

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

B E T W E E N:

ROYNAT INC.

Applicant

and

TAMTAN INC. and 1308963 ONTARIO LTD. (o/a EZ FOOD GROUP)

Respondents

**RESPONDING FACTUM OF
CENTRAL ONTARIO DAIRY DISTRIBUTORS INC. O/A DAIRY CENTRAL
(returnable July 29, 2020)**

July 23, 2020

AFFLECK GREENE MCMURTRY LLP
Barristers and Solicitors
200 - 365 Bay St
Toronto ON M5H 2V1

David N. Vaillancourt LSO# 56969I
dvaillancourt@agmlawyers.com
Meredith Hayward LSO# 40870V
mhayward@agmlawyers.com

Tel: (416) 360-2800
Fax: (416) 360-5960

Lawyers for the Responding Party,
Central Ontario Dairy Distributing Inc. o/a
Dairy Central

TO: SERVICE LIST

SERVICE LIST
(as of July 21, 2020)

<p>BLAKE, CASSELS & GRAYDON LLP 4000 - 199 Bay St Toronto ON M5L 1A9</p> <p>Chris Burr Tel: (416) 863-2400 Fax: (416) 863-2653 E-mail: chris.burr@blakes.com</p> <p>Lawyers for Roynat Inc.</p>	<p>CHAITONS LLP 10th Fl 5000 Yonge St Toronto ON M2N 7E9</p> <p>Sam Rappos Tel: (416) 218-1137 Fax: (416) 218-1837 E-mail: samr@chaitons.com</p> <p>Lawyers for msi Spergel Inc., Court-appointed Receiver</p>
<p>MSI SPERGEL INC. 200 - 505 Consumers Rd North York ON M2J 4V8</p> <p>Philip Gennis and Mukul Manchanda Tel: (416) 497-1660 Fax: (416) 494-7199 E-mail: PGennis@spergel.ca; mmanchanda@spergel.ca</p> <p>Court-appointed Receiver</p>	<p>SEIZED PROPERTY MANAGEMENT DIRECTORATE Public Services and Procurement Canada 11 Laurier St Place du Portage Gatineau QC K1A 0S5</p> <p>Jean Cadrin and Céline Forest E-mail: Jean.Cadrin@tpsgc-pwgsc.gc.ca; Celine.Forest@tpsgc-pwgsc.gc.ca</p>
<p>PUBLIC PROSECUTION SERVICE OF CANADA 9th Fl Guy-Favreau Complex, East Tower 200 René-Lévesque Blvd W Montréal QC H2Z 1X4</p> <p>Ninette Singoye and Belinda Peres E-mail: Ninette.Singoye@ppsc-sppc.gc.ca; Belinda.Peres@ppsc-sppc.gc.ca</p>	<p>TRANSBIZ TRUCK TRAINING CENTRE 2nd Fl 1405 Morningside Ave Scarborough ON M1B 3J1</p> <p>Muzzaffar Malik E-mail: malikjee123@hotmail.com; smalik124@hotmail.com</p>
<p>RELIABLE CONSULTANTS INC. 2nd Fl 1405 Morningside Ave Scarborough ON M1B 3J1</p> <p>Beverly Gobin E-mail: careers.reliable.consultants@gmail.com</p>	<p>ABRAHAMS LLP 488 Huron St Toronto ON M5R 2R3</p> <p>Garth Dingwall Tel: (416) 964-0304 Fax: (866) 807-0806 E-mail: garth@abrahamsllp.com</p> <p>Lawyers for Reliable Consultants Inc.</p>

