

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

B E T W E E N :

JAMES RYAN

Applicant

- and -

EXCAPSA SOFTWARE INC.

Respondent

**FACTUM OF JAMES RYAN  
(APPLICATION FOR COURT SUPERVISION OF LIQUIDATION)**

**Part I: Overview**

1. The shareholders of Excapsa Software Inc. (“Excapsa”), a corporation continued under the *Canada Business Corporations Act* (“CBCA”) which operated as a holding company, have approved the sale of all of Excapsa’s operating subsidiaries, for reasons set out further below. Excapsa’s assets now consist primarily of cash and a promissory note in connection with the sale which is to be repaid to Excapsa over the next five-and-a-half years. As Excapsa is no longer actively carrying on business, the shareholders have also voted to voluntarily liquidate and dissolve the corporation under the CBCA. At a meeting on November 24, 2006, attended by 63% of Excapsa’s shareholders (either in person or by proxy), the shareholders present unanimously approved the liquidation and dissolution of the company as well as a series of related resolutions.

2. The applicant, who is the Chief Executive Officer and a director of Excapsa, seeks an order under s. 211(8) of the CBCA continuing the liquidation and dissolution of Excapsa under court supervision. The Applicant also seeks an order under s. 217 of the CBCA, *inter alia*

- (a) confirming the appointment of Mintz & Partners Inc. as liquidator (the “Liquidator”) and empowering the Liquidator to take certain steps with respect to the liquidation;
- (b) vesting the powers of the directors and shareholders of Excapsa in the Liquidator;
- (c) setting a procedure for the submission of claims against Excapsa and the consideration of such claims by the Liquidator;
- (d) fixing a procedure for the payment of interim distributions by the Liquidator during the course of the liquidation; and
- (e) confirming the appointment of inspectors to supervise and assist the Liquidator and to represent the interests of the shareholders of Excapsa to the Liquidator.

## **Part II: Facts**

3. Excapsa was incorporated in April 2004 and later continued under the Canada Business Corporations Act (“CBCA”).<sup>1</sup>

4. Since February 9, 2006, Excapsa has only been a holding company. Its business operations were, at relevant times, carried on by the following direct and indirect subsidiaries (the “Subsidiaries”):

- (a) Excapsa Services Inc., an Ontario corporation;
- (b) Game Theory Ltd., a Malta corporation;
- (c) Game Theory Holdings Ltd., a Malta corporation; and
- (d) Game Theory Services Ltd., a Malta corporation.<sup>2</sup>

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<sup>1</sup> Affidavit of Daniel Friedberg, sworn November 27, 2006 (“Friedberg Affidavit”) at para. 2.

<sup>2</sup> Friedberg Affidavit at para. 3.

5. Since its incorporation, Excapsa and the Subsidiaries (collectively, the “Excapsa Group”) have developed, maintained, and marketed online gaming software applications. The main products of the Excapsa Group were multi-player real time Internet-enabled poker software, its back office e-cash and reporting software, and the poker network. The Excapsa Group licensed this software to a variety of third parties that operate both real money and “play money” online gaming ventures. Most of the revenue of the Excapsa Group came from licensing fees for its software and the domain names owned by it.<sup>3</sup>

6. In February 2006, Excapsa made a private placement of approximately 23 million and also sought and obtained admission of its shares to trading on the Alternative Investments Market of the London Stock Exchange (“AIM”). Excapsa is structured as a mutual fund corporation for Canadian legal purposes.<sup>4</sup>

7. In the fiscal year ended December 31, 2005, the Excapsa Group generated net income of US\$9,075,000 on revenue of US\$49,505,000. For the six months ended June 30, 2006, the Excapsa Group had revenue of US\$54,195,000 and net income of US\$15,112,000.<sup>5</sup>

8. This year, the landscape for Internet gaming has changed significantly. On September 30, 2006, the United States Congress passed the *SAFE Port Act* (the “SPA”). Subsequently, on October 13, 2006, the SPA was signed into law by President Bush. Title VIII of the SPA, entitled Unlawful Internet Gambling Enforcement, prohibits online gaming service providers from accepting credit card or other payments originating in the United States. It also prevents United States financial institutions from facilitating Internet gaming anywhere in the world. Although the Excapsa Group was not directly engaged in Internet gambling activities—its licensees were the ones that carried on such businesses—Excapsa recognized that the SPA would have a material negative effect on the business of the Excapsa Group.<sup>6</sup>

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<sup>3</sup> Friedberg Affidavit at para. 4.

<sup>4</sup> Friedberg Affidavit at para. 5.

<sup>5</sup> Friedberg Affidavit at para. 6-7.

<sup>6</sup> Friedberg Affidavit at para. 8.

