

Estate/Court File No.: 31-2481648
Estate/Court File No.: 31-2481649

ONTARIO
SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP
ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES
LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO**

Applicants

**FACTUM OF THE MOVING PARTY
(RETURNABLE JUNE 13, 2019)**

**MILLER THOMSON LLP
SCOTIA PLAZA
40 KING STREET WEST, SUITE 5800
P.O. BOX 1011
TORONTO, ON CANADA M5H 3S1**

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695
kmahar@millerthomson.com

Stephanie De Caria LSO#: 68055L
Tel: 416.597.2652 / Fax: 416.595.8695
sdecaria@millerthomson.com

Lawyers for Green Earth Environmental Products,
Green Earth Stores Ltd., Matthew McBride
Enterprises Corp. and Beckstette Enterprises Corp.

TO: THE SERVICE LIST

ONTARIO
SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP
ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES
LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO**

Applicants

FACTUM OF THE MOVING PARTIES
(returnable June 13, 2019)

PART I - OVERVIEW

1. On March 4, 2019, the Applicants, Green Earth Environmental Products (“**GEEP**”) and Green Earth Stores Ltd. (“**GESL**”) (collectively, the “**Applicants**”) each commenced proposal proceedings (the “**Proposal Proceedings**”) under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended (the “**BIA**”) by each filing a Notice of Intention to File a Proposal (“**NOI**”). Crowe Soberman Inc. was appointed Proposal Trustee of each of the Applicants (in such capacity, the “**Proposal Trustee**”). The Proposal Period has been extended to June 17, 2019. All capitalized terms not otherwise defined herein have the same meaning ascribed to them in the McBride Affidavit.

Affidavit of Matthew McBride sworn June 7, 2019 (the “McBride Affidavit”) at paras. 11 and 19, Tab 2 of the Motion Record of the Applicants and Secured Creditors dated June 7, 2019 (the “Motion Record”).

2. The purpose of the Proposal Proceedings was to implement a court supervised orderly liquidation process and wind-down of the Applicants’ retail business operations known as the “Green Earth”, which were comprised of 29 store locations in shopping malls across Ontario. The store locations were operated by GEEP and the Inventory was owned by GESL. The Proposal Proceedings allowed the Applicants to undertake a successful Liquidation Sale, which concluded with the last store closing on May 30, 2019. The Liquidation Sale generated \$5,473,503.91 and \$2,764,119.48 was paid by GEEP to GESL for the purchase of the Inventory.

McBride Affidavit, at paras. 3, 7, 10, 22, 24 and 29.

3. Undertaking the Liquidation Sale in the Proposal Proceedings had a number of benefits for the stakeholders including the Applicants who had operated the business for over * years were able to assist with its orderly wind down, ensuring the employees were given notice of termination and dealt with in a fair and orderly manner and that landlords were provided notices of disclaimer and the leased premises were turned over in a broom swept condition. In addition, the Applicants are of the view that the highest recovery was achieved because the Proposal Proceedings had the least amount of stigma associated with it as compared to other insolvency proceedings. The NOI Proceedings also provided cost effective proceeding within which to liquidate.

McBride Affidavit, at paras. 51.

4. However, after reviewing the amount of the Secured Indebtedness and the expected amount available for distributions, the Applicants, working closely with the Chief Restructuring Advisor, the Proposal Trustee and counsel, have determined that neither GESL nor GEEP has sufficient monies to fund a proposal to unsecured creditors. The result of not filing proposals is that each of the Applicants will be deemed to have made an assignment in bankruptcy effective the date following the expiry of the Proposal Period.

McBride Affidavit, at paras. 48 to 50.

