

**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 BZAM LTD., BZAM HOLDINGS INC., BZAM
MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE
SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN
ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD
HOLDING CORP. and FINAL BELL CORP.

Applicants

FACTUM OF CORTLAND CREDIT LENDING CORPORATION

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FACTUM OF CORTLAND CREDIT LENDING CORPORATION

PART I - INTRODUCTION

1. Cortland Credit Lending Corporation ("**Cortland**") seeks an order requiring Final Bell Holding International Ltd. ("**Final Bell**") to post security for costs in the partial indemnity amount of \$243,595.34, or such amount as the Court deems appropriate, pursuant to Rule 56.01 of the *Rules of Civil Procedure*. Cortland is entitled to security for costs on the basis that Final Bell: (a) resides outside of Ontario; and (b) does not have any exigible and marketable assets in Ontario to satisfy a costs award.

2. This is precisely the type of case where security for costs is appropriate. Final Bell asserts a tenuous claim of fraud that, simply by existing, has had and will continue to have a significant financial effect on Cortland. A security for costs order is necessary to protect Cortland from incurring significant costs to respond to this litigation without any

prospect of recovering those costs if Final Bell is unsuccessful at the summary trial of an issue.

PART II - SUMMARY OF FACTS

A. BACKGROUND OF THE MOTION FOR RESCISSION

(i) The FBC Share Exchange Agreement

3. On December 5, 2023, Final Bell, Final Bell Canada Inc. ("**FBC**"), and BZAM Ltd. ("**BZAM**") entered into a Share Exchange Agreement (the "**Share Exchange Agreement**") pursuant to which Final Bell became a shareholder of BZAM. Under the Share Exchange Agreement, Final Bell divested to BZAM its Canadian subsidiary FBC, together with FBC's subsidiary, Final Bell Corp.¹ On January 5, 2024, the Share Exchange Agreement closed.

4. On January 8, 2024, Cortland, the existing lender to BZAM, through a credit agreement with one of BZAM's subsidiaries, The Green Organic Dutchman Ltd. ("**TGOD Ltd**"), executed a further amended and restated credit agreement (the "**Second ARCA**").² Cortland entered into the Second ARCA to add FBC and Final Bell Corp (collectively known in the Second ARCA as the "**FBC Obligors**") and their assets into the collateral package pledged to Cortland.³

¹ Affidavit of Jonathan Shepherd sworn April 24, 2024 ("**Shepherd Affidavit**"), at para 9, Motion Record of Cortland ("**MR-Cortland**"), Tab B, p 13.

² Exhibit "9" to the Shepherd Affidavit, MR-Cortland, Tab B, p 166.

³ Exhibit "9" to the Shepherd Affidavit, MR-Cortland, Tab B, p 166.

(ii) BZAM Seeks Protection Under CCAA

5. On February 28, 2024, BZAM and the other Applicants (including FBC and Final Bell Corp) entered proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("**CCAA**").⁴

6. Cortland, in its capacity as agent for the Lenders, also agreed to provide a debtor-in-possession credit facility (the "**DIP Facility**") to the Applicants in their CCAA proceedings. The DIP Facility was entered into to, among other things, provide the Applicants with immediate access to funding needed to continue to operate and preserve the value of their operations while a sale and investment solicitation process got underway.⁵ The DIP Facility provided that Cortland would have a super-priority charge over all existing and after-acquired real and personal property of the Applicants, which included all existing and after-acquired real and personal property of FBC and Final Bell Corp.⁶

(iii) Final Bell Brings Motion for Rescission

7. On March 18, 2024, Final Bell brought a motion seeking to rescind the Share Exchange Agreement that has proceeded as a summary trial of an issue on a compressed timeline.⁷

⁴ Shepherd Affidavit, at para 12, MR-Cortland, Tab B, p 14.

⁵ Exhibit "10" to the Shepherd Affidavit, MR-Cortland, Tab B, p 233.

⁶ Exhibit "10" to the Shepherd Affidavit, at s. 3.7, MR-Cortland, Tab B, p 242.