9. The directors of Excapsa determined, after a thorough review, that the best way to maximize shareholder value in the company would be to sell Excapsa's operating assets as a going concern. On October 12, 2006, Excapsa entered into a sale transaction with Blast Off Limited (the "Buyer"), a limited liability company in Malta. Excapsa sold all of the outstanding common shares of two of the Subsidiaries, Excapsa Services Inc. ("ESI") and Game Theory Holdings Ltd. ("GTHL"), for an aggregate purchase price of US\$130 million (the "Purchase Price"). The other two Subsidiaries, Game Theory Ltd. and Game Theory Services Ltd., are wholly-owned by GTHL and were indirectly included in the sale.<sup>7</sup>

10. The sale transaction was effective on October 12, 2006, subject only to the approval and ratification by Excapsa's shareholders.<sup>8</sup>

11. The Buyer paid Excapsa an initial US\$5 million on account of the Purchase Price and has issued a promissory note (the "Note") for the balance of US\$125 million.<sup>9</sup>

12. The Note is payable as follows:

- (a) one instalment of US\$5 million was due on or before October 17, 2006 and has been paid;
- (b) one instalment of US\$500,000 is due on or before November 22, 2006 and has been paid;
- (c) 12 instalments of US\$1 million must be paid on the last date of each calendar month commencing on December 31, 2006 and ending on November 30, 2007; and
- (d) further instalments of US\$2 million per month must be paid commencing on December 31, 2007 and continuing on the last day of each calendar month until

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<sup>7</sup> Friedberg Affidavit at para. 9-10.

<sup>8</sup> Friedberg Affidavit at para. 10.

<sup>9</sup> Friedberg Affidavit at para. 11.

the Note is paid in full (by May 31, 2012, unless the Buyer opts to make accelerated payments which are permitted on terms outlined in the Note).<sup>10</sup>

13. Interest is also payable on the Note, with the terms as outlined in the supporting affidavit of Daniel Friedberg. The Note is secured directly and indirectly by the common shares of ESI and GTHL and certain other security.<sup>11</sup>

14. Under the Agreement, ESI and GTHL also paid over to Excapsa all of their cash and accounts receivable as of October 12, 2006, as well as a portion of prepaid expenses.<sup>12</sup>

### **Approval of Sale and Other Matters**

15. As a result of the sale of Excapsa's Subsidiaries to the Buyer, Excapsa had no other operating business. It only had cash in the bank, accounts payable, and the right to receive payments under the Note. The board of directors of Excapsa determined that, since there was no other business venture that the company could reasonably undertake to maximize shareholder value, Excapsa should be voluntarily dissolved, its debts satisfied, and any remaining proceeds distributed to shareholders.<sup>13</sup>

16. Under the AIM exchange rules, a company's shares must be delisted when the company ceases to carry on an active business. Since such situation has occurred here, Excapsa was required to make application to cancel the admission of its shares to trading on AIM.<sup>14</sup>

17. On October 26, 2006, the board of directors of Excapsa met. At that meeting, the board decided to call a special meeting of shareholders for November 24, 2006 for the following purposes:

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<sup>10</sup> Friedberg Affidavit at para. 12.

<sup>11</sup> Friedberg Affidavit at para. 13.

<sup>12</sup> Friedberg Affidavit at para. 14.

<sup>13</sup> Friedberg Affidavit at para. 16.

<sup>14</sup> Friedberg Affidavit at para. 17.

- (a) Obtain an affirmative vote of not less than sixty-six-and-two-thirds percent of the votes cast at such special meeting to ratify and approve a resolution authorizing the completion of the sale transaction with the Buyer in accordance with the Agreement.
- (b) Obtain an affirmative vote of not less than 75 percent (as required by AIM rules) of the votes cast at such special meeting to ratify and approve the cancellation of the admission of its shares to trading on AIM, thereby resulting in Excapsa ceasing to be a publicly-traded company.
- (c) Approve a plan of liquidation and distribution (the "Plan"), which is to become effective on the date that the sale transaction between Excapsa and the Buyer is approved by shareholders. The Plan provides for a voluntary liquidation and dissolution under section 211 of the CBCA (the "Liquidation"), which includes the following steps:
  - (i) on November 30, 2006, Mintz & Partners Limited would be appointed as liquidator under the CBCA (the "Liquidator"), with such appointment being subsequently confirmed by the Ontario Superior Court (the "Court") later that day;
  - (ii) An application will be brought to the Court to have the Liquidation continued under court supervision;
  - (iii) All employees and independent contractors of Excapsa would be terminated, other than those individuals that the Liquidator required to retain to assist with the Liquidation;
  - (iv) The Liquidator would be empowered to, amongst other matters:
    - (A) gather up and realize upon the assets of Excapsa, including ongoing payments made under the Note;
    - (B) maintain such reserves as are reasonably necessary to cover contingent liabilities of Excapsa,

