

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF NORTH AMERICAN FUR PRODUCERS INC., NAFA PROPERTIES INC.,
3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS
INC., NAFA PROPERTIES (US) INC., NAFA PROPERTIES STOUGHTON LLC,
NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC (WISCONSIN
LLC), NAFA EUROPE CO-OPERATIEF UA, NAFA EUROPE B.V., DAIKOKU
SP.Z OO and NAFA POLSKA SP. Z OO

(the "Applicants")

**FACTUM OF MEADOWVALE LAND LIMITED, REBECCA'S GIFT HOLDINGS
LIMITED, 1350739 ONTARIO LIMITED AND THE ESTATE OF JOSEPH BLACK
(hearing November 5, 2020)**

November 4, 2020

MINDEN GROSS LLP

Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSUC# 26900N)

cfrancis@mindengross.com

Tel: 416-362-3711

Fax: 416-864-9223

Lawyers for Meadowvale Land Limited,
Rebecca's Gift Holdings Limited, 1350739
Ontario Limited and The Estate of Joseph
Black

TO: THE SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF NORTH AMERICAN FUR PRODUCERS INC., NAFA PROPERTIES INC.,
3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS
INC., NAFA PROPERTIES (US) INC., NAFA PROPERTIES STOUGHTON LLC,
NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC (WISCONSIN
LLC), NAFA EUROPE CO-OPERATIEF UA, NAFA EUROPE B.V., DAIKOKU
SP.Z OO and NAFA POLSKA SP. Z OO

(the "Applicants")

**FACTUM OF MEADOWVALE LAND LIMITED, REBECCA'S GIFT HOLDINGS
LIMITED, 1350739 ONTARIO LIMITED AND THE ESTATE OF JOSEPH BLACK
(hearing November 5, 2020)**

PART I - OVERVIEW

1. The Applicants are seeking an Order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") approving the sale and assignment of a Ground Lease and a City Ground Lease (as hereinafter described) with respect to the real property at 65 Skyway Ave, Toronto (the "**Skyway Property**"), to Niche Bakers Properties Inc. ("**Niche Bakers Properties**"), a company which was incorporated on September 23, 2020 under the Ontario *Business Corporations Act* for the purpose of the proposed transaction.

2. Meadowvale Land Limited, Rebecca's Gift Holdings Limited, 1350739 Ontario Limited and The Estate of Joseph Black are the landlords of the Skyway Property

(collectively, the “**Landlord**”). The Landlord objects to the assignment of the Ground Lease to Niche Bakers Properties on the terms proposed by the Applicants.

3. Niche Bakers Properties is not intended to be the actual tenant and occupant of the Skyway Property. Rather, the proposed tenants/occupants of the Skyway Property are Niche Bakers Corp. (“**Niche Bakers**”) and Niche Bakers (USA) Corp. (“**Niche Bakers (USA)**”) (referred to herein collectively as the “**Niche Bakers Operating Entities**”).

4. The term of the Ground Lease runs to 2073. However, the proposed transaction has been structured so that the Niche Bakers Operating Entities will obtain the benefit of the rent currently payable under the Ground Lease until the end of the current rental period, February 28, 2029, with no covenant or commitment by them for the remaining 44 years of the Ground Lease.

5. The proposed purchase agreement is not yet firm and the purchaser requires the Landlord’s consent to their plans for the Skyway Property. The Landlord, the Applicants and the proposed assignee have been involved in without prejudice discussions to renegotiate the Ground Lease on terms that are more favourable to the Tenant, on proper consideration to the Landlord, but thus far the discussions have not resulted in an agreement.

6. The negotiations, if successful, will require changes to the proposed purchase agreement. Accordingly, it is premature to consider the proposed sale and assignment of the Ground Lease and the City Ground Lease to the purchaser.