5. As a result, in order to effect a distribution from each of GEEP and GESL to priority claimants and the secured creditors, Matthew McBride Enterprises Corp. ("**McBride Enterprises**") and Beckstette Enterprises Corp. ("**Beckstette Enterprises**", and together with McBride Enterprises, the "**Secured Creditors**") and to allow for the continued marketing and eventual sale of the Real Property, the Applicants and the Secured Creditors seek an Order (the "**Receiver Appointment and Distribution Order**"), among other things:

- (a) appointing Crowe Soberman Inc., as receiver (in such capacity, the "**Receiver**"), pursuant to section 243 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**"), without security, of all of the assets, undertakings and properties of each of GESL and GEEP, acquired for or used in relation to the businesses carried on by the Applicants, effective on June 18, 2019;

(b) authorizing and directing the Receiver to distribute the monies held by the Receiver on behalf of GEEP, net of any monies the Receiver determines are required for the administration of the receivership of GEEP and to satisfy any claims that rank ahead of the Secured Creditors (collectively, the “**Priority Claims**”), in order of priority as follows:

- (i) first to pay any amounts owing to the beneficiaries under the Administration Charge (as defined in the Administration Order);
- (ii) second to pay any amounts owing to the beneficiaries of the KERA Charge (as defined in the Administration Order”);
- (iii) third to pay any amounts owing by GEEP for source deductions, which are subject to the super priority deemed trust, if any;
- (iv) fourth to repay an amount to the Secured Creditors in respect of the secured indebtedness assigned by Royal Bank of Canada (“**RBC**”) to the Secured Creditors (the “**Assigned Indebtedness**”), which when combined with the amount repaid by the Receiver from the monies held by GESL to the Secured Creditors in respect of the Assigned Indebtedness results in the Assigned Indebtedness being repaid in full; and
- (v) fifth to repay amounts to the Secured Creditors on a *pro rata* basis until \$734,798 owing by GEEP is repaid in full to McBride Enterprises and \$734,867 owing by GEEP is repaid in full to Beckstette Enterprises (collectively, the “**GEEP Enterprises Indebtedness**”);

(c) authorizing and directing the Receiver to distribute the monies held by the Receiver on behalf of GESL, net of any monies the Receiver determines are required for the administration of the receivership of GESL and to satisfy any Priority Claims, in order of priority as follows:

- (i) first to pay any amounts owing to the beneficiaries of the Administration Charge;
- (ii) second to pay any amounts owing to the beneficiaries of the KERA Charge;

- (iii) third to pay any amounts owing by GESL for source deductions, which are subject to the super priority deemed trust, if any;
- (iv) fourth to repay the Assigned Indebtedness less the amount available to be paid by monies held by the Receiver from GEEP (as calculated above) results in the Assigned Indebtedness being repaid in full to the Secured Creditors; and
- (v) fifth to repay amounts owing to the Secured Creditors on a *pro rata* basis until \$2,424,777 owing by GESL is repaid in full to McBride Enterprises and \$2,411,077 owing by GESL is repaid in full to Beckstette Enterprises (collectively, the “**GESL Enterprises Indebtedness**”).

PART II - THE FACTS

6. The facts with respect to this motion are fully set out in the McBride Affidavit, as well as the Affidavits of Matthew McBride sworn March 4th 2019 and April 18th 2019, attached as Exhibits “A” and “B” to the McBride Affidavit, respectively.

A. Administration Order and Liquidation Process Order

7. On March 7, 2019, Justice Penny granted the Administration Order, *inter alia*, (a) Proposal Period to May 3, 2019, (b) approving the administrative consolidation of the Applicants’ Proposal Proceedings, (c) approving the engagement of FAAN as Chief Restructuring Advisor of the Applicants, (d) directing that the Chief Restructuring Advisor be added as a required signing officer on the Applicants’ bank accounts for the pendency of the Proposal Proceedings and required to authorize all expenditures of \$5,000 or greater, (e) approving certain court-ordered charges, including the Administration Charge and the D&O Charge (as defined in the Administration Order), and (f) approving the KERA and the KERA Charge.

McBride Affidavit, at para 17 and Exhibit “C”.

