D-1-2238

District of Ontario
Division No. 9 - Toronto
Court File No.: BK-24-03051650-0031
Estate File No.: 31-3051650

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
ORGANIC GARAGE (CANADA) LTD.

FACTUM OF THE APPELLANT

(Returnable November 21, 2024)

November 8, 2024

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PART I - OVERVIEW

1. This hearing concerns two appeals. The first is from certain decisions made by the Official Receiver during the first meeting of creditors of the bankrupt. The decisions clearly violated the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***"). The OR seems to understand this, as it re-convened the first meeting, over the objections of the appellant, during the pendency of this appeal. In law, the re-convened meeting, and everything that occurred within it, is a nullity.

2. The second is from the disallowance of the appellant's proof of claim by the trustee in bankruptcy. For years, the relevant debts were recorded as liabilities in the books and records and tax returns of the bankrupt. For years, they were recorded as assets in the books and records and tax returns of the appellant. The former chief financial officer of the bankrupt testified under oath that the sums were owed to the appellant by the bankrupt. The trustee will not say outright that these books, records and tax returns were incorrect, or that the former CFO is lying or mistaken. Instead, the trustee has taken the approach that because all its questions cannot be answered by those books, records, and tax returns, the relevant debts must not exist. This is a legal error, being the application of an unlawfully high standard to a proof of claim, and the disallowance should be set aside.

PART II – THE FACTS

The Nature of the Hearing

3. Specifically, the appeals are as follows.

    1. From decisions made by Emily Beckerman, Official Receiver, Office of the Superintendent of Bankruptcy (the "**OR**"), made during the first meeting of creditors of Organic Garage (Canada) Ltd. (the "**Bankrupt**") on June 6, 2024, at which the OR was the Chairperson, (the "**First Meeting**").

2. From the October 1, 2024 disallowance of the appellant's unsecured claim in the within bankruptcy proceeding (the "**Disallowance**") by KPMG Inc. in its capacity as Trustee in Bankruptcy (the "**Trustee**") of the estate of the Bankrupt.

The Insolvencies

4. Oragin Foods Inc., previously known as Organic Garage Ltd., ("**Oragin**") is the sole shareholder of the Bankrupt. Oragin is a holding company. The Bankrupt was the entity which carried on business, as a retailer of organic foodstuffs.[1]

5. On November 14, 2023, an Origin creditor named Tobias Ihde ("**Ihde**") applied for a bankruptcy order in respect of Oragin. Oragin filed a Notice of Dispute.[2]

6. On March 5, 2024, the Bankrupt, together with its wholly-owned subsidiaries, (2412383 Ontario Inc., 2347018 Ontario Inc., 2507158 Ontario Inc., and 2581751 Ontario Inc., which held the leases on the retail stores), filed Notices of Intent to File a Proposal.[3] The Bankrupt was deemed to have assigned into bankruptcy in May 2024.[4]

The Inter-Company Debt is Revealed

7. During the proposal proceeding, the former officer, director and CEO of Oragin and the

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[1] Affidavit of Allan Rutman affirmed October 15, 2024 (the "**Rutman Affidavit**"), Tab 3 in the Motion Record, Vol. I, at page 2, paragraph 3, (Caselines A1107), and Exhibit "A" at pages 5, (Caselines A1117) and 9-11, (Caselines A1121-A1122)

[2] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 2, paragraphs 4-5, (Caselines A1107) and Exhibits "B" (Caselines A1159) and "C" (Caselines A1192)

[3] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 2, paragraph 6, (Caselines A1107), and Exhibit "D" (Caselines A1194)

[4] First Report KPMG Inc. in its capacity as Trustee in Bankruptcy dated November 1, 2024, Tab 2 in the Responding Motion Record, (the "**Report**") at page 1, paragraph 6. The appointment of the Trustee was confirmed during the re-convened first meeting of creditors, and so should not be effective, but this factum will assume that the Trustee occupies its position legitimately.

Bankrupt, Matt Lurie ("**Lurie**"), was cross-examined on his affidavit dated March 8, 2024 (the "**Lurie Affidavit**"). In that cross-examination, (the "**Lurie Examination**"), Lurie was asked about an entry in the Bankrupt's 2023 financial statement which said "*Due to the related parties 6.8 million dollars*". His response was "*I'm not aware of what that number comprises, you would have to ask the auditor or CFO*". When asked who the related parties were, he answered "*I'm not clear, you would have to ask the auditor or CFO*".[5] Lurie identified the "*CFO*" (a former chief financial officer), as Nelson Lamb ("**Lamb**").[6] KPMG Inc., the proposal trustee, had not examined Lamb under oath.[7]

8. Oragin was adjudged bankrupt by the Honourable Justice Wilton-Seigel on March 25, 2024, the first day of a scheduled two-day trial of a disputed bankruptcy application. Despite having filed a notice of dispute, Oragin told Wilton-Seigel J. at the commencement of the hearing that it would not defend the bankruptcy application. Wilton-Seigel J. appointed Zeifman Partners Inc., ("**Zeifman**"), trustee in bankruptcy of Oragin Foods Inc.[8] (Zeifman in its capacity as trustee of the bankruptcy estate of Oragin is hereinafter the "**Creditor"**).

9. The Creditor instructed its counsel to examine Lamb under oath pursuant to section 163(1) of the *BIA* (the "**Lamb Examination**").[9]

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[5] Transcript of the Cross-Examination of Matt Lurie on his affidavit sworn March 8, 2024 taken on March 19, 2024 (the "**Lurie Transcript**"), Exhibit "F" to the Rutman Affidavit, Motion Record, Vol I, at pages 55-56, Q. 226-228 (Caselines A1280-A1281)
[6] Lurie Transcript, Exhibit "F" to the Rutman Affidavit, Motion Record, Tab I, at page 90, Q. 346 (Caselines A1315)
[7] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 3, paragraph 8 (Caselines A1108)
[8] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 3, paragraphs 9-10, (Caselines A1108), Exhibits "G" (Caselines A1408) and "H" (Caselines A1413)
[9] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 3, paragraph 11 (Caselines A1108)

10. During that examination, Lamb testified that Oragin was the related party referred to in the Bankrupt's balance sheet.[10] He testified the Oragin had issued debentures, but that the proceeds from those debentures had gone directly from the debenture holders (arm's-length parties) to the Bankrupt, (rather than to Oragin), creating a "*due to*" Oragin entry in the Bankrupt's accounts.[11] (This is hereinafter the "**Debenture Loan**").