PART II - FACTS

Background/The Ground Lease

7. By a lease dated July 30, 1973, certain lands including the Skyway Property were leased by Samuel Black, Joseph Black, Norman Black, and Beatrice Wintroub (formerly and now known as Beatrice Minden), as landlords, to Rockford Developments Limited, as tenant (the "**Head Lease**"). In 1980, Rockford Developments Limited ("**Rockford**") assigned an undivided one half interest in the Head Lease to Imbrook Properties Limited ("**Imbrook**").¹

8. By a "peel off" lease made as of October 1, 1980, the above-noted parties entered into the Ground Lease in respect of the Skyway Property (the "**Ground Lease**").²

9. There is a second "ground lease" in favour of the City of Toronto (referred to herein as the "**City Ground Lease**"), which relates to parking at the Skyway Property.³

10. By a sublease dated as of October 1, 1980, Rockford and Imbrook subleased the Skyway Property to Hudson's Bay Company Developments Limited ("**Hudson's Bay**") with the right to purchase all of the leasehold interest of Rockford and Imbrook, effective March 1, 1999. Through a series of other transactions, Ivanhoe Cambridge II Inc. ("**Ivanhoe**") became the Tenant under the Ground Lease effective August 15, 2001.⁴

¹ Affidavit of Stephen Posen sworn November 3, 2020 ("Posen Affidavit"), para. 10; Affidavit of Douglas Lawson sworn October 30, 2020, Exhibit "C"

² Posen Affidavit, para. 11

³ Posen Affidavit, para. 3

⁴ Posen Affidavit, paras. 12 - 15

11. The persons and entities currently comprising the Landlord are the successors in interest of the original owners.⁵

12. The Ground Lease was for a term of 100 years, expiring on February 28, 2073. As set out in the Ground Lease, there are six rental periods as follows:

- (a) Initial Rental Period to February 18, 1999
- (b) Second Rental Period to February 28, 2014
- (c) Third Rental Period to February 28, 2029
- (d) Fourth Rental Period to February 28, 2044
- (e) Fifth Rental Period to February 28, 2059
- (f) Sixth Rental Period to February 28, 2073⁶

13. Prior to the end of each rental period, the rent is set for the next rental period at "Fair Market Rental". Section 1.01 (h) of the Ground Lease contains two distinct definitions of "Fair Market Rental", Definition 1 and Definition 2. Definition 2 applies where the lands are available for redevelopment and allows for a potentially significant increase in rent.⁷

14. Pursuant to Section 5.02 of the Ground Lease, the rent was to be reset for all rental periods except Rental Period 3 using Definition 1. However, if the conditions for

⁵ Posen Affidavit, para. 16

⁶ Posen Affidavit, paras. 17-18

⁷ Posen Affidavit, para. 19

Definition 2 did not yet apply in Rental Period 3, then Definition 2 would be deferred and used for a later rental period.⁸

15. The Landlord and the then-Tenant agreed that the Skyway Property was not yet appropriate for redevelopment when the rent was reset for the Third Rental Period. Accordingly, the application of Definition 2 of Fair Market Rental was postponed, to be applied to the establishment of Fair Market Rental for the Fourth Rental Period.⁹

16. Pursuant to a Rental Rate Agreement dated as of March 1, 2014, the Landlord and Tenant agreed that the rent for the Third Rental Period commencing March 1, 2014 and ending February 28, 2029 would be \$459,375 per annum, payable in instalments of \$38,281.25 per month. The Landlord and Tenant also agreed to amend the Ground Lease such that Definition 2 would apply to the Fourth Rental Period, subject to the same proviso as in the original Ground Lease.¹⁰

17. In or about 2016, Ivanhoe entered into an agreement to sell its interest in the Ground Lease to NAFA Properties Inc. ("**NAFA Properties**") and sought the Landlord's consent to the assignment. The Landlord was prepared to consent to the assignment, but only on the strict condition that the ultimate tenant of the Skyway Property, North American Fur Auctions Inc. ("**NAFA**") provided an unlimited and unconditional indemnity in respect of the obligations of NAFA Properties as Tenant under the Ground Lease.¹¹