<p>DEPARTMENT OF JUSTICE CANADA Ontario Regional Office 400 - 120 Adelaide St W Toronto ON M5H 1T1</p> <p>Diane Winters and Pat Confalone Tel: (416) 973-3172 Fax: (416) 973-0810 Email: Diane.Winters@justice.gc.ca; Pat.Confalone@justice.gc.ca</p> <p>Lawyers for Canada Revenue Agency</p>	<p>HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE 11 Fl Legal Services 777 Bay St Toronto ON M5G 2C8</p> <p>Kevin J. O'Hara Tel: (416) 327-8463 Fax: (416) 325-1460 Email: kevin.ohara@ontario.ca</p>
<p>DEPARTMENT OF JUSTICE CANADA 174 Stone Rd W Guelph ON N1G 4S9</p> <p>Andrea Horton Tel: (226) 217-8478 Fax: (226) 217-8507 Email: andrea.horton@canada.ca</p> <p>Lawyers for Agriculture and Food Inspection Legal Services</p>	<p>FASKEN MARTINEAU DuMOULIN LLP 2400 - 333 Bay St Bay Adelaide Centre, Box 20 Toronto ON M5H 2T6</p> <p>Dylan Chochla Tel: (416) 868-3425 Fax: (416) 364-7813 E-mail: dchochla@fasken.com</p> <p>Lawyers for Forest Ridge Inc.</p>
<p>MACDONALD SAGER MANIS LLP 800 - 150 York St Toronto, ON M5H 3S5</p> <p>Howard Manis Tel: (416) 364-1553 Fax: (416) 364-1453 E-mail: hmanis@msmlaw.net</p> <p>Lawyers for Argil Property Tax Services Paralegal Professional Corporation</p>	<p>CITY OF TORONTO 26th Fl Metro Hall 55 John St Toronto ON M5V 3C6</p> <p>City Clerk E-mail: clerk@toronto.ca Christopher J. Henderson Tel: (416) 397-7106 Email: chender3@toronto.ca</p>
<p>TREASURER, CITY OF TORONTO George Charocopos Collections Department North York Civic Centre, Lower Level 5100 Yonge St North York ON M2N 5V7</p> <p>Fax: (416) 395-6703 E-mail: gcharoc@toronto.ca</p>	<p>TAMTAN INC. 46 Tomlin Cres Richmond Hill ON L4C 7S9</p>

<p>1308963 ONTARIO LTD. 46 Tomlin Cres Richmond Hill ON L4C 7S9</p>	<p>1978240 ONTARIO INC. (o/a OpalOnline and formerly 1562712 Ontario Inc.) c/o Gary Rapkoski 301 High St Whitby ON L1N 5H7</p>
<p>EMPLOYMENT PANACHE c/o Birenbaum Gottlieb PC 21 - 951 Wilson Ave Toronto ON M3K 2A7</p> <p>Tel: (416) 633-3720 Fax: (416) 633-4546</p>	<p>THE DENBAR FOOD GROUP INC. c/o Denise and Barry Millman 328 Wicklow Beach Rd Colborne ON K0K 1S0</p>

PART I – INTRODUCTION

1. Central Ontario Dairy Distributing Inc. o/a Dairy Central (“Dairy Central”) has a Judgment against the Respondent 1308693 Ontario Ltd. o/a EZ Food Group (“1308”) arising from 1308’s trade debt to Dairy Central. It will be a claimant in 1308’s impending bankruptcy.

2. Dairy Central asks this Honourable Court to make an order authorizing the payment of the all of the past and future Receivers fees, disbursements and legal fees from this jointly-administered receivership out of the Morningside Proceeds (as defined in the Receiver’s Third Report), and not further deplete the limited pool of money available for 1308’s legitimate trade creditors.

3. Dairy Central submits that such an order would be fair and reasonable in the circumstances and that this Honourable Court should exercise its discretion to make such an order.

4. Dairy Central further submits that any remaining Morningside Proceeds should be first be used to satisfy remaining creditors prior to impoundment by the Government of Canada.

PART II – THE FACTS

A. 1308’s Debt to Dairy Central

5. Dairy Central is a corporation that carries on a dairy distribution business in the Greater Toronto Area. 1308 operated a food manufacturing business in Scarborough and was a customer of Dairy Central. 1308 operated its business out of 1405 Morningside Avenue, a property that was owned by the Respondent TamTan Inc. (“TamTan”).

Statement of Claim issued May 9, 2019, Court File No. CV-19-00619616-0000 (“Statement of Claim”) at paras. 2-4; Responding Motion Record of Dairy Central (“Dairy Central MR”), Tab 2.