11. Lamb undertook to determine exactly how much the Bankrupt owed to Oragin. He answered that undertaking by stating that the indebtedness owed by the Bankrupt to Oragin totaled $11.1 million.[12]

The Underlying Transactions

12. In 2018, Oragin (under its previous name, Organic Garage Ltd.) had borrowed $3 million (the "**BDC Loan**") from the Business Development Bank of Canada ("**BDC**"). The loan was secured by all Oragin's assets, including the shares of its wholly-owned subsidiary, the Bankrupt, and was guaranteed by the Bankrupt, the operating entity.[13] The proceeds of the Loan went directly from BDC to the Bankrupt. During the Lurie Examination, Lurie testified that the BDC Loan was spent on "*things related to the Leaside location [and it] could have been used for general operating purposes…*"[14] He suggested that Lamb, the former CFO, be asked about the use of the funds.[15]

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[10] Transcript of the Examination of Nelson Lamb under section 163(1) of the *BIA* taken April 15, 2024, (the "**Lamb Transcript**"), Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, at pages 45-46, Q. 190-193 (Caselines A1461-A1462)
[11] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, pages 30-32, Q. 126-128 (Caselines A1446-A1447)
[12] Rutman Affidavit, Tab 3 in the Motion Record, Vol. II, at Exhibit "J" (Caselines A1484)
[13] Report, Tab 2 in the Responding Motion Record, at paragraph 20 and Appendix "D", page 1
[14] Lurie Transcript, Exhibit "F" to the Rutman Affidavit, Motion Record, Tab I, at pages 16-17, Q. 71 (Caselines A1241-1242)
[15] Lurie Transcript, Exhibit "F" to the Rutman Affidavit, Motion Record, Tab I, at page 16, Q. 70 (Caselines A1241)

Lamb testified that the money had been used "*to do improvements on the stores*", to build a fourth location, and in the Bankrupt's operations.[16] He confirmed that "*the assets in the stores, the leasehold improvements, the equipment, the inventory, they are all owned by [the Bankrupt]*."[17]

13. In short, Oragin had obtained the BDC Loan, and had advanced those funds as a loan to the Bankrupt, the operating entity. The Bankrupt had then spent the funds on leasehold improvements and general operations. In 2019, as described by Lamb, Oragin had issued debentures to raise funds which were then used to repay BDC. The funds were paid directly to the Bankrupt, and by the Bankrupt to BDC. The Bankrupt was thereby relieved of its guarantee of the indebtedness owed to BDC. The transaction was recorded in the books of Oragin and the Bankrupt as a loan (Lamb's "*due to*") by Oragin to the Bankrupt (on which much more below).[18]

14. The $6.8 million "*due to*" also included other, smaller, loans to the Bankrupt from Oragin, made from 2016 forward.[19] In fact, but for loans from Oragin, the Bankrupt wouldn't have had physical stores or indeed a business enterprise, since it never raised money from another source.[20]

The Creditor's Proof of Claim

15. The Creditor conducted a review of Oragin's records and submitted a proof of claim in the bankruptcy of the Bankrupt in the amount of $6,760,280.89 (the "**Proof of Claim**"), (i.e.

[16] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, pages 48-49, Q. 203 (Caselines A1464-A1465)
[17] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, page 49, Q. 205 (Caselines A1465)
[18] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, pages 30-32, Q. 126-128 (Caselines A1446-1447)
[19] Report, Tab 2 in the Responding Motion Record, at paragraphs 26-28 and 35-36
[20] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, page 47, Q. 196-197 (Caselines A1463)

considerably less than Lamb's total). Included with the Proof of Claim were documents from the books and records of Oragin and the Bankrupt.[21] (In the following, the term "**Loans**" is a reference to the $6,760,280.89 claimed in the Proof of Claim which was, as explained below, recorded in the relevant books and records as an inter-company payable or loan by Oragin to the Bankrupt.)

The First Meeting of Creditors

16. The First Meeting of Creditors of the Bankrupt took place on June 6, 2024. At the encouragement of the OR, the Creditor appealed from certain of the decisions made by the OR during that meeting.[22] Notwithstanding the pending appeal, and over the objections of the Creditor,[23] the OR then held a "Re-Convened First Meeting of Creditors" (the "**Re-Convened Meeting**") on July 10, 2024. At that meeting, the Creditor took the position that the meeting could not proceed due to the pending appeal.[24]

The Disallowance

17. On August 19, 2024, the Trustee wrote to the Creditor *"to request additional information/clarification" with respect to the Proof of Claim".*[25]

18. On September 11, 2024, Lurie, the former principal of both Oragin and the Bankrupt, was

[21] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 4, paragraph 14 (Caselines A1109) and Exhibit "K" (Caselines A1488)
[22] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 5, paragraphs 15-16 (Caselines A1110) and Exhibit "L" (Caselines A1566-A1567)
[23] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 5, paragraph 16 (Caselines A1110) and Exhibit "M" (Caselines A1571)
[24] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 5, paragraph 16 (Caselines A1110) and Exhibit "N" (Caselines A577-A1578)
[25] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 5, paragraph 17 (Caselines A1110) and Exhibit "O" (Caselines A1589)

examined by the Official Receiver.[26]

19. On September 19, 2024, the Creditor provided detailed answers to the Trustee's questions, supplemented by further documentation, including (i) the audited Consolidated Financial Statements and workbooks for Oragin for the years ended January 31, 2022 and 2021, which had been received from the former auditor, Smythe LLP and the former CFO Lamb, and (ii) the Balance Sheet for the Bankrupt as at January 31, 2024.[27]

20. On October 1, 2024, the Trustee sent the Creditor a letter in which the Trustee stated that it had "*disallowed your unsecured claim (the "Claim") in the amount of $6,760,280.89 in full…*" (the "**Disallowance**").[28] The Creditor has appealed the Disallowance.

PART III – THE ISSUES AND THE LAW

21. The issues before this Honourable Court are as follows.

1. Was the Trustee correct to disallow the Proof of Claim?

2. Was the OR correct to:

   (a) object to the Proof of Claim; and
   (b) deny the Creditor a vote on matters at the Meeting?

3. Was the Re-Convened Meeting a nullity (or alternatively, should it be entirely ignored by the Court)?

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[26] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 6, paragraph 19 (Caselines A1111) and Exhibit "Q" (Caselines A2430)
[27] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 5, paragraph 18 (Caselines A1110) and Exhibit "P" (Caselines A1592)
[28] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at page 6, paragraph 20 (Caselines A1111) and Exhibit "R" (Caselines A2446)

ISSUE ONE: THE DISALLOWANCE

The Standard of Review

22. After receipt of the Proof of Claim, the Trustee was obliged to review it in accordance with the following statement of the law.

> *... The test to be applied when examining proofs of claim has been described as follows:*
>
> > *In deciding the validity of a claim, certainty is not the test.* ***If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted****.*[29]

23. The standard of review for a disallowance of a proof of claim is correctness.[30]

24. The Trustee's decision is incorrect: it is contrary to the law. The Loans claimed in the Proof of Claim were annually recorded in the books and records of Oragin *and* the Bankrupt. The most important of those Loans were acknowledged, under oath, by the Bankrupt's former CFO, Lamb, and the Bankrupt's former principal, Lurie. There is no plausible basis for the Trustee's position that the debt arising from the Loans does not exist.

