the appointment of a receiver, in the form attached as Schedule "A", which consent shall be held in escrow by the Investor Group's counsel and may be released from escrow and relied upon in the event of a default as contemplated above.

[19] In his initial responding affidavit of May 22, 2012, Eric Inspektor questioned the inclusion of certain terms in the Forbearance Agreement and Side Letter, hinting that he had only recently learned of their existence. I give no credence to Mr. Inspektor's efforts to distance himself and Insignia from those agreements. Mr. Inspektor is an experienced businessman and he signed the Letter Agreement. He was represented by very experienced counsel – Mr. Mel Solmon – who signed the Side Letter on behalf of the respondents.

## III. Review of the respondents' position on their indebtedness and default

[20] In his initial responding affidavit of May 22, 2012 Eric Inspektor did not respond in any fashion to the applicants' evidence establishing their loans, the security they had received, the defaults by 202 and KFI, and the demands for repayment made to those companies by the applicants.

[21] In his second affidavit dated May 31, 2012 Eric Inspektor deposed:

> There has been no independent or objective vetting of the security or levels of investment claimed by the Applicants. The alleged indebtedness has been exaggerated and misrepresented to the Court.

[22] Although Mr. Inspektor deposed that "the Kaptor Group has from time to time provided an accounting to the Investor Group of the outstanding indebtedness due and owing to them", he did not provide any statement of accounts in his affidavit. He simply asserted that "the amounts

owing to the Investor Group are in dispute" and "until the forensic audit is conducted and security is vetted, the Investor Group status standing and amount at issue is in doubt".

[23] In sum, when faced with evidence by the applicants that they had loaned $15 million to 202 and KFI, Mr. Inspektor did not dispute the fact of some indebtedness – his January, 2012 work-out proposal closed that avenue to him - offered no evidence on the amount of the indebtedness, notwithstanding the receipt of funds by 202 and KFI, and did not dispute the allegations of default or entitlement to repayment. His evidence on the issues of indebtedness and default was vague and evasive.

[24] I find, on the evidence filed, that 202 and KFI are indebted to the applicants for significant sums of money and are in default of their obligations to repay. Mr. Inspektor did not respond in any meaningful way to the applicants' evidence about the amount of the debt or the default, and the respondents' entry into the Forbearance Agreement and Side Letter confirms the fact of the indebtedness and default – companies which are not in default of their obligations do not enter into such agreements, especially when they have the assistance of highly experienced insolvency counsel.

[25] I also find that the Kaptor Group, as described by Mr. Inspektor in his January, 2012 Investor Package, has an excess of liabilities over assets of approximately $13 million. In addition, from the weekly budget submitted by Insignia for the week ended May 18, 2012, it is clear that Insignia is operating at a loss.

## IV. Review of the allegations of default under the Side Letter

### A. The allegations of default

[26] The Forbearance Agreement was entered into on April 17, 2012. According to the Monitor's First Report dated May 25, 2012, on its first attendance at the respondents' premises on April 27 the Monitor requested:

(i) access to certain books and records of the businesses;

(ii) access to the online bank statements of 202 and KFI; and,

(iii)its addition as co-signatory on the bank accounts of 202 and KFI.

[27] By May 9 the respondents had provided much of the documentation requested by the Monitor; however, 202 and KFI had not facilitated the addition of the Monitor as co-signatory on their accounts nor provided online access to their accounts. Nor had Insignia provided a weekly operating budget for approval by the applicants. The Monitor also informed the respondents of material deficiencies in their financial statements and records which were preventing the preparation of the forensic audit.

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[28] In its First Report the Monitor stated that instead of receiving complete and unfettered access to the respondents' books and records as required by the Forbearance Agreement, records were not released until first reviewed and authorized by Eric Inspektor.

[29] The Monitor reported that by May 10 the respondents had committed several defaults of the Forbearance Agreement, including (i) their failure to provide online access to bank statements, (ii) their failure to add the Monitor as co-signatory for the accounts of 202 and KFI, and (iii) Insignia's failure to provide weekly operating budgets.