- (C) pay debts of Excapsa (including taxes), and
- (D) distribute any remaining amounts to shareholders, whether by interim or final distributions; and
- (E) Appoint inspectors to supervise and assist the Liquidator with the implementation of the Plan.<sup>15</sup>

18. The Management Information Circular of Excapsa issued in connection with the meeting also proposed that resolutions be approved:

- (a) changing the name of the corporation to 6356095 Canada Inc.;
- (b) authorizing Excapsa to reduce the stated capital of the corporation and distribute the amount of any such reduction to shareholders;
- (c) dispensing with the appointment of an auditor and the compliance with the audit requirements of the CBCA if permitted thereunder; and
- (d) approving the acts of the directors and officers to date.<sup>16</sup>

19. A package of materials was sent to shareholders in connection along with the Management Information Circular. Its contents are set out in the affidavit of Daniel Friedberg.<sup>17</sup>

### **Approval of Resolutions**

20. The Special Meeting was held on November 24, 2006 at the offices of Cassels Brock & Blackwell LLP. Shareholders holding 121,738,497 shares of Excapsa, being 63 percent of the total issued and outstanding shares of the company, were present at the meeting either in person or by proxy. All of the shareholders present at the meeting voted in favour of resolutions:

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<sup>15</sup> Friedberg Affidavit at para. 18.

<sup>16</sup> Friedberg Affidavit at para. 19

<sup>17</sup> Friedberg Affidavit at para. 20-21.

- (a) Approving the sale transaction with the Buyer;
- (b) Approving the cancellation of the admission to AIM;
- (c) Approving the Plan;
- (d) Changing the name of Excapsa;
- (e) Reducing the stated capital;
- (f) Dispensing with the appointment of an auditor and the preparation of audited financial statements; and
- (g) Approving the directors' and officers' actions.<sup>18</sup>

21. Following the Special Meeting, Excapsa took steps to begin the Liquidation under section 211 of the CBCA. First, Excapsa filed a Statement of Intent to Dissolve with the Director appointed under the CBCA pursuant to Section 211(4) of the CBCA. This statement was filed effective November 24, 2006.<sup>19</sup>

22. As authorized by the resolution at the Special Meeting, Excapsa will, prior to the hearing of this application, formally change its name to 6356095 Canada Inc. Such name change will require an amendment to the title of proceedings.<sup>20</sup>

23. As of November 24, 2006, the Director appointed under the CBCA issued a Certificate of Intent to Dissolve in accordance with section 262 of the CBCA (the "Certificate"). A Certificate has been issued and, therefore, the dissolution and liquidation process has begun.<sup>21</sup>

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<sup>18</sup> Friedberg Affidavit at para. 22.

<sup>19</sup> Friedberg Affidavit at para. 24

<sup>20</sup> Friedberg Affidavit at para. 25.

<sup>21</sup> Friedberg Affidavit at para. 26.

## **Future Steps**

24. It will not be possible to completely wind-up the affairs of Excapsa until the Buyer fully pays all amounts owing under the Note. Since the Note provides for payments up to and including May 31, 2012, the affairs of Excapsa will not be finalized for more than five-and-one-half years (assuming that the Buyer does not make pre-payments under the Note).<sup>22</sup>

25. Given that there is no active business of Excapsa and the fact that its shares will no longer trade on the AIM market after approximately December 4, 2006, the officers do not wish to maintain their current positions. The officers will resign effective upon the Court granting an order for supervision of the Liquidation.<sup>23</sup>

26. Initially, three directors will continue with Excapsa to assist the Liquidator; however, it is possible that these directors will eventually resign during the course of the liquidation.<sup>24</sup>

27. The directors have resolved to ensure that the liquidation will proceed on a fair, orderly, and transparent basis. In that regard, the Plan envisions court supervision of the liquidation, with all material steps taken by a court-confirmed liquidator who is assisted by inspectors. Under the Plan, which was approved by the shareholders on November 24, 2006, Gail Gleed, who was the Chief Financial Officer of Excapsa up to that date, John K. Fitzgerald, an independent lawyer, and the applicant were appointed as inspectors of the liquidation (collectively, the "Inspectors"). The role of the Inspectors will be to supervise and assist the Liquidator with the liquidation. In the event that an Inspector resigns, the Plan authorizes the Liquidator (or failing that, any shareholder can apply to the court) to appoint a replacement Inspector. The Inspectors also have the right to apply to the court to appoint a replacement liquidator if they believe that circumstances require it. The Inspectors also will have the authority to apply to the court for directions.<sup>25</sup>

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<sup>22</sup> Friedberg Affidavit at para. 27.

