



COURT FILE NUMBER 2401-04879

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT DURISOL LTD.

RESPONDENT CANDESTO ENTERPRISES CORP., D-3
INFRASTRUCTURE SERVICES INC., AND SAFE
ROADS ALBERTA LTD.

DOCUMENT **BENCH BRIEF**

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Nov 13, 2024

**APPLICATION BEFORE THE HONOURABLE JUSTICE C. FEASBY
November 13, 2024 AT 11:00 AM ON THE CALGARY COMMERCIAL LIST
VIA WEBEX**

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I. INTRODUCTION

1. On April 17, 2024, on application by Durisol Ltd., Alvarez & Marsal Canada Inc. (“**A&M**”) was appointed receiver (in such capacity, the “**Receiver**”) pursuant to a Receivership Order of the Honourable Justice E. Sidnell dated April 17, 2024 (the “**Receivership Order**”) over all assets, undertakings and properties (the “**Property**”) of the Respondents, Candesto Enterprises Corp. (“**Candesto**”), Safe Roads Alberta Ltd. (“**Safe Roads**”) and D3 Infrastructure Services Inc. (“**D3**”, and with Candesto and Safe Roads, the “**Debtors**”).
2. The Receiver has filed the Second Report of the Receiver, dated November 4, 2024 (the “**Second Report**”). The Second Report provides the evidentiary basis for orders, *inter alia*:
 - (a) abridging the time for service of the Application of the Receiver and the materials filed in support thereof, such that the motion is properly returnable on the stated hearing date, and dispensing with further service thereof;
 - (b) authorizing and directing the Receiver to make distributions to Durisol Inc. (“**Durisol**”) in the amount of approximately \$1,186,000, plus all remaining amounts in the Receiver’s account after payment of the Receiver’s and its legal counsel’s final fees and disbursements after the completion by the Receiver and its legal counsel of any incidental duties as may be required to complete the administration of the receivership, provided that no amounts will be provided in excess of the interim financing Durisol has provided to the Debtors;
 - (c) approving the Assignment of Accounts Receivable Agreement (the “**Assignment Agreement**”) between the Receiver and Durisol, as appended to the Second Report of the Receiver dated November 4, 2024;
 - (d) approving the Second Report, and the conduct and activities of the Receiver described therein and the fees and disbursements of the Receiver and its counsel, Gowling WLG (Canada) LLP (“**Gowling**”), up to and including October 31, 2024;
 - (e) approving the Forecast Fees & Cost, including the Receiver’s and Gowling’s estimated fees and disbursements for incidental duties that may be required to complete the administration of the receivership;
 - (f) approving the discharge of the Receiver as receiver and manager over the assets, undertaking and property of the Debtors; and
 - (g) approving the delivery of the books and records of the Debtors to the current or prior directors and/or shareholders, or alternatively, following 30 day after the Receiver’s discharge, the destruction of the records.
3. Capitalized terms not otherwise defined herein have the meaning set out in the Second Report.

II. FACTS

4. The relevant facts in support of the Receiver's motion are more particularly set out in the Second Report. For the purpose of efficiency, the facts will not be summarized here but instead pinpoint references to the evidence in the Second Report will be made below where appropriate.

III. ISSUES

5. The primary issues to be determined on this motion are as follows:
- (a) should an order authorizing and directing that the Receiver make distributions to Durisol be granted;
 - (b) should an order authorizing and approving the Assignment Agreement between the Receiver and Durisol be granted;
 - (c) should the Receiver's activities as set out in the Second Report, the Receiver's professional fees and those fees of its legal counsel for the period up to October 31, 2024, and the Forecast Fees and Cost be approved; and
 - (d) should an order approving the discharge of the Receiver as receiver and manager over the assets, undertaking and property of the Debtors be granted.

