

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

B E T W E E N :

JAMES RYAN

Applicant

- and -

6356095 CANADA INC.

Respondent

**MOTION RECORD OF GAIL GLEED, INSPECTOR
(RETURNABLE AUGUST 21, 2008)**

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Solicitors for the Moving Party

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JAMES RYAN

Applicant

and

6356095 CANADA INC.

Respondent

Court File No: 06-CL-6752

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced in Toronto

**MOTION RECORD
(RETURNABLE AUGUST 21, 2008)**

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SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST**

B E T W E E N :

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- and -

6356095 CANADA INC.

Respondent

NOTICE OF MOTION
(returnable August 21, 2008)

Gail Glead, in her capacity as an Inspector of the Respondent, 6356095 Canada Inc. formerly known as Excapsa Software Inc. (“Excapsa”), will make a motion to a Judge of the Commercial List on the 21st day of August, 2008 at 10:00 a.m. at 330 University Avenue, Toronto, Ontario, or as soon thereafter as the motion may be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR

- a) An order, if necessary, abridging the time for service of this Notice of Motion, validating and dispensing with further service thereof, and declaring that the Motion is properly returnable on August 21, 2008;
- b) An order, *nunc pro tunc*, discharging James Ryan and John K. Fitzgerald as Inspectors and approving and confirming the appointment of Melissa Gaddis as an Inspector of Excapsa with all duties, obligations, powers, rights and protections provided for in the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, as amended (“CBCA”), the Plan of Liquidation and Distribution, and the Amended and Restated Order of the Honourable Madam Justice

Mesbur dated November 30, 2006, as may be amended from time to time (the “Liquidation Order”);

- c) An order discharging and removing Mintz & Partners Limited (“Mintz”) as “Liquidator” pursuant to the Liquidation Order and “Trustee” under the Plan of Liquidation and Distribution and substituting XMT Liquidations Inc. as Liquidator under the Liquidation Order and Trustee under the Plan of Liquidation and Distribution, with all duties, obligations, powers, rights and protections provided for in the CBCA, the Plan of Liquidation and Distribution, and the Liquidation Order, provided that such order shall not prevent Deloitte & Touche LLP (“Deloitte”) (which merged with Mintz & Partners LLP), and any affiliates of Mintz or Deloitte, from continuing to provide accounting, consulting and/or tax services to Excapsa, the Inspectors or their advisors;
- d) An order directing that Mintz shall as soon as practicable after the date of the order sought transfer to XMT Liquidations Inc. all assets, property and records of Excapsa and the liquidation in its possession, including, without limitation, all cash balances maintained in the Liquidator’s accounts;
- e) An order approving the conduct and activities of Mintz, in its capacity of court-appointed Liquidator, and its agents and employees, as will be set out in the First Report to the Court of Mintz to be filed (the “First Report”), including, without limitation:
 - i) approving the fees and disbursements of the Liquidator, its counsel and counsel to Excapsa as set out in the First Report and the Affidavits of Daniel Weisz, Clifton Prophet and Gary Steinhart;
 - ii) approving the claims bar process conducted by the Liquidator as described in the First Report and the resolution by the Liquidator of each of the claims received pursuant to the claims bar process as described in the First Report, and permanently barring and

extinguishing all Pre-Filing Claims and Settled Claims, as such terms are defined in the Liquidation Order;

- iii) barring claims by any person against Mintz in its capacity as Liquidator;
- f) An order, *nunc pro tunc* to the extent necessary, pursuant to section 221(h) of the CBCA dispensing with (i) the requirement for Excapsa to prepare, file or deliver financial statements required by the CBCA and the associated regulations and (ii) the requirement to hold annual meetings of shareholders until further order of this Honourable Court;
- g) An order amending paragraph 34 of the Liquidation Order to state as follows (changes and additions shown in blackline):

34. THIS COURT ORDERS that the Liquidator or Excapsa is authorized and directed to set aside the aggregate amount of US\$5,000,000 or such additional amount approved by further order of this court (the “Indemnification Fund”) in the trust account of counsel to Excapsa for the purpose of funding actual and potential claims, together with legal fees and other expenses of defending such claims (the “Claims Expenses”), against

- (a) the parties to the Indemnification Agreements,
- (b) the current, former and future Inspectors;
- (c) ~~the Liquidator~~ Mintz and XMT Liquidations Inc., in their capacities as Liquidator, and its their respective officers, directors, shareholders, partners, employees, agents and independent contractors, ~~and~~
- (d) Excapsa and its current, ~~and~~ former and future officers, directors, employees, and independent contractors, and

(e) the advisors, consultants and legal counsel to Excapsa, its directors, or the Inspectors.

