

O21499

COURT FILE NUMBER 2301 - 02578

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT ENZIO HOLDINGS LTD.

RESPONDENTS CANDRE CANNABIS INC., FRONDIS HOLDINGS LTD., CALYPTRA CULTIVATION INC. and JASMINE VENTURES LTD.

DOCUMENT BRIEF OF LAW OF THE APPLICANT

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Burnet, Duckworth & Palmer LLP

2400, 525 – 8 Avenue SW
Calgary, Alberta T2P 1G1

Lawyer: David LeGeyt / Ryan Algar

Phone Number: (403) 260-0216 / (403) 260-0210

Fax Number: (403) 260-0332

Email Address: ralgar@bdplaw.com / dlegeyt@bdplaw.com

File No. 75684-2



COM
March 6, 2023

ENTERED

**Hearing via Webex before the Honourable Justice J. Fagnan
on the Commercial List, on March 6, 2023, commencing at 2:00 P.M.**

TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	ISSUE	4
III.	THE LENDER'S POSITION.....	4
IV.	FACTUAL BACKGROUND.....	4
	A. Borrower Security.....	4
	B. The Guarantees & Guarantor Security	5
	C. Defaults and Demand.....	5
	D. Present Circumstances of Candre.....	6
V.	LAW AND ARGUMENT	7
	A. The Lender is entitled to appoint a receiver.....	7
	B. Considerations when Appointing a Receiver	7
	C. The Receiver ought to have the authority to assign the Borrower into bankruptcy	9
VI.	CONCLUSION.....	12
	TABLE OF AUTHORITIES	13

I. INTRODUCTION

1. This is the Enzo Holdings Ltd. ("**Enzio**" or the "**Lender**"), in support of its application (the "**Application**") to appoint Alvarez & Marsal Canada Inc. ("**A&M**") as the receiver and manager (the "**Receiver**") of all of the current and future assets, undertakings and property (collectively, the "**Property**") of Candre Cannabis Inc. ("**Candre**" or the "**Borrower**").
2. The Lender extended credit facilities and related services to the Borrower (collectively, the "**Loans**") pursuant to, among others, an Amended and Restated Loan Agreement dated November 12, 2019, evidencing a loan in the original principal amount of CAD \$18,600,000, as further amended by:
 - (a) a First Letter Amending Agreement, dated June 30, 2020;
 - (b) a Second Letter Amending Agreement, dated December 31, 2020; and
 - (c) a Third Letter Amending Agreement, dated January 1, 2022,(collectively, and as amended, the "**Loan Agreements**").¹
3. As at December 31, 2022, the Borrower was indebted to the Lender for \$23,729,287.56 in respect of funds borrowed pursuant to the Loan Agreements, plus interest, excluding costs and legal fees, which continue to accrue (the "**Indebtedness**").²
4. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.³
5. A&M is qualified, prepared and has consented to act as Receiver.⁴
6. As the Borrower is in default of its obligations to the Lender under both the Loan Agreement and the Security, the Lender seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

¹ Affidavit No. 1 of Sveinung Svarte, sworn February 27, 2023 (the "**Svarte Affidavit**") at para 10.

² Svarte Affidavit at para 12.

³ Svarte Affidavit at para 36.

⁴ Svarte Affidavit at para 33.

II. ISSUE

7. There is one issue in this application, namely should this Honourable Court appoint a receiver over the Property?

III. THE LENDER'S POSITION

8. The appointment of a receiver over the Borrower is a contractual remedy that is available to the Lender and the Lender respectfully submits that it is just and convenient to appoint a Receiver of the Property in the present circumstances.