IV. LAW AND ARGUMENT

(a) Service

6. Bankruptcy and Insolvency General Rule 6(1) allows service of a notice or other document to be performed by electronic transmission.¹ Alternatively, this Court has the power to abridge the time requirements, validate defective service and dispense with service of this application where necessary in the interest of justice.²

(b) Approval of the Distribution to the Interim Lender is Appropriate

7. Pursuant to the Receivership Order, the Receiver was authorized to, *inter alia*:

¹ *Bankruptcy and Insolvency General Rules* C.R.C., c. 368, rules 3 and 6 [Tab 1].

² *Alberta Rules of Court*, Alta Reg 124/2010, R. 11.27-11.29 [Tab 2].

- (a) market any or all of the Property (as defined in the Receivership Order, the “**Property**”), including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
 - (b) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property; and
 - (c) 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 Receiver’s powers and duties, including without limitation those conferred by the Receivership Order.
8. In accordance with the Receivership Order, the Receiver entered into an auction agreement with McDougall Auctioneers which was approved by this Honourable Court in the Receivership Proceeding³. The auction has completed and the Receiver recommends distributing the proceeds from the auction to Durisol, less the Receiver and its counsel professional fees and disbursements including to the conclusion of the Receivership Proceeding. Following the conclusion of the Receiver’s remaining administrative tasks in the Receivership Proceeding, any remaining funds in the Receiver’s accounts will be distributed by the Receiver to Durisol up to the amount of indebtedness owing by the Debtors to Durisol in accordance with the interim lending Durisol has provided to the Debtors.
- (c) **Approval of the Assignment of Accounts Receivable Agreement is Appropriate**
9. The *Bankruptcy and Insolvency Act* (“**BIA**”) permits the Court to appoint a receiver to do any of the following:
- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
 - (b) exercise any control that the Court considers advisable over the property and over the insolvent corporation's business; and

³ Second Report of the Receiver (“**Second Report**”) at para 5.

- (c) take any other action that the Court considers advisable.⁴
10. A receiver is obligated to act in good faith and deal with an insolvent company's property in a commercially reasonable manner in carrying out its duties and exercising its powers.⁵
11. The Receivership Order authorizes the Receiver to, among other things; (i) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property for any purpose pursuant to the Receivership Order; (ii) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business and; (iii) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations⁶.
12. The *Personal Property Security Act* (Alberta) (“**PPSA**”) states that a term in a contract between an account debtor and an assignor that prohibit or restricts assignment of the whole of the account is unenforceable against third parties⁷.
13. The Receiver is respectfully requesting that this Honourable Court approve the Assignment Agreement for the following reasons:
- (a) the Receivership Order allows the Receiver to enter into agreements, to transfer assets with court approval outside of the ordinary course of business, and take any other steps reasonably incidental to the exercise of the Receiver’s power⁸;
 - (b) the Receiver is required to act upon the Receivables in good faith and in the best interest of the Debtors stakeholders;
 - (c) the PPSA allows for the assignment of contractual debt claims;
 - (d) the Receiver has exhausted its efforts in attempting to realize on the outstanding receivables of the Debtors (the “**Receivables**”) in an efficient and cost effective manner⁹;
 - (e) assigning the Receivables will afford Durisol the opportunity to realize on the Receivables in a cost-effective manner to assist in recouping its outstanding loan that is subject the

⁴ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (the “**BIA**”), Section 243 [**Tab 3**].

⁵ *BIA*, Section 247 [**Tab 3**].

⁶ Receivership Order dated April 17, 2024 (“**Receivership Order**”), paras 3(h), 3(l), and 3(s).

⁷ *Personal Property Security Act*, RSA 2000, c P-7, s 41 (11) [**Tab 4**]

⁸ Second Report at para 27 (a)

⁹ Second Report at para 27 (b)

Interim Financing Charge, which is not expected to be paid in full from the realization of the Debtors other assets in these Receivership Proceedings; Any amounts recovered by Durisol in excess of its interim financing debt will be paid into court by Durisol on notice to the service list in the Receivership Proceeding¹⁰;