- h) An order authorizing and directing Excapsa to indemnify any current, former or future Inspectors and current or future directors and officers on terms substantially similar to the Indemnification Agreements between Excapsa and its former directors and certain of its officers as ratified by paragraph 33 of the Liquidation Order;
- i) An order directing that the compensation or remuneration payable to any person acting as an Inspector and/or a director of Excapsa (including any person acting in both capacities) shall not exceed US\$30,000.00 per annum, in the aggregate, and authorizing compensation up to such amount; and
- j) Such further or other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Background

- a) As of October 12, 2006, Excapsa entered into a Sale Agreement, pursuant to which Blast Off Limited (“Blast Off”) purchased two subsidiaries of Excapsa for US\$130 million.
- b) The Sale Agreement provided for Blast Off to pay US\$5 million upon execution of the agreement, a further US\$5 million in late 2006 and the remaining US\$120 million being paid through various monthly instalments ending on May 31, 2012.
- c) On November 24, 2006, Excapsa held a special meeting of shareholders (the “Special Meeting”) to consider, and seek approval of, the Sale Agreement and a court-supervised liquidation of Excapsa.
- d) At the Special Meeting, shareholders representing 63 percent of the total issued and outstanding shares of Excapsa were present either in person or by proxy

and such shareholders unanimously approved every resolution, without any negative votes being cast.

- e) Blast Off is currently in default of its obligations to Excapsa.

The Liquidation Order

- f) On November 30, 2006, the Honourable Madam Justice Mesbur granted an order which, *inter alia*, confirmed the appointment of Mintz as Liquidator of Excapsa, brought the liquidation under the supervision of the Court, provided a procedure for a claims bar process, and permitted the distribution to shareholders of certain cash held by Excapsa.
- g) On December 22, 2006, as a result of a number of changes that were required to the liquidation process, the Honourable Madam Justice Mesbur issued an Amended and Restated Order, effective *nunc pro tunc* (referred to as the Liquidation Order herein).
- h) The Liquidation Order provides that any Inspector has the right to apply to the Court for advice and direction and has the power to bring a motion for, *inter alia*, the discharge of the Liquidator, the appointment of a new liquidator and any other relief that the Inspector deems advisable.

The Claims Bar Process

- i) The Liquidator conducted a claims bar process in accordance with the Liquidation Order.
- j) The claims bar process generated a small number of claims for non-material amounts. As a result of discussions between the Liquidator and the claimants, a number of claims were withdrawn.
- k) Those claims that remained are being settled by the Liquidator within the monetary authority provided by the Liquidation Order.

- l) No unresolved Pre-Filing Claims will remain and therefore an order forever barring and extinguishing any Pre-Filing Claims and Settled Claims (as such terms are defined in the Liquidation Order) is just and appropriate.

The Substituted Inspector

- m) The Liquidation Order confirmed the appointment of Gail Glead, John K. Fitzgerald and James Ryan as Inspectors.
- n) Since the Liquidation Order was granted, John K. Fitzgerald and James Ryan have resigned as Inspectors, and Melissa Gaddis was appointed as an Inspector to replace the resigned Inspectors. It is therefore just and appropriate to confirm the appointment of the replacement Inspector and ensure that she is afforded the powers, obligations, and protections provided to inspectors.

The Replacement Liquidator

- o) Both the Liquidation Order and the Plan of Liquidation and Distribution contemplate and authorize the resignation or removal of Mintz as Liquidator and the appointment of a replacement Liquidator.
- p) As described in the First Report, Mintz, the Inspectors and directors of Excapsa are in agreement that it is acceptable and appropriate for Mintz to be replaced as Liquidator. A majority of the shareholders has also approved the replacement of Mintz as Liquidator.
- q) In order to facilitate a smooth transition, the Inspectors and directors of Excapsa (through their advisors) have consulted with other firms to identify a replacement Liquidator and have reached an agreement with XMT Liquidations Inc. (a company controlled by WSBG LLP, a chartered accountant firm based in Montreal, Quebec) to act as the replacement Liquidator of Excapsa, subject to confirmation and appointment by the Court. XMT Liquidations Inc. proposes to retain the law firm of Davies Ward Phillips Vineberg LLP to act as legal counsel to the Liquidator.

- r) In addition, the Inspectors have canvassed the shareholders of Excapsa and obtained the consents of shareholders representing a majority of the total issued and outstanding common stock of Excapsa approving the resignation or removal of Mintz as Liquidator and the appointment of XMT Liquidations Inc. as replacement Liquidator.
- s) The Inspectors of Excapsa support the approval of the activities and conduct of Mintz in its capacity as Liquidator of Excapsa, including approval of the fees and disbursements of the Liquidator, its counsel and counsel to Excapsa.