<sup>23</sup> Friedberg Affidavit at para. 28.

<sup>24</sup> Friedberg Affidavit at para. 29.

<sup>25</sup> Friedberg Affidavit at para. 30.

### **Current Financial Status of Excapsa**

28. Taking into account the US\$10.5 million paid to date under the Agreement, as well as the ongoing expenses that Excapsa has paid (such as rent, utilities, and salaries), Excapsa now has cash on hand of approximately US\$60,000,000.<sup>26</sup>

### **Liabilities of Excapsa**

29. Excapsa wishes to ensure that it properly provides for and pays all of its liabilities, as is required by the CBCA. Its liabilities are expected to be minimal because:

- (a) Until the sale transactions, all operations were undertaken by the Subsidiaries and, therefore, it was those Subsidiaries which incurred most of the liabilities of the business. Since Excapsa sold the shares of those Subsidiaries to the Buyer, the ongoing and future liabilities of the business remain with the Subsidiaries;<sup>27</sup>
- (b) Excapsa has paid all of its known accounts payable which existed up to November 24, 2006. Excapsa has also prepaid its rent on its business premises up to December 31, 2006, the date on which it will vacate such premises. Thereafter, the Liquidation will operate from the premises of the Liquidator, which will not require any ongoing rent to be paid; and<sup>28</sup>
- (c) Employee wages are paid up to date. All employees have been offered—and have accepted and been paid—a compensation package in relation to their entitlement upon termination.<sup>29</sup>

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<sup>26</sup> Friedberg Affidavit at para. 31.

<sup>27</sup> Friedberg Affidavit at para. 33.

<sup>28</sup> Friedberg Affidavit at para. 34.

<sup>29</sup> Friedberg Affidavit at para. 35.

30. Excapsa will have to pay its own current and future income tax liability as well as tax liability (up to October 12, 2006) of certain of its operating subsidiaries. Other than this tax liability, Excapsa does not have any other ongoing liabilities.<sup>30</sup>

31. Excapsa's accrued tax liability is less than CAD\$8 million and such amount will be reduced further by refunds and credits that Excapsa is entitled to claim upon filing its returns.

### **Claims Barring Process**

32. Although there are unlikely to be many claims against Excapsa, the board of directors recognized that any party that is owed money by Excapsa or who has an actual or potential claim against Excapsa or its officers or directors should have the opportunity, and be required, to bring such claim forward as soon as possible for adjudication.<sup>31</sup>

33. To allow claims to be asserted and adjudicated, Excapsa seeks in this motion a claims-barring process under the supervision of the court. Since section 221(b)(iii) of the CBCA contemplates that creditors should be required to assert their claims against a company in liquidation within two months of publication of a notice of dissolution, Excapsa seeks an order requiring all claimants to assert their claims on or before February 15, 2007. Excapsa intends to publish a notice concerning the liquidation and the appointment of the Liquidator in the national edition of the Globe and Mail, the Wall Street Journal, the Times of London, as well as in a newspaper of general circulation in Malta.<sup>32</sup>

34. Excapsa also intends to give notice of the Liquidation to, and seek any claims from, shareholders, trade creditors, employees, and all other persons who may potentially have claims against Excapsa or its directors.<sup>33</sup>

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<sup>30</sup> Friedberg Affidavit at para. 36-37.

<sup>31</sup> Friedberg Affidavit at para. 38.

<sup>32</sup> Friedberg Affidavit at para. 39.

<sup>33</sup> Friedberg Affidavit at para. 40.

### **Former Role of Mintz**

35. Excapsa wishes the appointment of Mintz & Partners Limited as Liquidator to be approved by the court. A related entity, Mintz & Partners LLP, is the auditor of Excapsa; however, the board of directors of Excapsa does not believe that there would be any conflict of interest in having Mintz & Partners Limited confirmed as Liquidator. In fact, based on Mintz & Partners LLP's knowledge of Excapsa, the board of directors believes that the appointment of Mintz & Partners Limited will benefit and facilitate the liquidation process.

### **Part III: Law and Argument**

#### **The Liquidation and Dissolution Process Under the CBCA**

36. Section 211 of the CBCA provides a procedure whereby the shareholders of a corporation may determine, by special resolution, to liquidate and dissolve the corporation. A voluntary liquidation and dissolution may be proposed by the directors of a corporation and approved by a special resolution of the shareholders of the corporation.

CBCA, s. 211(1) and 211(3).

37. As set out above, such a special resolution was proposed by the directors of Excapsa and has been passed by special resolution of the shareholders at a duly called meeting of the shareholders.