- (f) the costs and time associated of the Receiver in continuing to attempt to realize on the Receivables within these Receivership Proceedings may likely exceed the collection value of the Receivables¹¹; and
 - (g) the Secured Creditors (the Primary Lender and Durisol) are supportive of the Receiver assigning the Receivables to Durisol;¹²
 - (h) it is in the best interests of the Debtors' creditors that the Receivables be assigned to Durisol so there is a party with an interest in the Receivables in a position to realize upon them.
- (d) **The Court should approve the Second Report and the Receiver's activities described therein**
14. Courts have held that there are good policy and practical reasons for approving a court officer's reports and activities, including that Court approval:
- (a) allows the court officer to move forward with the next steps in the proceedings;
 - (b) brings the court officer's activities before the Court;
 - (c) allows an opportunity for the concerns of stakeholders to be addressed, and any problems to be rectified;
 - (d) enables the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner;
 - (e) provides protection for the court officer not otherwise provided by the applicable legislation; and
 - (f) protects creditors from the delay in distribution that would be caused by: (i) re-litigation of steps taken to date; and (ii) potential indemnity claims by the court officer.¹³

¹⁰ Second Report at para 27 (c)

¹¹ Second Report at para 27 (d)

¹² Second Report at para 27 (e)

¹³ *Target Canada Co, Re*, 2015 ONSC 7574, at para 12 [**Tab 5**]

15. The same observations apply to the activities of a Court-appointed receiver because the activities of any court officer “can and should be considered by the Court as against the mandate, powers and authority of that officer.”¹⁴
16. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver’s duties and powers set out in the Receivership Order and were, in each case, in the best interest of the Debtors’ stakeholders. Further, the Second Report was served on the service list maintained in these proceedings and posted on the Receiver’s website and no party has objected.
- (e) **The Court should approve the fees and disbursements of the Receiver and its counsel**
17. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel up to and including October 31, 2024, and the Forecast Fees & Costs as described in the Second Report.
18. The Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.
19. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver’s knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver’s efforts and (i) the cost of comparable services when performed in a prudent and economical manner.¹⁵
20. The fees and disbursements are fair and reasonable and have been properly incurred¹⁶. Since the granting of the Receivership Order, the Receiver, with the assistance of its counsel, has acted in good faith and with due diligence.
21. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

¹⁴ *Triple-I Capital Partners Limited v 12411300 Canada Inc*, 2023 ONSC 3400 at para 66 [Tab 6]

¹⁵ *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras 33, 44-45 [Tab 7].

¹⁶ Second Report at para 48

(f) **The Court should grant the Discharge Order**

22. The Receiver seeks its discharge over the Debtors' assets, undertaking and property. Certain ancillary administrative tasks remain in the Receivership Proceeding pending the Receiver's discharge, including performing the distribution to Durisol and the Receiver performing its statutory reporting to the office of superintendent of bankruptcy. The Receiver intends on either returning the books and records of the Debtors to their former current or prior directors/shareholders, or destroying them following 30 days after its final discharge.

V. CONCLUSION AND RELIEF SOUGHT

23. For the reasons stated herein, the Receiver respectfully requests that the Honourable Court grant:
- (a) the Order substantially in the form attached as Schedule "A" to the Receiver's Application;
and
 - (b) such other ancillary relief as may be sought by the Receiver at the hearing of the Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2024.

GOWLING WLG (CANADA) LLP



Per: _____

VI. TABLE OF AUTHORITIES

Tab	Authorities
1.	<i>Bankruptcy and Insolvency General Rules</i>
2.	<i>Alberta Rules of Court, Alta Reg 124/2010, R. 11.27-11.29</i>
3.	<i>Bankruptcy and Insolvency Act, RSC 1985 c B-3</i>
4.	<i>Personal Property Security Act, RSA 2000, c P-7</i>
5.	<i>Target Canada Co, Re, 2015 ONSC 7574</i>
6.	<i>Triple-I Capital Partners Limited v 12411300 Canada Inc, 2023 ONSC 3400</i>
7.	<i>Bank of Nova Scotia v. Diemer, 2014 ONCA 851</i>