

COURT FILE NUMBER 2201 -  
COURT **COURT OF QUEEN'S BENCH OF ALBERTA**  
JUDICIAL CENTRE **CALGARY**  
APPLICANT **CORTLAND CREDIT LENDING CORPORATION**  
RESPONDENTS **GENESIS INTEGRATION INC., and 965591 ALBERTA LTD.**  
DOCUMENT **BENCH BRIEF**  
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File No. 428661/20

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**BENCH BRIEF OF CONVERGINT TECHNOLOGIES LTD. IN RESPECT OF ORIGINATING APPLICATION FOR RECEIVERSHIP ORDER AND REVERSE VESTING ORDER OF CORTLAND CREDIT LENDING CORPORATION  
RETURNABLE ON SEPTEMBER 13, 2022**

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## **I. INTRODUCTION**

1. This bench brief is filed by Convergent Technologies Ltd. (“**Convergent**”) in respect of Cortland Credit Lending Corporation’s (“**Cortland**”) Application for a Receivership Order and Reverse Vesting Order. Through its Application, Cortland is seeking this Court’s approval of a Share Purchase Agreement by which Sequent AI Exchangeco Limited (“**Sequent**”) proposes to acquire all of the outstanding shares of the Respondent Genesis Integration Inc. (“**Genesis**”) (the “**SPA**”).
2. The consideration contemplated within the proposed SPA includes the retention of debt owed by Genesis to Cortland, in the approximate amount of \$9.4 million, and the retention of approximately \$1.7 million owing to a collection of 88 entities identified by Sequent as “Critical Suppliers”.<sup>1</sup> The SPA contemplates that Convergent, Genesis’ primary unsecured creditor to which it has an outstanding liability of approximately \$1.1 million, and other unsecured creditors of Genesis not deemed “Critical Suppliers” will receive nothing.<sup>2</sup>
3. Convergent opposes the proposed payment in full of the pre-filing debt of the “Critical Suppliers” to the prejudice of Convergent and other unsecured creditors. Convergent’s position is that such proposed payments are improper in the circumstances of this proposed Receivership and amount to an unlawful preference of some creditors over others, without justification.

## **II. ISSUES**

4. Is a “critical supplier” designation applicable to a receivership in this case?
5. If a “critical supplier” designation is appropriate, does the designation of the 88 entities as “Critical Suppliers” justify the satisfaction in full of these unsecured creditors’ pre-filing debt claims against Genesis in preference to Genesis’ other unsecured creditors, including Convergent?

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<sup>1</sup> Report of KSV Restructuring Inc. as Proposed Receiver of 965591 Alberta Ltd. and Genesis Integration Inc., dated September 2, 2022 [**Report**] at Section 8.0, para 1(d).

<sup>2</sup> *Ibid* at Section 8.0, para 1(g).

### III. LAW AND ARGUMENT

#### *Critical Supplier Designations Not Applicable to Receiverships*

6. The provision by which a Court may designate a supplier to a debtor as a “critical supplier” is section 11.4 of the *Companies’ Creditors Arrangement Act* (“*CCAA*”).<sup>3</sup> There is no equivalent provision in the *Bankruptcy and Insolvency Act* (“*BIA*”).<sup>4</sup>
7. Critical supplier designations may, however, also be granted where appropriate in bankruptcy proposals under the *BIA* which, like *CCAA* reorganizations, contemplate the continuation of a debtor’s business as a going concern during the period in which a restructuring is pursued under the supervision of a Monitor or Proposal Trustee. In both such situations, all stakeholders potentially stand to benefit from the debtor company’s continued operation, aided by critical suppliers.<sup>5</sup>
8. Critical supplier designations are to be made only on application by a debtor company. If the Court is satisfied that “the goods or services that are supplied are critical to the (debtor) company’s continued operation”, a supplier may be ordered by the Court to support the debtor company’s continued operation through continued supply of goods or services during the restructuring period.<sup>6</sup> The designations and associated statutory charges are designed to prevent situations where debtors are held hostage by critical suppliers during an attempted reorganization.<sup>7</sup>
9. In line with the Model Receivership Order, the proposed Receivership Order in this case includes provisions stipulating that suppliers may not cease performing under a contract with the debtors nor may they discontinue supply of goods and services required by the debtors.<sup>8</sup>

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<sup>3</sup> RSC 1985, c C-36, s 11.4 [*CCAA*] [TAB 1].

<sup>4</sup> RSC 1985, c B-3 [*BIA*].

<sup>5</sup> *1732427 Ontario Inc v 1787930 Ontario Inc*, 2019 ONCA 947 at paras 13-14 [TAB 2].