38. Section 211(8) of the CBCA provides that:

The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be continued under the supervision of the court as provided in this Part, and on such application the court may so order and make any further order it thinks fit.

39. The application must be made on notice to the Director under the CBCA (which notice has been given by the applicant).

CBCA, s. 211(9).

40. Once an order is made continuing the liquidation and dissolution under the supervision of the court, the powers available to the court are the same as those which are available in an involuntary liquidation:

... where it is satisfied that it is appropriate to do so (and, in particular, where the court is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations), the court may make an order bringing the liquidation and dissolution under its supervision. If the court makes such an order, the liquidation and dissolution continues thereafter under the supervision of the court. The ancillary order making powers of the court in such a case are the same as in an involuntary liquidation.

K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths Canada, 1999) at §11.121.

41. The powers which the court may exercise in connection with the dissolution or the liquidation and dissolution of a CBCA corporation are extensive, and are set out in CBCA s. 217. Under this section, the court may, *inter alia*:

- (a) make an order to liquidate the corporation: s. 217(a);
- (b) appoint a liquidator: s. 217(b);
- (c) determine the validity of any claims made against the corporation: s. 217(e);
- (d) approve the payment, satisfaction or compromise of claims against the corporation: s. 217(h);
- (e) make an order reliving a liquidator from liability for acts or omissions: s. 217(k);
- (f) make an order approving an interim distribution or final distribution to shareholders of money or property: s. 217(l); and
- (g) after a final account by the liquidator, make an order dissolving the corporation: s. 217(o).

42. The procedure to be followed by a liquidator is set out in CBCA s. 221. The liquidator must, *inter alia*:

- (a) give notice after appointment to the Director under the CBCA and each known creditor after its appointment: s. 221(a);
- (b) publish notices calling for claims once a week for two consecutive weeks in a newspaper in the place where the corporation has its registered office: s. 221(b);
- (c) take control of the property of the liquidating corporation: s. 221(c);
- (d) open and maintain a trust account for the administration of the liquidating corporation: s. 221(d);
- (e) keep accounts: s. 221(e);
- (f) maintain lists of shareholders, creditors and other persons with claims: s. 221(f);
- (g) deliver financial statements to the court and the Director at least once in every 12 month period, financial statements in a prescribed form: s. 221(h);
- (h) after final accounts are approved by the court, distribute any remaining property of the corporation among the shareholders according to their rights: s. 221(i)

CBCA, s. 221(b).

### **The Relief Sought by the Applicant in this Motion**

43. As is set out in the notice of motion and in the draft order filed with the court on this application, the applicant seeks an order which, *inter alia*, continues the liquidation and dissolution under court supervision and confirms the appointment of Mintz as Liquidator. The draft order provides for the liquidation to proceed in accordance with the procedure in s. 221 of the CBCA.

44. The applicant also seeks court approval of a claims bar process. It is implicit in CBCA, s. 221(b) that claims not asserted within the two months provided for under s. 221(b) could be barred. The applicant submits that CBCA s. 217(e) and 217(h) grant authority for a claims bar order.

45. Through this claims-barring process, Excapsa wishes to bar all claims based on facts existing up to the date that the Liquidation is continued under court supervision that are not asserted on or before February 15, 2007 (“Pre-Filing Claims”). The Liquidator would run a separate process for any claims that may arise after the date that court supervision begins (“Post-Filing Claims”).

46. Since Excapsa does not want to implement a cumbersome claims adjudication process if one is not necessary, it seeks an authorization permitting the Liquidator to review and pay or settle claims up to \$100,000 per claim, if the Liquidator in its discretion believes it should do so. The applicant submits that such an order may be made pursuant to CBCA s. 217(h).

47. To the extent that there are unresolved claims, or claims above this monetary threshold, Excapsa wishes the Liquidator to return to court upon subsequent motion for an order establishing a claims determination process. The details of that process will depend on the volume and size of the claims received by the claims bar date.

48. Given the significant cash that Excapsa has on hand, it seeks an order confirming an interim payment to shareholders in the aggregate amount of US\$26 million, to be paid on a *pro rata* basis in an equal amount per share. This amount would be paid as a dividend to shareholders of record as of December 8, 2006 and designated as a capital gains dividend for tax purposes. This payment would be made before the claims bar date and likely prior to December 31, 2006. The court’s power to approve such interim distributions is found in s. 217(1) of the CBCA.

49. After making this interim distribution, Excapsa would still have remaining cash on hand of approximately US\$34 million, which will be significantly in excess of Excapsa’s accrued tax liability to date. Such tax liability is less than CAD\$8 million and the amount will be further reduced by the refunds and credits that Excapsa may claim.