8. In addition, on March 7, 2019, Justice Penny granted the Liquidation Process Order, *inter alia*, (a) approving the Consulting Agreement between the Applicants and Shawn Parkin as the Consultant dated February 25, 2019, (b) approving the Sale Guidelines attached as Schedule “A” to the Liquidation Process Order for the conduct of the Liquidation Sale,

(c) authorizing the Applicants, with the assistance of the Chief Restructuring Advisor and the Consultant, to conduct the Liquidations Sales at the retail locations in accordance with the Liquidation Process Order and the Sale Guidelines, and (d) authorizing the Consultant to have access to the Closing Stores in accordance with the applicable leases and Sale Guidelines.

McBride Affidavit, at para. 18 and Exhibit "D".

B. Status regarding Proposal Proceedings including Liquidation Sale and Real Property

9. Key updates in respect of the orderly wind down of the Applicants operations during the Proposal Proceedings can be summarized as follows:

(a) Liquidation Sale: The Applicants, with the assistance of the Chief Restructuring Advisor and the Consultant, commenced the Liquidation Sale immediately following the granting of the Liquidation Order and it concluded on May 30, 2019. The Liquidation Sale generated \$5,473,503.91, which amount exceeds projections that were included in the cash flow forecasts filed with the Court during these Proposal Proceedings. In accordance with the Inventory Agreement, \$2,764,119.48 was paid by GEEP to GESL for the purchase of the Inventory sold during the Liquidation Sale.

McBride Affidavit at paras. 22 to 24.

(b) Leases and Store Closures: The Applicants issued lease disclaimers in respect of all 29 retail store locations in accordance with BIA. The period for each of the lease disclaimers has expired and the leased premises have been returned to the relevant landlord in broom swept condition in accordance with the Liquidation Order. No opposition was filed in respect of the lease disclaimers.

McBride Affidavit at paras. 27 to 29.

(c) Employees: All of GEEP's employees have been terminated except for one (being Matthew McBride) and all of GESL's employees have been terminated, with the exception of approximately 5 employees that are assisting with accounting, administration and clean up at the Applicants' head office (which are expected to be terminated at the end of the Proposal Period, subject to the Receiver retaining same).

McBride Affidavit, at para. 34.

(d) Employee Payments: As employees have been terminated or quit, all amounts owing to such employees for wages, vacation pay and any stay bonus or KERA, if applicable, have been paid to the employees on their last payroll. The recently terminated employees are being paid in the same manner. The Applicants intend to fund remaining employees' final payroll prior to the end of the Proposal Period, which amount will include also include all outstanding wages, vacation pay and any stay bonus or KERA, if applicable.

McBride Affidavit at paras. 32 to 34.

(e) Consultant: In accordance with the Consulting Agreement, the Consultant was given notice on May 15, 2019 terminated effective on May 30, 2019. All amounts owing to the Consultant pursuant to the Consulting Agreement will be paid prior to the end of the Proposal Period.

McBride Affidavit at para. 26.

(f) Discharge of Chief Restructuring Advisor: Given that the Liquidation Sale has concluded, the Applicants are seeking an Order discharging the Chief Restructuring Advisor in these Proposal Proceedings. Effective on May 20, 2019, the Chief Restructuring Advisor and the Applicants agreed that the Chief Restructuring Advisor would move from a weekly fee arrangement to an hourly arrangement given that the Liquidation Sale was winding down. The CRA was given notice that the CRA would be terminated effective on the earlier of the bankruptcy of the Applicants or the appointment of a receiver in respect of the Applicants. All amounts owing to the CRA have been agreed upon and will be paid to the CRA and/or counsel prior to the end of the Proposal Period.

McBride Affidavit, at para. 69.

Third Report of the Proposal Trustee dated June 11, 2019 (the "Third Report") at para. 18.

(g) Post-Filing Obligations: The Applicants have been paying all post filing services in the ordinary course and all amounts owing are expected to be paid prior to the end of the Proposal Period, which include any amounts in respect of source deductions and HST to the end of the Proposal Period.

McBride Affidavit at paras. 42 to 45.

(h) Real Property: The Real Property was listed by GESL with CBRE in December 2018 at \$6,500,000. While there has been interest in the Real Property, no offers or letters of intent have been received. The Applicants and Secured Creditors are seeking the appointment of the Receiver to allow the Receiver to continue to market the Real Property.