<sup>6</sup> *CCAA*, *supra* note 3, s 11.4(1)-(2) [TAB 1]; *Arrangement relatif à Atis Group Inc*, 2021 QCCS 744 [*Atis Group*] at paras 24-25 [TAB 3].

<sup>7</sup> *Re Air Canada*, 2003 CanLII 64280 (Ont Sup Ct J), 47 CBR (4<sup>th</sup>) 163 [*Air Canada*] at para 2, Appendix “A” [TAB 4]; Steven D. Dvorak & Helen M.E. Sevenoaks, “Section 11.4 CCAA and Beyond: A “Critical” Look at Critical Supplier Orders and the Payment of Pre-Filing Claims” in Janis P Sarra, ed, 2012 Ann Rev Insolv L 9 (Toronto: Carswell, 2013) [A Critical Look] at 3 [TAB 5].

<sup>8</sup> Proposed Consent Receivership Order at paras 11-12.

10. Simply put, the underlying rationale for critical supplier designations in CCAA reorganizations and BIA proposals does not equally apply to receiverships. There is thus no basis for the designating of “critical suppliers” in this case.

***The Applicant Has Provided No Evidence Justifying the “Critical” Nature of the Suppliers***

11. Critical supplier designations are not to be granted lightly, and should only be made where the debtor company would be unable to continue to operate without a continuing business relationship with the supplier.<sup>9</sup>
12. The only support provided in the Application materials for classifying the 88 suppliers as “critical” is within the Report of the proposed receiver of the Genesis, where it is stated that, in Sequent’s view, receiving continued supply from the designated entities is critical to preserving Genesis’ going concern value and that such supply cannot be replaced in a commercially reasonable time and/or at a commercially reasonable cost.<sup>10</sup> The Schedule to the PSA listing the proposed “Critical Suppliers” fails to indicate the outstanding amounts owing to each supplier, despite claiming to do so.<sup>11</sup>
13. In a number of cases, the parties seeking Court recognition of critical suppliers have provided evidence with respect to the percentage of business a certain supplier represents for the debtor.<sup>12</sup>
14. In other cases, applicants have demonstrated that an interruption in supply causing an immediate material adverse impact to the debtor’s business would occur without a designation,<sup>13</sup> that the supplier would terminate its relationship with the debtor if not granted the special treatment,<sup>14</sup> or that the suppliers at issue may go out of business without a payment guarantee, imperiling the debtor’s own business.<sup>15</sup>

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<sup>9</sup> A Critical Look, *supra* note 7 at 3 [TAB 5].

<sup>10</sup> Report, *supra* note 1 at Section 1.0, para 5.

<sup>11</sup> Report, *supra* note 1 at Appendix B, Schedules “B” and “T”.

<sup>12</sup> *Re Contech Enterprises Inc*, 2015 BCSC 129 at para 32 [TAB 6]; *Re Soccer Express Trading Corp*, 2020 BCSC 749 [Soccer Express] at paras 29-30, 60, 62 [TAB 7]; *Re Comark Inc*, 2015 ONSC 2010 at para 5 [TAB 8].

<sup>13</sup> *Soccer Express*, *supra* note 12 at para 67 [TAB 7]; *Re Prizm Income Fund*, 2011 ONSC 2061 at paras 31-34 [TAB 9].

<sup>14</sup> *Air Canada*, *supra* note 7 at para 3 [TAB 4].

<sup>15</sup> *Atis Group*, *supra* note 6 at para 19 [TAB 3].

15. In this case, there is no evidence presented as to why the proposed “Critical Suppliers” are truly critical and thus deserving of preferential treatment over Genesis’ other unsecured creditors, including Convergent.

***Payment of Pre-Filing Debts Should be Minimized***

16. Convergent acknowledges that the Courts have general jurisdiction to permit the payment of pre-filing debts to suppliers deemed critical in appropriate circumstances. The Courts have established a number of factors to consider in determining whether to authorize such payments, including the effect on a debtor’s ongoing operations and ability to restructure if unable to make pre-filing payments to critical suppliers.<sup>16</sup>
17. Multiple decisions have emphasized that the ordering of such payments should be minimal and exceptional, as they amount to a preference benefitting certain creditors over others.<sup>17</sup>
18. There is no evidence in this case that the “Critical Suppliers” are unwilling or unable to continue to provide goods and services to Genesis absent payment in full of their pre-filing debts.<sup>18</sup> The exceptional circumstances required for critical supplier designations are simply not present.

***Payment of Pre-Filing Debts Amounts to Unequal Treatment to Other Unsecured Creditors***

19. Pre-filing debt payments to certain creditors over others constitutes a “form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system.”<sup>19</sup>
20. Where such preferential payments are allowed by the Court and approved by a Monitor/Trustee, they are done so on the basis that allowing them stands to benefit *all stakeholders* down the road by fostering the development of a successful reorganization.