Clarification or Clean-Up Amendments Sought to the Liquidation Order

- t) A number of clarification or clean-up changes are sought to the Liquidation Order, which are necessary in order to fill gaps or address issues that have arisen during the course of the liquidation, primarily because of the complexities and timelines for the liquidation that were not originally contemplated at the time of the initial application.
- u) In particular, the following changes are sought to the Liquidation Order which are supported by the Inspectors:
 - i) Clarification changes to ensure that not only the originally appointed Inspectors but that any replacement Inspectors receive the protections and indemnifications contained in the Liquidation Order;
 - ii) Similarly, changes to ensure that current, former and future directors and officers are covered by the protections and indemnification contained in the Liquidation Order and to provide that the advisors and legal counsel for Excapsa, the Inspectors, the directors or the officers receive the same protections;
 - iii) Capping the fees and remuneration to Inspectors and directors at US\$30,000 per annum to avoid the unintended potential for excessive

compensation being paid to a person who acts as both an Inspector and a director of Excapsa; and

- iv) Dispensing with the need and requirements for the preparation of financial statements and holding annual shareholders meetings which have not been and likely will not be necessary given the liquidation and lack of any ongoing business by Excapsa.
- v) The *Canada Business Corporations Act*, R.S.C. 1995 c. C-44, as amended, including sections 217, 221, and 222.
- w) The terms of the Liquidation Order.
- x) Such other and further grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) The Affidavit of Gail Gleed, sworn August 8, 2008;
- b) The Affidavit of Gary Steinhart, sworn August 13, 2008;
- c) The First Report of the Liquidator to be filed;
- d) The Affidavit of Daniel Weisz, to be filed; and
- e) The Affidavit of Clifton P. Prophet, to be filed.

August 14, 2008

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Solicitors for Mintz & Partners Limited

AND TO: THE DIRECTOR (appointed pursuant to s. 260 of the CBCA)
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 Ottawa, ON K1A 0C8

AND TO: Davies Ward Phillips & Vineberg LLP
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Mark Schrage
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Solicitors for the proposed replacement
Liquidator, XMT Liquidations Inc.

JAMES RYAN

Applicant

and

6356095 CANADA INC.

Respondent

Court File No: 06-CL-6752

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

NOTICE OF MOTION

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ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

BETWEEN:

JAMES RYAN

Applicant

- and -

6356095 CANADA INC.

Respondent

CONSENT

XMT LIQUIDATIONS INC. consents to act as Liquidator in the above noted matter.

XMT Liquidations Inc.

Per: 

I have authority to bind the corporation

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) THURSDAY THE 21st
JUSTICE)
) DAY OF AUGUST, 2008

B E T W E E N:

JAMES RYAN

Applicant

- and -

6356095 CANADA INC.

Respondent

ORDER

THIS MOTION, made by Gail Gleed, in her capacity as an Inspector of 6356095 Canada Inc., formerly known as Excapsa Software Inc. (“Excapsa”), for orders, *inter alia*, (a) confirming the appointment of a substitute Inspector in the Excapsa liquidation, (b) discharging and removing the current Liquidator and appointing a replacement Liquidator, along with associated and ancillary relief to effect the transition, (c) approving the conduct and activities of the Liquidator to date and approving the fees and disbursements of the current Liquidator, its counsel and counsel to Excapsa, and (d) making a number of clarification or clean-up changes to the Liquidation Order (as defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the First Report of Mintz & Partners Limited (“Mintz”) dated August ●, 2008 (the “First Report”), the Affidavit of Gail Gleed sworn August 8, 2008, the Affidavit of Daniel Weisz sworn August ●, 2008, the Affidavit of Clifton T. Prophet sworn August ●, 2008, the Affidavit of Gary Steinhart sworn August 13, 2008, and the Consent of XMT Liquidations Inc., filed, and on hearing the submissions for counsel for the Moving Party, counsel for Mintz, and counsel for XMT Liquidations Inc., and ●,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the First Report of Mintz is hereby validated and abridged such that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS**, *nunc pro tunc*, that James Ryan and John K. Fitzgerald be and are hereby discharged as Inspectors and that the appointment of Melissa Gaddis as an Inspector in the Dissolution (as such term is defined in the Amended and Restated Order of the Honourable Madam Justice Mesbur dated November 30, 2006 (“Liquidation Order”)) is hereby confirmed, and that Melissa Gaddis shall act as an Inspector in the Dissolution with all the duties, obligations, powers, rights and protections provided for in the *Canada Business Corporations Act*, RSC 1985, C-44 as amended (“CBCA”), the Plan of Liquidation and Distribution, and the Liquidation Order.
3. **THIS COURT ORDERS** that Mintz be and is hereby discharged and removed as “Liquidator” pursuant to the Liquidation Order and “Trustee” under the Plan of Liquidation and Distribution and that XMT Liquidations Inc. is hereby appointed and confirmed as replacement Liquidator under the Liquidation Order and replacement Trustee under the Plan of Liquidation and Distribution, with all duties, obligations, powers, rights and protections provided for in the CBCA, the Plan of Liquidation and Distribution and the Liquidation Order; provided that this Order shall not prevent Deloitte & Touche LLP (“Deloitte”) (which merged with Mintz & Partners LLP), and any affiliates of Mintz or Deloitte, from continuing to provide accounting, consulting and/or tax services to Excapsa, the Inspectors or their advisors.
4. **THIS COURT DIRECTS** that Mintz shall as soon as practicable after the date of this Order transfer to XMT Liquidations Inc. all assets, property and records of Excapsa and the Dissolution in its possession including, without limitation, all cash balances maintained in the Liquidator’s accounts.
5. **THIS COURT ORDERS** that the First Report of Mintz be accepted and approved and that the actions and activities of Mintz, in its capacity as Liquidator, as set out therein, be and are hereby approved.