McBride Affidavit at paras. 46 to 47 and Exhibit “B” at paras. 38 to 40.

C. Receiver Appointment and Distribution Order

10. As noted above, the Applicants have determined that there is not sufficient cash to fund a Proposal for either GESL or GEEP. As a result, at the expiry of the Proposal Period the Applicants will be deemed to have filed an assignment in bankruptcy. To facilitate distributions to priority claimants, if any, and the Secured Creditor and to facilitate the continued marketing and eventual sale of the Real Property, the Applicants and the Secured Creditors are seeking the Receiver Appointment and Distribution Order effective with the appointment of the Receiver being effective on June 18, 2019 being the date of the bankruptcy.

McBride Affidavit, at paras. 48 to 49.

11. The Secured Creditors have the contractual entitlement to seek the appointment of a Receiver pursuant to the general security agreements (each a “GSA”) granted by each of GESL and GEEP to RBC, which, along with other security, were assigned to the Secured Creditors along with the Assigned Indebtedness (the “RBC Security”).

McBride Affidavit, at paras. 53 and Exhibit “F”.

i. Estimated Amounts Available for Distribution

12. Based on current estimates, it is expected that there will be between approximately \$1,600,000 and \$1,800,000 available to be distributed in GEEP and between approximately \$3,600,000 and \$3,750,000 available to be distributed in GESL.

McBride Affidavit, at paras. 65 to 66.

Third Report, at paras. 45 and 47 and Appendix “D”.

ii. Proposed Order of Distribution of Monies from GESL and GEEP

13. The proposed distribution order for each of GESL and GEEP contemplates first that any amount under the Administration Charge and the KERA Charge that are not paid prior to the expiry of the Proposal Period be paid by the Receiver. While the Administration Order granted a D&O Charge, the Applicants are aware of no potential claims that could arise under the D&O Charge and are therefore seeking to terminate the D&O Charge effective on the appointment of the Receiver.

McBride Affidavit, at paras. 2 and 39.

14. The Applicants are not aware of any source deductions owing. However, the Receiver intends to request a source deductions audit from Canada Revenue Agency to confirm that no amounts owing in respect of source deductions and the proposed distribution order for each of GESL and GEEP contemplates the payment of source deductions, which are subject to the super priority deemed trust, if any.

McBride Affidavit, at paras. 2, 42 and 43.

15. The Applicants are not aware of any other priority payables, however the distribution orders provide for the Receiver to provide for and maintain a reserve for potential priority payables, if required. The Receiver will report to the Court during the course of the receivership proceedings should they become aware of any priority payables.

McBride Affidavit, at para. 43.

Third Report, at para. 49.

16. The Secured Creditors are first-ranking secured creditors of both GESL and GEEP for the full amount of the Assigned Indebtedness pursuant to the RBC Security, which was assigned to the Secured Creditors prior to the Proposal Proceedings. The amount of the Assigned Indebtedness is \$3,254,740.85 as at February 26, 2019 plus interest accruing at RBC's prime rate plus 5 percent per annum until repaid in full. The Assigned Indebtedness is an obligation of both GEEP and GESL.

McBride Affidavit, at paras. 52 and 62.

17. As reported in the First Report of the Proposal Trustee, the Proposal Trustee has received an opinion from its independent legal counsel, Stikeman, confirming that subject to

typical qualifications and assumptions, the RBC Security is valid and enforceable in the province of Ontario.

McBride Affidavit, at para. 54.

18. The proposed distributions orders contemplate that the Assigned Indebtedness would be repaid by a combination of the amount paid from GESL and the amount paid by GEEP. The proposed allocation of the Assigned Indebtedness is approximately 10 percent to be repaid by GEEP. The amount was calculated to allow GEEP to repay the full amount of the second secured GEEP Enterprises Indebtedness, which is in the amount of \$1,469,665. The Secured Creditors support allocating the Assigned Indebtedness in this manner.

McBride Affidavit, at para. 62.