Third Report of msi Spergel Inc. dated July 15, 2020 (“Receiver’s Report”) at paras. 6-7; Receiver’s Motion Record dated July 15, 2020 (“Receiver’s MR”) at Tab B.

6. From time to time, 1308 placed orders for dairy products with Dairy Central which were fulfilled in accordance with Dairy Central’s standard trade terms. Sometime in early 2019, 1308 stopped paying Dairy Central’s invoices. In May 2019, Dairy Central commenced an action to collect on the unpaid dairy products. On June 27, 2019, Dairy Central obtained Default Judgment against 1308 for \$206,671.09 plus \$1,146 in costs. The Judgment bears interest at the contractual rate of 18% per year.

Statement of Claim at paras. 2-4, 5, Dairy Central MR, Tab 2.

Judgment dated June 27, 2019, Dairy Central MR, Tab 3

7. On August 13, 2019, Dairy Central served a Notice of Garnishment on The Bank of Nova Scotia. On August 22, 2019, The Bank of Nova Scotia delivered a Garnishee’s Statement indicating it had “[n]o funds to remit at this time”.

Affidavit of Michael Binetti sworn July 22, 2020 (“Binetti Affidavit”) at para. 3, Dairy Central MR, Tab 1, and Notice of Garnishment, Exhibit “A” to the Binetti Affidavit, Dairy Central MR, Tab 1A.

Garnishee’s Statement, Exhibit “B” to the Binetti Affidavit, Dairy Central MR, Tab 1B.

B. The Restraint Orders

8. It was not until after the appointment of the Receiver that Dairy Central became aware of the restraint orders in relation to certain bank accounts of 1308 and the bank accounts and real property belonging to the Respondent TamTan, which had been issued in February 2019 pursuant to the provisions of the *Criminal Code*.

Receiver's Report at paras. 8-9; Receiver's MR at Tab B.

9. The restraint orders were granted in connection with criminal proceedings brought against the principal of TamTan.

Receiver's Report at paras. 8-9; Receiver's MR at Tab B.

C. Joint Receivership of TamTan and 1308

10. On or about October 21, 2019, Dairy Central received the Notice and Statement of the Receiver advising of 1308's receivership. Appendix "A" to the Notice and Statement of the Receiver lists 18 creditors of 1308, with debts totaling approximately \$617,000.

Notice and Statement of the Receiver, Exhibit "C" to the Binetti Affidavit; Dairy Central MR, Tab 1C.

11. Using the amounts set out in Appendix "A" to the Notice and Statement of Receiver, it appears the largest creditors of 1308 are Dairy Central (approximately 33% of 1308's debt), Saputo (16%), Reliable Consultants (13%) and CRA (11%).¹

12. The Application Record also makes clear that **TamTan's default** on the loan from the Applicant caused 1308 to be placed in receivership, along with TamTan.

Affidavit of Silvio Marsili sworn October 3, 2019 at paras. 4, 5, 8, 26, 28, 42, 43, 47, Exhibit "D" to the Binetti Affidavit; Dairy Central MR Tab 1D.

D. Outcome of the Joint Receivership of TamTan and 1308

13. The Receiver conducted a sale of 1308's assets, which, net of disbursements, has yielded approximately \$150,000 in proceeds. These proceeds do not fall under any restraint order, which cover only bank accounts and not 1308's personal property. The Receiver proposes that 1308 file

¹ The amount of the debt said to be owed to Dairy Central in Appendix "A" (\$210,698.53) is incorrect as the Judgment obtained is in the amount of \$206,671.09, plus \$1,146 in costs, for a total of \$207,877.09, plus interest at 18% per year, calculated from June 27, 2019.

an assignment in bankruptcy and that distribution to creditors occur through a trustee in bankruptcy.

Receiver's Report at paras. 18, 40; Receiver's MR at Tab B.

14. The Receiver conducted a sale of TamTan's real property, which yielded total proceeds of \$6,984,272.89 ("Morningside Proceeds"). The Morningside Proceeds greatly exceed TamTan's debt to the Applicant secured creditor, the court-ordered charge, as well as all fees and all applicable taxes. Based on the figures from the Receiver's report (including the Supplement to the Third Report concerning capital gains taxes), there will be a surplus of approximately \$2.7 million from the Morningside Proceeds.