⁷ Shepherd Affidavit, at para 15, MR-Cortland, Tab B, p 14.

B. THE PARTIES' POSITIONS ON RESCISSION MOTION

8. Final Bell alleges fraudulent misrepresentation against BZAM in support of its request to rescind the Share Exchange Agreement. The five fraudulent misrepresentations alleged to have been made by BZAM in respect to the Share Exchange Agreement are:

- (a) BZAM had sufficient cash to fund its operations and would experience positive cash flows throughout 2024;
- (b) BZAM had between \$6-7 million in financing available through access to a revolving credit facility it had with Cortland, which in March 2024 would be extended for a further 15 months;
- (c) BZAM had no outstanding tax liabilities other than the \$7,828,000 in liabilities it disclosed to Final Bell;
- (d) BZAM had sufficient cash flow throughout 2024 to fund its tax liabilities; and
- (e) BZAM would not terminate its CFO without cause immediately after closing on the FBC Transaction.⁸

9. BZAM denies all of the fraudulent misrepresentation allegations.

10. Cortland has participated in every step of the litigation. Cortland supports BZAM's position that they made no fraudulent misrepresentations whatsoever to Final Bell.

⁸ Amended Notice of Motion of Final Bell dated April 16, 2024.

C. CORTLAND'S LIKELY COSTS IN RESPONDING TO THE RESCISSION MOTION

11. From the commencement of the motion for rescission on March 18, 2024 to the completion of the responding motion records, out-of-court examinations, and trial preparation in anticipation of the hearing commencing on April 22-23, 2024, Cortland has incurred \$126,521.10 (excluding HST) in partial indemnity fees.⁹

12. Cortland has estimated its costs to respond to this motion for rescission on a partial indemnity scale from the current phase of this litigation to the end of the summary trial of an issue.¹⁰ Cortland estimates spending a total of \$84,711.00 in additional fees (excluding disbursements and HST) on a partial indemnity basis.¹¹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

13. The issues on this motion are:

- (a) Should Final Bell be ordered to post security for costs; and
- (b) If so, in what amount?

14. The *Rules of Civil Procedure* permit the Court to order security for costs based on a two-step analysis.¹²

⁹ Shepherd Affidavit, at para 18; See also Exhibit "11" to the Shepherd Affidavit, MR-Cortland, Tab B, p 259.

¹⁰ Exhibit "11" to the Shepherd Affidavit, MR-Cortland, Tab B, p 259.

¹¹ Shepherd Affidavit, at para 19; See also Exhibit "11" to the Shepherd Affidavit, MR-Cortland, Tab B, p 259.

¹² [RRO 1990, Reg 194](#), Rule 56.01(1)(a).

15. The initial onus is on the responding party to establish that it “appears” that one of the categories for security for costs set out in Rule 56.01(1) has been met. Once that burden is discharged, the onus shifts to the applicant to establish that an order for security for costs would be unjust in the circumstances.¹³

16. The rationale for the rule is that in the circumstances enumerated in rule 56.01(1), the successful responding party ought to have some prospect of recovering costs from the unsuccessful applicant.

A. CORTLAND MEETS THE SECURITY FOR COSTS TEST

(i) Final Bell is Ordinarily Resident Outside Ontario

17. It is undisputed that Final Bell is ordinarily resident outside Ontario with its head office located in British Columbia.¹⁴ Final Bell’s only current subsidiaries are based in Delaware.¹⁵ Cortland’s burden under Rule 56.01(1)(a) is met.

(ii) Final Bell Lacks Sufficient Assets in Ontario to Satisfy a Costs Award

18. There is also good reason to believe that Final Bell has insufficient assets in Ontario to pay Cortland’s costs.

19. The financial condition for a corporate plaintiff is sufficient to satisfy Rule 56.01(1)(d). In *Capital Sports Management Inc. v. Trinity Development Group Inc. et al.*,¹⁶

¹³ *Coastline Corp v Canaccord Capital Corp*, [2009 CanLII 21758 \(ON SC\)](#) at para 7.

