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

BOOK OF AUTHORITIES OF THE APPLICANT

December 13, 2019

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Lawyers for the Applicant, Ontario Securities Commission

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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INDEX

Tab No.	Case
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])

Tab 1

Court File: CV-19-00614868-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 6th
	)	
JUSTICE HAINEY	)	DAY OF MARCH, 2019

IN THE MATTER OF THE *SECURITIES ACT* R.S.O. 1990, C. S-5, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION IN THE ENFORCEMENT OF A SANCTIONS ORDER MADE AGAINST YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE, AND SCOTT BASSINGDALE

ORDER

(Receivership and Claims Process)

THIS APPLICATION, made by the Ontario Securities Commission ("**Commission**"), for an Order under appointing A. Farber & Partners Inc. ("**Farber**") as receiver ("**Receiver**"), without security, of all funds obtained by the Commission (the "**Proceeds**") in the enforcement of a sanctions order issued by the Commission on March 31, 2014 (the "**Sanctions Order**") against, or under settlement agreements with, the parties listed at **Schedule "A"** ("**Respondents to the Commission Proceeding** "), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the affidavit of Wayne Vanderlaan sworn February 28, 2019, the affidavit of Paul Denton sworn March 4, 2019, the consent of Farber to act as the Receiver, and on hearing the submissions of the Commission's counsel:

SERVICE

1. THIS COURT ORDERS that service of the Notice of Application is dispensed with and that the application is properly returnable without notice on this date.

APPOINTMENT

2. THIS COURT ORDERS that Farber is appointed Receiver, without security, of all Proceeds the Commission has obtained, or may in future obtain or recover, under the Sanctions Order.

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is immediately, and exclusively, authorized to exercise all necessary powers in relation to the Proceeds, and in particular may implement a claims process ("**Claims Process**") to distribute the Proceeds to investors ("**Investors**") in York Rio Resources Inc. ("**York Rio**") and Brilliante Brasilcan Resources Corp. ("**Brilliante**") and is further empowered, without limitation, to:

(a) take possession of, and exercise control over, the Proceeds and any and all additional proceeds, receipts, and disbursements arising out of or from the Proceeds;

(b) receive, preserve, and protect the Proceeds, or any part of the Proceeds;

(c) engage counsel and such other persons from time to time, and on whatever basis necessary, to assist with the exercise of the Receiver's powers and duties, including, without limitation, the powers conferred by this Order, and in this regard the Receiver is specifically authorized to engage counsel to the Applicant to advise and represent the Receiver, save and except on matters upon which the Receiver, in its judgment, requires independent counsel;

(d) report to, meet with, and discuss the Receiver's activities with staff of the Commission ("**Staff**"), counsel, and any other person or expert the Receiver deems appropriate to consult on all matters relating to the Proceeds and the receivership, and to share information subject to such confidentiality terms as the Receiver deems appropriate;

(e) engage, utilize, and rely upon any Staff who are made available by the Commission to assist the Receiver in discharging the mandate under this Order;

(f) notify Investors and implement and administer the Claims Process described in this Order in relation to the Proceeds; and

(g) take whatever steps are reasonably necessary or incidental to the exercise of any powers relating to the Proceeds under this Order or in the performance of any statutory obligations.

NO PROCEEDINGS AGAINST THE RECEIVER

4. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Receiver, except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST PROCEEDS

5. THIS COURT ORDERS that no other Proceeding in respect of the Proceeds obtained to date by the Commission under the Sanctions Order shall be commenced except with the written consent of the Receiver or with leave of this Court. Proceedings currently before the British Columbia Supreme Court in *Ontario Securities Commission v. York Rio Resources Inc. et al* No. S-178993 (Vancouver Registry) in which the Commission seeks to recover additional amounts currently paid into the British Columbia Supreme Court, may be continued by the Commission until resolved by Order of the British Columbia Supreme Court, or any appeals therefrom.

NO EXERCISE OF OTHER RIGHTS OR REMEDIES

6. THIS COURT ORDERS that all other rights and remedies against the Receiver or in relation to the Proceeds are otherwise stayed and suspended except with the written consent of the Receiver or leave of this Court.

RECEIVER TO HOLD FUNDS

7. THIS COURT ORDERS that the Proceeds, and any or all other amounts (including all additional funds, interest, or other types of payment derived from the Proceeds) that are received, collected, or otherwise obtained by the Receiver after the granting of this

Order, whether in existence on the date of this Order or received in future, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Receivership Accounts**") and the monies standing to the credit of the Receivership Accounts from time to time shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

PROTECTIONS FOR RECEIVER

8. THIS COURT ORDERS that in carrying out the terms of this Order:

(a) the Receiver shall incur no liability or obligation as a result of the appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct by the Receiver;

(b) the Receiver shall be entitled to rely on all records compiled by the Commission and any other information in relation to Investors provided by the Commission and Commission counsel, all without independent investigation; and

(c) Nothing in this Order shall derogate from the protections afforded the Receiver by any applicable legislation.

SERVICE AND NOTICE

9. THIS COURT ORDERS that any notice or other communication (including, without limitation, Proofs of Claim and Notices of Dispute) to be given under this Order by an Investor to the Receiver shall be in writing substantially in the form provided for in this Order and will be sufficiently given only if given by email or digital transmission, prepaid ordinary mail, courier, or personal delivery, addressed to:

A. Farber & Partners Inc.
in its capacity as Receiver of the Proceeds of a Sanctions Order against York Rio, Brilliante, and others

Email: **yorkrio@farbergroup.com**

OR:

150 York Street, Suite 1600
Toronto, ON M5H 3S5
Attention: **Megha Sharma**

Any such notice or other communication by an Investor shall be deemed received only upon actual receipt by the Receiver during normal business hours on a Business Day.

10. THIS COURT ORDERS that Confidential Exhibit "1" to the Vanderlaan Affidavit be sealed, kept confidential, and not form part of the public record, subject to further Order of this Court.

11. THIS COURT ORDERS THAT the E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 [7] this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: **www.farbergroup.com/yorkrio**.

12. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Guide is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Investors or other interested parties at their respective addresses as last shown on the Investor List and that any such service or distribution by courier, personal delivery, or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

CLAIMS PROCESS

Definitions

13. THIS COURT ORDERS that for the purposes of this Order, the following terms have the following meanings:

"Appointment Date" means March 6, 2019;

"Business Day" means a day, other than a Saturday, Sunday, or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

"Claim" means a claim by an Investor in York Rio or Brilliante other than an Excluded Claim;

"Claims Bar Date" means 5:00 p.m. Pacific time on May 31, 2019 or such later date as the Court may order or the Receiver may determine under the authority of this Order;

"Claims Process" means the procedures outlined in this Order, including the Schedules;

"Confirmation of Claim" means an Investor has confirmed the amount of the Investor's Claim as stated in the Notice of Claim and has communicated the confirmation to the Receiver by one of the following methods:

> **i.** Completing the Confirmation of Claim appended to the Notice of Claim and sending the form to the Receiver by: email to yorkrio@farbergroup.com; ordinary mail, courier, or telefax; or
>
> iii. Otherwise responding in writing to the Receiver by email to yorkrio@farbergroup.com, ordinary mail, courier, or telefax, and providing confirmation of the Investor's identity and the amount of the Claim as stated the Notice of Claim.

"Confirmation of Claim" means the short form appended to the Notice of Claim, and attached hereto as "**Schedule D**," that Investors may use to confirm the amount of a Claim as stated in the Notice of Claim;

"Corporate Respondents to the Commission Proceeding" means York Rio and Brilliante;

"Court" means the Ontario Superior Court of Justice (Commercial List);

"Excluded Claim" means a Claim by any of the Respondents to the Commission Proceeding or their officers, directors, or agents or any party related to the Respondents to Commission Proceeding who, in the discretion of the Receiver, should be excluded;

"Individual Respondents to the Commission Proceeding" means Victor York ("York"), Robert Runic ("Runic"), George Schwartz ("Schwartz"), Peter Robinson ("Robinson"), Adam Sherman ("Sherman"), Ryan Demchuk ("Demchuk"), Matthew Oliver ("Oliver"), Gordon Valde, ("Valde"), and Scott Bassingdale ("Bassingdale");

"Investor List" means the list of Investors compiled by Staff, as amended from time to time to reflect additional information acquired by Staff or the Receiver, based on documents, including bank records, subscription agreements, cheques, and corporate records obtained from York Rio and Brilliante, gathered in the course of the investigation and prosecution of the proceedings against the Respondents to the Commission Proceedings or in the administration of the receivership;

"Known Investors" means:

(i) Investors identified in the Investor List; and

(ii) any other Investor actually known to the Receiver or the Commission as of the date of this Order or who becomes known to the Receiver or the Commission before the Claims Bar Date;

"Notice of Claim" means a notice, substantially in the form attached hereto as **Schedule "C"**, delivered by the Receiver to each Known Investor for which it has an address stating the amount of their Claim (where the amount of the Claim is known to the Receiver), mailing address, and other contact details, and notifying the Investor that the Investor will have until the Claims Bar Date to provide a Confirmation of Claim or Proof of Claim;

"Notice of Dispute" means a notice, substantially in the form attached hereto as **Schedule "F"**, delivered to the Receiver by an Investor disputing the amount indicated in a Notice of Revision or Disallowance and stating the reasons for the dispute;

"Notice of Revision or Disallowance" means a notice, substantially in the form attached hereto as **Schedule "G"**, informing an Investor that the Receiver has revised or disallowed all or any part of the Investor's Claim and stating the reasons for the revision and/or disallowance;

"Person" means any individual, general or limited partnership, firm, association, joint venture, trust, entity, corporation, limited or unlimited liability company, unincorporated organization, trade union, pension plan administrator, pension plan regulator, governmental authority or agency, employee, or other association, or any other juridical entity howsoever designated or constituted;

"Proof of Claim" means a Proof of Claim, substantially in the form attached as **Schedule "E"**, to be completed and filed by an Investor stating the Investor's Claim where the Investor does not agree with the amount of the Claim set out in the Notice of Claim delivered by the Receiver or where the amount of the Claim is not known to the Receiver;

"Proven Claim" means the amount of any Investor's Claim as finally determined under the Claims Process;

"Public Notice to Investors" means the notice, substantially in the form of the notice attached as Schedule "B", publicizing the Claims Process and published under authority of this Order;

"Receivership Proceedings" means the proceedings commenced by this Application;

"Receiver's Website" means: www.farbergroup.com/yorkrio; and

"Respondents to the Commission Proceeding" means both the Corporate Respondents to the Commission Proceeding and the Individual Respondents to the Commission Proceeding.