Receiver's Report at paras. 18, 20-34; Receiver's Motion MR at Tab B;

Supplement to the Third Report of msi Spergel Inc., dated July 18, 2020 ("Receiver's Supp Report") at para. 2.0.2; Receiver's Supplementary Motion Record ("Receiver's Supp MR") at Tab A.

15. The Seized Property Management Directorate takes the position that the surplus Morningside Proceeds should be delivered to it, while some creditors of TamTan and/or 1308 take the position that these proceeds should be used to satisfy debts first, with the balance to be paid to the Seized Property Management Directorate.

Receiver's Report at paras. 46-47; Receiver's MR at Tab B.

E. Receiver's Request to Assign TamTan to Bankruptcy

16. The Receiver has identified a potential liability for a taxable capital gain of approximately \$1.2 million from the sale of TamTan's real property (which is reflected in the net \$2.7 million figure stated above). Accordingly, the Receiver has recommended to the Court that it be authorized to make an assignment in bankruptcy so that the CRA's debt may be expeditiously quantified and to enable the CRA to participate in any bankruptcy claims process.

Receiver's Supp Report at para. 2.0.3; Receiver's Supp MR at Tab A.

F. Receiver and Counsel's Fees

17. The Receiver is seeking payment of its \$157,547.99 in fees to date and an estimated further \$60,000 plus disbursements and taxes on account of time associated with **TamTan**'s portion of the joint receivership. The Receiver's counsel is seeking payment of \$48,230.33 in fees to date and an estimated further \$12,500 plus disbursements and taxes on account of time associated with **TamTan**'s portion of the joint receivership.

Receiver's Report at paras. 20-24; Receiver's MR at Tab B.

18. The Receiver is seeking payment of its \$49,107.26 in fees to date and an estimated further \$35,000 plus disbursements and taxes on account of time associated with **1308**'s portion of the joint receivership. The Receiver's counsel is seeking payment of \$4,224.30 in fees to date and an estimated further \$10,000 plus disbursements and taxes on account of time associated with **1308**'s portion of the joint receivership.

Receiver's Report at paras. 20-24; Receiver's MR at Tab B.

19. 1308 has thus been allocated \$98,331.56 of the total fees, taxes, and disbursements of this joint receivership.

PART III – STATEMENT OF LAW, ISSUES, AND AUTHORITIES

20. Dairy Central raises the following issues:

- (a) The Receivers fees, disbursements and counsel fees for the entire joint receivership should be paid out of the Morningside Proceeds; and

- (b) TamTan should be assigned into bankruptcy, with the balance of the Morningside Proceeds made available for creditors.

A. Allocation of Fees

21. The Receiver in this case was appointed pursuant to section 243(1) of the *BIA*. Subsection 243(6) provides, in relevant part:

If a receiver is appointed under subsection (1), **the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper**, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors,...(emphasis added)

[*Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243\(6\)*](#)

22. The allocation of a Receiver's fees is a discretionary exercise. The allocation should be fair and equitable and not ignore the benefit or detriment to any creditor. The allocation must not readjust the priorities between creditors.

[*JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp, 2006 CanLII 25352 \(ONSC\) at para. 42.*](#)

[*Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531 at para. 43.*](#)

23. The facts of the present case are unique, to say the least. Usually, a dispute about a Receiver's fees is a dispute between two secured creditors, each of whom will receive less than 100% recovery on their debt, each of whom is attempting to increase the proportion that the other must pay in support of the Receiver's activities.

24. The Morningside Proceeds would be sufficient to pay all of TamTan's creditors. The Applicant secured creditor will receive 100% recovery of its secured debt. As far as the unsecured creditors, there is no evidence that the extent of TamTan's unsecured debt comes anywhere close to the available \$2.7 million from the Morningside Proceeds.

25. If the Morningside Proceeds end up being available to be distributed to TamTan's creditors (whether now, or whether after the criminal proceeding in the event they are not proceeds of crime), there would be enough money to pay all creditors. The surplus of funds would then ultimately be available to TamTan.