[30] On May 10 the Monitor wrote Eric Inspektor requiring the rectification of those failures by May 11, failing which the Monitor would inform the applicants that the respondents were in default of the Forbearance Agreement.

[31] On May 11 the respondents provided online access to bank records and presented a first budget. However, arrangements were not made to add the Monitor as the second signature on 202 or KFI accounts. A further letter of May 17 was sent to the respondents advising them of their continuing default on that matter. The default was not remedied by the respondents until May 18, under further pressure from the Monitor. The evidence shows that the reason for the delay was the unwillingness of Eric Inspektor to make himself available to change the account signing cards or to send an appropriate direction to the bank to add the Monitor to the accounts.

[32] Upon obtaining online access to bank statements for 202 and KFI on May 11, the Monitor discovered that between April 17 and May 11, 2012, funds had been paid from those accounts to Eric Inspektor and his wife in respect of "shareholder loans", "consulting fees", and a "guarantee fee". Payments to Eric Inspektor and his wife totaled about $60,000 and payments to their related company, 1360403 Ontario Limited, totaled $52,000. Funds also had been transferred to Insignia. In respect of those transactions the Monitor reported:

> It appears from the Monitors' initial review that the excessive delay by Eric Inspektor to add the Monitor as a 2nd signature on the bank accounts during this time a number of payments to Eric and Lynette Inspektor were made without the authorization or approval of the Monitor during the Monitoring Period (April 17, 2012 onwards). The Monitor sees this as a default of the Monitor Agreement (par. 9).
>
> Although the Monitor has not fully reviewed the circumstances of these payments from 2025610 Ontario Ltd. and Kaptor Financial Inc. to the Inspektors, the Monitor notes the quantum and frequency of the payments to be unusual for corporations which do not carry on active business.

[33] The first budget presented by Insignia was for the week ending May 18 showed an operating deficit of $32,900. The second largest operating expense was payroll of $11,500, most of which would be payable to members of the Inspektor family working for the respondents.

[34] On May 17 the applicants informed the respondents that a payment of $10,000 was due the next day to the Monitor as required by paragraph 2 of the Forbearance Agreement. The respondents did not make that payment; their default remains outstanding.

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**B. The position of Eric Inspektor**

[35] In his two affidavits Eric Inspektor offered several explanations for the events which transpired between the appointment of the Monitor and the First Report of the Monitor of May 25, 2012, including the following:

(i) "the information requests had nothing to do with doing a forensic review of the historic operations and transactions of the companies";

(ii) The Monitor "began to make demands and requests for information in a peremptory and dictatorial manner";

(iii) The Bank would only add the Monitor as a signatory if a personal attendance was made with the presentation of photo ID. That turned out to be inaccurate; Mr. Inspektor ultimately ended up sending a May 18 letter of authorization;

(iv) The Monitor attempted to create "circumstances of default simply for the purposes of trying to use the Forbearance letter that was entered into and that they have done so in bad faith";

(v) The respondents "saw absolutely no reason to make the $10,000" payment to the Monitor since the applicants had taken the position that the respondents were in default of the Forbearance Agreement and would be seeking the appointment of a receiver;

(vi) The payments to Lynette and himself out of the accounts of 202 and KFI were to repay Lynette, as a creditor, for funds she had advanced to the respondents and to pay them both amounts due under their employment contracts for the first 3.5 months of 2012.

**C. Findings of fact**

[36] When read as a whole, the Forbearance Agreement and Side Letter were designed to provide the applicants, through the appointment of the Monitor, with complete and unfettered access to the respondents' books and records so that they could attempt to find out what had happened to the significant amount of money they had loaned to 202 and KFI. The inclusion of Insignia in those agreements reflected the business reality of the high degree of inter-relatedness amongst the Kaptor Group of companies. In order to ensure that the operations of the respondents, pending completion by the Monitor of a forensic audit, were limited to ordinary course transactions, the Forbearance Agreement imposed restrictions on the respondents' operations and provided the Monitor with access to all material financial and operational information about the companies. That the applicants were affording the respondents a "last chance forbearance" from enforcement by such an arrangement was signaled by the tight default provisions contained in the Side Letter and the applicants' securing of the respondents' consents to the appointment of a receiver in the event of an uncured default.