Notice

14. THIS COURT ORDERS that:

(a) the Receiver shall, no later than five Business Days following the date granting this Order, post a copy of this Order (together with all Schedules) on the Receiver's Website;

(b) the Receiver shall send to each of the Known Investors for which it has an address a copy of the Notice of Claim as soon as practicable after the granting of this Order;

(c) the Receiver shall make reasonable efforts to ascertain an address or other contact information for each Known Investor for which it does not have an address;

(d) the Receiver shall, as soon as practicable after the granting of this Order, publish the Public Notice to Investors in national and regional Canadian newspapers including, at the Receiver's discretion, any or all of the *Globe and Mail*, *National Post*, *Vancouver Sun*, *Calgary Herald*, or such other national or regional publication that the Receiver in its discretion determines is appropriate to publicize; and

(e) the Receiver shall deliver, as soon as reasonably practicable following a request, a copy of a Notice of Claim to any Person claiming to be an Investor, provided such request is received from the Investor before the Claims Bar Date.

Confirmation of Claims

15. THIS COURT ORDERS that all Investors who agree with the amount of their Claim as stated in the Notice of Claim, shall provide the Receiver with a Confirmation of Claim before the Claims Bar Date.

16. THIS COURT ORDERS that if an Investor delivers a Confirmation of Claim to the Receiver before the Claims Bar Date, then the Investor's Claim shall constitute a Proven Claim in the amount stated in the Notice of Claim.

Proof of Claim

17. THIS COURT ORDERS that any Investor who disagrees with the amount stated in the Notice of Claim, whose Claim amount is not known to the Receiver, or who disagrees with any other aspect of their Notice of Claim (including, without limitation, whether the Claim is excluded) shall file a Proof of Claim with the Receiver within the time period provided for in this Order.

18. THIS COURT ORDERS that any Proof of Claim, together with any supporting documentation, must be filed with the Receiver by email to yorkrio@farbergroup.com, prepaid ordinary mail, courier, personal delivery, or telefax before the Claims Bar Date. This shall include, without limitation, any Proof of Claim filed by: Investors who dispute the amount stated in their Notice of Claim; Investors whose Claim amount is not known to the Receiver; and Investors who have not received a Notice of Claim from the Receiver but who deliver a Proof of Claim after the Public Notice to Investors is published in newspapers or on the Receiver's Website.

Claims Bar Date

19. THIS COURT ORDERS that any Investor who does not deliver a Confirmation of Claim, or a Proof of Claim together with supporting documentation, before the Claims Bar Date shall:

(a) be barred from asserting or enforcing any Claim;

(b) not be entitled to receive a share in any distribution under the Claims Process; and

(c) not be entitled to any further notice of, or to participate as an Investor in, the Claims Process.

20. THIS COURT ORDERS, subject to further order of the Court, that the Claims Bar Date shall be 5:00 PM Pacific time on May 31, 2019 but the Receiver may, at its

discretion, extend the date generally or in individual cases. If the Claims Bar Date is extended generally, the Receiver shall post notice of the extension on the Case Website.

Determination of Claims

21. THIS COURT ORDERS that the Receiver shall review all Proof of Claim forms filed on or before the Claims Bar Date and may accept, revise, or disallow (in whole or in part) the amount, or any other aspect of, a Claim asserted in any Proof of Claim. If the Receiver decides to revise or disallow a Claim, the Receiver shall send a Notice of Revision or Disallowance to the Investor. At any time, the Receiver may request additional information with respect to any Claim or request that the Investor file a revised Proof of Claim.

22. THIS COURT ORDERS that the Receiver may attempt to consensually resolve the amount of, or any other aspect of, a Claim by an Investor before accepting, revising, or disallowing a Claim.

23. THIS COURT ORDERS that where a Proof of Claim has been revised or disallowed by the Receiver through a Notice of Revision or Disallowance, the revised or disallowed portion of the Claim will not constitute a Proven Claim unless the Investor disputes the revision or disallowance and proves the revised or disallowed Claim under this Order.

Notices of Dispute

24. THIS COURT ORDERS that if an Investor disputes a Notice of Revision or Disallowance made by the Receiver, the Investor must deliver a Notice of Dispute to the Receiver by email, prepaid ordinary mail, courier, telefax, or personal delivery. The Notice of Dispute must be delivered to the Receiver within 15 days of the date the Receiver makes the determination in the Notice of Revision or Disallowance, or such later date as the Receiver may agree upon in writing or the Court may order. The delivery of a Notice of Dispute to the Receiver within 15 days shall constitute a request to have the amount or status of the Claim determined according to the terms of this Order.

25. THIS COURT ORDERS that if an Investor who receives a Notice of Revision or Disallowance fails to deliver a Notice of Dispute to the Receiver within 15 days, the amount and status of the Investor's Claim shall be deemed to be the amount in the Notice of Revision or Disallowance and shall constitute the Investor's Proven Claim.

Resolution of Claims

26. THIS COURT ORDERS that as soon as practicable after the delivery of the Notice of Dispute to the Receiver, the Receiver may:

(a) attempt to consensually resolve the amount, or any other aspect, of the Claim with the Investor;

(b) schedule an appointment with the Court for the purpose of seeking appointment of an independent claims officer with a mandate to determine the Claim; and/or

(c) schedule an appointment with the Court for the purpose of scheduling a motion to have the amount, or any other aspect, of the Claim determined by the Court.

27. THIS COURT ORDERS that notwithstanding any other provision of this Order, the Receiver may make a motion to the Court for a final determination of a Claim at any time, whether or not a Notice of Revision or Disallowance has been sent by the Receiver.

28. THIS COURT ORDERS that in the event that a dispute between the Investor and Receiver is not settled in a manner satisfactory to the Receiver or the Investor, the Receiver or Investor may make a motion to the Court for final determination of an Investor's Claim.

Assignment, Transfer, and Security Interests

29. THIS COURT ORDERS that the Receiver shall not be obligated to give notice to, or otherwise deal with, a transferee or assignee of a Claim unless:

(a) actual written notice of transfer or assignment, together with satisfactory evidence of a proper transfer or assignment, is received by the Receiver; and

(b) the Receiver, in its discretion, accepts in writing the transfer or assignment.

30. THIS COURT ORDERS that any transferee or assignee of a Claim accepted by the Receiver shall be treated as the "Investor" for purposes of a particular Claim and be bound by any notices given or steps taken in respect of the particular Claim according to the terms of this Order.

31. THIS COURT ORDERS that the Receiver shall not be bound to accept, acknowledge, or recognize any transfer or assignment of a Claim, in whole or in part, and shall be entitled to give notices to, and to otherwise deal with a Claim by treating the Person last holding the Claim as the Investor.

32. THIS COURT ORDERS that if the holder of a Claim has transferred or assigned a Claim to more than one Person, the transfer or assignment shall not create a separate Claim or Claims. Any such claim shall continue to be dealt with by the Receiver as a single Claim.

33. THIS COURT ORDERS that the Receiver is under no obligation to give notice to any Person other than the Investor holding the Claim and shall, without limitation, have no obligation to give notice to any Person holding a security interest, lien, or charge in, or a pledge or assignment by way of security in, a Claim.

Death or Incapacity

34. THIS COURT ORDERS that if an Investor has died, the Receiver may accept a Claim on the Investor's behalf from the duly appointed legal representative or estate trustee of the Investor.

35. THIS COURT ORDERS that if an Investor has died or become incapacitated, and no legal representative has been appointed or otherwise has authority to act on behalf of the Investor, the Receiver has discretion to allow the Investor's surviving spouse, survivor, or next-of-kin to act on the Investor's behalf including the filing of a Confirmation of Claim or a Proof of Claim form, as applicable.

36. THIS COURT ORDERS that before allowing a person to act on behalf of an Investor, the Receiver may require the person to execute a statutory declaration or provide some other document confirming the person's relationship to the Investor.

37. THIS COURT ORDERS that if the Receiver exercises its discretion to allow a person to act on behalf of an Investor, the Receiver shall incur no liability or obligation to any person for exercising that discretion or for distributing funds as permitted under this Order.

38. THIS COURT ORDERS that in exercising the discretion to allow another person to file a Claim on behalf of an Investor or to receive funds otherwise payable to an Investor, the Receiver shall have reference to:

> (a) if the Investor is alive, whether it appears to the Receiver that the distribution of funds to that person is in the best interests of the Investor; and
>
> (b) if the Investor is deceased and intestate, the rules relating to distribution of intestate estates set out in the *Estates Act*, R.S.O. 1990, c. E.21.

Adequacy of Information/Currency

39. THIS COURT ORDERS that the Receiver may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to completion and execution of any Proof of Claim.

40. THIS COURT ORDERS that any Investor Claims denominated in a currency other than Canadian dollars shall, for the purposes of this Order, be converted to, and constitute obligations in, Canadian dollars, and be calculated based on the Bank of Canada's noon spot rate on the day this Order is granted.

GENERAL

41. THIS COURT ORDERS that nothing in this order shall have the effect of staying the proceeding in the British Columbia Supreme Court, *Ontario Securities Commission v. York Rio Resources Inc. et al* No. S-178993 (Vancouver Registry).

42. THIS COURT ORDERS that the Receiver may, at any time, and with such notice as this Court may require, seek directions from this Court with respect to this Order, the Claims Procedure, and the forms attached as Schedules, including with respect to appointment of a claims officer if the Receiver deems it necessary or appropriate.

43. THIS COURT ORDERS that this Order does not provide for distribution of Proceeds and is intended only to appoint the Receiver and implement a Claims Process for submission and adjudication of individual Claims. The Receiver will request a further Order from the Court approving a final distribution of Proceeds on a *pro rata* basis that treats all Investors in York Rio and Brilliante Investors equally.

44. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory, and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

45. THIS COURT ORDERS that the Receiver is at liberty, and is hereby authorized and empowered, to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Ontario or Canada.

