

COURT FILE 2201 09318
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF **ARNAKI LTD.**
DEFENDANT **SOLVAQUA INC.**
DOCUMENT **BRIEF OF EXPORT DEVELOPMENT CANADA**

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INTRODUCTION

1. The following are the written submissions of Export Development Canada ("**EDC**") with respect to the proposed assignment of insurance claims of Solvaqua Inc. ("**Solvaqua**") without the contractually required consent of EDC for the sole benefit of Solvaqua's lender, Arnaki Ltd. ("**Arnaki**").

FACTS

2. On April 9, 2020, Vivaventures Inc. ("**Vivakor**") and Solvaqua entered into a written agreement (the "**Project Charter**") for, *inter alia*, purchase of the Equipment by Vivakor from Solvaqua (the "**Transaction**").¹
3. EDC issued a policy of Export Receivables Insurance for the Transaction to Solvaqua, effective May 1, 2020, bearing policy number SE102960 (the "**Policy**"). The Coverage Certificate shows that the "insured events" include "Default (non-payment)".²
4. On August 31 2020, Arnaki agreed in writing with Solvaqua to provide financing of USD \$2M for the Transaction (the "**Loan Agreement**").³ Arnaki took security from Solvaqua in the form of a General Security Agreement.
5. Arnaki further secured its position by requiring, as a condition precedent, that Solvaqua provide evidence of "EDC insurance" over Solvaqua's receivables, assigned in favour of Arnaki.⁴
6. Solvaqua delivered to EDC a written Direction to Pay Arnaki's parent company, Murchinson Ltd. ("**Murchinson**") on September 3, 2020. There was no assignment of the EDC Policy to Arnaki, contrary to the evidence in the Belilo Affidavit.⁵
7. In addition to the Loan Agreement, Arnaki entered into two other similar loan agreements with Solvaqua relating to different transactions, each of which was secured with a similar written and

¹ Affidavit of Dan Barona sworn November 30, 2022 ("**Barona Affidavit**"), at para 3

² Barona Affidavit, at paras 4-5

³ Barona Affidavit, at para 7

⁴ Belilo Affidavit at para 7, Exhibit B

⁵ Undertaking Response No. 3 of Paul Zogala

registered GSA and Direction to Pay under a separate but fundamentally identical EDC policy of Export Receivables Insurance.⁶

8. In July, 2021, Solvaqua invoiced Vivakor for the Transaction in the amount of USD \$2.5M. Vivakor repudiated the Project Charter and defaulted on payment. Vivakor has failed to make any payments toward the purchase price of the Equipment.⁷
9. From August to November, 2021, Arnaki and Murchinson's lawyer repeatedly requested that EDC pay them out under the Policy for the failed Transaction.⁸
10. The normal process under the Policy is that insured goods should be sold and only thereafter, once the loss is determined, is there a payout. However, Solvaqua advised EDC that it was undergoing severe cash flow requirements due to Arnaki's loans and asked EDC to pay the claim outside of the usual process.⁹
11. EDC acceded to the request and paid Murchinson USD \$1.386 million (90% of the Policy's total potential approved loss amount of \$1.54 million US).¹⁰
12. Arnaki subsequently exercised its rights as secured creditor under its GSAs and appointed the Receiver.
13. On December 21, 2022, Arnaki's Affiant, Paul Zogala, was questioned on his Affidavit sworn December 13, 2022. In the course of the questioning, counsel for Arnaki objected to several questions including whether an assignment of claims under the EDC insurance contracts was being sought.¹¹

ISSUE

14. Can and should the Receiver assign the Insurance Policies of Solvaqua without the consent of EDC?

⁶ Belilo Affidavit, at para 7

⁷ Barona Affidavit at para 7

⁸ Barona Affidavit at para 7, Exhibit F

⁹ Barona Affidavit, Exhibit B, para 8 and Barona Transcript, p. 16

¹⁰ Barona Affidavit at para 7

¹¹ Affidavit of Elvina Hussein sworn July 6, 2023

ARGUMENT

Assignment of Claims against EDC held by Solvaqua

15. Solvaqua had existing claims ("Claims") under insurance policies given by EDC which had been denied or only partially paid (partly on the basis that goods had not been delivered and the claims was not yet payable). Pursuant to the Insurance Policies, Solvaqua's rights under insurance policies cannot be assigned to any other party without the consent of EDC. Arnaki/Murchison has refused to answer questions as to whether these claims are to be assigned to Arnaki/Murchison as part of the proposed sale of assets. However, on the assumption that they are, it is submitted that the Court should recognize the contractual terms agreed to between Solvaqua and EDC and require the approval of EDC for any such assignment. EDC does not consent to the assignment, therefore the Court should not include the insurance claims in any assignment of Solvaqua's assets.
16. While it is not unheard of in restructuring proceedings to grant assignments without consent of contracting parties even where such consent is contractually mandated, those cases involve consideration of the best interest of multiple stakeholders in a proposed restructured entity. In the present case, those concerns are not present, since this is merely a sale of assets conducted under Court supervision. It is submitted, therefore, that there is no compelling reason to dispense with contractually agreed rights held by EDC.
17. The Courts will not generally permit a party to assign the contract without the contractually required consent of a counterparty.¹²
18. In the insolvency context, the Courts have, in some cases, interfered with the foregoing principle. The leading case on assignment of a contract without the contractually required consent of the counterparty is *Re: Playdium Entertainment Corp.*¹³ In that case, the Court held that its inherent powers under the CCAA permitted it to "override" the non-consent of a contractual counterparty in order to approve an assignment of a contract. The Court held (at