19. McBride Enterprises and Beckstette Enterprises each hold security on a *pari passu* basis, including general security agreements from each of GESL and GEEP, which were granted in 2009, that rank behind the RBC Security on each of GESL and GEEP (the “**Enterprise Security**”).

McBride Affidavit, at para. 55.

20. The GEEP Enterprise Indebtedness is comprised of \$734,798.00 owing to McBride Enterprises and \$734,866.50 owing to Beckstette Enterprises. The GESL Enterprise Indebtedness is comprised of \$2,424,777.02 owing to McBride Enterprises and \$2,411,076.52 owing to Beckstette Enterprises.

McBride Affidavit, at paras. 56 to 57.

21. The proposed distribution order contemplates that GESL making distributions on account of the GESL Enterprises Indebtedness after repaying the Assigned Indebtedness. Currently, it is estimated that there will be a shortfall to the Secured Creditors in respect of the GESL Enterprises Indebtedness of approximately \$4,200,000 prior to the sale of the Real Property.

McBride Affidavit at para. 62.

22. In the event the Real Property sale results in net proceeds after the costs of the sale and receivership and bankruptcy are in excess of the amount that will remain unpaid to the Secured Creditors in respect of the GESL Enterprises Indebtedness then money will

become available for unsecured creditors of GESL (and potentially for unsecured creditors of GEEP to the extent that rights of subrogation arise).

McBride Affidavit at para. 64.

PART III - ISSUES

23. This issue raises the following issues:
- (a) Whether it is appropriate to appoint the Receiver in respect of GESL and GEEP; and
 - (b) Whether the proposed distribution orders are appropriate in the circumstances.

PART IV - THE LAW AND ARGUMENT

Issue 1: Is it Appropriate to appoint a Receiver over GESL and GEEP effective on June 18, 2019?

24. Yes. As noted above, the Proposal Period currently expires on June 17, 2018, after which the Applicants will have deemed to have made an assignment in bankruptcy. The Applicants and the Secured Creditors are seeking the appointment of Crowe Soberman Inc. as Receiver of all of the assets, undertakings and properties of each of the Applicants, effective as at June 18, 2019 (the date of the deemed assignment in bankruptcy of GESL and GEEP).

BIA, s. 50.4(8)(a).

25. The secured creditors are authorized pursuant to the BIA to seek the appointment of the Receiver. Section 243(1) of the BIA provides as follows:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

BIA, s. 243(1).

26. In addition, Section 101(1) of the CJA provides that a receiver may be appointed “...where it appears to a judge of the Court to be just or convenient to do so.”

CJA, s. 101.

27. In determining whether it is “just and convenient” to appoint a receiver, the Court must have regard to all of the circumstances, particularly the nature of the properties and the rights and interests of all parties in relation thereto.

***Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 CBR (3d) 271 at para 10 (Ont. Gen Div).**

28. As stated by Justice Newbould in *Degroote v DC Entertainment Corp et al.*, “There are no pre-conditions for the exercise of a court’s discretion to appoint a receiver. Each case depends on its own facts.”

***Degroote v DC Entertainment Corp et al.* 2013 ONSC 7101 at paras 52 to 53.**

29. In determining whether it is “just and convenient” to appoint a receiver under the BIA or CJA, the Court has held that where the security instrument governing the relationship between the debtor and the secured creditor provides for the right to appoint a receiver upon default, the burden on the applicant secured creditor seeking the appointment is relaxed. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

***RMB Australia Holdings v Seafield Resources Ltd.*, 2014 ONSC 5205 at paras. 28 and 29.**

30. Although an application for the appointment of a receiver is typically made by a secured creditor in respect of a debtor, there are Ontario cases in which a debtor itself has successfully applied for an order appointing a receiver over its own property pursuant to section 101 of the CJA.

***Tool-Plas Systems Inc., Re*, (2008) 2008 CarswellOnt 6257 (S.C.J. [Commercial List]); *Graceway Canada Company, Re*, 2011 ONSC 6292.**

31. This Court has in other instances granted a receivership as a transition from a NOI proceeding. In particular, Justice Spence in the NOI proceedings in respect of Herbal Magic Inc., granted the debtor’s motion for the appointment in that case of an interim

receiver for the purposes of distributing certain available proceeds from the assets of Herbal Magic Inc.