Hainey J.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 0 7 2019

PER / PAR: RW

SCHEDULE "A"
RESPONDENTS TO THE COMMISSION PROCEEDING

- York Rio Resources Inc.
- Brilliante Brasilcan Resources Corp.
- Victor York
- Robert Runic
- George Schwartz
- Peter Robinson (settlement agreement approved by order of the Commission on November 5, 2010)
- Adam Sherman (settlement agreement approved by order of the Commission on June 6, 2011)
- Ryan Demchuk
- Matthew Oliver
- Gordon Valde
- Scott Bassingdale

SCHEDULE "B"

PUBLIC NOTICE TO INVESTORS

IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION UNDER A SANCTIONS ORDER MADE AGAINST YORK RIO RESOURCES INC BRILLIANTE BRASILCAN RESOURCES CORP. AND OTHERS

RE: NOTICE OF CLAIMS PROCESS

On March 6, 2019, the Ontario Superior Court of Justice (Commercial List) appointed **A. Farber & Partners Inc.** as receiver ("**Receiver**") of monies recovered ("**Proceeds**") under a sanctions order ("**Sanctions Order**") granted by the Ontario Securities Commission against York Rio Resources Inc. ("**York Rio**"), Brilliante Brasilcan Resources Corp. ("**Brilliante**"), and others.

The Superior Court Order authorizes the Receiver to implement a Claims Process ("**Claims Process**") that will be available to all known investors ("**Investors**") in York Rio and Brilliante who receive a Notice of Claim from the Receiver by mail and assert a claim ("**Claim**") for money invested in York Rio or Brilliante.

If you were an Investor in York Rio or Brilliante and you did not receive a Notice of Claim from the Receiver, please go to the Receiver's website at www.farbergroup.com/yorkrio for information on how you can make a Claim under the Claims Process. You can also contact the Receiver by telephone at 647-796-6034, fax at 416-496-3839 or by email at yorkrio@farbergroup.com.

The Receiver must receive confirmation of Claims or Proof of Claim forms by 5:00 p.m. (Pacific time) on Friday, May 31, 2019. Investors are responsible for ensuring that their confirmation of Claim or Proof of Claim forms are submitted to the Receiver by May 31, 2019.

CLAIMS THAT ARE NOT RECEIVED ON OR BEFORE MAY 31, 2019 WILL BE BARRED AND EXTINGUISHED FOREVER.

DATED at Toronto this ______ day of ______________, 2019

SCHEDULE "C"
NOTICE OF CLAIM

IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION IN THE ENFORCEMENT OF A SANCTIONS ORDER AGAINST YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP. AND OTHERS

[Name]

[Address]

Dear [Name],

We understand you were an Investor ("**Investor**") in York Rio Resources Inc. ("**York Rio**") and/or Brilliante Brasilcan Resources Corp. ("**Brilliante**") between 2004 and 2008.

The Ontario Securities Commission (the "**Commission**") has recovered monies (the "**Proceeds")** that are now being distributed to Investors who lost money in York Rio and/or Brilliante.

A. Farber & Partners Inc. was appointed by the Ontario Superior Court as Receiver (the "**Receiver**") over the Proceeds on [Date]. The Receiver is working to identify Investors and distribute the Proceeds equally to eligible York Rio and Brilliante Investors who make a claim ("**Claim**").

The information below explains how you can make a Claim for a share of this money. Please read it carefully. **ONLY INVESTORS WHO MAKE A CLAIM ON OR BEFORE May 31, 2019 WILL BE ENTITLED TO RECEIVE A PAYMENT.**

YOUR CLAIM

The Receiver has reviewed the records provided by the Commission and has determined that you invested ______in York Rio and/or Brilliante.

If there is no amount stated immediately above, the Receiver has reviewed the records provided by the Commission and has been unable to determine the amount you invested in York Rio and/or Brilliante.

IF YOU AGREE WITH THIS AMOUNT

If you agree that the amount stated above is accurate, you must confirm your Claim. You can confirm in one of the following two ways:

a) Complete the Confirmation of Claim Form included with this Notice of Claim and send it to the Receiver by email (at yorkrio@farbergroup.com), ordinary mail, courier or fax at the address below; or

b) Respond to this Notice of Claim in writing by e-mail (at yorkrio@farbergroup.com), ordinary mail, courier, or fax at the address below stating your name and that you agree with the amount of your claim as stated in this Notice of Claim.

Once you have provided a confirmation of your Claim through one of these two methods, your Claim will be accepted at the amount stated above and you will be eligible to receive a distribution, along with other Investors in York Rio and/or Brilliante, of a proportionate share of the Proceeds.

If your address has changed from the address on this Notice of Claim, please provide the Receiver with your current contact information.

IF YOU DISAGREE WITH THIS AMOUNT OR THERE IS NO AMOUNT

If you disagree with the amount of the Claim stated above, or no amount is stated, you must complete a Proof of Claim. A Proof of Claim form is enclosed with this letter. Proof of Claim forms can also be found on the Receiver's Website at **www.farbergroup.com/yorkrio**. On the Proof of Claim form you must state the amount of your claim and enclose any evidence you have that supports that amount.

You must file your Proof of Claim with the Receiver by email (at yorkrio@farbergroup.com), ordinary mail, courier, personal delivery, or fax at the address below. **Only investors who disagree with the amount of their Claim set out above, or for whom no Claim amount is stated, are required to file a Proof of Claim.**

DEADLINE

You must confirm your Claim or deliver a Proof of Claim to the Receiver on or before 5:00 p.m. Pacific time on Friday, May 31, 2019 (the "Claims Bar Date") Under the Claims Process approved by the Ontario Superior Court, failure to confirm your Claim or submit a Proof of Claim form by May 31, 2019 will result in your Claim being barred, extinguished, released, and discharged forever.

Other information can be obtained from the Receiver's Website at **www.farbergroup.com/yorkrio** or by contacting the Receiver at the telephone number below and providing your name, address, and contact information.

It is your responsibility to ensure that the Receiver receives confirmation of your Claim or a Proof of Claim form by the Claims Bar Date.

GENERAL

For further information, including a copy of the Ontario Superior Court Order establishing the Receivership and Claims Process, please refer to the Receiver's Website at: (www.farbergroup.com/yorkrio).

If you have any questions regarding the Claims Process, please consult the Receiver's website or contact the Receiver at the address provided below.

All notices and enquiries with respect to the Claims Process should be addressed to:

Email: **yorkrio@farbergroup.com**

or

A. Farber & Partners Inc.
in its capacity as Receiver of the Proceeds of a Sanctions Order against York Rio, Brilliante, and others

150 York Street, Suite 1600
Toronto, ON M5H 3S5

Attention: **Megha Sharma**

or

Telephone Number: 647-796-6034; Fax: 416-496-3839

SCHEDULE "D"

CONFIRMATION OF CLAIM

IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION IN THE ENFORCEMENT OF A SANCTIONS ORDER AGAINST YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP. AND OTHERS

[Name]

[Address]

Amount of Claim in York Rio and/or Brilliante: $____________________________
(Please state if in US dollars)

Certification

1. I am the Investor or authorized representative of the Investor.
2. I have knowledge of the circumstances connected with this Claim and agree with the amount stated above.

Signature: ____________________________

Name: ____________________________
(Please print name)

Title: ____________________________
(If applicable)

Date:____________________________

Please send this Confirmation of Claim by email to: yorkrio@farbergroup.com, or by ordinary mail, courier, or fax to the address below:

A. Farber & Partners Inc.
150 York Street, Suite 1600, Toronto, ON M5H 3S5
Attention Megha Sharma: Phone: 647-796-6034, Fax: 416-496-3839

SCHEDULE "E"

PROOF OF CLAIM

PROOF OF CLAIM RELATING TO FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION IN THE ENFORCEMENT OF A SANCTIONS ORDER AGAINST YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., AND OTHERS

This form does NOT need to be completed if you received a Notice of Claim from the Receiver and you agree with the claim amount ("Claim") stated in the Notice of Claim.

This form must only be completed if: you did not receive a Notice of Claim from the Receiver; you received a Notice of Claim from the Receiver and no amount is stated; or you dispute the Claim amount stated in your Notice of Claim.

1. CONTACT INFORMATION OF INVESTOR

(a)	Full Legal Name:	______________________
(b)	Full Mailing Address:	______________________ ______________________ ______________________
(c)	Telephone Number:	______________________
(d)	Facsimile Number:	______________________
(e)	E-mail Address:	______________________
(f)	Attention (Contact Person):	______________________
(g)	Have you sold or assigned your claim to another party [check (✓) one]?	☐ YES ☐ NO
(h)	Are you a representative of an Investor's estate or acting on behalf of a legally incapacitated Investor?	☐ YES ☐ NO
(i)	If "yes" to either the above, please provide the following information:	

(j) Full Legal Name of Assignee(s), Estate Representative, Guardian, or Power of Attorney: ______________________

(If there is more than one assignee, estate representative, guardian or power of attorney, please attach a separate sheet with the require information)

(ii) Full Mailing Address: ______________________

____

____

(iii) Telephone Number: ______________________

(iv) Facsimile Number: ______________________

(v) E-mail Address: ______________________

(vi) Other Important Contact Information: ______________________

2. PROOF OF CLAIM

I, ____

[name of Investor or Representative of the Investor]

of ______________________________________ do hereby certify that:

[City or Province]

(a) I [check (✓) one]

☐ am an Investor; OR

☐ am ______________________(state position or title) of

______________________(name of Investor)

(b) I have knowledge of all the circumstances connected with the Claim referred to below;

(c) I [check (✓) one]

☐ am NOT in any way related to York Rio Resources Inc., Brilliante Brasilcan Resources Corp., Victor York, Robert Runic, George Schwartz, Peter Robinson, Adam Sherman, Ryan Demchuk, Matthew Oliver, Gordon Valde or Scott Bassingdale; OR

☐ am related to the above noted individuals ______________________ (state the person related to)

______________________ (state the relationship);

(d) I invested a total of:

$____________________CAD in

☐ York Rio Resources Inc. and/or

☐ Brilliante Brasilcan Resources Corp.