6. **THIS COURT ORDERS** that the fees and disbursements of Mintz in its capacity as Liquidator, counsel for the Liquidator, and counsel for Excapsa as set out in appendices ●, ●, and ● of the First Report of Mintz and the Affidavits of Daniel Weisz sworn August ●, 2008, Clifton P. Prophet sworn August ●, 2008 and the Gary Steinhart sworn August 13, 2008 be and are hereby approved and passed pursuant to the Liquidation Order.

7. **THIS COURT ORDERS** that, without limiting the generality of the foregoing and without limiting the terms of the Liquidation Order, the claims bar process conducted by the Liquidator pursuant to the Liquidation Order and the resolution by the Liquidator of claims received pursuant to the claims bar process, as described in the First Report, be and are hereby approved and that all Pre-filing Claims and Settled Claims (each as defined in the Liquidation Order) are hereby forever barred and extinguished and any person holding a Pre-filing Claim or Settled Claim are forever barred from asserting or enforcing such Pre-filing Claim or Settled Claim and all such persons shall be deemed to have fully and finally released and discharged Excapsa from such claims.

8. **THIS COURT ORDERS** that any and all claims or causes of action by any person against Mintz, in its capacity as Liquidator, be and are hereby forever extinguished and barred, except any claim that may arise out of the gross negligence or wilful misconduct on the part of Mintz.

9. **THIS COURT ORDERS**, *nunc pro tunc* to the extent necessary, that the requirement for Excapsa or the Liquidator to prepare, file or deliver financial statements required by the CBCA and the associated regulations and the requirement to hold annual meetings of shareholders are hereby dispensed with until further Order of this Court.

10. **THIS COURT ORDERS** that paragraph 34 of the Liquidation Order shall be deleted and replaced with the following:

34. **THIS COURT ORDERS** that the Liquidator or Excapsa is authorized and directed to set aside the aggregate amount of US\$5,000,000 or such additional amount approved by further order of this court (the “Indemnification Fund”) in the trust account of counsel

to Excapsa for the purpose of funding actual and potential claims, together with legal fees and other expenses of defending such claims (the “Claims Expenses”), against

- (a) the parties to the Indemnification Agreements,
- (b) the current, former and future Inspectors;
- (c) Mintz and XMT Liquidations Inc., in their capacities as Liquidator, and their respective officers, directors, shareholders, partners, employees, agents and independent contractors,
- (d) Excapsa and its current, former and future officers, directors, employees, and independent contractors, and
- (e) the advisors, consultants and legal counsel to Excapsa, its directors, or the Inspectors.

11. **THIS COURT ORDERS** that Excapsa be and is hereby directed and authorized to indemnify any current, former or future Inspectors in the Dissolution and current and future directors and officers of Excapsa on terms substantially similar to the Indemnification Agreements between Excapsa and its former directors and certain of its officers as ratified by paragraph 33 of the Liquidation Order.

12. **THIS COURT DIRECTS** that the compensation or remuneration payable to any person acting as an Inspector in the Dissolution and/or a director of Excapsa (including any person acting in both capacities) shall not exceed US\$30,000.00 per annum, in the aggregate, and payment of compensation up to such amount is hereby authorized and approved.

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ORDER

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