26. Even if the costs of administration are paid from the Morningside Proceeds, as Dairy Central proposes, the unsecured creditors of 1308 will still be left with somewhere less than 50 cents on the dollar recovery of their unsecured debt, and hampered in their recovery by the existing restraint orders against 1308.

27. The question of allocation in fees, then, becomes a question of who should bear the burden of costs of administering the receivership: TamTan (the defaulted borrower), or the unsecured creditors of 1308?

28. The Receiver has proposed that fees and disbursements of approximately \$100,000 be allocated to 1308.

29. TamTan's default on the loan swept 1308, as Guarantor, into receivership as well. After payment of approximately \$100,000 in fees to the Receiver and its counsel, the unsecured creditors of 1308 would be left with the prospect of minimal recovery in future bankruptcy proceedings. As it stands, there will be at most \$150,000 in proceeds (likely less with further administration fees) to be split among the unsecured creditors of 1308, who are collectively owed approximately \$617,000.

30. It is fair and reasonable that the receiver's fees, and those of its counsel, be paid out of the Morningside Proceeds because:

- (a) 1308's receivership was caused by TamTan's default on the loan;
- (b) there has been an exceptional recovery from the sale of the Morningside Property which, if not forfeited to the government will result in a surplus amount being returned to the hands of TamTan; and
- (c) such an allocation will not readjust the priorities among creditors.

B. Morningside Proceeds Available to Creditors

31. Dairy Central understands that at least one creditor of TamTan's will be arguing that the Morningside Proceeds should be used to satisfy creditors of TamTan. Furthermore, the Receiver has suggested an assignment into bankruptcy to facilitate the assessment of capital gains tax, with CRA to then participate in a claims process.

32. Dairy Central supports TamTan's assignment into bankruptcy, and the use of the Morningside Proceeds to pay creditors. This seems to be the most equitable use of the Morningside Proceeds.

33. While Dairy Central is not a creditor of TamTan per se, based on the materials filed in this matter it would appear that there may have been some joint fraudulent conduct as between TamTan and 1308, and so Dairy Central anticipates submitting a Proof of Claim in TamTan's bankruptcy on the basis that the corporate veil should be pierced (a legal argument to be determined another day).

PART IV – ORDER REQUESTED

34. Dairy Central respectfully requests that this Honourable Court exercise its discretion to order all past and future Receiver fees, disbursements and counsel fees incurred in this jointly-administered receivership be paid from the Morningside Proceeds, and further to order that the remaining Morningside Proceeds be used to pay creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: July 23, 2020



AFFLECK GREENE MCMURTRY LLP
Barristers and Solicitors
200 - 365 Bay St
Toronto ON M5H 2V1

David N. Vaillancourt LSO# 56969I
dvaillancourt@agmlawyers.com
Meredith Hayward LSO# 40870V
mhayward@agmlawyers.com

Tel: (416) 360-2800
Fax: (416) 360-5960

Lawyers for the Responding Party,
Central Ontario Dairy Distributing Inc.
o/a Dairy Central

SCHEDULE “A”

LIST OF AUTHORITIES

1. *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp*, 2006 CanLII 25352 (ONSC)
2. *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

BANKRUPTCY AND INSOLVENCY ACT, R.S.C., 1985, C. B-3

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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

ROYNAT INC.
Applicant

-and-

TAMTAN INC. et al
Respondents

Court File No. CV-19-00628569-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**RESPONDING FACTUM OF
CENTRAL ONTARIO DAIRY
DISTRIBUTORS INC. O/A DAIRY CENTRAL
(returnable July 29, 2020)**

AFFLECK GREENE MCMURTRY LLP
Barristers and Solicitors
200 - 365 Bay St
Toronto ON M5H 2V1

David N. Vaillancourt LSO# 56969I
dvaillancourt@agmlawyers.com
Meredith Hayward LSO# 40870V
mhayward@agmlawyers.com

Tel: (416) 360-2800
Fax: (416) 360-5960

Lawyers for the Responding Party,
Central Ontario Dairy Distributing Inc. o/a Dairy Central