(If other than $CAD, please specify currency, e.g. $USD. The Receiver will convert claims in a foreign currency to Canadian Dollars at the Bank of Canada noon spot rate as at the date of the Receiver's appointment, [DATE]. The Canadian Dollar/U.S, Dollar rate of exchange on that date was CDN$[•]/US$1.00)

3. PARTICULARS OF CLAIM:

In addition to the information stated above on this form, please attach any additional details of your Claim, including any documents you rely on to support your Claim, as a schedule to this document. The documents may include: statements of account; copies of cancelled cheques or money orders; wire confirmations; bank statements; receipts; invoices; or screenshots.

The chart immediately below may assist with preparation of your Claim:

Date	Method of Payment	Who Was Payment Made To	Nature of Investment	Amount of Payment

4. FILING PROOF OF CLAIM WITH RECEIVER

This Proof of Claim must be delivered to the Receiver no later than 5:00 p.m. (Pacific time) on Friday May 31, 2019, by email to **yorkrio@farbergroup.com,** ordinary mail, courier, personal delivery, or fax at the following address:

A. Farber & Partners Inc.
in its capacity as Receiver of the Proceeds of a Sanctions Order Against York Rio, Brilliante, and Others

150 York Street, Suite 1600
Toronto, ON M5H 3S5

Attention: **Megha Sharma**
Email: **yorkrio@farbergroup.com**
Telephone Number: 647-796-6034

Failure to file a Proof of Claim on or before May 31, 2019 will result in any Claim being barred and the Investor being prevented from making or enforcing a Claim to the Proceeds. Failure to file a Proof of Claim by May 31, 2019 will also disentitle a person to any further notice or the right to participate as an Investor in these proceedings.

5. EXCLUDED CLAIMS

Claims by Investors who are Respondents to the Commission Proceeding or individuals related to the Respondents to the Commission Proceeding will be excluded from consideration. Please consult the Receivership and Claims Process Order (posted at www.farbergroup.com/yorkrio) for further details relating to Excluded Claims.

Dated at ________________ this ________ day of ____________________, 2019.

______________________	Per:	______________________
Witness		**[Name]**
	Name:	______________________
	Title:	______________________

SCHEDULE "F"

NOTICE OF REVISION OR DISALLOWANCE OF CLAIM
REFERENCE NUMBER __________

TO: [insert name of claimant]

A. Farber & Partners Inc., in its capacity as receiver ("**Receiver**") of funds obtained by the Ontario Securities Commission ("**Proceeds**") in the enforcement of a sanctions order made against York Rio Resources Inc., Brilliante Brasilcan Resources Corp., and others, has reviewed your Proof of Claim. The Receiver has revised [or rejected] your Claim, [or aspect of you Claim] as follows:

Proof of Claim as Submitted	Claim as Accepted

Reasons for Revision or Disallowance:

[insert brief explanation]

If you wish to dispute the Receiver's determination of your Claim you must, within 15 days of the date of this Notice, deliver a Notice of Dispute to the Receiver. The Notice of Dispute form is enclosed. The procedure for disputing the Receiver's determination is described in the Receivership and Claims Process Order granted by the Ontario Superior Court. A copy of the Receivership and Claims Process Order may be found on the Receiver's Website at www.farbergroup.com/yorkrio.

IF YOU DO NOT DELIVER A NOTICE OF DISPUTE BY [Insert Date], THE DETERMINATION OF YOUR CLAIM ACCORDING TO THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE FINAL AND BINDING UPON YOU.

Dated at __________________ this ________ day of ____________________, 2019.

A. Farber & Partners Inc.,
In its capacity as Receiver of the Proceeds of a Sanctions Order against York Rio, Brilliante, and Others

SCHEDULE "G"
NOTICE OF DISPUTE

We hereby provide notice of our intention to dispute the Notice of Revision or Disallowance bearing Reference Number ______________ and dated ______________________ issued in respect of our claim.

Reasons for Dispute (attach additional sheet and copies of all supporting documentation if necessary):

____

____

____

Name of Investor: ______________________________

______________________________ ______________________
(Signature of individual completing this Dispute) Date

____
(Please print name)

Telephone Number of Claimant: ______________________

Facsimile Number of Claimant: ______________________

E-mail Address of Claimant: ______________________

Full Mailing Address of Claimant: ______________________

____

____

THIS FORM MUST BE RETURNED BY EMAIL, PREPAID ORDINARY MAIL, COURIER, PERSONAL DELIVERY, OR TELEFAX WITHIN 15 DAYS OF THE DATE OF THE NOTICE OF REVISION OR DISALLOWANCE, OR BY 5:00 P.M. (PACIFIC TIME) ON ______________________. THE ONTARIO SUPERIOR COURT'S RECEIVERSHIP AND CLAIMS PROCESS ORDER ESTABLISHING THE PROCEDURE FOR DISPUTING THE RECEIVER'S DETERMINATION OF CLAIMS MAY REVIEWED ONLINE AT ONLINE AT www.farbergroup.com/yorkrio

TO:

A. Farber & Partners Inc.
in its capacity as Receiver of the Proceeds of a Sanctions Order Against York Rio, Brilliante, and Others

150 York Street, Suite 1600
Toronto, ON M5H 3S5

Attention: **Megha Sharma**

OR:

Email: yorkrio@farbergroup.com

OR

Fax: 416-496-3839

IN THE MATTER OF THE *SECURITIES ACT* R.S.O. 1990, C. S-5, AS AMENDED

AND IN THE MATTER OF THE RECEIVERSHIP OF FUNDS OBTAINED BY THE ONTARIO SECURITIES COMMISSION IN THE ENFORCEMENT OF A SANCTIONS ORDER MADE AGAINST YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE, AND SCOTT BASSINGDALE

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER
(Receivership and Claims Process)

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto ON M5X 1G5

Malcolm N. Ruby (#25970G)
Tel: 416-862-4314
Fax: 416-862-7661
malcolm.ruby@gowlingwlg.com

C. Haddon Murray (#61640P)
Tel: 416-862-3604
Fax: 416-862-7661
haddon.murray@gowlingwlg.com

Lawyers for the Applicant, Ontario Securities Commission

10:00

COUNSEL SLIP

COURT FILE NO 19-CV-614868 DATE WED. MAR. 6th 19

NO ON LIST 4

TITLE OF PROCEEDING ONTARIO SECURITIES COMMISSION

COUNSEL FOR: PLAINTIFF(S) APPLICANT(S) PETITIONER(S)

C. Haddon Murray

Malcolm Ruby

PHONE & FAX NOS

haddon.murray@gowlingwlg.com

malcolm.ruby@gowlingwlg.com

COUNSEL FOR: DEFENDANT(S) RESPONDENT(S)

PHONE & FAX NOS

no one

Nikhil Cooper

Student-at-law (OSC)

Paul Denton

FARBER GROUP

March 6, 2019

I am satisfied that this Application, which is not opposed, should be granted on the Terms of the attached order appointing A Farber & Partners Inc. as receiver and approving a claims process.

There shall be a sealing order with respect to Confidential Exhibit 1.

Hainey J.

Tab 2

2009 CarswellOnt 4241
Ontario Superior Court of Justice [Commercial List]

Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.

2009 CarswellOnt 4241, 179 A.C.W.S. (3d) 345

IN THE MATTER OF THE SECURITIES ACT, R.S.O. 1990, c. S.5 AS AMENDED

ONTARIO SECURITIES COMMISSION (Applicant) v. SEXTANT STRATEGIC OPPORTUNITIES HEDGE FUND L.P., SEXTANT CAPITAL MANAGEMENT INC. AND SEXTANT CAPITAL GP INC. (Respondents)

Morawetz J.

Heard: April 30, 2009
Judgment: July 17, 2009
Docket: CV-09-8053-CL

Counsel: Susan Kushneryk for Ontario Securities Commission
Robert Brush, Anna K. Markiewicz for Respondents, Sextant Capital Management Inc., Sextant Capital GP Inc.
David Bish for PricewaterhouseCoopers Inc.

Subject: Corporate and Commercial; Securities
Related Abridgment Classifications
Securities
II Commissions and exchanges
II.4 Orders
II.4.d Miscellaneous
Securities
III Trading in securities
III.7 Miscellaneous
Headnote
Securities --- Commissions and exchanges — Orders — Miscellaneous
Securities --- Trading in securities — Miscellaneous
Table of Authorities
Cases considered by *Morawetz J.*:

British Columbia (Securities Commission) v. DiCimbriani (1996), 11 C.C.L.S. 181, 138 D.L.R. (4th) 263, 81 B.C.A.C. 34, 132 W.A.C. 34, 1996 CarswellBC 1932 (B.C. C.A.) — referred to

Ontario (Securities Commission) v. C & M Financial Consultants Ltd. (1979), 1979 CarswellOnt 764, 23 O.R. (2d) 378 (Ont. H.C.) — referred to

Ontario Securities Commission v. Factorcorp Inc. (2007), 2007 CarswellOnt 7515 (Ont. S.C.J.) — referred to

Statutes considered:
Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 111 — referred to

s. 116 — referred to

s. 129 — pursuant to

***Morawetz J.*:**

Introduction

1 The Ontario Securities Commission (the "OSC" or the "Commission") moves for the appointment of a receiver and/or receiver and manager (collectively "receiver") over the assets and undertaking of Sextant Strategic Opportunities Hedge Fund L.P. ("Sextant Canadian Fund"), Sextant Capital Management Inc. ("SCMI") and Sextant Capital GP Inc. ("Sextant GP") (collectively, the "Sextant Canadian Entities") pursuant to s. 129 of the *Ontario Securities Act* (the "Act").

2 The OSC takes the position that the Sextant Canadian Fund is a mutual fund in Ontario, managed by SCMI and Sextant GP. The OSC submits that nearly 250 Canadians have together invested just under $30 million in the Sextant Canadian Fund since 2006.

3 The OSC submits that it has become aware of issues giving rise to what it considers to be significant concerns with respect to the Sextant Canadian Fund and its management, SCMI and Sextant GP. The OSC submits that these problems include potential fraud, potential misappropriation of investor money, misrepresentations, self-dealing by the fund managers, and numerous and significant recordkeeping inaccuracies and apparent record manipulation.