[37] Against that background, I have reviewed carefully Mr. Inspektor's affidavits of May 22 and 31, 2012. In them he developed the theme that he really did not know what he was getting

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into when he agreed to the appointment of a Monitor, he has had second thoughts, and he is not prepared to have his companies fund the Monitor anymore.[2] As I noted above, I give no credence to Mr. Inspektor's efforts to distance himself and Insignia from the contents of the Forbearance and Side Agreements. Mr. Inspektor and the respondents entered into those agreements freely and with independent legal advice.

[38] The evidence filed by the applicants and Eric Inspektor reveals, and I find, that following the appointment of the Monitor Mr. Inspektor, as the person in control of the respondents, did not provide the Monitor with "complete and unfettered access" to the respondents' records. He insisted on reviewing and authorizing the release of information, thereby impeding and delaying access by the Monitor.

[39] The respondents did not provide the Monitor with online access to their banking records for over three weeks after the execution of the Forbearance Agreement and for two weeks after the Monitor had made formal demand. There was no reasonable excuse offered by the respondents for such a failure. While the respondents ultimately "cured" the defect by giving access and arranging for the co-signature, I conclude from the evidence that the respondents delayed providing such access in order to arrange payments to members of the Inspektor family, and their related companies, in preference to payments to other creditors, including the applicants. That is clear from the information the Monitor obtained about withdrawals from the 202 and KFI accounts once it had secured online access.

[40] In his second affidavit Mr. Inspektor deposed that "the only purpose for the appointment of the Monitor was to give the Applicants comfort while the forensic audit was performed." That is an ironic statement given the payments which Mr. Inspektor made to his wife and himself from the bank accounts of 202 and KFI during the period of April 17 to May 18 when he delayed placing the Monitor on those accounts as a signing authority.

[41] While the respondents cured their default in respect of providing online access to bank records and adding the Monitor to as signatory for the 202 and KFI accounts, the "cure", for all practical purposes, was too late and therefore meaningless. By the time the Monitor had secured access and signing authority, the damage had been done, to the prejudice of the applicants and other arm's-length creditors of 202 and KFI.

[42] There is no dispute that the respondents failed to make the $10,000 payment due to the Monitor on May 18, 2012. I do not accept Mr. Inspektor's explanation that he was justified in so doing because the applicants were intending to apply before the court for the appointment of a receiver. Mr. Inspektor's position would stand the Forbearance Agreement and Side Letter on their heads. The respondents were granted forbearance on very strict terms, understandably strict

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[2] Strikingly, in the January, 2012 Investor Package for The Kaptor Group, Eric Inspektor also complained about the unfairness of the forbearance agreement entered into with Callidus in October, 2011: see Application Record, Vol. 1, pp. 125-6.

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in light of the respondents' failure to account for the significant sums loaned by the applicants. As I have found, after the execution of the Forbearance Agreement the respondents failed to provide timely and meaningful access to information about the accounts of 202 and KFI and, by the time they had, the preferential withdrawals in favour of the Inspektor family had been made and the damage done. Under those circumstances the applicants' intention to apply to court for a receiver was understandable. However, it did not relieve the respondents of their obligation to continue to fund the Monitor. The respondents' refusal to make the May 18 payment of $10,000 to the Monitor in my view simply re-inforced the message their conduct had been conveying that they were not prepared to comply with the terms, or the spirit, of the Forbearance Agreement.

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## V. Consideration of the applicants' request to appoint a receiver

[43] The general principles guiding a court's consideration about whether to appoint a receiver were set out in *Bank of Nova Scotia v. Freure Village on Clair Creek*:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently…It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed…[3]

[44] The applicants gave notice of this proceeding to the secured creditors of 202, KFI and Insignia. Some secured creditors were parties related to the Inspektor family; they opposed the application. Their interests are identical to those of the respondents. As to the arm's-length secured creditors, two appeared on the return of the application – Bibby Financial Services (Canada) Inc. and Toronto-Dominion Bank - and neither opposed the appointment of a receiver.