IV. FACTUAL BACKGROUND

9. The facts in support of the Lender's application are set forth in the Svarte Affidavit.⁵
10. The Borrower is a corporation incorporated pursuant to the laws of Alberta, with its registered office located in Sundre.⁶

A. Borrower Security

11. The Borrower granted, among others, the following security to the Lender in respect of all of its obligations, indebtedness, and liabilities under the Loans:
- (a) a General Security Agreement (a "**GSA**") dated May 11, 2018 (as confirmed from time to time);
 - (b) a Share Pledge dated May 11, 2018 in respect of shares held by the Borrower in Calyptra;
 - (c) an Assignment of Material Contracts dated May 11, 2018, as amended by a First Amendment to Assignment of Material Contracts dated November 12, 2019;
 - (d) a Collateral Mortgage in respect of lands (the "**Lands**") legally described as:

PLAN 1810863
BLOCK 3
LOT 8
EXCEPTING THEREOUT ALL MINES AND MINERALS; and
 - (e) a Mortgage in respect of the Lands dated May 10, 2018, as amended by a Mortgage Amending Agreement dated December 31, 2020 and a Mortgage Amending Agreement dated August 30, 2021, originally granted in favour of Strathmore Lakes Estates Ltd. ("**SLE**") as mortgagee, and assigned by SLE (as

⁵ Capitalized terms not otherwise defined herein have the meaning set forth in the Svarte Affidavit, the Lender's Statement of Claim or the Lender's Application.

⁶ Svarte Affidavit at paras 5.

assignor) to Enzo (as assignee) pursuant to an Assignment of Indebtedness and Security Agreement dated as of February 3, 2022,

(collectively, the "**Borrower Security**").⁷

B. The Guarantees & Guarantor Security

12. Each of the Guarantors guaranteed the amounts owing to the Lender under the Loan Agreements pursuant to guarantees dated May 11, 2018 (the "**Guarantees**").⁸
13. In addition to the Borrower Security, the Guarantors also granted, among others, the following security in favour of the Lender in support of their respective obligations under the Guarantees:
 - (a) from Frondis, a Share Pledge dated May 11, 2018, in respect of, among other things, all shares held by Jasmine in the capital stock of the Borrower;
 - (b) from Calyptra, a GSA dated May 11, 2018; and
 - (c) from Jasmine, a Share Pledge dated May 11, 2018 in respect of, among other things, all shares held by Jasmine in the capital stock of the Borrower,

(collectively, the "**Guarantor Security**" and together with the Borrower Security, the "**Security**").⁹

C. Defaults and Demand

14. The Borrower has committed certain defaults under the Loan Agreement, including but not limited to the failure to:
 - (a) make payments against the Loans as required by the Loan Agreement; and
 - (b) remit amounts owing to Canada Revenue Agency when due,
 (collectively, the "**Defaults**").¹⁰
15. As a result of the Defaults, on or about January 19, 2023, the Lender issued a notice of default and demand for payment to the Borrower (the "**Borrower Demand**"), and concurrently delivered notice of its intention to enforce the Security pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) RSC 1985 c B-3 (each, a "**244 Notice**").¹¹
16. Also on or about January 19, 2023, the Lender issued notices of default and demands for payment to each of the Guarantors (the "**Guarantor Demands**" and together with the Borrower Demand, the "**Demands**"), together with 244 Notices.¹²

⁷ Svarte Affidavit at para 14.

⁸ Svarte Affidavit at para 16.

⁹ Svarte Affidavit at para 18.

¹⁰ Svarte Affidavit at para 22.

¹¹ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (as amended, the "**BIA**") [**Book of Authorities** ("**Authorities**") **Tab 1**].

¹² Svarte Affidavit at paras 24.

17. Despite the Lender's demands for repayment of the Indebtedness, the Borrower and the Guarantors have failed or neglected, and continue to fail or neglect to repay the Indebtedness, and they are default of their obligations under the Loans, the Guarantees and the Security.¹³