4 The OSC further submits that any one of the foregoing list of concerns would be sufficient to cause risk to investors' interests in the Sextant Canadian Fund and, taken together, these issues and the course of conduct which created them, have placed investors' interests at significant risk. The OSC submits that the only way to safeguard those interests and to adequately address the numerous deficiencies and irregularities associated the Sextant Canadian Fund and its management is to introduce an independent, third party to undertake a verifiable review and analysis of the fund and its management. They submit that the investors are entitled to a process that is reliable and that they can trust.

5 Accordingly, the OSC seeks the appointment of a receiver pursuant to s. 129 of the Act, for the interests of the investors and for the due administration of Ontario securities law.

6 The OSC submits that the respondents chose not file any responding material in this application, such that the evidence proffered by the OSC in the affidavit of Mr. Raymond Daubney sworn March 5, 2009 is uncontroverted.

7 No party appeared on behalf of the Sextant Canadian Fund.

8 SCMI and Sextant GP oppose the appointment of a receiver on the basis that:

(i) there are serious flaws in the evidentiary record underlying this application;

(ii) it is unnecessary to appoint a receiver for SCMI and Sextant GP for the due administration of Ontario securities law or to protect the interests of creditors and security holders; and

(iii) the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver.

9 SCMI and Sextant GP take the position that limiting the receiver's appointment to the Sextant Canadian Fund, but on terms requiring SCMI and Sextant GP to cooperate with the receiver, will avoid this conflict of interest while, at the same time, ensure that the interests of stakeholders will be protected and Ontario securities law will be duly administered.

Motion of SCMI and Sextant GP

10 SCMI and Sextant GP brought a separate motion to address what they consider to be serious flaws in the evidentiary record underlying the application. They sought an order striking out certain paragraphs of the affidavit of Mr. Daubney, in particular, paragraphs 78, 82, 88, 90, 121, 161, 175, 188 and 189 on the basis that all of these paragraphs contain either opinions or conclusions or legal argument. The moving parties also take the position that on April 9, 2009 they attempted to cross-examine Mr. Daubney on his affidavit but during the course of the examination, Mr. Daubney refused to answer or took under advisement questions respecting the basis for his opinions and legal conclusions and the factual underpinnings of those opinions and conclusions. They further suggest that, as a result of Mr. Daubney's refusal to answer, they were unable to test what they consider to be the improper and highly prejudicial paragraphs of the affidavit of Mr. Daubney in defence of the application and, as a result, they were unable to make full answer and defence.

11 In my view, the motion brought by SCMI and Sextant GP has no merit. To the extent that the moving parties complain about the refusal of Mr. Daubney to answer certain questions or to take certain questions under advisement, they should have challenged his response as opposed to bringing a motion to strike. Any complaints with respect to the conduct of the cross-examination were, in this respect, within the control of SCMI and Sextant. The moving parties made the decision not to challenge the refusals or taking questions under advisement.

12 Counsel to SCMI and Sextant GP also challenge Mr. Daubney's evidence with respect to his statements on valuation on the basis that he is not a qualified expert valuator. Mr. Daubney is not an expert and his concluding opinion on valuation has not been considered. However, certain of his comments on the issue of value are factual in nature and go to the reasonableness of the factors that are considered in a valuation. These statements have been considered. The concerns of SCMI and Sextant GP go to weight.

13 Certain of Mr. Daubney's statements are in the form of legal argument, and have been either disregarded or discounted to the point where they have been given, little or no weight.

Facts and Concerns

14 A summary of the factual background to this application has been set out in the factum of the OSC and the factum of SCMI and Sextant Capital.

15 At paragraph 72 of the OSC factum, counsel submits that there are a number of reasons why the appointment of a receiver is in the best interests of the Sextant Canadian Fund security holders and for the due administration of Ontario securities law. These reasons include:

> (a) SCMI and Sextant GP have caused the Sextant Canadian Fund to pay each of them significant fees, including fees in excess of $3.5 million in 2008 alone, as a result of manipulation of the value of the fund - which purportedly increased by approximately 172% from the end of 2007 to the end of 2008 notwithstanding that the underlying assets are principally shares of companies that are not operating:
>
> (b) there is a capital shortfall in the Sextant Canadian Fund based on outstanding redemption requests and the value of the Sextant RBC Accounts and the Sextant Canadian Fund New Edge account;
>
> (c) the value of the assets held by the Sextant Canadian Fund is uncertain, such that the accurate net asset value per unit held by investors held in the Sextant Canadian Fund is not known;
>
> (d) record keeping inaccuracies have to be investigated to determine the accurate shareholdings held in the Sextant Canadian Fund and to confirm the accuracy and propriety of the flow of money out of the fund;
>
> (e) there is a history of mismanagement of the investments in the Sextant Canadian Fund;

(f) there has been significant regulatory non-compliance;

(g) investors' interests are not served by the status quo whereby SCMI and Sextant GP continue to manage the Sextant Canadian Fund;

(h) there is no evidence that SCMI or Sextant GP are in any better position than a receiver to protect investors' interests;

(i) there is no evidence of a tangible alternative to appointing a third party to step in and manage the Sextant Canadian Entities; and

(j) in light of the recordkeeping inconsistencies, questionable value of the assets of the Sextant Canadian Fund, evidence of forgery and other fraudulent activity, investors are entitled to an independent and verifiable claims process.

16 The above list of reasons has been drawn from paragraph 188 of the affidavit of Mr. Daubney, which was one of the paragraphs challenged by SCMI and Sextant GP. It is, in my view, appropriate, to review the basis for some of these statements.

17 Earlier in his affidavit, Mr. Daubney states that the Sextant Canadian Fund is structured as a limited partnership pursuant to a Limited Partnership Agreement between Sextant GP and the investors in the Sextant Canadian Fund dated February 17, 2006. There is also an Amended and Restated Limited Partnership Agreement dated July 28, 2008 which introduced a new class of units in the Fund but otherwise retained identical governance provisions. The initial and subsequent agreements together are referred to as the "LP Agreement".

18 The LP Agreement includes, among others, the following provisions:

(i) the Sextant Canadian Fund will make investments in accordance with the disclosure in its offering document;

(ii) the Sextant Canadian Fund may not invest more than 20% of its portfolio, based on the net asset value at the most recent calculation date, in any single class of securities of an issuer as calculated at cost;

(iii) the Sextant Canadian Fund will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm in which any principle of SCMI may have a direct or indirect material interest; and

(iv) the Sextant Canadian Fund will pay a 2% advisory fee to SCMI and a 20% performance fee or "management allocation" to Sextant GP.

19 The affidavit of Mr. Daubney at paragraph 21 also references a confidential offering memorandum which describes investment restrictions applicable to the Fund, including that Sextant Canadian Fund may not invest more than 20% of its portfolio in any single class of securities of an issuer and that it will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm which a principal of SCMI may have a direct or indirect material interest.

20 At paragraph 22, Mr. Daubney addresses the relationship between Mr. Otto Spork and the Sextant Canadian Entities. Mr. Daubney states that Mr. Spork is the directing mind behind these three entities and various related entities, including those invested in by the Sextant Canadian Fund. Mr. Daubney states that Mr. Spork created an elaborate structure with three main components:

(a) the investment component which solicits investors and includes three investment funds, one in Canada (i.e. the Sextant Canadian Fund) and two in the Cayman Islands;

(b) the management component including SCMI and Sextant GP in Toronto and Sextant Capital Management, an Islandi ehf ("Sextant Iceland"), which manages the investment funds in exchange for fees paid by the funds from investors' money; and

(c) the glacier company component, consisting of two private Luxembourg companies and their Icelandic subsidiaries which were the primary investments for the three investment funds.

21 Mr. Daubney goes on to state that through this structure, Mr. Spork was able to take investors' monies in at least two ways. First, he could take investors' money through management fees, in the management component and, second, through direct investment in his own Luxembourg companies. Further, Mr. Spork has significant ownership and management roles in the various entities relevant to this matter, including SCMI, Sextant GP, Sextant Iceland, the Sextant Strategic Hybrid 2 Hedge Resource Fund Offshore Ltd. ("Sextant Hybrid Fund"), the Sextant Strategic Global Water Fund Offshore Ltd. ("Sextant Water Fund"), Iceland Glacier Products S.A. ("IGP") and Iceland Global Water 2 S.A. ("IGW").

22 Mr. Daubney goes on to state that in addition to the Sextant Canadian Fund, the Sextant investment structure includes the Sextant Hybrid Fund and the Sextant Water Fund (together, the "Sextant Offshore Funds") two investments funds incorporated under the laws of the Cayman Islands. Further, although the Sextant Offshore Funds are incorporated in the Cayman Islands, their custodial accounts are held at New Edge in Canada and IAS is the net asset calculation agent for the Funds.

23 Mr. Daubney further states that the net asset value of the Sextant Offshore Funds in December 2008, as stated on the IAS Portfolio Valuation Statement for those funds, was just over U.S. $100 million. Those statements also indicate that their respective investment holdings essentially mirrored the investments held by the Sextant Canadian Fund for the same month, in that the portfolios of all three funds were just over 90% invested IGP and just over 2.5% invested in IGW, as calculated by IAS.

24 Mr. Daubney also states that the Sextant Offshore Funds were not isolated but rather were an integral part of the structure created by Mr. Spork.

25 With respect to Sextant funds management, SCMI was incorporated in Ontario in August 2005. It is registered under the Act as an investment counsel, portfolio manager and limited market dealer and is the principle distributor of the Sextant Canadian Fund.

26 Sextant GP was incorporated in Ontario in December 2005.

27 Mr. Daubney is of the view that the only purpose for SCMI and Sextant GP apparent in the records available to staff of the OSC, is to manage the Sextant Canadian Fund.

28 Mr. Daubney further states that the management of the Sextant Canadian Fund and the Sextant Offshore Funds, in addition to SCMI and Sextant GP, includes Sextant Iceland.

29 Mr. Daubney goes on to describe the third component of the investment structure created by Mr. Spork which is comprised of two limited Luxembourg companies, IGP and IGW, and their Icelandic subsidiaries. Mr. Daubney states that Mr. Spork has ownership interests and management roles in each of IGP and IGW. IGP and IGW are limited Luxembourg companies. IGP has a wholly-owned subsidiary called Iceland Glacier Products ehf ("IGP Iceland") and IGW has a wholly-owned subsidiary called Iceland Global Water EHF ("IGW Iceland").

