Court File No. CV-19-00632480-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 129 OF THE *SECURITIES ACT* R.S.O. 1990, C. S-5, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C. 43, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE **ONTARIO SECURITIES COMMISSION** PURSUANT TO A SETTLEMENT AGREEMENT AMONG STAFF OF THE ONTARIO SECURITIES COMMISSION AND **GITC INVESTMENTS & TRADING CANADA LTD.** carrying on business as **GITC INVESTMENTS AND TRADING CANADA INC.** and **GITC, GITC INC.**, and **AMAL TAWFIQ ASFOUR**

Applicant

FACTUM OF THE APPLICANT

December 13, 2019

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PART I – OVERVIEW

1. The Ontario Securities Commission (the "**Commission**") commenced this Application seeking two orders substantially in the form attached to the Application Record of the Commission at Tabs 3 and 4, among other things:

   (a) appointing Grant Thornton Limited as receiver (the "**Receiver**") over the settlement funds paid to the Commission following an investigation conducted by the Commission relating to the contravention of the *Securities Act* (Ontario) (the "**Receivership Order**"); and

   (b) approving a claims process (the "**Claims Process**") to be conducted by the Receiver to ascertain and determine any and all claims that investors may have to the Settlement Funds (as defined below) (the "**Claims Process Order**").

PART II – FACTS

The Parties

2. GITC Investments & Trading Canada Ltd., carrying on business as GITC Investments and Trading Canada Inc. and GITC ("**GITC Investments**") was incorporated on June 21, 2011, as a New Brunswick corporation, and was registered in Ontario as an extra-provincial corporation. GITC Inc. (together with GITC Investments, "**GITC**") was incorporated on December 23, 2013 as a corporation existing under the laws of Canada, and it has a registered corporate address in Ontario.[1]

[1] Affidavit of Jody Sikora sworn December 10, 2019 ("**Sikora Affidavit**") at para. 3; Application Record at Tab 2.

3. Amal Tawfiq Asfour ("**Asfour**"), was an Ontario resident and is the sole director and the directing mind of GITC.[2]

Unregistered Solicitation and Trading

4. Between March 26, 2013 and September 9, 2014 (the "**Trading Period**"), GITC and Asfour (collectively, the "**Contraveners**"): (i) traded in securities without being registered, contrary to subsection 25(1) of the *Securities Act* (Ontario) (the "**Act**"); (ii) illegally distributed securities, contrary to subsection 53(1) of the Act, and (iii) acted in a manner that was contrary to the public interest.[3]

5. Contrary to the Act, the Contraveners solicited and sold shares of GITC without the proper registrations under the Act and without filing a prospectus with the Commission. The Contraveners solicited and sold shares of GITC to at least one investor in Ontario and investors domiciled in countries throughout the Middle East.[4]

6. GITC was not a reporting issuer in Ontario. During the Trading Period, the Contraveners were not registered with the Commission in any capacity. The Contraveners solicited potential investors with an Investment Agreement (the "**GITC Investment Agreement**") that promised returns ranging from 5% to 20% annually for a five-year term and, in most cases, required interested investors to execute the GITC Investment Agreement.[5]

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[2] Sikora Affidavit at para. 4; Application Record at Tab 2.

[3] Sikora Affidavit at para. 5; Application Record at Tab 2.

[4] Sikora Affidavit at para. 6; Application Record at Tab 2.

[5] Sikora Affidavit at para. 7; Application Record at Tab 2.

7. The Commission was advised by the Contraveners that, through these solicitations, GITC raised approximately $6.68 million from 48 investors. Approximately $5.3 million of investor funds were deposited into certain bank accounts of GITC and Asfour in Ontario.[6]

8. Based on information provided by the Contraveners to the Commission, it appears that most of the investors have not been repaid.[7]

Settlement with the Contraveners

9. On October 15, 2015, the Commission and the Contraveners entered into a settlement agreement (the "**Settlement Agreement**"). On October 23, 2015, an Order (the "**Settlement Order**") by the Ontario Securities Commission tribunal was granted that approved the Settlement Agreement.[8]

10. The following summarizes the salient terms of the Settlement Agreement:

    (a) the Contraveners were permanently prohibited from acquiring or trading in securities or derivatives;

    (b) Asfour was required to resign from all director and officer positions of an issuer, registrant or investment manager, and Asfour was permanently prohibited from acting as a director or officer of an issuer, registrant or investment manager;

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[6] Sikora Affidavit at para. 8; Application Record at Tab 2.