The Error

25. As detailed below, the Trustee's basic approach, in both the Disallowance and its later First Report to the Court dated November 1, 2024, (again, the "**Report**"), is to repeatedly assert that the Loans recorded, year over year, in the books, records and tax returns of Oragin and the Bankrupt have not been adequately *explained* in those books and records: there are no director's

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[29] *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*, 2010 SKQB 182, at paragraphs 46-47, emphasis added and citations omitted, cited on this point in *Summit Glen Waterloo/2000 Developments Inc., Re*, 2016 ONCA 405, at paragraphs 28-29

[30] *Galaxy Sports Inc., Re*, 2004 BCCA 284, at paragraph 39; see also *Charlestown Residential School, Re,* 2010 ONSC 4099, at paragraph 17, and *Oil Lift Technology Inc. v Deloitte & Touche Inc.*, 2012 ABQB 357 at paragraphs 16-17, cited in *Houlden & Morawetz* at § 8:80 Appeals from Disallowance of Claims by the Trustee.

resolutions, executed loan agreements, schedules of repayment, notes in the journal entries, and so forth. One criteria in an unclear international accounting standard, has not, in the retrospective opinion of the Trustee, been complied with! The Trustee never cites extrinsic evidence casting doubt on the legitimacy of the Loans; there is none. Instead, the Trustee treats *the absence of explanations satisfactory to itself* as conclusive evidence that the Loans recorded, year over year, in the books, records and tax returns of Oragin and the Bankrupt *did not exist*.

26. The entire argument is legally incorrect. Again, the law is "*if the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted.*" "*Reasonable*", "*relevant*" and "*probative*", not *"indisputable*", "*explicitly on point*", and "*beyond all doubt*", which appear to be the standards applied by the Trustee in this case.

27. The following speaks to the reasons given by the Trustee in the Disallowance, and then the Report, in the order in which they were given.

The Disallowance

Reasons One and Two

> *1. Oragin Foods Inc. ("Oragin") asserts that the Company's financial records and tax returns reflect a debt obligation owing by the Company to Oragin in the amount of $6,760,280.89 (the "Alleged Loans");*
>
> *2. The documentation provided in Schedule "A" to the Claim, and the subsequent information provided by ZPI on September 19, 2024 (collectively, the "Claim Documentation"),* ***does not support the existence of the Alleged Loans in the amount of $6,760,280.89, or at all;***[31]

[31] Rutman Affidavit, Motion Record, Vol. III, at Exhibit "R", page 1, (Caselines A446), emphasis added

28. This is the real substance of the disallowance: the Trustee claims not to have seen evidence that the Loans from Oragin to the Bankrupt existed. The Trustee has therefore disregarded the following.

a. Oragin's Canada Revenue Agency ("**CRA**") "View Return – Initial Assessment" document for the tax period ending January 31, 2023.[32]

b. The Bankrupt's CRA "View Return – Initial Assessment" document for the tax period ending January 31, 2023.[33]

These tax returns demonstrate that both Oragin and the Bankrupt (i.e. creditor and debtor) recorded the Loans as a "*loan*" or payable in their books and records and reported its existence, as such, to the Government of Canada.

- Oragin's tax return: among the assets listed in Schedule 100 – Balance Sheet Information are:

  i. at Line 2241, ("*Due from/investment in Canadian related parties*") the sum of $8,957,000;

  ii. at Line 2248 ("*Loans/advances to foreign related corporations*") the sum of $8,229,585.[34]

- The Bankrupt's tax return: among the liabilities listed in Schedule 100 – Balance Sheet Information is, at Line 2860 ("*Due to related parties*"), the sum of $6,865,733.[35]

[32] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1491)
[33] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1514)
[34] Rutman Affidavit, Vol. II, at Exhibit "K", page 12/23 of the return (Caselines A1502)
[35] Rutman Affidavit, Vol. II, at Exhibit "K", page 13/34 of the return (Caselines A1526)

c. The balance sheet of the Bankrupt as at January 31, 2024,[36] which showed, on page 5, in the *"Liabilities & Equity" section:*

i. a current liability of $2,917,423.11, respecting a "*Loan*" from Oragin (under its previous name, Organic Garage Ltd.);

ii. a long-term liability of $3,342,857.78 respecting a "*Loan*" from Oragin (under its previous name); and

iii. a long-term liability of $500,000 respecting a "*Note Payable*" due to Oragin (under its previous name).[37]

(The aggregate of (i)-(iii) is $6,760,280.89, the amount in the Proof of Claim)

d. The General Ledger of Oragin (under its previous name) for the period ending Jan 31, 2019, which showed as assets of the company:

i. a convertible debenture from the Bankrupt in the amount of $2,917,423.11;

ii. a loan receivable from the Bankrupt in the amount of $3,342,857.78; and

iii. a note receivable from the Bankrupt in the amount of $500,000.[38]

e. The General Ledger of Oragin for period ending Jan 31, 2024, which showed as assets of the company:

i. a "*Loan Rec – Organic Garage (Canada)*" of $3,342,857.78 (at line 1350);

ii. a "*Note Rec – Organic Garage (Canada)*" of $500,000 (at Line 1351); and

[36] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1552)
[37] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1556)
[38] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1549)

iii. a "*Conv Deb – Organic Garage (Canada)*" of $2,917,423.11 (at Line 1850).[39]

f. The General Ledger of the Bankrupt for the period ending Jan 31, 2024, which showed, as liabilities of the company:

i. a "*Loan – Organic Garage Ltd.*" of $3,342,857.78;

ii. a "*Note Rec – Organic Garage Ltd.*" of $500,000;

iii. a "*Loan – Organic Garage Ltd. - CD*" of $2,917,423.11.[40]

g. The audited Consolidated Financial Statements for Oragin for the years ended January 31, 2022 and 2021,[41] (the "**Audited Statements**") together with the auditor's consolidation workbook for those statements (the "**Workbook**").[42]

The auditor was Smythe LLP, ("**Smythe**") and the Audited Statements were filed with Sedar. The Creditor obtained these documents from Lamb, the companies' former CFO. Lamb has advised that these were the last audited statements prepared for the companies.[43]

The Audited Statements, which consolidate the financials of Oragin and the Bankrupt, necessarily eliminate the intercompany balances, including the Loans, but the Workbook contains a detailed breakup analysis which showcases those intercompany balances.[44] Specifically:

- At Workbook Tab TBPUBCO:

[39] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1549); the complete GL is Exhibit "P(7)" (Caselines A1705)
[40] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1551); the complete GL is Exhibit "P(8)" (Caselines A1716)
[41] Rutman Affidavit, Vol. II, at Exhibit "P(2)" (Caselines A1611)
[42] Rutman Affidavit, Vol. II, at Exhibit "P(2)" (Caselines A1616)
[43] Rutman Affidavit, Vol. II, at Exhibit "P(3)" (Caselines A1635)
[44] Rutman Affidavit, Vol. II, at Exhibit "P(2)" (Caselines A1616)

i. Row 18 (Line 1350): a *"Loan Rec – Organic Garage (Canada)*" of $4,034,915.06;

ii. Row 19 (Line 1351): a "*Note Rec – Organic Garage (Canada)*" of $500,000; and

iii. Row 63 (Line 1850): a "*Conv Deb – Organic Garage (Canada)*" of $2,917,423.11.[45]

- At Workbook Tab TBOPCO:

i. Row 191: a "*Loan – Organic Garage Ltd. – CD*" of $2,917,423.11;

ii. Row 216: a "*Loan – Organic Garage Ltd*" of 4,034,915.06; and

iii. Row 218: a "*Note Payable – OrganicGarageLtd*" of 500,000.[46]

All the above-mentioned entries are consistent in their language and content with those in the GLs described above.

h. The consolidation workbook that was provided by the companies' management to Smythe in advance of an anticipated 2023 year-end audit, together with a Smythe "leadsheet" in which Smythe notes that the amounts eliminate upon consolidation. The Creditor received these documents directly from Smythe.[47]

Specifically, Oragin's Sheet for Related Parties includes the following entries:

i. (Line 2013): OPCO Loan-Organic Garage Ltd. - CD (2,917,423.11);

ii. (Line 2018): OPCO Loan-Organic Garage Ltd. (3,489,585.21);

iii. (Line 2019): Note payable- OrganicGarageLtd (500,000.00);

[45] Rutman Affidavit, Vol. II, at Exhibit "P(2)" (Caselines A1626)
[46] Rutman Affidavit, Vol. II, at Exhibit "P(2)" (Caselines A1621)
[47] Rutman Affidavit, Vol. II, at Exhibit "P(5)" (Caselines A1690)

iv. (Line 1350): PUBCO Loan Rec-Organic Garage (Canada) (3,489,585.21);

v. (Line 1351): PUBCO Note Rec – Organic Garage (Canada) (500,000); and

vi. (Line1850): PUBCO Conv Deb-Organic Garage (Canada) (2,917,423.11).[48]

The Excel workbook contains a detailed breakup analysis which showcases those intercompany balances. Specifically:

- At workbook Tab TBPUBCO:

  i. Row 18 (Line 1350): a "*Loan Rec – Organic Garage (Canada)*" of $3,489,585.21;

  ii. Row 19 (Line 1351): a "*Note Rec – Organic Garage (Canada)*" of $500,000; and

  iii. Row 63 (Line 1850): a "*Conv Deb – Organic Garage (Canada)*" of $2,917,423.11.[49]

- At workbook Tab TBOPCO:

  i. Row 191: a "*Loan – Organic Garage Ltd. – CD*" of $2,917,423.11;

  ii. Row 217: a "*Loan – Organic Garage Ltd."* of 3,489,585.21; and

  iii. Row 219: a "*Note Payable – OrganicGarageLtd*" of 500,000.[50]

j. The sworn testimony of Lamb, the former CFO of Oragin and the Bankrupt, which was (i) that the proceeds of the debentures had been paid directly to the Bankrupt (rather

[48] Rutman Affidavit, Vol. II, at Exhibit "P(5)" (Caselines A1690)
[49] Rutman Affidavit, Vol. II, at Exhibit "P(4)" (Caselines A1684)
[50] Rutman Affidavit, Vol. II, at Exhibit "P(5)" (Caselines A1680)

than to Oragin, and then to the Bankrupt), because Oragin did not have a bank account, creating a debt owed by the Bankrupt to Oragin,[51] and (ii) that the total debt owed by the Bankrupt to Oragin was $11.1 million.[52]

k. The sworn testimony of Lurie, the former principal of both Oragin and the Bankrupt, during his examination before the Official Receiver on September 11, 2024, which was in part as follows.

> *43. What were the proceeds from the convertible debentures issued by Oragin Foods used for?*
>
> *Answer: The entirety of the proceeds were used to repay the BDC loan. I don't remember the exact amount but approximately $3 million.*
>
> *44. Why did Organic Garage, and not Oragin Foods, receive the proceeds from the convertible debentures in its bank accounts?*
>
> *Answer: At the time, Oragin Foods did not have a bank account.*[53]

l. A document filed by Oragin with its regulator (the Annual Information Form for the year ended January 31, 2022, (the "**Annual Information Form**")), in which the debenture transaction is described (on which more below).[54]

Reasons Three, Four, Six and Seven

> *3. There are no loan documents evidencing the Alleged Loans;*
>
> *4. There is no agreed means by which the Company was to repay the Alleged Loans;*
> *[…]*
> *6. There is no fixed maturity date or payment schedule associated with the Alleged Loans;*

[51] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, Motion Record, Vol II, at pages 45-46, Q. 190-193 (Caselines A1461-A1462)
[52] Rutman Affidavit, Tab 3 in the Motion Record, Vol. II, at Exhibit "J" (Caselines A1484)
[53] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "Q" (Caselines A2438)
[54] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at Exhibit "A" (Caselines A1113)

7. *There is no fixed rate of interest or interest payments associated with the Alleged Loans;*[55]

29. This amounts to a single objection: there is no written agreement setting out the terms and method of repayment, as there would be in a transaction between a bank and a consumer. The objection elevates formality over facts and, when used as justification for denying the existence of the Loans, is contrary to the law.

30. Formality: there can be no doubt, given the testimony of Lamb and Lurie, the tax returns filed by Oragin and the Bankrupt, and the multi-year accounting treatment of the Loan in the books and records of both Oragin and the Bankrupt (including the working papers of the auditor), that the Loans exist, and that the debt was incurred by the Bankrupt. That the Loans were not papered carefully (or the paper is inaccessible to the lender) is immaterial to *the existence of the debt*, which was the matter before the Trustee.

31. The law has long been clear that a loan that "*has no terms and no date for repayment…is a demand obligation*".[56] Demand obligations, it need not be said, routinely form the basis for accepted proofs of claim in Canadian bankruptcies. A loan without written terms does not cease to be a loan.