⁸ Posen Affidavit, para. 20

⁹ Posen Affidavit, para. 21

¹⁰ Posen Affidavit, para. 22; Affidavit of Douglas Lawson sworn October 30, 2020, Exhibit "L"

¹¹ Posen Affidavit, para. 23

18. NAFA accepted that this was a reasonable requirement and agreed to provide the indemnity. NAFA executed a formal Indemnity Agreement dated February 22, 2017.¹²

19. In addition to NAFA, as well as NAFA Properties, assuming the obligations of the Tenant under the Ground Lease, Ivanhoe recognized that it was exposed on its covenant under the Ground Lease. Accordingly, Ivanhoe provided direct consideration to the Landlord for the release of its covenant.¹³

Proposed Assignment to Niche Bakers Properties

20. After the Applicants sought protection under the CCAA, NAFA/NAFA Properties entered into an agreement for the assignment of the Ground Lease to another entity. However, this transaction was terminated as the proposed assignee failed to obtain the required zoning and did not waive the conditions.¹⁴

21. On or about October 8, 2020, counsel for NAFA advised counsel for the Landlord that NAFA had entered into a new agreement, which was firm, subject to due diligence, with an anticipated closing date of November 15, 2020.¹⁵

22. By email dated October 8, 2020, Stephen Gaudreau, counsel for NAFA, sought the Landlord's consent to the assignment of the Ground Lease and advised as follows with respect to the proposed purchaser:

¹² Posen Affidavit, para. 24; Exhibit "A"

¹³ Posen Affidavit, para. 25

¹⁴ Posen Affidavit, para. 26

¹⁵ Posen Affidavit, para. 28

The proposed purchaser is Niche Bakeries Properties Inc. (<https://www.nichebakers.com>). A well established commercial baker in Toronto. We have forwarded the following request for information (based on the last round) to the Purchaser in order to obtain the consent. Please let us know if you would like to revise/adjust anything.

1. Financial Statement: The Purchaser's current financial statements for its two most recent fiscal years.
2. Purchaser's History: A history of the business of the Purchaser or guarantor to establish the viability of its business.
3. *Organizational structure and guarantee: A document setting out the Purchaser's organizational structure, including whether the Purchaser is a single purpose holding entity. A guarantee from the ultimate parent company. The purpose of the guarantee of the ultimate parent will be in part to satisfy the landlord of the financial strength of its tenant and in part to forestall any prospect that the parent could strip assets from the purchaser and potentially reorganize the Purchaser for the parent's benefit and to the disadvantage of the landlord.*
4. APS: The terms of the Agreement of Purchase and Sale.
5. Permitted use: A description of the Purchaser's intended use for the property.
6. Professional Fees: The Landlord requires to be completely indemnified for its professional fees (including legal fees) incurred with respect to the contemplated assignment.¹⁶

23. On October 15, 2020, Minden Gross LLP on behalf of the Landlord provided authorization for the proposed purchaser to conduct its due diligence.¹⁷

24. On the morning of October 21, 2020, NAFA's counsel sent a package of documents related to Niche Bakers Properties and the Niche Bakers Operating Entities, including:

- (a) Articles of incorporation for Niche Bakers Properties

¹⁶ Posen Affidavit, para. 29; Exhibit "B"

¹⁷ Posen Affidavit, para. 31; Exhibit "C"

- (b) Financial statements
- (c) Business profile
- (d) Commercial credit report
- (e) Proposed sublease from Niche Bakers Properties to Niche Bakers¹⁸

25. The proposed assignee was not the Niche Bakers Operating Entities, but Niche Bakers Properties, a newly incorporated entity.¹⁹

26. Included in the package was a document entitled: Niche Bakers Properties Inc. Plan, which stated as follows:²⁰

Niche Bakers Properties Inc. ("Properties") was incorporated in September 2020, to purchase the leasehold interest in two ground leases located on the property municipally known as 75 Skyway Avenue, Toronto.