¹⁴ Shepherd Affidavit, at para 3, MR-Cortland, Tab B, p 11.

¹⁵ Exhibit “5” to the Shepherd Affidavit, MR-Cortland, Tab B, p 34.

¹⁶ *Capital Sports Management Inc. v. Trinity Development Group Inc. et al.*, [2020 ONSC 7309](#).

the Court held that showing that a corporations liabilities surpass its assets has normally been enough to meet the first part of the test.

20. Final Bell's condensed consolidated financial statements as of and for the years ended March 31, 2022 and March 31, 2023 (which remain unaudited and not publicly disclosed) show total assets of Final Bell of USD \$71,413,507 while its total liabilities are USD \$100,443,891. As at March 31, 2023, Final Bell's total liabilities exceeded its total assets by USD \$29,030,384.¹⁷

21. There is no evidence that Final Bell has assets in Ontario. In any event, given the corporations liabilities surpass its assets, this evidence satisfies the low burden of establishing that there are good reasons to believe that Final Bell has insufficient assets to pay costs.¹⁸

B. AN ORDER FOR SECURITY FOR COSTS IS NOT UNJUST

22. As Cortland has discharged its burden, Final Bell bears the burden of demonstrating that an order for security for costs would be unjust. The Court of Appeal in *Yaiguaje v. Chevron Corporation*, [2017 ONCA 827](#) at paras. 22-25 has confirmed that determining the justness of a security for costs order requires a holistic approach, in which all the circumstances of the case are examined. Although various factors have been outlined by courts to be considered, such as merits of the claim, delay in bringing the motion, the impact of a defendant's conduct on the available assets of the plaintiff,

¹⁷ Exhibit "7" to the Shepherd Affidavit, MR-Cortland, Tab B, p 98.

¹⁸ See e.g.: *Capital Sports Management Inc. v. Trinity Development Group Inc. et al.*, [2020 ONSC 7309](#), at para 18.

access to justice concerns, and the public importance of the litigation, those factors are not static.

(i) Holistic Approach Supports Final Bell Posting Security for Costs

23. When looking at this case holistically, it is just to require Final Bell to post security for costs. Final Bell is a corporation incorporated under the laws of British Columbia however its only operating subsidiaries are located in the United States. The merits ought to be neutral to the decision of imposing an order for security for costs given the complexity of the action, or alternatively, favour BZAM's position that there was no fraud.

24. The rescission motion has forced Cortland to protect its position as a secured creditor to FBC and Final Bell Corp and as the DIP Lender to the Applicants. As DIP Lender, Cortland has a super-priority charge over all assets of FBC and Final Bell Corp. Cortland has spent considerable legal fees responding to the rescission motion in order to maintain its super-priority charge over FBC and Final Bell Corp. Final Bell ought to be obliged to protect Cortland from the risk of unrecoverable costs in these circumstances.

(ii) Merits of Claim Neutral in Assessing Security for Costs In This Case

25. If the case is complex or turns on credibility, assessment of the merits of the case is generally not appropriate and ought not factor into the analysis as to the justness of a security for costs order.¹⁹

¹⁹ *Coastline Corp v Canaccord Capital Corp*, [2009 CanLII 21758 \(ON SC\)](#) at para 7(vii); See also: *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2007 CanLII 44824 \(ON SC\)](#) at para 41.

26. In *Air Palace v. Abdel*, [2021 ONSC 7882](#), the Court dealt with a security for costs motion in respect to a claim brought by the plaintiff who alleged fraud, misrepresentation, theft, conversion and detinue, among other things. The Court held that the merits were neutral, at best, in the assessment of the security for costs motion because the case was incredibly complex factually and credibility is at issue.²⁰ The Court rather looked at the case holistically and held that ordering security for costs was just because the defendants ought to have a reasonable measure of protection for their costs.²¹

27. Final Bell alleges fraudulent misrepresentation in respect to the Share Purchase Agreement which ultimately touch on the credibility of the directors and officers of BZAM, including the credibility of the CEO of BZAM, Mr. Matthew Milich, and the prior-CFO, Mr. Sean Bovingdon. The claims call into question these witnesses' credibility and the alleged discrepancies between documents produced in due diligence and records disclosed following the close of the Share Exchange Agreement. This is not the appropriate forum to resolve the alleged credibility or discrepancy issues and therefore the merits of the case ought to be a neutral factor.