30 Mr. Daubney further states that IGP Iceland is intended to operate, in the future, as a bottled water business that extracts and bottles glacier water, as set out in its business plan. Mr. Daubney states that OSC staff have not been able to confirm the details of any glacier rights held by IGP, although there is some indication that IGP does

have some rights to at least one glacier in Iceland. A plant is being constructed in the town in connection with the lease but the plant is not yet operating.

31 The relationship of the Sextant Canadian Entities to Mr. Spork to IGP and IGW raises concerns in the areas outlined in the LP Agreement referenced at [18] above. It also raises concerns in respect of the mandated prohibition against self dealing by mutual funds (Section 111); and the standard of care of investment funds (Section 116).

32 Section 2 of the factum is entitled *Misconduct: Manipulation of Value, Mismanagement of Investments and Manipulation of Records*. In my view, the submissions in this section raise very serious issues.

33 At paragraph 78 of his affidavit, Mr. Daubney states that there is no evidence supporting the purported value of IGP and, to the contrary, it appears that the value of those shares has been fraudulently manipulated by or to the knowledge of SCMI and Sextant GP, for purposes including allowing SCMI and Sextant GP to collect significant management and performance fees that they did not earn. This paragraph was also the subject of challenge by counsel to SCMI and Sextant GP. Again, it is appropriate to review the basis for these statements.

34 At paragraph 79, Mr. Daubney states that the value of the Sextant Canadian Fund is tied almost exclusively to the value of its shares in IGP and with over 90% of the market value of the Sextant Canadian Fund held in shares of IGP, the fund's holdings are materially over concentrated in IGP.

35 Mr. Daubney also states that IGP shares held by the Sextant Canadian Fund are over concentrated even on the basis of the initial cost of the shares. He states that even at the cost or book value recorded on the IAS portfolio valuation statement, at $6,131,347 out of a total portfolio book value of $10,516,509.06, the Sextant Canadian Fund holds 58.3% of its assets in shares of IGP. The IAS portfolio valuation statement for July 2007 lists the book value for those shares of $1,758,405 out of a total portfolio book value of $3,002,841.65, or 59% of the total portfolio book value. Mr. Daubney states that, even on a cost-base calculation, the IGP shares represent more than half the value of the Fund. This evidence is objective in nature and it can properly be considered.

36 Mr. Daubney goes on to question the stated value of IGP as not being reliable or supportable. He states that the IGP shares purportedly increased in value from their initial cost of 0.163 in July 2007 to a market value of 2.450 in January 2009. He states that this a 1400% increase from the purchase price to the stated market value a year and one-half later, notwithstanding that this is a non-operating business and there have been no material developments that would explain the surging value of these shares. The calculations were challenged by Mr. Brush on Mr. Daubney's cross-examination, and using different variables, the percentage of the fund's total portfolio that was invested in a single security in July 2007 was 31.5%, which I note is still more than 50% greater than the permitted maximum of 20%. Mr. Daubney also stated that the purported increase in value over time resulted in millions of dollars in management fees being paid from investors' money. He also states that there is no evidence that neither of the mandated valuation procedures was followed by Sextant GP in respect of the value of IGP for the purpose of the Sextant Canadian Fund. Rather, he states that the value of IGP shares was set from time to time by the Board of Directors of Sextant Iceland, which consists of Mr. Spork and two other individuals.

37 Mr. Daubney went on to state that in determining the value of IGP, the directors of Sextant Iceland relied on purported independent valuations of IGP Iceland at December 31, 2007, as prepared by companies called Hempstead and Spardata (together, the "Purported Valuations"). Mr. Daubney is of the view that the Purported Valuations do not constitute independent or reliable valuations and cannot be reasonably relied upon to support the value assigned by Sextant Iceland Board of Directors.

38 Mr. Daubney further refers to a letter dated September 29, 2008 from Canacord Capital Corporation ("Canacord") to Mr. Spork (the "Canacord Letter"). The Canacord Letter indicates that it is a financing proposal, not a valuation.

39 Mr. Daubney states that among the materials that Mr. Spork provided to Canacord in connection with the Canacord Letter were purported letters of intent for the purchase of water (the "LOIs"). He states that at least three of those LOIs are fraudulent insofar that three of the LOIs purport to be agreements with, respectively, the Los Angeles Department of Water and Power, the San Diego County Water Authority and Division 4, Orange County Water District. Mr. Daubney states that the purported counter parties to each of these LOIs has confirmed that they did not, in fact, execute these agreements; moreover, none of them had any previous dealings with Sextant, IGP or their related entities, or had so much as heard of Sextant, IGP or Mr. Spork. The statements of Mr. Daubney are corroborated by the affidavits of Mr. Philip Anthony of the Orange County Water District, Mr. Wally Knox of the Board of the Los Angeles Department of Water and Power and Mr. Barry Martin of the San Diego Water Authority.

40 Mr. Daubney went on to state that there was no basis for the claimed market value in excess of $160 million in December 2008. Similarly, he stated that without operations, there was no basis for the claimed returns on their shares from July 2007 to November 2008.

41 Mr. Daubney also made the point that OSC staff had written to counsel for the Sextant Canadian Fund, SCMI and Sextant GP and counsel for Mr. Spork and Sextant Iceland, inviting them to provide some explanation or basis for the extraordinary value and purported rate of return for IGP. No substantive response has been received.

42 A number of the statements made by Mr. Daubney raise issues that comment on the value of the IGP, but they are not, in my view, valuations. Obvious examples would be the three LOIs with Los Angeles, San Diego and Orange County. The remarkable sworn responses from these municipal officials casts considerable doubt on the *bona fides* and operations of Mr. Spork and by extension, the Sextant Canadian Entities.

43 Mr. Daubney also comments about recordkeeping inaccuracies or manipulation. He states that records for the Sextant Canadian Fund and related entities contain a number of material inaccuracies and there is evidence that those records have been manipulated. As a result, he states that the records relating to the fund are unreliable. Further, as the general partner and investment advisor, Sextant GP and SCMI are responsible for the records of the Sextant Canadian Fund.

44 According to Mr. Daubney, the material of recordkeeping inaccuracies include the following:

(a) the number of IGP shares held by the Sextant Canadian Fund does not reconcile between the IGP share register book and the IAS records for the Fund;

(b) based on the IGP share register book, the IAS portfolio valuation statements have overstated the Sextant Canadian Fund's ownership of IGP shares and, therefore, the Fund's value by an amount between 3,080,463.40 and 6,755,463.40;

(c) the cost of IGP shares as reported on the IAS portfolio valuation statements or the Sextant Canadian Fund is inconsistent, in that the IAS portfolio valuation statements and portfolio valuation detailed statements show variances over time among the number of shares held, the average cost of those shares and the total cost of those shares, without the valuations correlating consistently;

(d) the value of the initial investment in IGP shares by the Sextant Canadian Fund and the Sextant Offshore Funds is recorded on the IAS portfolio valuation statements does not match the value of the shareholders' investment in IGP as recorded in the annual accounts for IGP as at December 31, 2007;

(e) there appears to have been a transfer of US $1.2 million to Riambel, a holding company owned by Mr. Spork, out of funds paid by the Sextant Canadian Fund and the Sextant Offshore Funds for IGP shares and there is no apparent basis or justification for this transfer; and

(f) there are no share certificates and there is no share register for IGW, such that those shares held in the Sextant Canadian Fund and the Sextant Offshore Funds are not evidenced anywhere.

45 At paragraphs 46 - 53 of the factum, the section is entitled, *Investments not in Accordance with Offering Memoranda or LP Agreement*. The submissions in this section raise very serious issues with respect to the role of the investment advisor, SCMI and the basis on which the advisory and performance fees were calculated.

46 At paragraph 54 of the factum, the submission is made that the manipulation of value, manipulation of records and mismanagement of investments by SCMI and Sextant GP, as managers of the Sextant Canadian Fund, have cost investors millions in invalid fees, caused the net asset value of the Sextant Canadian Fund to be unreliable, created a capital shortfall in the fund and otherwise compromised the value of the fund and that the actions of SCMI and Sextant GP have thereby materially compromised and diminished the value of investors' investments in the Sextant Canadian Fund.

47 The above submission is based on statements in the affidavit of Mr. Daubney at paragraphs 156 - 174.

48 It is noted that in excess of $3.5 million was charged to the Sextant Canadian Fund in 2008 in respect of the advisory and performance fees, combined. The statement is made that these fees are based almost entirely on the purported value of the fund's IGP shares.

49 Serious questions are raised as to whether the shares hold anything more than a nominal value, and certainly not the purported value in the tens of millions of dollars as listed on the IAS portfolio valuation statements. In my view, the statement of Mr. Daubney again raises very serious questions about the operation of the fund.

50 It is not surprising that the submission is made that the recordkeeping inaccuracies and manipulations, as described in Mr. Daubney's affidavit, have caused the net asset value of the Sextant Canadian Fund, therefore the value of the individual investor's investments, to be uncertain.

51 Counsel to SCMI and Sextant GP at paragraphs 30 - 85 of their factum raise what they consider to be serious flaws in the evidentiary foundation for the application. I cannot give effect to this submission. In my view, there is ample objective evidence to establish that serious issues have been raised and that there are serious areas of concern with respect to all three respondents. These areas of concern relate not only to the protection of the position of the investors but also with respect to the due administration of securities law in Ontario. In my view, the basis for the application of the OSC has, beyond any doubt, been established.

Law

52 Section 129 of the Act permits the Commission to apply to court for an order appointing a receiver. Such an order shall be made if the court is satisfied that such an appointment is:

(i) in the best interests of the company's creditors or the security holders or of subscribers to the company; or

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

53 I am in agreement with the submissions set out at paragraphs 89 - 98 of the factum submitted by counsel to the OSC which address the criteria to be considered on a s. 129 application.

54 The criteria for determining what is in the best interests of creditors, security holders or subscribers for the purpose of the appointment of a receiver under the Act is broader than a solvency trust. The criteria should taken into consideration all the circumstances and whether, in the context of those circumstances, it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all

stakeholders. See *British Columbia (Securities Commission) v. DiCimbriani* (1996), 138 D.L.R. (4th) 263 (B.C. C.A.) and *Ontario Securities Commission v. Factorcorp Inc.*, [2007] O.J. No. 4496 (Ont. S.C.J.).