Upon closing of the transaction, the two leases shall be assigned to Properties from the current tenant and the company will enter into subleases with Niche Bakers Corp. ("Bakers") on essentially the same terms and conditions as are contained in the ground leases.

Bakers has been in business for over eleven years and its principals have been in the business of the preparation of baked goods, desserts, snacks and confectionaries since the early 1980's. Bakers, by way of remitting rent to Properties, will effectively be responsible for the rent and operating expenses set out in the ground leases. Bakers currently has two bases of operation.

Given that Properties is newly incorporated, audited financial records and commercial credit reports have not been provided for Properties, however such records and reports have been provided for Bakers. An unaudited Financial Statement Forecast has been provided for Properties. The audited financial statements were for

¹⁸ Posen Affidavit, para. 32; Exhibit "F"

¹⁹ Posen Affidavit, para. 33

²⁰ Posen Affidavit, para. 34, Exhibit "D"

the Niche Bakers Operating Entities, Niche Bakers and Niche Bakers (USA).

27. The proposed sublease (the “**Proposed Sublease**”) was between Niche Bakers Properties and Niche Bakers (not Niche Bakers (USA)). The only rent payable by the Niche Bakers Operating Entities under the Proposed Sublease was the rent payable to the Landlord under the Ground Lease (and City Ground Lease), together with other operating expenses, which are the Tenant’s responsibility.²¹

28. The Proposed Sublease was not on substantially the same terms as the Ground Lease and the City Ground Lease, but was for a term which expires at the end of the Third Rental Period on February 28, 2029, leaving 44 years remaining on the Ground Lease, from February 28, 2029 to February 28, 2073.²²

29. The Proposed Sublease includes an option to extend for two further terms of five years each, which Niche Bakers could choose not to exercise. Further, the options would only extend the term to two-thirds of the Fourth Rental Period under the Ground Lease, let alone for the Fifth and Sixth Rental Periods under the Ground Lease.²³

30. On October 21, 2020, the Landlord’s counsel discussed with the proposed purchaser’s counsel the indemnity to be provided by the Niche Bakers Operating Entities. They advised that the Niche Bakers Operating Entities were not prepared to provide an indemnity beyond the term of the Proposed Sublease, i.e. beyond February 28, 2029,

²¹ Posen Affidavit, para. 35

²² Posen Affidavit, paras. 36 and 37

²³ Posen Affidavit, paras. 38 and 39, Exhibit “E”

which would leave 44 years remaining on the Ground Lease with no covenant or indemnity from the Niche Bakers Operating Entities.²⁴

31. Without such a covenant, the Landlord will be bound by the new rental rates under the Fourth Rental Term if the rates are favourable to the Tenant, but the Niche Bakers Operating Entities can simply choose not to exercise the option to renew and walk away from the Ground Lease if the new rental rates are unfavourable to the Tenant, leaving Niche Bakers Properties with no means to make the rental payments under the Ground Lease.²⁵

32. The Landlord has no objection to the Niche Bakers Operating Entities as the Tenant under the Ground Lease. The Landlord's objection is that the Niche Bakers Operating Entities are not being proposed as the Tenant under the Ground Lease, and have not agreed to provide a guarantee or indemnity for all of the obligations of the Tenant under the Ground Lease.²⁶

33. The Tenant will also require the Landlord's consent for the proposed investments in the Skyway Property. The proposed investments include setting up the plant, including a 30,000 square foot freezer, and installing production and packaging lines, storage rack systems and ovens.²⁷

34. The installation of special purpose equipment and machinery for the business of Niche Bakers Operating Entities is unlikely to be of any value to the Landlord

²⁴ Posen Affidavit, paras. 43 and 44

²⁵ Posen Affidavit, para. 53

²⁶ Posen Affidavit, para. 56

²⁷ Posen Affidavit, para. 57

or other prospective tenants and would be very costly to remove in the event that Niche Bakers Operating Entities chose not to remain at the Skyway Property beyond February 28, 2029.²⁸

35. Consequently, the Landlord is not prepared to consent to the plans of the Niche Bakers Operating Entities without an enhanced commitment to the Ground Lease by way of a guarantee or indemnity.²⁹

36. It is the Landlord's understanding that Niche Bakers Properties has not yet completed its due diligence and has not yet committed to purchase the Ground Lease and the City Ground Lease.³⁰

PART III - LAW AND ARGUMENT

Section 11.3 of the CCAA

37. The relevant provisions of section 11.3 of the CCAA are as follows:

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

...