50. Further, as noted above, all of Excapsa’s known accounts payable up to November 24, 2006 have been paid and some expenses have been prepaid. Excapsa has also paid all wages and has settled with its employees concerning their entitlements upon termination.

51. As such, the payment of this capital gains dividend will not in any way impair Excapsa’s ability to pay the tax authorities or other creditors.

52. Further interim distributions are contemplated as monthly payments are received from the Buyer. To the extent that it does not need to pay, or hold a reserve for, liabilities (including income tax liabilities and claims asserted in the claims bar process), it is proposed that the Liquidator have the authority to make monthly distributions to shareholders as well as special distributions where warranted. At all times prior to the rendering of a final accounting, it is contemplated that the Liquidator would maintain US\$5 million as a general reserve to cover any claims that may be advanced against the Liquidator, Excapsa, and their officers, directors, employees and independent contractors. It is accordingly clear that the payment of such further interim distributions will not impair Excapsa's ability to pay its liabilities.

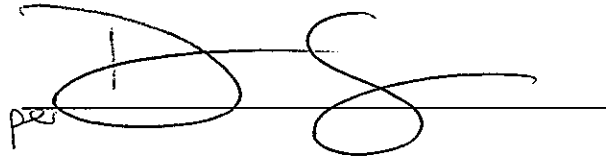
#### **Part IV: Order Sought**

53. The applicant asks that the court grant an order in the form provided in draft for the court's consideration, which, *inter alia*,

- (a) confirms Mintz & Partners Inc. as liquidator and empowering the Liquidator to take certain steps with respect to the liquidation;
- (b) vests the powers of the directors and shareholders of Excapsa in the Liquidator;
- (c) sets a procedure for the submission of claims against Excapsa and the consideration of such claims by the Liquidator;
- (d) fixes a procedure for the payment of interim distributions by the Liquidator during the course of the liquidation; and

- (e) confirms the appointment of inspectors to supervise and assist the Liquidator and to represent the interests of the shareholders of Excapsa to the Liquidator.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF NOVEMBER, 2006

A handwritten signature in black ink, appearing to be 'John N. Birch', written over a horizontal line.

**CASELS BROCK & BLACKWELL LLP**  
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Solicitors for the Applicant

**Schedule "A"**  
**Authorities**

W.D. Gray, *The Annotated Canadian Business Corporations Act*, Looseleaf Ed. (Toronto: Thomson Carswell, 2004).

K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths Canada, 1999).

**Schedule "B"**  
**Statutes Cited**

***Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended.***

Section 211: Proposing liquidation and dissolution

211. (1) The directors may propose, or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 137, make a proposal for, the voluntary liquidation and dissolution of a corporation.

Notice of meeting

(2) Notice of any meeting of shareholders at which voluntary liquidation and dissolution is to be proposed shall set out the terms thereof.

Shareholders resolution

(3) A corporation may liquidate and dissolve by special resolution of the shareholders or, where the corporation has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

Statement of intent to dissolve

(4) A statement of intent to dissolve in the form that the Director fixes shall be sent to the Director.

Certificate of intent to dissolve

(5) On receipt of a statement of intent to dissolve, the Director shall issue a certificate of intent to dissolve in accordance with section 262.

Effect of certificate

(6) On issue of a certificate of intent to dissolve, the corporation shall cease to carry on business except to the extent necessary for the liquidation, but its corporate existence continues until the Director issues a certificate of dissolution.

Liquidation

(7) After issue of a certificate of intent to dissolve, the corporation shall

(a) immediately cause notice thereof to be sent to each known creditor of the corporation;

(b) without delay take reasonable steps to give notice of it in each province in Canada where the corporation was carrying on business at the time it sent the statement of intent to dissolve to the Director;

(c) proceed to collect its property, to dispose of properties that are not to be distributed in kind to its shareholders, to discharge all its obligations and to do all other acts required to liquidate its business; and

(d) after giving the notice required under paragraphs (a) and (b) and adequately providing for the payment or discharge of all its obligations, distribute its remaining property, either in money or in kind, among its shareholders according to their respective rights.

#### Supervision by court

(8) The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be continued under the supervision of the court as provided in this Part, and on such application the court may so order and make any further order it thinks fit.

#### Notice to Director

(9) An applicant under this section shall give the Director notice of the application, and the Director is entitled to appear and be heard in person or by counsel.

#### Revocation

(10) At any time after issue of a certificate of intent to dissolve and before issue of a certificate of dissolution, a certificate of intent to dissolve may be revoked by sending to the Director a statement of revocation of intent to dissolve in the form that the Director fixes, if such revocation is approved in the same manner as the resolution under subsection (3).

#### Certificate of revocation of intent to dissolve

(11) On receipt of a statement of revocation of intent to dissolve, the Director shall issue a certificate of revocation of intent to dissolve in accordance with section 262.