55 Further, where there is a history of mismanagement, no evidence of a tangible alternative resolution, evidence that investors' interests will not be served by maintaining *status quo* and evidence that the company is not in a better position than a receiver to protect investors' interests, it is appropriate to appoint a receiver. See *Factorcorp*, *supra*, and *Ontario (Securities Commission) v. C & M Financial Consultants Ltd.* (1979), 23 O.R. (2d) 378 (Ont. H.C.).

56 In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of assets purchased with investor funds has been compromised, it is in investors' best interests, that a receiver be appointed so that such investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely upon. See *Factorcorp*, *supra*, and *Ontario (Securities Commission) v. ASL Direct* (November 14, 2008),Toronto (CV-08-7793-00CL).

Conclusion

57 The evidence of Mr. Daubney and others raises many serious and troubling concerns. I am satisfied that the investors' interest will not be served by maintaining the *status quo*. There are also a number of troubling concerns that have been raised relating to regulatory non-compliance that justify the appointment of a receiver on the basis of it being appropriate for the due administration of Ontario securities law.

58 I accept the submission at paragraph 72 of the factum which is referenced at [15]. The situation, in my view, justifies the appointment of a receiver for SCMI, Sextant GP and the Sextant Canadian Fund as being in the best interests of the Sextant Canadian Fund security holders (its investors) and it is also appropriate for the due administration of Ontario securities law.

59 I have been satisfied that the requirements for the appointment of a receiver under both parts of s. 129 have been met.

60 In my view, in order to protect investors, the appointment of a receiver is necessary for each of the Sextant Canadian Entities. A receiver is necessary for SCMI and Sextant GP because, among other things:

(i) these are the entities to which fees were paid from the Sextant Canadian Fund and these payments should be reviewed;

(ii) SCMI and Sextant GP are responsible for certain conduct as outlined in the affidavit of Mr. Daubney and, in my view, cannot be entrusted with the continuing responsibility for investors' interests; and

(iii) as the managers of the Sextant Canadian Fund, SCMI and Sextant GP are responsible for the books and records of the fund to which the receiver will require access.

61 Further, a receiver is necessary for the Sextant Canadian Fund to ensure that investors' assets in the fund are managed, and potentially distributed, in an orderly fashion.

62 The records are such that investors' funds are not completely accounted for and identified shortcomings in the operations of SCMI and Sextant GP require an independent review. In these circumstances, investors are entitled to an independent and verifiable reporting process and to treatment on which they can rely more generally.

63 It seems to me that anything less than the appointment of a receiver would not permit the overview or control of the financial affairs of the company.

64 I note that counsel to SCMI and Sextant GP submitted that the Sextant Canadian Fund is not a mutual fund and therefore not in breach of s. 111 of the Act. No submission was made by the Sextant Canadian Fund.

65 To the extent that this is an issue, the OSC, in my view, has provided a full response to this position at paragraphs 107 and 108 of its factum.

66 Counsel to SCMI and Sextant GP also raised the issue that the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver. In my view, it is premature to consider this issue. The interests of the investors can be best served, it seems to me, if there is one receiver who coordinates the mandated activities of the receiver. To the extent that the receiver identifies issues of conflict, these can be addressed at a future time.

Disposition

67 In the result, the application is granted. PricewaterhouseCoopers Inc. ("PwC") is appointed as Receiver and Manager over the property, assets and undertakings of each of SCMI, Sextant GP and the Sextant Canadian Fund. The consent of PwC has been filed.

68 An order shall issue in the form of the draft order presented.

End of Document

Tab 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: M & K Construction Ltd. v. Kingdom Covenant International | 2015 ONSC 2241, 2015 CarswellOnt 5609, 252 A.C.W.S. (3d) 642 | (Ont. S.C.J., Apr 20, 2015)

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Receivers --- Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

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

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 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; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. 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: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

End of Document

Tab 4

2006 CarswellOnt 3109
Ontario Superior Court of Justice [Commercial List]

Ontario (Securities Commission) v. Juniper Fund Management Corp.

2006 CarswellOnt 3109, 29 O.S.C.B. 4351

In The Matter of the Securities Act R.S.O. 1990, c. S.5, as Amended

Ontario Securities Commission, Applicant and The Juniper Fund Management Corporation, Juniper Income Fund and Juniper Equity Growth Fund, Respondents

Cumming J.

Judgment: May 18, 2006
Docket: None given.

Counsel: None given

Subject: Occupational Health and Safety; Corporate and Commercial; Securities

Related Abridgment Classifications

Securities

II Commissions and exchanges

II.5 Hearings and appeals

II.5.e Practice and procedure

II.5.e.vii Miscellaneous

Headnote

Securities and commodities --- Commissions and exchanges — Hearings and appeals — Practice and procedure — General

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 14.06 [en. 1992, c. 27, s. 9(1)] — referred to

s. 14.06(1.2) [en. 1997, c. 12, s. 15(1)] — referred to

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33

Generally — referred to

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Generally — referred to

Ontario Water Resources Act, R.S.O. 1990, c. O.40

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

s. 7(3)(c) — referred to

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

s. 127 — referred to

s. 129 — pursuant to

Rules considered:

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

Generally — referred to

***Cumming J.*:**

Order

THIS APPLICATION, made by the Ontario Securities Commission (the "Commission") for an Order pursuant to Section 129 of the *Securities Act*, R.S.O. 1990, c.S.5 as amended (the "Act") appointing Grant Thornton Limited as Receiver (in such capacity, the "Receiver") without security, of all of the assets, undertakings and properties of The Juniper Fund Management Corporation ("JFMC"), Juniper Income Fund ("JIF") and Juniper Equity Growth Fund ("JEGF") (collectively, the "Juniper Group") was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Naomi Chak sworn May 17, 2006 and the Exhibits thereto, and on hearing the submissions of counsel for the Commission, and on reading the consent of Grant Thornton Limited to act as Receiver,

Service

1 *THIS COURT ORDERS AND DECLARES* that this Application is properly made by the Commission without notice to any other party and is properly returnable today, and hereby dispenses with further service of the Notice of Application and Application Record.

Appointment

2 *THIS COURT ORDERS* that, pursuant to Section 129 of the Act, Grant Thornton Limited be and it is hereby appointed Receiver, without security, of all of the Juniper Group's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "Juniper Property") and any assets, undertakings and properties relating to the Juniper Group's business including, without limitation, that which is in the possession or under the control of the Juniper Group or any other Person (as defined herein) including cash, deposit instruments, securities or other property held in trust for any other person (collectively, the "Other Property"), such appointment to be for a period of 15 days from the date hereof, subject to further Order of the Court.

Receiver's Powers

3 *THIS COURT ORDERS* that the Receiver be and it is hereby empowered and authorized, but not obligated, to act at once in respect of the Juniper Property and the Other Property (collectively, the "Property") and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive and collect all monies, dividends or other amounts payable in respect of the Property;

(c) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(e) to engage such investment managers, fund managers, portfolio managers, hedge fund managers and other financial professionals from time to time and on whatever basis, including on a temporary basis, as may in the opinion of the Receiver be appropriate;

(f) to invest and/or reinvest the Property as the Receiver considers appropriate;

(g) to incur such obligations as are appropriate and/or advisable for the purpose of carrying out the mandate prescribed herein;

(h) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to fulfill the Receiver's mandate hereunder;

(i) to receive and collect all monies and accounts now owed or hereafter owing to the Juniper Group (which term, for greater certainty, includes any of them) and to exercise all remedies of the Juniper Group in collecting such monies and accounts, including, without limitation, to enforce any security held by the Juniper Group;

(j) to settle, extend or compromise any indebtedness owing to the Juniper Group;

(k) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Juniper Group, for any purpose pursuant to this Order;

(l) to undertake environmental or workers' health and safety assessments of the Property and operations of the Juniper Group;

(m) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Juniper Group, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order of judgment pronounced in any such proceeding;

(n) without limiting the generality of the foregoing, to initiate such actions, applications and other proceedings as the Receiver considers appropriate;

(o) to report to, meet with and discuss with any party deemed necessary or advisable by the Receiver including, without limitation, any secured and unsecured creditors of the Juniper Group, persons holding units in JIF and/or JEGF (collectively, the "Unitholders"), any other stakeholder of the Juniper Group, and any of their advisors as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share and provide reasonable access to information and documentation, subject to such terms as to confidentiality as the Receiver deems advisable;

(p) without limiting the foregoing subparagraph (n), to report to, meet with and discuss with any regulatory bodies including provincial securities commissions, securities exchanges and investment industry governing bodies and their advisors as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(q) without limiting the foregoing subparagraph (n), to arrange and participate in a meeting of the Unitholders;

(r) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(s) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Juniper Group;

(t) to enter into agreements with any trustee in bankruptcy appointed in respect of the Juniper Group, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Juniper Group and the power to lend money to or indemnify any such trustee borrowings or indemnity not to exceed $100,000 unless otherwise increased by this Court;

(u) to negotiate and enter into an extension of any real property lease where the Receiver considers it advisable to do so, on such terms as the Receiver considers appropriate;

(v) to repudiate any real property lease where the Receiver considers it advisable to do so;

(w) to repudiate leases in respect of equipment leased by the Juniper Group, and to return any such equipment to the lessors;

(x) to arrange for the liquidation of such equipment and property of the Juniper Group as the Receiver considers advisable;

(y) to exercise any shareholder, partnership, joint venture or other rights which the Juniper Group may have; and

(z) to take any steps reasonably incidental to the exercise of these powers,

and in each such case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Juniper Group, and without interference from any other Person.

Duty to Provide Access and Co-Operation to the Receiver

4 *THIS COURT ORDERS* that (i) the Juniper Group (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instruction or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person", which term, for greater certainty, includes Bank of Montreal, Royal Bank of Canada, National Bank of Canada, Canadian Imperial Bank of Commerce, National Bank Financial Limited, RBC Dominion Securities Inc., NBCN Inc., FundServ Inc., D-Tech Consulting and each of their respective affiliates) shall forthwith advise the Receiver of the existence of any Property in such Person's possession of control, shall grant immediate and continued access to the Property to the Receiver, shall provide the Receiver with account numbers and/or names under which Property may be hold by third parties, and shall deliver all such Property to the Receiver upon the Receiver's request, without charge to the Receiver.