[7] Sikora Affidavit at para. 8; Application Record at Tab 2.

[8] Sikora Affidavit at paras. 10-11; Application Record at Tab 2.

(c) the Contraveners were required to pay an administrative penalty in the amount of $200,000, on a joint and several basis; and

(d) the Respondents were to disgorge to the Commission the amount of $6,680,000, on a joint and several basis.[9]

11. The Commission has received $563,708.93 (the "**Settlement Funds**") in partial satisfaction of amounts payable to the Commission pursuant to the Settlement Agreement. Pursuant to the terms of the Settlement Agreement and the Act, these funds have been designed for allocation to or for the benefit of third parties or for use by the Commission for the purposes of investor education and related knowledge enhancement.[10]

The Proposed Receiver

12. Grant Thornton Limited ("**Grant Thornton**") has extensive experience and expertise acting as a receiver or trustee in bankruptcy, administering claims processes, and distributing funds.[11]

The Investor List

13. Grant Thornton has reviewed the investor information and consolidated the information into one investor list of 75 investors representing investments in the aggregate amount of $7,383,000 (the "**Investor List**"). The Investor List represents the best information

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[9] Sikora Affidavit at para. 10; Application Record at Tab 2.

[10] Sikora Affidavit at para. 12; Application Record at Tab 2.

[11] Sikora Affidavit at para. 15; Application Record at Tab 2.

available to the Commission, but is missing investment amounts and mailing addresses for certain investors.[12]

Proposed Claims Process

14. The proposed Claims Process is designed to efficiently ascertain and determine any claims to the Settlement Funds. The key provisions of the proposed Claims Process are:

(a) the Receiver shall create and maintain a case website in accordance with the Commercial List Practice Directions (the "**Case Website**");

(b) the Receiver will either request that securities regulators in the various jurisdictions of GITC investors post a translated Public Notice to Investors on their respective websites, or the Receiver will post an advertisement in the various jurisdictions;

(c) the Commission will post a copy of the Public Notice to Investors on its website;

(d) the Receiver will send a notice of claim to the last known mailing address of each investor on the Investor List;

(e) each investor of GITC is required to provide a completed proof of claim form to be eligible to participate in the Claims Process;

(f) the claims bar date shall be 120 days after approval of the Claims Process Order;

(g) the Receiver may revise or disallow claims and may engage with investors of GITC in order to resolve any disputes with respect to a claim; and

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[12] Sikora Affidavit at para. 14; Application Record at Tab 2.

(h) if resolution is not possible, the Receiver may apply for advice and directions from the Court with respect to any outstanding disputed claims.[13]

PART III – ISSUES

15. This Application raises the following issues:

    (a) Should this Court appoint Grant Thornton as Receiver over the Settlement Funds?

    (b) Should this Court approve the Claims Process?

PART IV – LAW AND ARGUMENT

ISSUE 1: This Court Should Appoint the Receiver

A. The Appointment is Appropriate for Administration of Securities Law in Ontario

16. The Court should appoint Grant Thornton as Receiver because the appointment is: (i) appropriate for the due administration of Ontario securities law according to section 129 of the Act; and (ii) just and convenient under section 101 of the *Courts of Justice Act* (the "**CJA**").[14]

17. Section 129 of the Act provides the Court with the jurisdiction to appoint, at the Commission's request, a receiver of property of any person or company if the Court is satisfied that it is "appropriate for the due administration of Ontario securities law."[15]

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[13] Sikora Affidavit at para. 21; Application Record at Tab 2.

[14] *Securities Act*, R.S.O. 1990, c. C.43 [*Securities Act*].

[15] *Securities Act*, section 129(1) – (2).

18. In *York Rio*, this Court has previously appointed a receiver over funds obtained by the Commission for the purposes of administering a claims process to identify, validate, and distribute such funds to harmed investors.[16]

19. The Commission respectfully submits that it is appropriate for the due administration of Ontario securities law and in the best interests of investors to appoint Grant Thornton as Receiver over the Settlement Funds for the following reasons:

(a) the appointment of a receiver for the purposes of ascertaining and determining investors harmed by persons that contravened the Act is inherently in the public interest, consistent with the purpose of the Act and promotes the due administration of securities law in Ontario;

(b) GITC has committed numerous regulatory breaches in contravention of the Act;

(c) the Commission is of the view that a receiver is best suited to distribute the Settlement Funds to harmed investors in GITC, as the Claims Process is necessary to identify harmed investors and quantify their claims;

(d) Grant Thornton has extensive experience and expertise acting as a receiver or trustee in bankruptcy, administering claims processes, and distributing funds;

(e) the persons responsible for the matter at Grant Thornton have acted as a receiver for similar purposes on behalf of the Commission;

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[16] Receivership and Claims Process order dated March 6, 2019, Court File. CV-19-00614868-00CL and Endorsement of Justice Hainey dated March 6, 2019, Applicant's Book of Authorities ("**Applicant's BOA**") at Tab 1.