#### Effect of certificate

(12) On the date shown in the certificate of revocation of intent to dissolve, the revocation is effective and the corporation may continue to carry on its business or businesses.

#### Right to dissolve

(13) If a certificate of intent to dissolve has not been revoked and the corporation has complied with subsection (7), the corporation shall prepare articles of dissolution.

#### Articles of dissolution

(14) Articles of dissolution in the form that the Director fixes shall be sent to the Director.

#### Certificate of dissolution

(15) On receipt of articles of dissolution, the Director shall issue a certificate of dissolution in accordance with section 262.

#### Effect of certificate

(16) The corporation ceases to exist on the date shown in the certificate of dissolution.

Section 215: Application for supervision

215. (1) An application to a court to supervise a voluntary liquidation and dissolution under subsection 211(8) shall state the reasons, verified by an affidavit of the applicant, why the court should supervise the liquidation and dissolution.

Court supervision

(2) If a court makes an order applied for under subsection 211(8), the liquidation and dissolution of the corporation shall continue under the supervision of the court in accordance with this Act.

Section 216: Application to court

216. (1) An application to a court under subsection 214(1) shall state the reasons, verified by an affidavit of the applicant, why the corporation should be liquidated and dissolved.

Show cause order

(2) On an application under subsection 214(1), the court may make an order requiring the corporation and any person having an interest in the corporation or claim against it to show cause, at a time and place specified in the order, within four weeks after the date of the order, why the corporation should not be liquidated and dissolved.

Powers of court

(3) On an application under subsection 214(1), the court may order the directors and officers of the corporation to furnish the court with all material information known to or reasonably ascertainable by them, including

- (a) financial statements of the corporation;
- (b) the name and address of each shareholder of the corporation; and
- (c) the name and address of each known creditor or claimant, including any creditor or claimant with unliquidated, future or contingent claims, and any person with whom the corporation has a contract.

Publication

(4) A copy of an order made under subsection (2) shall be

- (a) published as directed in the order, at least once in each week before the time appointed for the hearing, in a newspaper published or distributed in the place where the corporation has its registered office; and
- (b) served on the Director and each person named in the order.

Person responsible

(5) Publication and service of an order under this section shall be effected by the corporation or by such other person and in such manner as the court may order.

Section 217: Powers of court

217. In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order to liquidate;
- (b) an order appointing a liquidator, with or without security, fixing the liquidator's remuneration and replacing a liquidator;
- (c) an order appointing inspectors or referees, specifying their powers, fixing their remuneration and replacing inspectors or referees;
- (d) an order determining the notice to be given to any interested person, or dispensing with notice to any person;
- (e) an order determining the validity of any claims made against the corporation;
- (f) an order, at any stage of the proceedings, restraining the directors and officers from
  - (i) exercising any of their powers, or
    - (ii) collecting or receiving any debt or other property of the corporation, and from paying out or transferring any property of the corporation, except as permitted by the court;
- (g) an order determining and enforcing the duty or liability of any present or former director, officer or shareholder
  - (i) to the corporation, or
    - (ii) for an obligation of the corporation;
- (h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of assets for such purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;
- (i) an order disposing of or destroying the documents and records of the corporation;

- (j) on the application of a creditor, the inspectors or the liquidator, an order giving directions on any matter arising in the liquidation;
- (k) after notice has been given to all interested parties, an order relieving a liquidator from any omission or default on such terms as the court thinks fit and confirming any act of the liquidator;
- (l) subject to section 223, an order approving any proposed interim or final distribution to shareholders in money or in property;
- (m) an order disposing of any property belonging to creditors or shareholders who cannot be found;
- (n) on the application of any director, officer, security holder, creditor or the liquidator,
  - (i) an order staying the liquidation on such terms and conditions as the court thinks fit,
  - (ii) an order continuing or discontinuing the liquidation proceedings, or
  - (iii) an order to the liquidator to restore to the corporation all its remaining property; and
- (o) after the liquidator has rendered a final account to the court, an order dissolving the corporation.

Section 219: Cessation of business and powers

219. (1) If a court makes an order for liquidation of a corporation,

- (a) the corporation continues in existence but shall cease to carry on business, except the business that is, in the opinion of the liquidator, required for an orderly liquidation; and
- (b) the powers of the directors and shareholders cease and vest in the liquidator, except as specifically authorized by the court.

Delegation by liquidator

(2) The liquidator may delegate any powers vested in the liquidator by paragraph (1)(b) to the directors or shareholders.

Section 220: Appointment of liquidator

220. (1) When making an order for the liquidation of a corporation or at any time thereafter, the court may appoint any person, including a director, an officer or a shareholder of the corporation or any other body corporate, as liquidator of the corporation.