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

²⁸ Posen Affidavit, para. 58

²⁹ Posen Affidavit, para. 59

³⁰ Posen Affidavit, para. 60

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

38. Section 11(3) of the CCAA was first introduced in s. 128 of Chapter 47 of the Statutes of Canada, 2005, but did not come into force until September 18, 2009.

39. As noted in the Applicants' factum, prior to the enactment of section 11(3) of the CCAA, Spence J. held in *Re Playdium Entertainment Corp.*, 2001 CarswellOnt 4109 ([CanLII](#)) that the court has jurisdiction in a CCAA proceeding to approve the assignment of a contract without the consent of the counterparty.

40. The reasons cited above were supplemental to Spence J.'s earlier decision in the case, where he held that, but for the court's jurisdiction under the CCAA, the assignment could not be forced on the counterparty, and that under the CCAA, the assignment "must be in keeping with the purposes and spirit of the regime created by CCAA".³¹

41. In *Playdium*, the assignment involved a sale of the debtor's assets as a going concern. In considering the factors and approving the assignment, Spence J. held as follows:

[24] The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under [CCAA](#) and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

³¹ *Playdium Entertainment Corp.*, [Re, 2001 CanLII 28281 \(ON SC\)](#), paras. 22 and 23

42. In *Re Nexient Learning Inc.*, 2009 CanLII 72037 ([CanLII](#)), which is also cited by the Applicants in their factum, Wilton-Siegel J. set out the factors to be applied:

[59] It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

43. After considering and applying these factors, Wilton-Siegel J. declined to approve the proposed assignment of a contract to the purchaser of the debtor's business. Among other things, Wilton-Siegel J. found:

[84] The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. ... The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process.

44. It is submitted that section 11(3) of the CCAA, along with many other amendments which came into force in 2009, simply represents a codification of the common law principles that were developed and applied prior to the amendments.³² The forced assignment of a lease or contract without the consent of the counterparty is not a

³² *Re Veris Gold Corp.*, [2015 BCSC 1204](#), para. 56 ([CanLII](#))

“rubber stamp”, but remains a remedy to be applied sparingly and after considering both the purpose and spirit of the CCAA proceedings and the position of the counterparty.

45. This was recognized by Dunphy J. in *Re Dundee Oil and Gas Limited*, 2018 ONSC 3678 ([CanLII](#)), which is also cited by the Applicants in their factum:

[27] Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

46. *Dundee Oil* involved the sale of the insolvent debtor’s business. The case directly raised the principles applicable to the CCAA. The issue was the proposed purchaser’s ability to operate the business successfully.

47. Although the Applicants’ factum currently addresses section 11.3 of the CCAA only in respect of the City Ground Lease, the Applicants have not addressed two key factors:

- (a) The proposed transaction is a package. Either there is a sale of both the Ground Lease and the City Ground Lease, or there is no transaction at all;

- (b) The Landlord is a direct party to the City Ground Lease and has significant rights thereunder.³³

48. In addition, it is clear that the Applicants will be making the identical legal and factual arguments to support the forced sale/assignment of the Ground Lease, without the Landlord's consent.

49. Unlike *Veris Gold Corp.* and *Dundee Oil* and other cases considering section 11.3 of the CCAA, the proposed transaction in the present case does not involve the sale of NAFA's business. NAFA has either vacated or is in the process of vacating the Skyway Property. The proposed sale will not save the Applicants' business or jobs. The proceeds of the proposed sale will go principally to Business Development Bank of Canada with the surplus, if any, to another of the Applicants' secured creditors.