(f) the assessment, evaluation, and individual adjudication of filed claims is required, and Grant Thornton requires the customary protections and the assistance of this Court to carry out its proposed mandate;

(g) based on the amount of Settlement Funds held by the Commission and the details of the Investor List, it appears that the Settlement Funds will be insufficient to make the investors of GITC whole and a receiver is required to ensure that the funds are properly distributed to the harmed investors of GITC; and

(h) a formal proceeding and the appointment of Grant Thornton as Receiver may assist with the cooperation of regulators domiciled in the various jurisdictions of the investors, and such cooperation may maximize the opportunity for investors to participate in the Claims Process.[17]

20. For the foregoing reasons, the Commission respectfully submits that the Receiver should be appointed in accordance with Section 129 of the Act and requests this Court to grant the Receivership Order.

B. The Appointment of a Receiver is Just and Convenient

21. Section 101 of the CJA permits the appointment of a receiver in circumstances where it is just or convenient.

22. In determining whether the appointment of a receiver is just or convenient, *Bank of Nova Scotia v. Freure Village on Clair Creek*[18] provides that the court must have regard to all

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[17] *Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.*, 2009 CarswellOnt 4241 (Ont. S.C. [Commercial List]) at paras. 52-56; Applicant's BOA at Tab 2.

[18] 1996 CarswellOnt 2328, O.J. No. 5088 (Ont. S.C.) [*Freure Village*]; Applicant's BOA at Tab 3.

the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto, including:

(a) potential costs;

(b) relationship between the debtor and the creditors;

(c) likelihood of maximizing return on and preserving the subject property; and

(d) the best way of facilitating the work and duties of the receiver-manager.[19]

23. In *Freure Village*, the receiver was appointed over the property of a debtor. Although the Receiver is only being appointed in respect of the Settlement Funds, the same factors can be applied to the Commission's request in the following way:

(a) the Settlement Funds were designated under the terms of the Settlement Agreement and Settlement Order for allocation to or for the benefit of third parties or for use by the Commission for investors education and knowledge enhancement purposes, and the Contraveners have no further claim to these funds;

(b) Section 3.4(2)(b) of the Act allows the Commission to allocate the Settlement Funds to third parties, such as the investors harmed by GITC;

(c) the purpose of the receivership is to ascertain and determine the body of harmed investors to allow the harmed investors to be compensated *pro rata* based on the amount of claims received and the Settlement Funds; and

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[19] *Freure Village*, *supra* note 17 at para. 12; Applicant's BOA at Tab 3.

(d) Grant Thornton's experience and international offices will facilitate the efficient administration of the Claims Process and distribution of Settlement Funds.

24. For the foregoing reasons, the Commission respectfully submits that it is just and convenient for the Receiver to be appointed and requests that this Court grant the Receivership Order.

C. The Claims Process is Reasonable

25. The proposed Claims Process is consistent with:

(a) section 3.4(2)(b) of the Act and the Settlement Order, which contemplate that the funds may be allocated to third parties; and

(b) section 101(2) of the CJA, which provides the court with a broad discretion to appoint a receiver "on such terms as are just."

26. The proposed Claims Process is designed to provide the best possible chance to encourage harmed investors of GITC to participate and to ascertain and determine claims in an efficient manner. Moreover, the Claims Process provides for an efficient mechanism for the Receiver to seek the direction of the Court should any claims be unresolved. The proposed Claims Process is procedurally fair, reasonable, efficient, and appropriate in the circumstances.[20]

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[20] Sikora Affidavit at para. 22; Application Record at Tab 2.

27. In particular, the proposed Claims Process will assist with locating investors and distributing to investors their share of the Settlement Funds where such investors are located in various jurisdictions outside of Canada.[21]

28. The protections afforded to Grant Thornton in the proposed Claims Process provide reasonable protections from any liability that may arise in identifying, determining, and paying claims.