Reason Five

5. *There is no evidence of regular repayments made towards the Alleged Loans, reflective of an agreed means of repayment;*[57]

[55] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "R" (Caselines A446)
[56] *Greco v. Frano*, 2015 ONSC 7217 at paragraph 37
[57] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "R", page 1 (Caselines A446)

32. This statement is incorrect in fact. The General Ledgers of the Bankrupt show that it made payments toward the operating expenses of Oragin, and that those transactions were recorded as reductions of the debt owed to Oragin by the Bankrupt. For example, in the Bankrupt's General Ledger as at November 1, 2023, at Rows 6253-6257:

> *Loan-Organic Garage Ltd. [Oragin]* *-3372303.5*
>
> *Bill /11/1/2023 /2112022032/Business Wire Canada/Accounts Payable/8814/-3363489.5*
>
> *Bill/11/30/2023/201151925/TSX Trust Company/Accounts Payable/1030.56/-3362458.9*
>
> *Bill/11/30/2023/Pubco Retainer/ECS Law/Accounts Payable/15000/* *-3347458.9*
>
> *Total Loan – Organic Garage Ltd. [Oragin]* */24844.56/* *-3347458.9*[58]

33. Similar entries can be seen at (for example):

a. Rows 5764-5767 of the Bankrupt's General Ledger as at December 1, 2023;[59] and

b. Rows 6264-6267 of the Bankrupt's General Ledger as at January 1, 2024 (by which time the bill payments had reduced the amount outstanding on the Loan to $3,342,858).[60]

34. There are corresponding entries recording the reduction of the amount outstanding on the Loans in Rows 32-63 of the Oragin's General Ledger for the period ending January 1, 2024.[61]

Reason Eight

> *8. There is no source of repayment of the Alleged Loans aside from the Company's business operations;*[62]

[58] Rutman Affidavit, Vol. II, at Exhibit "P(12)" (Caselines A2127)
[59] Rutman Affidavit, Vol. II, at Exhibit "P(13)" (Caselines A2322)
[60] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "P(8)" (Caselines A1794)
[61] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "P(7)" (Caselines A1705-A1706)
[62] Rutman Affidavit, Motion Record, Vol. III, at Exhibit "R" (Caselines A2447)

35. There is no substance to this objection. Virtually every enterprise in Canada repays its financing with funds derived from its "*business operations*". The anticipated source of the funds used to repay a loan has nothing to do with *existence* of the loan indebtedness.

Reason Nine

> *9. The Company used the majority of the funds characterized as the Alleged Loans to acquire capital assets;*[63]

36. This too is incorrect in fact. As discussed above, both Lamb and Lurie testified that the proceeds from the debentures were used by the Bankrupt to repay the secured lender, BDC. This is, in fact, what was reported to the public and its regulator in Oragin's Annual Information Form of January 31, 2022. That form makes the following statements:

> "***BDC"*** *means Business Development Bank of Canada.*
>
> ***"BDC Loan"*** *means the 18th-month credit facility of up to $3,000,000 issued by BDC to Oragin Foods Inc. [then known as Organic Garage Ltd.] on July 10, 2018,* ***which was thereafter repaid from the net proceeds of the Debenture Offering****.*
> *…*
> *"**Debenture Offering"** means the private placement offering of Debentures as more particularly described in the section entitled "General Development of the Business".*
>
> "***Debentures"*** *means the Debentures issued by Oragin Foods pursuant to the Debenture Offering.*[64]

Reason Ten

> *10. The Alleged Loans have the characteristics of equity injections into the Company;*[65]

[63] Rutman Affidavit, Motion Record, Vol. III, at Exhibit "R" (Caselines A2447)
[64] Rutman Affidavit, Tab 3 in the Motion Record, Vol. I, at Exhibit "A", at pages 4-5 (Caselines A1116-A1117); see also pages 9-11, (Caselines A1121-A1122)
[65] Rutman Affidavit, Motion Record, Vol. III, at Exhibit "R" (Caselines A2447)

37. There is no evidence to support this theory, and the Trustee does not refer to any. *All* the evidence (the books and records of Oragin and the Bankrupt, the testimony of the former CFO and the principal, the auditor's working papers) supports the Creditor's contention that the Loans were loans, rather than equity injections. In the Bankrupt's most recent Balance Sheet, for the period ending January 31, 2024, the sums are categorized as liabilities, and not equity.[66]

Reason Eleven

> *11. Oragin and the Company are related companies, not acting at arm's length:*
>
> *(a) The Company is a wholly-owned subsidiary of Oragin; and*
>
> *(b) At all material times, Matt Lurie was the sole director and officer of the Company and a director, president and CEO of Oragin.*[67]

38. At the most basic level, *even if it is assumed that the Trustee is correct on this point*, the point is irrelevant. A non-arm's-length relationship does not preclude the existence of a loan, since there is no legal or practical reason a company cannot make a loan to a related company.

39. The Creditor agrees when the Loans were made, Oragin and the Bankrupt were "*related*" to one another, as that term is defined in section 4(2)(b)(i) of the *BIA*, because the companies were each then controlled by Lurie. However, Oragin and the Bankrupt were acting "*at arm's length*" during the transactions that resulted in the Loans.

[66] Rutman Affidavit, Vol. II, at Exhibit "K" (Caselines A1556)
[67] Rutman Affidavit, Motion Record, Vol. III, at Exhibit "R" (Caselines A2447)

40. There is no definition of "*arm's length*" in the *BIA*. Section 4(5) of the *BIA* makes clear that "*related*" and "*non-arm's length*" are not synonyms, as it states that related persons "*are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.*"[68] This means that there is a presumption that related parties do not act at arm's length, but that that presumption is rebuttable.[69] The Creditor can discharge this onus.

41. In *McLarty v. R.* 2008 SCC 26 (S.C.C.), ("***McLarty***"), Rothstein J discussed the term "*not dealing at arm's length*" in s 69 of the *Income Tax Act* ("***ITA***"). Justice Rothstein explained that the general concern in non-arm's length transactions is that "*there is no assurance that the transaction 'will reflect ordinary commercial dealing between parties acting in their separate interests*'".[70] Thus, the *ITA* provisions dealing with non-arm's length parties are "*intended to preclude artificial transactions from conferring tax benefits on one or more of the parties*".[71] Rothstein J further held that a court must consider all the relevant circumstances to determine if the parties in a transaction are at arm's length. The policy analysis articulated in *McLarty* is echoed in *Houlden & Morawetz* § 1:66, *Related Persons*:

> *[a] transaction is not at arm's length where one of the co-contracting parties is in a situation where he or she may exercise control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is by reason of influence in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration that is substantially different than adequate, normal or fair market value, the transaction is not at arm's length [citations omitted].*[72]

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[68] Emphasis added

[69] See also *Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada*, 4th Edition ("***Houlden & Morawetz***") § 6:39 to the same effect.