D. Present Circumstances of Candre

18. The cannabis industry in Canada is facing numerous financial and operational challenges, including significant regulatory compliance costs, black market competition, and over supply issues. A number of Canadian cannabis companies have made insolvency filings in the last few years.¹⁴
19. Recently, Candre has considered making an insolvency filing under the *Companies' Creditors Arrangement Act*, but did not do so as it was unable to secure the necessary interim financing.¹⁵
20. Candre is not profitable, has not been profitable since its inception and is presently facing a liquidity crisis. Candre is considering drastically downsizing, or even ceasing entirely, its operations, to address these issues.¹⁶
21. Since the legalization of cannabis, the industry has experienced rapid change and faces several challenges, including, among others:
- (a) over-saturation of new entrants and corresponding over-supply of products, resulting in significant competition and price compression;
 - (b) lower-than-expected consumer demand at the retail level, in part due to the persistent illegal cannabis market; and
 - (c) manufacturing and retail challenges due to regulatory delays and COVID-19 pandemic store closures.¹⁷

¹³ Svarte Affidavit at para 25.

¹⁴ Svarte Affidavit at para 26.

¹⁵ Svarte Affidavit at para 27.

¹⁶ Svarte Affidavit at para 28.

¹⁷ Svarte Affidavit at para 29.

22. In addition to amounts owing to suppliers and service providers, I also understand that the Borrower:
- (a) currently owes approximately \$1,000,000 in outstanding taxes in respect of, among others, excise taxes and Goods and Services Tax; and
 - (b) will not have funds available to it to make its payroll obligations to its employees in the near future.¹⁸

V. LAW AND ARGUMENT

A. The Lender is entitled to appoint a receiver

23. The Lender satisfied the procedural prerequisite to seeking the appointment of the Receiver in January 2023 when it served the 244 Notice on the Borrower.
24. Each of section 243 of the *BIA*, section 13(2) of the *Judicature Act* and section 65(7)(a) of the *PPSA* vest this Honourable Court with the authority to appoint a Receiver where it is just and convenient to do so.¹⁹
25. The Lender respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property, because it is just, convenient and otherwise appropriate in the circumstances and would be in accordance with the contractual terms agreed upon by the Lender and the Borrower under the Security.

B. Considerations when Appointing a Receiver

26. Traditionally, when considering an application to appoint a receiver, Courts have used the same test used to determine if an interlocutory injunction is appropriate,²⁰ but have loosened the test in cases where "the dictates of fairness are so overwhelming".²¹ In *Murphy*, Justice Veit confirmed that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Test are not met.²²

¹⁸ Svarte Affidavit at para 30.

¹⁹ *BIA* at s. 243 [Authorities, Tab 1]; *Judicature Act*, RSA 2000 c J-2, as amended (the "*Judicature Act*") at s. 13(2) [Authorities, Tab 2]; *Personal Property Security Act*, RSA 2000 c P-7 ("*PPSA*") at s. 65(7)(a) [Authorities, Tab 3].

²⁰ The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "*Injunction Test*")²⁰ *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paras 83-85 [Authorities, Tab 4].

²¹ *Murphy v Cahill*, 2013 ABQB 335 ("*Murphy*") at para 8 [Authorities, Tab 5].

²² *Murphy* at para 62 [Authorities, Tab 5].

27. The requirement to meet the Injunction Test is less relevant where a secured creditor is simply seeking to enforce its contractual rights.²³
28. There are a number of factors that are considered by a Court in appointing a receiver. In *Schendel*,²⁴ this Court affirmed the non-exhaustive list of factors set forth in *Bennett on Receiverships*, originally set forth by Justice Romaine in *Paragon* (the "**Paragon Factors**").²⁵

The Lender is not required to meet the Injunction Test

29. In *Kasten*, a secured creditor brought an application to appoint a receiver pursuant to the terms of its security documentation and this Honourable Court held that:

The security documentation in the present case authorizes the appointment of a Receiver [...]. Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed.²⁶

30. In *Paragon*, Justice Romaine confirmed that parties' contractual interests should be honored above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm in the absence of a Court appointing a receiver:

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.²⁷

31. This approach was also confirmed by the Ontario Superior Court in *RMB*:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.²⁸

32. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, essentially reversing the onus as to whether or not a receiver should be appointed. The

²³ *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("*Paragon*") at para 28 [Authorities, Tab 6].