50. Although the Applicants have been under CCAA protection for over a year, there is no plan or germ of a plan for the survival of the business, let alone evidence that the assignment of the Ground Lease and City Ground Lease to the purchaser will be a significant factor in such a restructuring, if there is one.

51. Accordingly, it is submitted that the proposed transaction does not meet the "twin goals" of assisting the reorganization process while also treating a counterparty fairly and equitably.

52. The concerns of the Landlord are addressed further below.

³³ See, for example, Affidavit of Douglas Lawson, Exhibit "C", City Ground Lease, sections XV (Rights of First Refusal) and XVII (Rights of Master Lands Landlord)

Assignment of Leases by a Trustee in Bankruptcy

53. Section 11(3) of the CCAA applies to all executory contracts (with some exceptions), not just leases. Prior to section 11(3) of the CCAA coming into force, there was a long judicial history of assignments of leases by a trustee in bankruptcy.

54. The provisions of section 11(3) of the CCAA are substantially similar to section 38(2) of the Ontario *Commercial Tenancies Act*, RSO 1990, c L.7, which permits a trustee in bankruptcy to assign a lease where the tenant is bankrupt:

Rights of assignee

(2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may ... assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Superior Court of Justice as a person fit and proper to be put in possession of the leased premises.

55. In *Deloitte & Touche Inc. v. 653129 Ontario Ltd.*, 1999 CanLII 15006 (ON SC), Epstein J., as she then was, addressed a request by the trustee in bankruptcy of Sunys Petroleum Inc., a bankrupt, to assign three leases for leased premises located in Hamilton, Toronto and Kingston to a subsidiary of another operator of retail gas stations. The landlords of each of the three premises resisted the trustee's application.

56. In each case, the proposed assignee:

- (a) Covenanted to observe and perform the terms of the lease;
- (b) Proposed to use the site to operate a retail gas station (the same use as the bankrupt);
- (c) Was a wholly owned subsidiary of Suny's Energy Inc., which was controlled and operated by Cango Inc. ("**Cango**").

57. Cango operated the Cango and Gasright retail station chains. The landlords were offered security by way of parent company guarantees.

58. Despite this, Epstein J. (as she then was) refused to approve the assignments, noting the following:

[16] According to the case law, the Trustee must satisfy the Court that the proposed tenant is one who will be motivated and able to honour the covenants in the lease and that he will make proper use of the premises. The Court will look to evidence of the proposed tenant's reputation in the community, both as a tenant and in business in general, and of its credit worthiness. The Court must also consider the status of the bankrupt estate and the benefits that will flow to the creditor if the trustee is able to assign the lease. See *Darrigo Consolidated Holdings Ltd. v. Norfinch Construction (Toronto) Ltd.* (1987), 63 C.B.R. (N.S.) 216 (Ont. H.C.); *Micro Cooking Centres (Can.) Inc. (Trustee of) v. Cambridge Leaseholds Ltd.* (1988), 68 C.B.R. (N.S.) 60 (Ont. H.C.).

...

[19] It is in treating New Suny and Cango as the Assignees where the argument of the Trustee fails. The problem with this position is that to force the landlords to look to a guarantor as the party primarily obligated to fulfill the terms of the lease amounts to varying the lease. The position of a landlord in looking to a tenant for relief is substantially different than that of a landlord pursuing a guarantor. For example, the landlord is exposed to having a guarantor released from its obligations on the happening of a number of events. In my view the altered position of the landlord is particularly important having regard to the fact that the type of

business that the Assignees propose to operate on the premises in question is a potentially hazardous one. The extensive reasons of Henry J. in *Micro*, supra clearly establish that the Act does not permit the Court to amend the terms of the lease in question. It follows that I cannot take into consideration the security offered by New Suny and Cango to assess the fitness of the Assignees. Without question, the Assignees standing alone cannot remotely be considered appropriate assignees within the meaning of the Act and related jurisprudence.