29. Accordingly, the Commission respectfully submits that this Court should approve the proposed Claims Process and grant the Claims Process Order.

C. Notice of Application

30. Rule 38.06(1) of the *Rules of Civil Procedure* (Ontario) (the "**Rules**") provides that a notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.[22]

31. Rule 5.03(1) provides that every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.[23]

32. The Settlement Funds were recovered by the Commission pursuant to the Settlement Agreement and the Settlement Order, in which all parties with an interest were served. The

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[21] Sikora Affidavit at para. 22; Application Record at Tab 2.

[22] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules*], Rule 38.06(1).

[23] *Rules*, Rule 5.03(1).

appeal periods for the Settlement Order has expired. Any interest in the Settlement Funds by the Contraveners has already been the subject of a final adjudication. On this basis, the Commission submits that the only parties necessary to enable the court to adjudicate the issues raised in this Application are the Commission and the Receiver, and there is no requirement to serve the Contraveners.

33. In any event, Rule 16.04(1) provides the Court with the jurisdiction to dispense with service of an originating process. Even if the Contraveners had an interest in this Application, which the Commission denies, this would be an appropriate case to dispense with service of the Application on any other parties, including the Contraveners. The Contraveners no longer have any interest in the Settlement Funds or the Commission request to appoint a receiver to distribute the Settlement Funds. Further, each person appearing on the Investor List will be provided with a Notice of Claim pursuant to the Claims Process and the Public Notice to Investors will be posted on the Receiver's website and a translated Public Notice of Investors will either be posted on the website of securities regulators in the various jurisdiction of GITC investors or the Receiver will post an advertisement in such jurisdictions.

34. Further, this Court has previously granted an application to appoint a receiver without notice.[24]

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[24] *Ontario (Securities Commission) v. Juniper Fund Management Corp.*, 2006 CarswellOnt 3109 (Ont. S.C. [Commercial List]) at para. 1, Applicant's BOA at Tab 4.

35. For all of the foregoing reasons, the Commission respectfully submits that no further notice of this Application be required and that further service of this Application Record be dispensed with.

PART V – ORDER REQUESTED

36. For the foregoing reasons, the Commission respectfully requests that this Court grant the Receivership Order in the form attached at Tab 3 of the Application Record and the Claims Process Order in the form attached at Tab 4 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2019.

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SCHEDULE "A" – LIST OF AUTHORITIES

1. Receivership and Claims Process order dated March 6, 2019, Court File. CV-19-00614868-00CL and Endorsement of Justice Hainey dated March 6, 2019.

2. *Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.*, 2009 CarswellOnt 4241, 179 A.C.W.S. (3d) 345 (Ont. S.C. [Commercial List]).

3. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

4. *Ontario (Securities Commission) v. Juniper Fund Management Corp.*, 2006 CarswellOnt 3109 (Ont. S.C. [Commercial List]).

SCHEDULE "B" – RELEVANT STATUTES AND RULES

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

Section 101

Injunctions and receivers

(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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

Rule 2.03

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

Rule 5.03

(1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Rule 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 under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Rule 38.06

(1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

***Securities Act*, R.S.O. 1990, c. S.5**

Section 3.4

(2) The Commission shall pay into the Consolidated Revenue Fund money received by the Commission pursuant to an order under paragraph 9 or 10 of subsection 127(1) of this Act or

paragraph 9 or 10 of subsection 60(1) of the *Commodity Futures Act* or as a payment to settle enforcement proceedings commenced by the Commission, other than money,

(a) to reimburse the Commission for costs incurred or to be incurred by it; or

(b) that is designated under the terms of the order or settlement,

(i) for allocation to or for the benefit of third parties, or

(ii) for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

Section 129

Appointment of receiver, etc.

(1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidation of all or any part of the property of any person or company.

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company, or

(b) it is appropriate for the due administration of Ontario securities law.

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AND IN THE MATTER OF A PROPOSED RECEIVERSHIP OF FUNDS OBTAINED BY THE **ONTARIO SECURITIES COMMISSION** PURSUANT TO A SETTLEMENT AGREEMENT BETWEEN STAFF OF THE ONTARIO SECURITIES COMMISSION AND **GITC INVESTMENTS & TRADING CANADA LTD.** carrying on business as **GITC INVESTMENTS AND TRADING CANADA INC.** and **GITC**, **GITC INC.**, and **AMAL TAWFIQ ASFOUR**

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