²⁴ *Re Schendel Management Ltd.*, 2019 ABQB 545 ("*Schendel*") at para 44 [Authorities, Tab 7].

²⁵ *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("*Lindsey*") at para 32 [Authorities, Tab 8]. *Paragon* at para 27 [Authorities, Tab 6]. Among the *Paragon* Factors are two of the three elements of the Injunction Test, with the "serious issue to be tried" question omitted. The five factors from *Lindsey* are also captured in the *Paragon* Factors.

²⁶ *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* ("*Kasten*") 2013 ABQB 63 at para 21 [Authorities, Tab 9].

²⁷ *Paragon* at para 28 [Authorities, Tab 6].

²⁸ *RMB Australia Holdings Ltd. v Seafeld Resources Ltd.*, 2014 ONSC 5205 ("*RMB*") at para 29 [Authorities, Tab 10].

Court confirmed that, where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.²⁹

33. Having regard for the *Paragon* Factors and the Security, the Lender respectfully submits that it is just and convenient to appoint A&M as Receiver over the Property for, among others, the following reasons:

- (a) it is an express term of the Security that, upon default, one of the remedies available to the Lender is the appointment of a receiver;
- (b) it is not necessary for the Lender to provide the existence of irreparable harm in the event a receiver is not appointed;
- (c) the Lender has lost confidence in the Borrower's management;
- (d) the Borrower has committed numerous defaults under the Security and the Loan Agreements; and
- (e) there are no compelling commercial or other reasons to not appoint A&M as receiver.³⁰

34. The Lender respectfully submits that it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over the Borrower's business and to maximize recovery for stakeholders.

C. The Receiver ought to have the authority to assign the Borrower into bankruptcy

35. The Lender's proposed form of Receivership Order would empower the Receiver to assign the Debtors into bankruptcy.

The Court has the authority to grant the power sought

36. Alberta's Template Receivership Order the ("**Template**"), does not explicitly grant a receiver the authority to bankrupt a debtor. However, the explanatory notes to the Alberta Template Order (the "**Explanatory Notes**") provide that:

²⁹ *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.*, 2012 BCSC 437 ("**Can-Pacific Farms**") at para 14 [Authorities, Tab 11].

³⁰ Svarte Affidavit at para 33.

There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention.³¹

37. *Gustin*, a recent decision of the Ontario Superior Court, addresses this very issue.³² In determining that a Receiver had the authority to assign a debtor into bankruptcy, Justice Rady stated:

...the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion ... There is no sound basis to distinguish the cases because the debtors were corporations.³³

38. The Court referenced, among others, its prior decisions *Sun Squeeze*³⁴ and *Owen Sound*.³⁵

39. In *Sun Squeeze*, Justice Farley concluded that he "...did not see that there is any dispute that this Court has the power to authorize the Court-appointed Receiver and Manager to either file an assignment in bankruptcy or consent to the Petition" and that:

Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed [Receiver and Manager] or liquidator to put a debtor company into bankruptcy.³⁶

40. Similarly, in *Owen Sound*, Justice Brown, in concluding that a receiver-manager had the authority to wind-up a debtor company, confirmed that "[i]t is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order".³⁷

41. In *Sun Squeeze*, Justice Farley cited the following from the Manitoba Court of Appeal's decision in *Brandon Packers*:

Must the Court then close its eyes to the facts as reported by its own officer?
It is my feeling that no amount of bankruptcy or winding-up legislation can

³¹ Alberta Template Receivership Order Explanatory Notes, January 2019 at 4 [Authorities, Tab 12].

³² *RBC v Gustin*, 2019 ONSC 5370 ("*Gustin*") [Authorities, Tab 13].

³³ *Gustin* at para 15 [Authorities, Tab 13].

³⁴ *Royal Bank v Sun Squeeze Juices Inc.*, [1994] OJ No 567 ("*Sun Squeeze*") [Authorities, Tab 14]; aff'd *Royal Bank v Sun Squeeze Juices Inc.*, 28 CBR (3d) 201.