¹² *Energy Construction and Directional Drilling (Re)*, 2022 ABQB 268 (CanLII), at paras 66-69 (**Tab 1**)

¹³ *Playdium Entertainment Corp., Re*, 2001 CanLII 28281 (ON SC), (**Tab 2**)

paragraph 43 of its additional reasons) that, in order for such an Order to be appropriate "it must be in keeping with the purpose and spirit of the regime created by the CCAA".¹⁴

19. It is important to note that, in *Playdium*, the Court stated at paragraph 23 of the initial reasons:

If there were no CCAA order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. [emphasis added]

20. The Court further noted that it was faced with the alternative between a "viable plan" and a "liquidation". In contrast, in the present case, a liquidation is precisely what is occurring.
21. There is no CCAA Order in place in the present proceeding, no Bankruptcy proceeding and the Receivership Order does not provide the Receiver with the power to make an assignment without obtaining contractually consent of counterparties.
22. The reason the Court approved the sale of a contract in *Playdium* was that it benefit all stakeholders, including the debtor, creditors in general, employees, etc. EDC has not been able to find a case where Court approval was granted for an assignment of a contract (without the contractually required consent of the counterparty) in a non-restructuring context. The rationale for this is apparent - in a restructuring insolvency proceeding such as CCAA or proposal under the BIA, the assignment of a contract may be a benefit to a number of parties and the success of the restructuring might depend upon the assignment. In such cases, the rights of the individual counterparty are outweighed by the needs of all of the stakeholders. In contrast, in a liquidation, and, in particular, a receivership instigated by a secured creditor, there is often only one party which would benefit from the assignment, namely the secured creditor (here, one who is making a credit bid). There will be no additional funds for creditors at large, no preservation of a business and no benefit to other parties. There will be a distinct detriment to EDC, the counterparty. It will be forced to accept an assignment to which it did not consent despite clear contractual language requiring its consent and will be immediately faced with litigation concerning denial of claims.

¹⁴ *Playdium Entertainment Corp., Re*, 2001 CanLII 2828 (ON SC), (Tab 3)

23. The Courts have refused assignments if they do not actually help the debtor and prejudice is present to the counterpart.¹⁵ In the *Nexient* case, the Court determined (at paragraph 46) that it should exercise authority to approve sales without consent (where contractually required) only in circumstances where it is "important to the reorganization process". The Court further held (at paragraph 59) that such powers should be exercised "sparingly". In the result, the Court found that the request of an assignment would have no impact on the CCAA proceedings and constituted unfair interference with the licensor's contractual rights (at paragraphs 97-98).
24. The most recent case touching upon this issue is *Veris Gold Corp. (Re)*¹⁶, at paragraphs 46 – 65. The Court noted that the test was whether the assignment was "important to the reorganization process".
25. At paragraph 54 of *Veris*, the Court cited both *Nexient* and *Playdium* and approved the test of "importance to the reorganization process". The Court stated:

Also of relevance was the effect of the assessment on the counterpart the principle of third-party rights should only be affected as is absolutely required to assist in the reorganization".

26. It is submitted that the proposed assignment is not related to any restructuring process, is of no benefit to the status or, indeed, any party aside from the bidder. The assignment would cause prejudice to EDC in forcing it to spend time and resources in litigating a claim which it properly denied. There is no evidence that EDC has improperly withheld its consent. It is entitled to contract with parties of its choice who have satisfied its own credit requirements and who meet its business purpose.

CONCLUSION

27. In summary:
- (a) As the insurance contracts cannot be assigned to a third party without consent of EDC, and since EDC has not granted such consent, both contracts and the rights thereunder should not be assigned in these proceedings.

¹⁵ *Nexient Learning Inc. (Re)*, 2009 CanLII 72037 (ON SC) (**Tab 4**)

¹⁶ *Veris Gold Corp. (Re)*, 2015 BCSC 1204 (CanLII) (**Tab 5**)

RELIEF REQUESTED

28. For the foregoing reasons, EDC requests an Order:

- (a) Declaring that the Receiver cannot assign the Claims without consent;
- (b) Awarding costs against Arnaki/Murchison in favor of EDC on a party party basis; and
- (c) Such further and other relief as this Honourable Court may deem just.

Submitted this 31st day of August, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FIELD LLP



Per: _____
Douglas S. Nishimura,
solicitor for Export Development Canada

TABLE OF AUTHORITIES

TAB

1. *Energy Construction and Directional Drilling (Re)*, [2022 ABQB 268 \(CanLII\)](#)
2. *Playdium Entertainment Corp.*, Re, [2001 CanLII 28281 \(ON SC\)](#)
3. *Playdium Entertainment Corp.*, Re, [2001 CanLII 28282 \(ON SC\)](#)
4. *Nexient Learning Inc. (Re)*, [2009 CanLII 72037 \(ON SC\)](#)
5. *Veris Gold Corp. (Re)*, [2015 BCSC 1204 \(CanLII\)](#)