In the matter of the Notice of Intention to Make a Proposal of Herbal Magic Inc., Court File No. 31-1890162, Order of Justice Spence dated July 30, 2014.

32. Yes, it is appropriate to appoint a Receiver of the assets, undertakings and properties of GESL and GEEP for the purposes of making distributions, collecting any remaining assets and, in the case of GESL, selling the Real Property and distributing those proceeds.
33. In this case, the Applicants and the Secured Creditors respectfully request the appointment of the Receiver over the assets, undertakings and properties of GESL and GEEP for the following reasons:
 - (a) The Liquidation Sale has successfully concluded and all 29 stores are now closed, such that there is no business for the Applicants to continue to operate or Inventory to liquidate to warrant seeking an extension of the Proposal Proceedings;
 - (b) The RBC Security specifically provides that upon default, the secured creditor may appoint a receiver. This term was assented to by the Applicants at the time of obtaining the granting the RBC Security;
 - (c) All assets of GESL and GEEP are subject to the RBC Security and the Enterprise Security, which has both been determined to be valid and enforceable in Ontario by the Proposal Trustee's independent legal counsel, Stikeman Elliot LLP;
 - (d) The Liquidation Sale generated significant monies to be distributed;
 - (e) The Real Property owned by GESL remains to be sold and there is the potential that some ancillary assets may be monetized after the date of bankruptcy in GESL and/or GEEP;
 - (f) Until the Real Property is sold, the Secured Creditors will suffer a shortfall of approximately \$4,200,000 in respect of the GESL Enterprises Indebtedness; and
 - (g) The sale proceeds from the Real Property once sold may result in the Secured Creditors at GESL being repaid in full and once paid may result in monies being

available to make a distribution to unsecured creditors of GESL (and potentially for unsecured creditors of GEEP to the extent that rights of subrogation arise given the repayment by GEEP of a portion of the Assigned Indebtedness, which obligation to do so arose under a guarantee).

McBride Affidavit at paras. 22, 53, 54, 58, 59, 60, 63 and 65 and Exhibit "F".

Issue 2: Are the proposed distribution orders appropriate in the circumstances?

34. Yes, the proposed distribution orders are appropriate in the circumstances. The orders contemplate that funds will be distributed to priority and secured creditors in order of priority in a bankruptcy and that the amount owing under the Assigned Indebtedness is allocated between GESL and GEEP in a manner that the Secured Creditors agree to and which does not negatively impact rights other creditors have in respect of the monies to be distributed.

35. First, any amounts owing under the super priority Court ordered charges granted under the Administration Order will be paid, including amounts owing under the Administration Charge and the KERA Charge at the time of the appointment of the Receiver. As set out above, the Applicants are not aware of any potential claims that could arise under the D&O Charge and are therefore seeking to terminate the D&O Charge effective on the appointment of the Receiver.

McBride Affidavit, at paras. 2, 17, 37, and 39 and Exhibit "C".

36. Second, any amounts owing to Canada Revenue Agency for source deductions which are subject to the super priority deemed trust will be paid. The Applicants are not aware of any source deductions owing to the Canada Revenue Agency, or other claims that would rank in priority to the Secured Creditors after the date of bankruptcy. However, the Receiver intends to seek a source deductions audit to confirm the amount owing for source deductions to Canada Revenue Agency that would be subject to a priority claim, if any is being served

McBride Affidavit at paras. 2 and 42.

37. Notwithstanding that HST is not a priority claim in a bankruptcy, the Applicants are not aware of any HST that will remain owing as the Applicants will file their May HST

returns and remit any amount owing for the month of May. The Applicants have not operated any of the stores in June and therefore have not collected any HST.

McBride Affidavit at para. 44.

38. The Applicants are not aware of any other potential Priority Payables.

McBride Affidavit at para. 43.