[70] *McLarty*, at para 43, citing *Swiss Bank Corp. v. Minister of National Revenue*, [1974] S.C.R. 1144 (S.C.C.), at 1152

[71] *McLarty*, at para 43

[72] See also *FT ENE Canada Inc, (Re)*, 2019 ONSC 5793, at paragraphs 27-28

42. Applying these policy considerations to this case: the Loans did not pervert the "*ordinary rule of supply and demand*". The evidence is to the contrary. The Bankrupt needed money to fund leasehold improvements and general operations, and then it needed to pay its senior secured lender. Funds flowed from third-party lenders (first BDC, then the debenture-holders) to Oragin, and from Oragin to the Bankrupt. In consideration for the loans, Oragin gave BDC security and, latterly, the third-party creditors got debentures. Similarly, in consideration for the Loans from Oragin, the Bankrupt gave Oragin a convertible debenture (there are multiple references to a "Conv Deb" in favour of Origin in the material discussed above), and consistently recorded a loan liability to Origin in its books, over many years. The transaction was not performed to benefit the party with "*influence*" over the other party; quite the opposite. The money flowed from the parent corporation to the wholly-owned subsidiary, (which of course would be unable to coerce its owner), rather than in the other direction. There is nothing "*artificial*" about the transaction, and no evidence that it was anything other than what the books and tax returns of the Bankrupt and Oragin say it was: a loan, which is to say a debt owed to Oragin by the Bankrupt. To the contrary: the Trustee is attempting to take advantage of Oragin, the Bankrupt's parent company, by using the parent/subsidiary relationship to confer an artificial benefit on the Bankrupt, in the form of a retro-active decision that, the evidence notwithstanding, Oragin gave the Bankrupt $3 million in free money.

43. In a very recent Supreme Court decision, *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, ("***Golden Oaks***"), the majority endorsed the following contextual test for "*at arm's length*".

> *127 Courts generally examine the following criteria in determining whether unrelated persons are dealing at arm's length: (i) whether there was a common mind that directed the bargaining for both parties to a transaction; (ii) whether the parties to a transaction*

were acting in concert without separate interests; and (iii) whether there was de facto control [citations omitted]
[...]
128 [...] I agree with the Court of Appeal that although the trial judge was required to focus on the transactions at issue between Golden Oaks and Mr. Scott, it was appropriate for her to consider these transactions in the overall context of the parties' relationship, including the Ponzi scheme that these transactions facilitated and Mr. Scott's role in that scheme. In McLarty, this Court rejected a "restrictive approach" under which a trial judge could examine only an impugned transaction, but not the parties' relationship at any other time or the facts relating to any other transaction (para. 65). Likewise, here, the trial judge was entitled to consider the totality of the evidence in determining whether parties were dealing at arm's length.

44. With respect to the criteria referred to in *Golden Oaks*:

(i) At the time of the Loans, there was a common mind directing Oragin and the Bankrupt, being Lurie;

(ii) however, Oragin and the Bankrupt *did* have separate interests, in that the Bankrupt wanted to pay BDC, whereas Oragin wanted to be repaid the money it was loaning to the Bankrupt, so that it could redeem the Debentures in accordance with their terms;

(iii) there was both legal and *de facto* control, but not in the manner that the Courts have found troubling *("[w]here one of the co-contracting parties is by reason of influence in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration that is substantially different than adequate"*[73]*).* In this case, the entity with control was *not* the beneficiary in the transactions: the beneficiary was the Bankrupt, a wholly owned subsidiary of Oragin, the benefactor. The benefactor did not *give* the money to its subsidiary: the transaction was booked by both sides as a loan. Thus, there was no perversion of the laws of supply and demand, and no artificiality to the Loans.

[73] *Houlden & Morawetz* § 1:66, *Related Persons*

45. With respect to the Supreme Court's encouragement of the review of "*the parties' relationship at any other time or the facts relating to any other transaction":* at the present time, Oragin's trustee in bankruptcy, the Creditor, has stepped into Oragin's shoes, and the Creditor's interests (to maximize recovery on Oragin's assets) are contrary to those of the Bankrupt (to avoid payment of its largest creditor).

46. In sum, if the relationship between Oragin and the Bankrupt is assessed for the purpose of the loan transaction, the result is "*related but arm's length*". If the relationship is assessed now, for the purpose of voting, the conclusion is the same.

The Trustee's Report to the Court

47. In response to the within appeal, the Trustee filed its Report.[74] The purpose of the Report is to supplement the Disallowance by introducing new "evidence" into the record upon which the Trustee can rely at the hearing, consisting of i) the Trustee's arguments about the evidence provided to it by the Creditor, and ii) bare assertions about matters not in the record, such as the content of the Trustee's conversations with Lurie, or its interpretation of an ambiguous international accounting standard. The following speaks to the new assertions made in the Report, generally in the order in which they were made.

48. (At page 3, paragraph 19): "*The Debentures are liabilities of Oragin and were not guaranteed by Organic Garage.*" This is true, but materially incomplete. The BDC Loan, which the proceeds from the Debentures were used to repay, *was* guaranteed by the Bankrupt, so that

[74] Tab 2 to the Responding Motion Record

repayment released the Bankrupt from a (not merely-hypothetical) $3 million liability. The Oragin News Release respecting the BDC Loan, attached as Appendix "D" to the Report, states on its first page, *"[t]he Loan is secured and guaranteed by the subsidiaries of the Company.*" Oragin's only assets were the subsidiaries, so any execution by BDC would have been directed against those subsidiaries, the Bankrupt primary among them. In reality, BDC was the Bankrupt's secured creditor.

49. (At page 4, paragraph 21): "*As stated in question 44 of the Examination Questionnaire to the examination of Matt Lurie conducted by the Official Receiver…the proceeds were received by Organic Garage, **on behalf of Origin**, as Origin did not have its own bank account…*"[75] Lurie did not use the words "*on behalf of Origin*", or anything like them. His testimony was this.

> *44. Why did Organic Garage, and not Oragin Foods, receive the proceeds from the convertible debentures in its bank accounts?*
>
> *Answer:*
> *At the time, Oragin Foods did not have a bank account.*[76]

50. One of the Trustee's arguments on this appeal, *which was not articulated in the Disallowance*, will apparently be that the BDC Loan represented a debt owed by Oragin, not the Bankrupt, and so the provision of funds to the Bankrupt for the repayment of BDC could not create an obligation owed by the Bankrupt to Oragin.[77] Neither Lurie nor Lamb ever said anything that supports this theory (as set out above, they were clear that the BDC money was provided by Oragin to the Bankrupt for use in its operations), so in the Report the Trustee has misstated Lurie's

[75] Emphasis added
[76] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "Q" (Caselines A2438)
[77] See the Report, Tab 2 in the Responding Motion Record, at paragraph 19

evidence ("*on behalf of Oragin*") to make its argument more plausible. Finally, if this argument had merit, then the Trustee should cause the Bankrupt to turn over to Oragin the $3 million the Bankrupt received "*on behalf of Oragin*."