[45] In the present case the applicants loaned monies to KFI, obtained security for their loans, KFI defaulted on the loans, demand was made, and the applicants enjoyed the right under their security to apply for the appointment of a receiver. So, too, the applicants loaned money to 202, default occurred and demand was made, although the applicants do not hold security which entitles them to the appointment of a receiver.

[46] However, as Mr. Inspektor's January, 2012 proposal to the applicants and other investors demonstrated, the "Kaptor Group", including KFI, 202 and Insignia, were highly inter-related companies run as a group. The April Forbearance Agreement signified that the respondents

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[3] (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.), para. 11, citations omitted.

realized that if they were to secure the forbearance of significant creditors, they would have to provide transparency to the creditor/applicants about the affairs of the remaining operating company, Insignia, to which both 202 and KFI had provided funds, and provide the creditors with sufficient comfort to justify their forbearance by exposing the business of Insignia to a possible receivership if the respondents did not live up to their promises of transparency. I reiterate: those were heavy terms, but reasonable in the circumstances and ones freely entered into by the respondents with the benefit of independent legal advice.

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[47] The respondents did not live up to their promises. They failed to make the May 18 payment of $10,000 to the Monitor. That was a breach of section 2 of the Forbearance Agreement. That breach triggered the rights of the applicants under the Side Letter, including the right to rely on the respondents' consents to the appointment of a receiver.

[48] In addition, the respondents' unjustifiable delays in providing the Monitor with online access to their bank accounts and adding the Monitor as a signatory to the 202 and KFI accounts, when coupled with the self-dealing withdrawals the Inspektors undertook during the period of delay, constituted material breaches of sections 6 and 9 of the Forbearance Agreement. The late technical cures of those breaches made by the respondents did not cure the actual damage caused by the breaches. As a result, I regard those breaches as entitling the applicants to invoke the terms of the Side Letter for the appointment of a receiver over all three respondents.

[49] Moreover, I regard that conduct, against the backdrop of all three respondents agreeing to the obligations contained in the Forbearance Agreement, as making it just and convenient to appoint a receiver over the three respondents under section 101 of the *Courts of Justice Act*. The respondents, by their conduct, turned their backs on their obligations under the Forbearance Agreement, thereby disentitling themselves to the benefit of the forbearance afforded by the applicants. The applicants understandably have lost confidence in the respondents' willingness to comply with the terms of the Forbearance Agreement and want the benefit of a court-appointed receiver to obtain timely directions and approvals in the realization process for the benefit of all creditors.[4]

[50] With the benefit of independent legal advice the respondents provided consents in escrow for the appointment of a receiver. I regard it just and convenient to appoint a receiver to make good the consents given by the respondents.

[51] Although the applicants did not loan monies to Insignia, that company owes KFI somewhere between $2 million and $8 million. Although Insignia owes a secured creditor, Bibby, about $270,000, as confirmed by Bibby's counsel at the hearing, a very significant receivable remains due and owing to KFI. A receivership of KFI inevitably will result in calls on Insignia to repay those loans. No doubt that degree of inter-connectedness between the two companies underlay the inclusion of Insignia in the Forbearance Agreement and Side Letter.

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[4] *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851, paras. 21 and 22.

Insignia appears to be insolvent on a balance sheet and operating basis. Its inclusion in the receivership therefore is justified not only by the terms of the Forbearance Agreement and Side Letter, but also by commercial practicality.

[52] Accordingly, I grant the application to appoint Soberman Inc. as Receiver of 202, KFI and Insignia.

[53] I have reviewed the terms of the proposed Receivership Order. The auditors of KFI, SF Partnership LP, proposed some changes to the language of the Model Order regarding the production of books and records. The applicants and SF Partnership have agreed on that language. Bibby Financial also proposed changes to take into account its factoring arrangement with Insignia; the applicants have agreed to those changes. The changes sought are reasonable in the circumstances. Consequently, I have signed the amended order submitted by the applicants.

[54] I would encourage the parties to try to settle the costs of this application. If they cannot, the applicants may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, June 29, 2012. The respondents may serve and file with my office responding written cost submissions by July 13, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

**Date**: June 18, 2012

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