C. QUANTUM OF SECURITY FOR COSTS

28. The Court's discretion when ordering security for costs "is substantially similar to the exercise of its discretion in fixing costs" and the amount ordered must fall within "the

²⁰ *Air Palace v. Abdel*, [2021 ONSC 7882](#), at para 58; See also: *Padnos v. Luminart Inc.*, [1996 CanLII 11781 \(ON SC\)](#); *Talisman v. Kyser*, [2013 ONSC 6612](#), at para 63-65.

²¹ *Air Palace v. Abdel*, [2021 ONSC 7882](#), at para 57.

reasonable contemplation of the parties”.²² To determine the proper quantum of security for costs, “the court must be guided by what is reasonable and fair”.²³

29. Cortland has invested significant amounts of time and money responding to what has been, and will continue to be, hard fought, high-stakes litigation. The quantum of its costs is appropriate considering the following: (i) the number of contested issues; (ii) the importances of the issues; and (ii) the devastating impact Final Bell’s position, if made out, would have on Cortland.

30. The quantum of costs sought for completed work is based on reasonable hourly rates and efficient work.²⁴ Ultimately, whether the quantum of costs incurred by Cortland is appropriate will be determined by the trial judge if Cortland is successful at trial and does not require scrutiny in this context of this motion.

31. Cortland’s estimates of future costs are reasonable in the context of the expedited trial process and significant impact that the motion may have on Cortland.

PART IV - ORDER REQUESTED

32. Cortland respectfully requests:

- (a) An order requiring Final Bell to post \$243,595.34 into court as security for Cortland’s costs, with three days, failing which Final Bell’s motion shall be dismissed;

²² *Canadian Metal Buildings Inc v 1467344 Ontario Limited*, [2019 ONSC 566](#) at para 27.

²³ *2018218 Ontario Limited v Realty Specialists Inc*, [2019 ONSC 150](#) at para 23.

²⁴ Exhibit “11” to Shepherd Affidavit, MR-Cortland, Tab B.

- (b) The costs of this motion on a partial indemnity basis; and
- (c) Such further and other Relief as to this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2024.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *2018218 Ontario Limited v Realty Specialists Inc.*, [2019 ONSC 150](#).
2. *Air Palace v. Abdel*, [2021 ONSC 7882](#).
3. *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2007 CanLII 44824 \(ON SC\)](#).
4. *Canadian Metal Buildings Inc v 1467344 Ontario Limited*, [2019 ONSC 566](#).
5. *Capital Sports Management Inc. v. Trinity Development Group Inc. et al.*, [2020 ONSC 7309](#).
6. *Coastline Corp v Canaccord Capital Corp*, [2009 CanLII 21758 \(ON SC\)](#).
7. *Forvest Financial Services v. Link Resource Partners*, [2020 ONSC 2165](#).
8. *Hembruff v. Ontario Municipal Employees Retirement Board*, [2005 CanLII 39859 \(ON CA\)](#).
9. *Padnos v. Luminart Inc.*, [1996 CanLII 11781 \(ON SC\)](#).
10. *Smith v Sino-Forest Corporation*, [2012 ONSC 24](#).
11. *Tabrizi v Kaushal*, [2017 ONSC 7660](#).
12. *Talisman v. Kyser*, [2013 ONSC 6612](#).
13. *TD Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998 CanLII 14806 \(ON SC\)](#).
14. *Yaiguaje v. Chevron Corporation*, [2017 ONCA 827](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Rules of Civil Procedure, RRO 1990, Reg 194](#), s 56.01(1)

Where Available

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 [\(1\)](#).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 [\(2\)](#).

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Court File No. CV-24-00715773-00CL

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