51. The Trustee materially misstated Lurie's evidence a second and a third time, as follows.

> (Page 6, paragraph 32) *"**As stated** in questions 47 to 52 of the OR Examination, **there were no** contractual agreements between Oragin and Organic Garage, **no** board resolutions indicating the treatment of funds advanced, **and no repayment terms** for the intercompany transactions."*
>
> (Page 8, paragraph 43) *"As previously noted, **Mr. Lurie stated** in the OR Examination **that there were no repayment terms** on either the Current Liability Component or the Long Term Liability Component (citing "Responses 46 and 49")*[78]

52. The Trustee reports Lurie making positive statements ("*there were no repayment terms*") that support the Trustee on the appeal (see Reason Four in the Disallowance, *"[t]here is no agreed means by which the Company was to repay the Alleged Loans"*). Lurie did not make these statements. In answer to questions 47 to 52, Lurie actually said that he *was not aware* of repayment terms, board resolutions, and so forth.[79] Lurie said this within a context in which, *to the Trustee's knowledge*, Lurie had previously referred virtually all inquiries about the Bankrupt's finances to Lamb. No reasonable person could accept Lurie's pleas of ignorance as settling any given issue. Finally, and again, the law is that a loan that "*has no terms and no date for repayment…is a demand obligation*",[80] so the absence of explicit repayment terms simply cannot have the decisive import the Trustee assigns to it.

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[78] Emphasis added
[79] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "Q" (Caselines A2438-A2439)
[80] *Greco v. Frano*, 2015 ONSC 7217 at paragraph 37

53. (At page 5, paragraph 29) "*Unlike the funding through issuance of debt instruments (consistent with typical equity contributions), there is no repayment obligation associated with Oragin's capital raises*". The Trustee does not cite any extrinsic evidence to support this statement: it is a bald assertion. It was also absent from the Disallowance. Most importantly, it is irrelevant. The issue before the Court is not the terms of Oragin's relationship to its shareholders; the issue is *whether the proceeds of the share sales were loaned to the Bankrupt*. The books and records of both Oragin and the Bankrupt show that they were. The Trustee has chosen to talk about something else.

54. (At page 6, paragraphs 30-31):

> *Per International Accounting Standards 32.11, if the financial instrument contains a contractual right to receive cash, then it shall be classified as a receivable […] Although IAS 32.11 does not provide clear guidance for accounting of intercompany transactions, in principle, such accounting follows the contractual agreement and is based on facts/substance rather than the parties' intent. […] One of the criteria that may be considered for classifying a transaction as an intercompany loan is whether there is a repayment schedule or terms mutually agreed between the parties […]*

55. In this passage, the Trustee gives itself permission to "*interpret*" an unclear international accounting standard in a manner amenable to its position on the appeal, by picking "*one of the criteria*" for an intercompany loan and declaring that the Loans can't meet it. This is argument and should not be in a Report to the Court. The argument, which was absent from the Disallowance, is a straw man. That there is often a repayment schedule attending a loan does not mean that all loans have repayment schedules, and therefore does not mean that the absence of a repayment schedule demonstrates the absence of a loan. The Trustee then goes on to "support" the argument by materially misstating Lurie's evidence in paragraph 32, as discussed above.

56. (At page 6, paragraph 34): the Creditor "*notes that repayments have been made by Organic Garage on account of this "Loan" and references various journal entries contained in the general ledger […] showing payments from the Organic Garage bank account for various legal, regulatory and other expenses incurred by Oragin. The Trustee was not satisfied that these transactions constitute repayment of debt obligations by Organic Garage to Oragin.*" The Trustee does not articulate any reasons for its dissatisfaction; the dissatisfaction itself is apparently to be dispositive. Significantly, the Trustee does not mention what else was included in the "*various journal entries*": explicit treatment of those payments as debt reduction:

> ***Loan-Organic Garage Ltd.*** *[Oragin]* ***-3372303.5***
>
> *Bill /11/1/2023 /2112022032/Business Wire Canada/Accounts Payable/8814/-3363489.5*
>
> *Bill/11/30/2023/201151925/TSX Trust Company/Accounts Payable/1030.56/-3362458.9*
>
> *Bill/11/30/2023/Pubco Retainer/ECS Law/Accounts Payable/15000/ -3347458.9*
>
> ***Total Loan – Organic Garage Ltd****. [Oragin]* */24844.56/* ***-3347458.9***[81]

57. (At page 7, paragraph 36) "*The Trustee has reviewed the Company's underlying journal entries related to the Note Payable Component and notes it is related to a single entry dated October 6, 2016 for $500,000. The Trustee has not been able to locate additional details in connection with this entry and no description is included on the journal entry*". This is to say that the debt was recorded in the Bankrupt's books, and the Trustee has no extrinsic evidence suggesting the debt does not exist as the books say it did, but the Trustee has nevertheless decided that the books are false.

[81] Rutman Affidavit, Vol. II, at Exhibit "P(12)" (Caselines A2127), emphasis added

58. (At page 7, paragraph 39) "*Schedule 100 of the Organic Garage return…included balance sheet information which noted a "Due to related parties" liability of $6,865,733 (Line 2860). No creditor name was provided."* The Trustee knows that Lurie was asked about this entry during the Lurie Examination, and that he referred the question to Lamb, who identified the Creditor as Oragin, as described above. Suggesting that there is some mystery about who the debt was owed to is a waste of time.

59. (At page 8, paragraph 41(a)): "*Balance sheet for Organic Garage for the period ending Jan 31, 2024… – this document does not provide any further details regarding the nature of the intercompany transactions".* As set out above, the Balance Sheet records (i) a current liability of $2,917,423.11, respecting a "*Loan*" from Oragin (under its previous name, Organic Garage Ltd.), (ii) a long-term liability of $3,342,857.78 respecting a "*Loan*" from Oragin (under its previous name); and a long-term liability of $500,000 respecting a "*Note Payable*" due to Oragin (under its previous name).[82] To complain that that the Balance Sheet does not "*provide any further details*" is to apply an unlawfully high standard to a Balance Sheet.

60. (At page 8, paragraph 41(b)): "*the workbook tabs that [the Creditor] refers to, "TBPUBCO" and "TBOPCO", follow a clear note that no audit work had been performed on those tabs…[The Creditor] notes that the consolidation workbook was prepared by the company so there would be no third-party comfort over the account balances and/or classification throughout this workbook. As such, the workbook primarily refers back to the above noted trial balances for the Company and provides no further support for the existence of a debt."* Firstly:

[82] Rutman Affidavit, Vol. II, at Exhibit "P(1)" (Caselines A1609)

the note on Oragin workbook tab (TBPUBCO) actually says "*No additional audit procedures* ***considered necessary***",[83] which is very different than "*no audit work had been performed*". Secondly, nowhere in the Disallowance or the Report does the Trustee consider the fact that a company which repeatedly records a large but non-existent debt in its books, records, and tax returns, as the Trustee asserts the Bankrupt did, would be acting, inexplicably, against its own direct self-interest. The Creditor didn't put those entries there: the Bankrupt did. There is *no evidence* that the Bankrupt was not recording a legitimate debt. The Trustee's desire for further explanation of the debt is not evidence.