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<sup>16</sup> *Re Cinram International Inc.*, 2012 ONSC 3767 at para 68 [TAB 10].

<sup>17</sup> *Re Toys “R” Us (Canada) Ltd*, 2017 ONSC 5571 [Toys R Us] at para 9 [TAB 11]; *Atis Group*, *supra* note 6 at para 27 [TAB 3]; *Re EarthFirst Canada Inc*, 2009 ABQB 78 at paras 7-9 [TAB 12]; *Air Canada*, *supra* note 7 at paras 3, 9 [TAB 4].

<sup>18</sup> *Re Northstar Aerospace Inc*, 2012 ONSC 4546 at paras 7-9, 14-15 [TAB 13]; *Atis Group*, *supra* note 6 at para 30 [TAB 3].

<sup>19</sup> *Toys R Us*, *supra* note 17 at para 9 [TAB 11]. See also *Soccer Express*, *supra* note 12 at para 84 [TAB 7].

21. The Applicant's proposal in this case to have part of the SPA consideration allocated solely to 88 "Critical Suppliers", without any evidence as to their critical nature or the necessity of satisfying pre-filing debts in full, prejudices Convergent and many other unsecured creditors. The proposal amounts to a clear preference in favour of creditors which the new entity hopes to maintain business relationships with, while Convergent and others in the same class as the "Critical Suppliers" are left with nothing.

**V. RELIEF REQUESTED**

22. Accordingly, Convergent respectfully submits that the satisfaction in full of the "Critical Suppliers'" pre-filing debt has the effect of preferring those creditors to the detriment of Convergent and the other unsecured creditors of Genesis. Cortland has not established that the 88 suppliers at issue are "critical" and that it is necessary to have their pre-filing debt claims satisfied in full in preference to the other unsecured creditors.

23. Unlike in debtor-led reorganizations under the CCAA or BIA proposal provisions, Convergent and other stakeholders will receive no potential benefit, but only deprivation, from the "Critical Suppliers" being given special treatment, as proposed.

24. Convergent submits that the \$1.7 million set aside in the SPA as consideration for the designated "Critical Suppliers" should instead be allocated to all unsecured creditors on a *pro rata* basis, consistent with general insolvency principles regarding equal treatment of creditors.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of September, 2022.

**BORDEN LADNER GERVAIS LLP**

Per: 

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Robyn Gurofsky / Myles Fish  
Counsel for Convergent Technologies Ltd.

## TABLE OF AUTHORITIES

<b><u>TAB</u></b>	<b><u>AUTHORITY</u></b>
<b>1.</b>	<i>Companies' Creditors Arrangement Act</i> , <a href="#">RSC 1985, c C-36</a> .
<b>2.</b>	<i>1732427 Ontario Inc v 1787930 Ontario Inc</i> , <a href="#">2019 ONCA 947</a> .
<b>3.</b>	<i>Arrangement relatif à Atis Group Inc</i> , <a href="#">2021 QCCS 744</a> .
<b>4.</b>	<i>Re Air Canada</i> , <a href="#">2003 CanLII 64280 ( Ont Sup Ct J)</a> , 47 CBR (4th) 163.
<b>5.</b>	Steven D. Dvorak & Helen M.E. Sevenoaks, "Section 11.4 CCAA and Beyond: A "Critical" Look at Critical Supplier Orders and the Payment of Pre-Filing Claims" in Janis P Sarra, ed, 2012 Ann Rev Insolv L 9 (Toronto: Carswell, 2013).
<b>6.</b>	<i>Re Contech Enterprises Inc</i> , <a href="#">2015 BCSC 129</a> .
<b>7.</b>	<i>Re Soccer Express Trading Corp</i> , <a href="#">2020 BCSC 749</a> .
<b>8.</b>	<i>Re Comark Inc</i> , 2015 ONSC 2010.
<b>9.</b>	<i>Re Prizm Income Fund</i> , <a href="#">2011 ONSC 2061</a> .
<b>10.</b>	<i>Re Cinram International Inc.</i> , <a href="#">2012 ONSC 3767</a> .
<b>11.</b>	<i>Re Toys "R" Us (Canada) Ltd</i> , <a href="#">2017 ONSC 5571</a> .
<b>12.</b>	<i>Re EarthFirst Canada Inc</i> , <a href="#">2009 ABQB 78</a> .
<b>13.</b>	<i>Re Northstar Aerospace Inc</i> , <a href="#">2012 ONSC 4546</a> .