59. The trustee in bankruptcy appealed. On appeal, the panel upheld Epstein J.'s decision,³⁴ finding as follows:

[3] In reaching her decision that the proposed assignees should not be approved, the motions judge considered the proper test applicable to this issue, namely, would the proposed tenants be motivated and able to honour the covenants in the lease, and would they make proper use of the premises. See *Darrigo Consolidated Holdings Inc. (Trustee of) v. Norfinch Construction Toronto) Ltd.* (1987), 63 C.B.R. (N.S.) 216 (Ont. H.C.); *Micro Cooking Centres (Canada) Inc. (Trustee of) v. Cambridge Leaseholds Ltd.* (1988), 68 C.B.R. (N.S.) 60.

[4] The respondent landlords object to the approval of the numbered companies as fit and proper persons on the grounds that they are mere shell corporations, specifically created by Cango to insulate Cango from liability. In a response to that objection, Cango and New Suny have offered to provide guarantees of the obligations to be undertaken by the proposed assignees.

[5] At the time the matter came before the motions judge, the proposed assignees had, in fact, been in possession of the leased premises. There is no issue but that rent has been paid in a timely fashion and that the premises have been operated in accordance with the terms of the lease. However, the assignees themselves have not been paying the rent. Rent has been paid by the parent corporations.

[6] In her reasons for judgment, the motions judge stated that she could not take into consideration the security offered by New Suny and Cango to assess the fitness of the assignees. In our view, that cannot be accepted as a generally applicable statement of the law. Where an assignee is a corporate entity, it will almost always be necessary to consider those behind the corporation in determining

³⁴ *Sunys Petroleum Inc. (Trustee of) v. 653129 Ontario Limited*, [2000 CanLII 5693](#) (ON CA)

the fitness of the entity. **Moreover, it is not the law that a newly incorporated entity cannot be approved as a fit and proper person assuming that it has appropriate backing:** See Darrigo Consolidated Holdings Inc., supra.

[7] However, we are not persuaded that the determination of the motions judge dismissing the trustee's application should be interfered with by this court. **As the motions judge indicated, the fatal flaw in the trustee's application is that it seeks to treat New Suny and/or Cango as if they were, in fact, the assignees. We agree with the conclusion of the motions judge that the landlords are entitled to look to their tenants as the primary party responsible for the terms of the lease.** On this record, it was clearly open to the motions judge to conclude that the assignees simply did not have the wherewithall to meet those obligations as they were specifically designed as shell corporations to insulate the real tenants, New Suny and Cango from liability. It was noted by the motions judge that the operation of these premises is a potentially hazardous undertaking and the issue of immediate liability is a significant one. In our view, it was open to her to conclude that a shell corporation is not a fit and proper person within the meaning of s. 38(2). [emphasis added]

60. It is respectfully submitted that the decisions of Epstein J. and the Ontario Court of Appeal in *Suny's* are directly on point to the present case.

61. As in *Suny's*, NAFA seeks to treat the Niche Bakers Operating Entities as if they were the proposed assignee, pointing to the Niche Bakers Operating Entities' history, track record and financial statements, as well as their proposed future operations and even the number of employees they intend to hire for their new operation at the Skyway Property. This is a legal error. The proposed assignee is a newly incorporated company with no track record and no operations.

62. Unlike in *Suny's*, moreover, Niche Bakers Properties was not incorporated to insulate the Niche Bakers Operating Entities from third party liability. Rather, Niche Bakers Properties was incorporated to insulate the actual proposed tenants/occupants of

the Skyway Property, the Niche Bakers Operating Entities, from liability to the Landlord under the Ground Lease itself.

63. Unlike in Suny's, the Niche Bakers Operating Entities have not offered to guarantee or indemnify the Landlord for the obligations under the Ground Lease. Rather, they have offered to do so **only** for the next eight years, with 44 years remaining on the Ground Lease after February 28, 2029.