5 *THIS COURT ORDERS* that the Receiver is hereby empowered and authorized, but not obligated, to take possession and control of any funds, securities or other assets held by any Person in the name of the Juniper Group, in any former names of the Juniper Group or by a third party for the benefit of the Juniper Group, or any stakeholders of the Juniper Group, including, without limitation, all amounts held in trust for any other person.

6 *THIS COURT ORDERS* that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Juniper Group or the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the

foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 6 or in paragraph 7 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7 *THIS COURT ORDERS* that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may request including providing the Receiver with instruction on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8 *THIS COURT ORDERS* that Internet Service Providers and other Persons which provide e-mail, world wide web, file transfer protocol, Internet connection or other similar services to the Juniper Group and/or its present and former directors, officers, employees and agents shall deliver to the Receiver all documents, server files, archive files and any other information in any form in any way recording messages, e-mail correspondence or other information sent or received by such directors, officers, employees or agents in the course of their association with the Juniper Group.

No Proceedings against the Receiver

9 *THIS COURT ORDERS* that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court, on seven (7) days notice to the Receiver and the Service List.

No Proceedings against the Juniper Group or the Property

10 *THIS COURT ORDERS* that no Proceeding against or in respect of the Juniper Group or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court, on seven (7) days notice to the Receiver and the Service List, and any and all Proceedings currently under way against or in respect of the Juniper Group or the Property are hereby stayed and suspended pending further Order of this Court, provided that nothing herein shall prevent the commencement or continuation of any proceedings against the Juniper Group by the Commission, including, without limitation, the proceedings commenced by Notice of Hearing issued March 21, 2006 pursuant to Section 127 of the Act.

No Exercise of Rights or Remedies

11 *THIS COURT ORDERS* that all rights and remedies against the Juniper Group or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver of leave of this Court, on seven (7) days notice to the Receiver and the Service List, provided however that nothing in this paragraph shall (i) empower the Receiver or the Juniper Group to carry on any business which the Juniper Group is not lawfully entitled to carry on, (ii) exempt the Receiver or the Juniper Group from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest or a claim for lien.

No Interference with the Receiver

12 *THIS COURT ORDERS* that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, arrangements, agreement, licence or permit in favour of or held by the Juniper Group, without written consent of the Receiver or leave of this Court, on seven (7) days notice to the Receiver and the Service List.

Continuation of Services

13 *THIS COURT ORDERS* that all Persons having oral or written agreements with the Juniper Group or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Juniper Group are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Juniper Group's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with the normal payment practices of the Juniper Group or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

Receiver to Hold Funds

14 *THIS COURT ORDERS* that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever including, without limitation, the sale of all or any of the Juniper Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

Employees

15 *THIS COURT ORDERS* that the employment of each employee of the Juniper Group is hereby terminated. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction, provided that, pursuant to subsection 14.06(1.2) of the BIA, the Receiver shall not be liable for any amount that is or could be due to an employee by the Juniper Group including, without limitation, any amount calculated by reference to any period of employment, service or seniority that precedes the date of this Order. For greater certainty, nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the BIA.

16 *THIS COURT ORDERS* that, pursuant to clause (7)(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized to disclose personal information of identifiable individuals to any party to the extent desirable or required to carry out the provisions of this Order. Each person to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to a manner which is in all material respects identical to the prior use of such information by the Juniper Group, and shall return all such information to the Receiver promptly upon the Receiver's request, or ensure that all other personal information is destroyed.

Limitation on Environmental Liabilities

17 *THIS COURT ORDERS* that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that the Receiver shall promptly advise the Ministry of the Environmental of any obvious or known environmental condition existing on or in any of the Property in accordance with the applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it in fact takes possession.

Limitation on the Receiver's Liability

18 *THIS COURT ORDERS* that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

Receiver's Accounts

19 *THIS COURT ORDERS* that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees and disbursements of the Receiver, its agents and the fees and disbursement of its legal counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").

20 *THIS COURT ORDERS* the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and their legal counsel are referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

21 *THIS COURT ORDERS* that, prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Funding of the Receivership

22 *THIS COURT ORDERS* that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $250,000 (or such greater amount as this Court may be further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

23 *THIS COURT ORDERS* that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24 *THIS COURT ORDERS* that the Receiver may at any time apply for its discharge as Receiver in the event that the Property is not, in the opinion of the Receiver, likely to be sufficient to indemnify the Receiver for its remuneration, costs, expenses and liabilities.

25 *THIS COURT ORDERS* that that Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

26 *THIS COURT ORDERS* that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis.

Service

27 *THIS COURT ORDERS* that the Receiver is at liberty to serve notice of its appointment as Receiver by placing advertisements regarding such appointment substantially in the form attached hereto as Schedule "B" in at least one (1) Canadian daily newspaper with national distribution, and such advertisement shall constitute effective notice of the appointment of the Receiver and all Persons shall be deemed to have received notice of the appointment.

28 *THIS COURT ORDERS* that, except as otherwise specified herein, the Receiver is at liberty to serve any notice, form or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective addresses or other contact particulars as last indicated in the records of the Juniper Group and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

29 *THIS COURT ORDERS* that the Receiver may serve any court materials in these proceedings (including, without limitation, application records, motion records, facta and orders) on all parties electronically, by e-mailing a PDF or other electronic copy of such materials (other than any book of authorities) to any such party's e-mail address as recorded on the service list, and posting a copy of the materials to an internet website to be hosted by the Receiver (or such other person as may be designated by the Receiver) (the "Website") as soon as practicable thereafter, provided that the Receiver shall deliver hard copies of such materials to any party requesting same as soon as practicable thereafter.

30 *THIS COURT ORDERS* that any party in these proceedings (other than the Juniper Group) may serve any court materials (including, without limitation, application records, motion records, facta and orders) on all other parties electronically, by emailing a PDF or other electronic copy of all materials (other than any book of authorities) to any such other party's e-mail address as recorded on the service list; provided that such party shall deliver both PDF or other electronic copies and hard copies of full materials to counsel to the Receiver and to any other party requesting same and the Receiver shall cause a copy to be posted to the Website, all as soon as practicable thereafter.

31 *THIS COURT ORDERS* that, unless otherwise provided herein or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings unless such Person has served a Notice of Appearance on the solicitors for the Receiver and has filed such notice with this Court.

General

32 *THIS COURT ORDERS* that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

33 *THIS COURT ORDERS* that the Receiver shall be entitled to make an assignment in bankruptcy on behalf of the Juniper Group (which term, for greater certainty, includes any member thereof), with leave of the Court first being obtained.

34 *THIS COURT ORDERS* that the Receiver shall be authorized to file an Application for a Bankruptcy Order in respect of the Juniper Group (which term, for greater certainty, includes any member thereof) (the "Bankruptcy Application"), provided that the Receiver shall not take any further step in the Bankruptcy Application without further Order of the Court.

35 *THIS COURT ORDERS* that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Juniper Group, with leave of the Court first being obtained.

36 *THIS COURT HEREBY REQUESTS* the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or elsewhere to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

37 *THIS COURT ORDERS* that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever locate, for the recognition of this Order and for assistance in carrying out the terms of this Order.

38 *THIS COURT ORDERS* that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

39 *THIS COURT ORDERS* that the Receiver shall be authorized to retain Morgan Meighen & Associates ("Morgan") on such terms as the Receiver considers appropriate, to provide the Receiver with advice regarding the investment strategy, the investment and reinvestment of the Property and the ongoing management of JIF and JEGF (together, the "Funds").

40 *THIS COURT ORDERS* that the Receiver shall be entitled to rely on the advice of Morgan in investing and reinvesting the Property. For greater certainty, and without limiting the foregoing, the Receiver shall not be required to act on any such advice.

41 *THIS COURT ORDERS AND DIRECTS* Roy Brown a.k.a. Roy-Brown Rodrigues ("Brown") to attend an examination under oath by the Receiver, at a time and place prescribed by the Receiver in a Notice of Examination to be served on Brown in accordance with the Ontario *Rules of Civil Procedure*, regarding Roy Brown's knowledge of the business and affairs of the Juniper Group, including, without limitation, with respect to bank and/or brokerage accounts, the movement of funds and other Property, and the Funds.

42 *THIS COURT ORDERS* that, without limiting the foregoing, Brown be and he is hereby directed to immediately advise the Receiver as to the existence and location of any Property, and Brown is hereby directed to immediately deliver any such Property to the Receiver upon the Receiver's request.

43 *THIS COURT ORDERS* that the Receiver be and it is hereby authorized to retain the law firm of Thornton Grout Finnigan LLP as the Receiver's counsel.

APPENDIX "A" — Receiver's Certificate

CERTIFICATE NO.________

AMOUNT $________

THIS IS TO CERTIFY that *, the Receiver (the "Receiver") of all of the assets, undertakings and properties of The Juniper Fund Management Corporation, Juniper Income Fund and Juniper Equity Growth Fund appointed by Order of the Ontario Superior Court of Justice (the "Court") dated the * day of May, 2006 (the "Order") made in an action having Court File Number 06-CL-*, has received from the holder of this certificate (the "Lender") the principal sum of $*, being part of the total principal sum of $* which the Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated [*monthly not in advance on the * day of each month*] after the date hereof at a notional rate per annum equal to the rate of * per cent above the prime commercial lending rate of Bank of * from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

APPENDIX "B" — Notice in respect of the Juniper Fund Management Corporation, Juniper Income Fund and Juniper Equity Growth Fund (collectively, the "Juniper Group")

Please be advised that pursuant to the Order of the Honourable Mr. Justice * of the Ontario Superior Court of Justice (Commercial List) dated May 18, 2006 in Court File No. * (the "Order"), Grant Thornton Limited has been appointed as Receiver (the "Receiver") of all of the Juniper Group's assets, undertakings and properties. The appointment of the Receiver was made under Section 129 of the Ontario *Securities Act*.

A copy of the Order and other information regarding the Receiver's appointment are available online at www.*.

End of Document

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

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**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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