³⁵ *Bank of Montreal v Owen Sound Golf & Country Club Ltd.*, 2012 ONSC 557 ("*Owen Sound*") [Authorities, Tab 15].

³⁶ *Sun Squeeze* at paras 6 and 10 [Authorities, Tab 14].

³⁷ *Owen Sound* at para 7 [Authorities, Tab 15].

fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

In this case the Court directed its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt: but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".³⁸

42. In *Bresea Resources*, the Alberta Court of Appeal set aside an order which directed the interim receiver-manager to assign the debtor company into bankruptcy because the debtor was not actually insolvent.³⁹ However, the Court expressly endorsed *Sun Squeeze*, holding that, in the appropriate circumstances, the Court has authority to direct that a receiver-manager assign a company into bankruptcy:

Where a company is insolvent within the meaning of the [BIA], and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy.⁴⁰ [emphasis added]

43. The Borrower has failed to pay its obligations in the ordinary course of business and has ceased to meet its liabilities each as they generally become due. Upon review of the aforementioned authorities, the Template and the Explanatory Notes, it is clear that this Court has the authority to authorize and empower the Receiver to assign the Borrower into bankruptcy.
44. Accordingly, it is the Lender's respectful submission that, should this Honourable Court appoint the Receiver as its officer, the Receiver would be best-positioned to assign either of the Borrower into bankruptcy should the circumstances warrant.

³⁸ *Re Brandon Packers Ltd.*, 33 DLR (2d) 503, ("*Brandon Packers*") at paras 52-53, leave to appeal to SCC refused [Authorities, Tab 16].

³⁹ *Chow v Bresea Resources Ltd.*, 75 ACWS (3d) 1006 ("*Bresea Resources*") at para 13 [Authorities, Tab 17].

⁴⁰ *Bresea Resources* at para 13 [Authorities, Tab 17].

VI. CONCLUSION

45. For the reasons set forth above, the Lender seeks a Receivership Order, substantially in the form appended as Schedule "A" to the Application in order to maximize value for all of the Borrower's stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF FEBRUARY, 2023

BURNET, DUCKWORTH & PALMER LLP

Per: 

David LeGeyt
Solicitors for Enzo Holdings Ltd.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	<i>Bankruptcy and Insolvency Act</i>, RSC 1985, c B-3.
2.	<i>Judicature Act</i>, RSA 2000, c J-2.
3.	<i>Personal Property Security Act</i>, RSA 2000 c P-7.
4.	<i>RJR — MacDonald Inc. v Canada (Attorney General)</i> [1994] 1 SCR 311 (SCC).
5.	<i>Murphy v Cahill</i>, 2013 ABQB 335.
6.	<i>Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.</i>, 2002 ABQB 430.
7.	<i>Re Schendel Management Ltd.</i>, 2019 ABQB 545.
8.	<i>Lindsey Estate v Strategic Metals Corp.</i>, 2010 ABQB 242.
9.	<i>Kasten Energy Inc. v Shamrock Oil & Gas Ltd.</i>, 2013 ABQB 63.
10.	<i>RMB Australia Holdings Ltd. v Seafield Resources Ltd.</i>, 2014 ONSC 5205.
11.	<i>Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.</i>, 2012 BCSC 437.
12.	<i>Alberta Template Receivership Order Explanatory Notes</i>, January 2019.
13.	<i>RBC v Gustin</i>, 2019 ONSC 5370.
14.	<i>Royal Bank v Sun Squeeze Juices Inc.</i> , [1994] OJ No 567 aff'd 28 CBR (3d). (not available on CanLII)
15.	<i>Bank of Montreal v Owen Sound Golf & Country Club Ltd.</i>, 2012 ONSC 557.
16.	<i>Re Brandon Packers Ltd.</i>, 33 DLR (2d) 503.
17.	<i>Chow v Bresea Resources Ltd.</i>, 75 ACWS (3d) 1006.