64. NAFA's own counsel, in providing information to the Landlord in support of the Landlord's consent to the proposed assignment, provided an example of the kind of concern that a guarantee is required to address:

The purpose of the guarantee of the ultimate parent will be in part to satisfy the landlord of the financial strength of its tenant and in part to forestall any prospect that the parent could strip assets from the purchaser and potentially reorganize the Purchaser for the parent's benefit and to the disadvantage of the landlord.³⁵

65. As the Proposed Sublease is merely a flow-through for the rent payable under the Ground Lease for the remainder of the Third Rental Term, there is no mechanism in place for Niche Bakers Properties to build up assets or equity to support its covenant in the Ground Lease. Indeed, if the rent for the Fourth Rental Term is set at a rate which is favourable to the Landlord and the Niche Bakers Operating Entities choose to abandon the Skyway Property, the Landlord will have no recourse against anyone for the rent due over the remaining 44 years of the term of the Ground Lease.

³⁵ Gaudreau Letter, Posen Affidavit, Exhibit "B"

66. It is respectfully submitted that it is neither fair nor reasonable to compel a landlord to accept a newly incorporated entity as a tenant under a lease, where that entity is not intended to be the actual tenant/occupier of the premises, where the entity was incorporated for the express purpose of insulating the real tenant from liability under the lease, and where the actual operating entity has refused to provide a guarantee or indemnity for the obligations under the lease. This is contrary to the tests under section 11.3 of the CCAA and the ratio of Epstein J. and the Court of Appeal in *Suny's*.

67. Further, and in any event, section 6.12 of the Ground Lease provides that the Tenant covenants not to construct any building on the lands or to make any major structural alterations, additions or changes to existing buildings without the prior written consent of the Landlord. The Landlord is not obligated under the Ground Lease to approve the plans of the Niche Bakers Operating Entities and it is not reasonable for the Landlord to accept a situation where the Niche Bakers Operating Entities will effectively control the Skyway Property until 2073, if they choose, without accepting the responsibilities under the Ground Lease after February 28, 2029.³⁶

68. Without the Landlord's consent to the plans of the Niche Bakers Operating Entities, it is likely that there will be no transaction.

69. This is not a situation where there are no alternatives. The transaction could be restructured to satisfy the concerns of both the Landlord and the Niche Bakers

³⁶ In *Nexient*, Wilton-Siegel J. specifically discussed the unfairness of the "selective assignment of a debtor's contracts" [para. 63]. Here, by seeking the assignment of the Ground Lease to a single purpose company because the operating entities do not want to assume the long-term burden of the Ground Lease, this is effectively what the Applicants are trying to do.

Operating Entities. Thus far, negotiations for a satisfactory amendment to the Ground Lease and the purchase agreement have not been concluded.

PART V - ORDER REQUESTED

70. It is respectfully submitted that it is premature for the Applicants to seek approval of the proposed transaction until there is a firm transaction on terms that satisfy the legitimate concerns of all stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2020.

Catherine Francis

Catherine Francis

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for Meadowvale Land Limited,
Rebecca's Gift Holdings Limited, 1350739
Ontario Limited and The Estate of Joseph
Black

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTH AMERICAN FUR PRODUCERS INC., NAFA PROPERTIES INC., 3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS INC., NAFA PROPERTIES (US) INC., NAFA PROPERTIES STOUGHTON LLC, NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC (WISCONSIN LLC), NAFA EUROPE CO-OPERATIEF UA, NAFA EUROPE B.V., DAIKOKU SP.Z OO and NAFA POLSKA SP. Z OO

Court file no. CV-19-00630241-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF MEADOWVALE LAND LIMITED,
REBECCA'S GIFT HOLDINGS LIMITED, 1350739
ONTARIO LIMITED AND THE ESTATE OF JOSEPH
BLACK**

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
Email: cfrancis@mindengross.com
Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for Meadowvale Land Limited, Rebecca's Gift Holdings Limited, 1350739 Ontario Limited and The Estate of Joseph Black