Vacancy

(2) Where an order for the liquidation of a corporation has been made and the office of liquidator is or becomes vacant, the property of the corporation is under the control of the court until the office of liquidator is filled.

Section 221: Duties

Duties of liquidator

221. A liquidator shall

- (a) forthwith after appointment give notice thereof to the Director and to each claimant and creditor known to the liquidator;
- (b) without delay publish notice by insertion once a week for two consecutive weeks in a newspaper published or distributed in the place where the corporation has its registered office and take reasonable steps to give notice of the appointment in each province where the corporation carries on business, requiring any person
  - (i) indebted to the corporation, to render an account and pay to the liquidator at the time and place specified any amount owing,
  - (ii) possessing property of the corporation, to deliver it to the liquidator at the time and place specified, and
  - (iii) having a claim against the corporation, whether liquidated, unliquidated, future or contingent, to present particulars thereof in writing to the liquidator not later than two months after the first publication of the notice;
- (c) take into custody and control the property of the corporation;
- (d) open and maintain a trust account for the moneys of the corporation;
- (e) keep accounts of the moneys of the corporation received and paid out by him;
- (f) maintain separate lists of the shareholders, creditors and other persons having claims against the corporation;
- (g) if at any time the liquidator determines that the corporation is unable to pay or adequately provide for the discharge of its obligations, apply to the court for directions;

(h) deliver to the court and to the Director, at least once in every twelve month period after appointment or more often as the court may require, financial statements of the corporation in the form required by section 155 or in such other form as the liquidator may think proper or as the court may require; and

(i) after the final accounts are approved by the court, distribute any remaining property of the corporation among the shareholders according to their respective rights.

## Section 222

### Powers of liquidator

222. (1) A liquidator may

- (a) retain lawyers, accountants, engineers, appraisers and other professional advisers;
- (b) bring, defend or take part in any civil, criminal or administrative action or proceeding in the name and on behalf of the corporation;
- (c) carry on the business of the corporation as required for an orderly liquidation;
- (d) sell by public auction or private sale any property of the corporation;
- (e) do all acts and execute any documents in the name and on behalf of the corporation;
- (f) borrow money on the security of the property of the corporation;
- (g) settle or compromise any claims by or against the corporation; and
- (h) do all other things necessary for the liquidation of the corporation and distribution of its property.

### Due diligence

(2) A liquidator is not liable if the liquidator exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on

- (a) financial statements of the corporation represented to the liquidator by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
- (b) a report of a person whose profession lends credibility to a statement made by the professional person.

### Application for examination

(3) If a liquidator has reason to believe that any person has in their possession or under their control, or has concealed, withheld or misappropriated any property of the corporation, the liquidator may apply to the court for an order requiring that person to appear before the court at the time and place designated in the order and to be examined.

#### Power of court

(4) If the examination referred to in subsection (3) discloses that a person has concealed, withheld or misappropriated property of the corporation, the court may order that person to restore it or pay compensation to the liquidator.

### Section 223

#### Costs of liquidation

223. (1) A liquidator shall pay the costs of liquidation out of the property of the corporation and shall pay or make adequate provision for all claims against the corporation.

#### Final accounts

(2) Within one year after appointment, and after paying or making adequate provision for all claims against the corporation, the liquidator shall apply to the court

(a) for approval of the final accounts and for an order permitting the liquidator to distribute in money or in kind the remaining property of the corporation to its shareholders according to their respective rights; or

(b) for an extension of time, setting out the reasons therefor.

#### Shareholder application

(3) If a liquidator fails to make the application required by subsection (2), a shareholder of the corporation may apply to the court for an order for the liquidator to show cause why a final accounting and distribution should not be made.

#### Publication

(4) A liquidator shall give notice of their intention to make an application under subsection (2) to the Director, to each inspector appointed under section 217, to each shareholder and to any person who provided a security or fidelity bond for the liquidation, and shall publish the notice in a newspaper published or distributed in the place where the corporation has its registered office, or as otherwise directed by the court.

#### Final order

(5) If the court approves the final accounts rendered by a liquidator, the court shall make an order

(a) directing the Director to issue a certificate of dissolution;

(b) directing the custody or disposal of the documents and records of the corporation; and

(c) subject to subsection (6), discharging the liquidator.

Delivery of order

(6) The liquidator shall forthwith send a certified copy of the order referred to in subsection (5) to the Director.

Certificate of dissolution

(7) On receipt of the order referred to in subsection (5), the Director shall issue a certificate of dissolution in accordance with section 262.

Effect of certificate

(8) The corporation ceases to exist on the date shown in the certificate of dissolution.