39. Next, the distribution orders contemplate the repayment of the Assigned Indebtedness. The Assigned Indebtedness is an obligation of both GEEP and GESL. Given this, in considering how to allocate the Assigned Indebtedness, the potential rights of subrogation and marshalling were considered.

McBride Affidavit at paras. 62 and 64.

40. The distribution order for GEEP contemplates that GEEP will repay a portion of the Assigned Indebtedness (allocated to be approximately 10 percent of the Assigned Indebtedness), which will allow sufficient monies to remain to permit GEEP to repay the amount of the GEEP Enterprises Indebtedness in full, which ranks behind the Assigned Indebtedness. The distribution order for GESL contemplates that GESL will repay the remaining amount owing under the Assigned Indebtedness.

41. The Secured Creditors support the proposed allocation. The rationale for the proposed allocation in respect of the Assigned Indebtedness is as follows:

(a) The Assigned Indebtedness has access to two pools of funds for repayment (i.e. monies in GESL under the Mortgage and GSA and monies in GEEP under the guarantee and GSA) whereas the GEEP Enterprises Indebtedness only has access to one being the monies in GEEP;

(b) The GESL Enterprises Indebtedness will still have recourse to the proceeds of the Real Property;

(c) In the event that the proceeds from the Real Property in GESL exceed the amount that remains outstanding in respect of the GESL Enterprises, the GESL unsecured creditors will receive a distribution and GEEP may be a creditor of GESL to the extent of the amount GEEP paid on account of the Assigned Indebtedness as a result of rights of subrogation, which the Receiver will consider if and when the issue arises; and

(d) Employees of GESL are not adversely impacted by the allocation because to the extent they have a priority claim under section 81.3 or 81.4 of the BIA this priority is preserved.

42. Lastly, the distribution orders contemplate the repayment from monies in GEEP of the GEEP Enterprises Indebtedness on a *pro rata* basis and repayment from monies in GESL of the GESL Enterprises Indebtedness on a *pro rata* basis. Based on the realization analysis, it is expected that there will be a shortfall in GESL of approximately \$4,200,000 in respect of the GESL Enterprises Indebtedness

PART V - ORDER REQUESTED

43. For the foregoing reasons, the Applicants and Secured Creditors request that this Court grant the Receiver Appointment and Distribution Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of June, 2019.



Kyla Mahar and Stephanie De Caria
MILLER THOMSON LLP

Lawyer for the Applicants and Secured Creditors

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 CBR (3d) 271 (Ont. Gen Div).
2. *Degroote v DC Entertainment Corp et al.* 2013 ONSC 7101.
3. *RMB Australia Holdings v Seafield Resources Ltd.*, 2014 ONSC 5205.
4. *Tool-Plas Systems Inc., Re*, (2008) 2008 CarswellOnt 6257 (S.C.J. [Commercial List]).
5. *Graceway Canada Company, Re*, 2011 ONSC 6292.
6. *In the matter of the Notice of Intention to Make a Proposal of Herbal Magic Inc.*, Court File No. 31-1890162, Order of Justice Spence dated July 30, 2014

SCHEDULE "B"
RELEVANT STATUTES

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

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

- (a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;
- (b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —
 - (i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and
 - (ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and
- (c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- **(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- **(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- **(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- **(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
- **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- **(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during

the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

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

Injunctions and receivers

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

Terms

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

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
GREEN EARTH STORES LTD AND GREEN EARTH ENVIRONMENTAL PRODUCTS**

Estate/Court File No.: 31-2481648
Estate/Court File No.: 31-2481649

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

Proceeding commenced at Toronto

**FACTUM OF THE MOVING PARTY
(RETURNABLE JUNE 13, 2019)**

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Kyla Mahar LSO#: 44182G

Tel: 416.597.4303 / Fax: 416.595.8695
kmahar@millerthomson.com

Stephanie De Caria LSO#: 68055L

Tel: 416.597.2652 / Fax: 416.595.8695
sdecaria@millerthomson.com

Lawyers for Green Earth Environmental Products,
Green Earth Stores Ltd., Matthew McBride
Enterprises Corp. and Beckstette Enterprises
Corp.