61. (At page 8, paragraph 43): "*The Trustee understands based on conversations with Matt Lurie, sole director of Organic Garage and former CEO and director of Oragin, that there was never an expectation by Oragin to be repaid any of the advances made to Organic Garage*." Firstly, if the Trustee wants this evidence in the record, it should file an affidavit from Lurie upon which Lurie could be cross-examined. It is improper to put hearsay in a Report to the Court and then attempt to rely upon it for the truth of its content, as the Trustee is doing. Secondly, even if Lurie said this to the Trustee, and even if the hearsay statement is somehow admissible, Lurie's statement should be given no weight. In March, when he was cross-examined, Lurie testified that he didn't know what the "*due to related party*" entry in the Balance Sheet related to, and that he didn't know who the related party was.[84] Those questions he referred to Lamb. Now, the Court is to accept that Lurie can report accurately about the precise terms of transactions he previously claimed ignorance about?

[83] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "P(5)" (Caselines A1690), emphasis added
[84] Rutman Affidavit, Motion Record, Vol I, at pages 55-56, Q. 226-228 (Caselines A1280-A1281)

62. (At page 9, paragraph 44): *"The Trustee notes that the support for the Oragin Claim is largely based on the internal accounting records of Oragin and Organic Garage, which were prepared by the same individual, Mr. Nelson Lamb…Lamb prepared the general ledgers for both Oragin and Organic Garage, and signed off on the tax returns for both entities as well.*" Firstly, Lamb never testified that he prepared the "*internal accounting records*" or "*the general ledgers*" for the companies. The Trustee's citation for these assertions is to Lamb's acknowledgment that he signed the financial statements. Lamb *actually* testified that part of his role was to "***oversee** the accounting operations*".[85] The Trustee has materially misstated Lamb's evidence. Similarly, Lamb testified that he signed the tax returns, but did not prepare them. That was done by Smythe, a third-party firm.[86] Lurie also testified in this fashion.[87] Secondly, Lamb testified that the Debenture Loan created a "*due to*" from the Bankrupt to Oragin. Why would Lamb lie under oath, and permit the fudging of the books, year after year? We know beyond doubt that the proceeds of the Debentures went from Oragin to the Bankrupt. That had to be recorded somehow. The Trustee does not have evidence that the manner in which debtor and creditor recorded that flow of funds in their books was inaccurate. The Trustee is not attempting to make a material point here; by implying that Lamb was incompetent, it is trying to create an atmosphere of uncertainty where there is none.

[85] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, at page 10, Q. 35 (Caselines A1426), emphasis added
[86] Lamb Transcript, Exhibit "I" to the Rutman Affidavit, at page 32. Q. 131 (Caselines A1448)
[87] Rutman Affidavit, Tab 3 in the Motion Record, Vol. III, at Exhibit "Q" (Caselines A2434 and A2437)

63. (At page 9, paragraph 45): *"[I]t appears [that] Lamb was primarily focused on the accounting at the consolidated level and not necessarily the offsetting intercompany transactions between the entities*." This is another groundless suggestion that Lamb was incompetent.

64. For these reasons, the disallowance of the Creditor's Proof of Claim should be set aside, and the Proof of Claim admitted for all purposes.

ISSUE TWO: THE DECISIONS OF THE OR

65. The Creditor seeks an order setting aside the following decisions of the OR, made at the First Meeting:

a. to "*object to the claim of Oragin Foods Inc…in the amount of $6,760,280.89*" (i.e. the Proof of Claim); and

b. that "*Oragin Foods [the Trustee] could not vote because they were a related party and therefore subject to restrictions under sec. 109(6) and Directive 22R*."

66. On questions of law or matters of statutory compliance, the standard of review is correctness. With respect to determinations of factual matters or the exercise of true discretion, the standard of review is reasonableness.[88] The OR's errors were legal.

The First Error: the Unexplained Objection

67. The First Meeting was held on June 6, 2024. The OR was the Chairperson.[89] After satisfying herself that there was a quorum, the OR made her opening comments:

[88] *Galaxy Sports Inc., Re*, 2004 BCCA 284, at paragraph 39

[89] Minutes of the First Meeting were prepared by the office of the OR and delivered on June 7, 2024 (the "**Minutes**"), Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1561)

> *The Chairperson noted that they object [to] the claim of Oragin Foods Inc. (Oragin Foods) in the amount of $6,760,280.89.*[90]

68. The OR then refused to explain this objection, on four occasions.

> *Allan Rutman questioned the objection made by the Chairperson.* ***The Chairperson answered that there is a process to be followed regarding questions and that this question could be asked and answered later in the meeting****. The Chairperson concluded and asked the Trustee [of the Bankrupt] to continue with the Report.*
>
> *Fred Tayar questioned the terms of the objection regarding Oragin Foods' claim. Allan Rutman questioned if he would be allowed to vote.* ***The Chairperson confirmed that these questions could be asked and answered later in the meeting*** *during the voting period. The Trustee [of the Bankrupt] was advised to continue with reading the Report.*[91]
>
> *Fred Tayar asked why the proof of claim was being objected to by the Chairperson.* ***The Chairperson answered that the question would not be answered at this point in the meeting****, as this session was for questions to the Trustee [of the Bankrupt].*[92]
>
> *Question from Michael Shakespear regarding Oragin Food claim. Will their (Oragin) vote be discounted?* ***The chairperson answered that we have not gotten to voting yet.*** *The Chairperson's reiterated that any decision of the Chair may be challenged in court by a creditor. Voting will be discussed later in the meeting.*[93]

69. When the "Voting Period" arrived, the OR did not explain why she had objected to the Proof of Claim. Rather, she explained why the Trustee could not vote at the meeting (on which more below).

70. As a matter of law, the OR's decision to deny the Trustee a vote was distinct from her objection to the Proof of Claim. The fact of the objection could not preclude the Trustee from voting, as the *BIA* makes clear:

> <u>*Chair may admit or reject proof*</u>

[90] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1562)
[91] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1562), emphasis added
[92] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1563), emphasis added
[93] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L", (Caselines A1564), emphasis added

> *108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.*
>
> *Accept as proof*
>
> *(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.*
>
> *In case of doubt*
>
> *(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected,* ***he shall mark the proof as objected to and allow the creditor to vote*** *subject to the vote being declared invalid in the event of the objection being sustained.*[94]

71. As the objection could not preclude voting, the OR's explanation for the denial of voting rights could not serve as a lawful explanation for the objection (on which more below). The result is that the OR objected to the Proof of Claim without any articulated reason for doing so. This was an error in law.

72. There is no lawful reason to object to the Proof of Claim, and this Court should order that it is admitted for voting at all meetings of the creditors of the Bankrupt.

The Second Error: the Denial of Voting Rights

73. The material section of the Minutes is as follows.

> *VOTING PERIOD*
>
> *The Chairperson made note of the proof of claim process and addressed the restriction of related parties to the debtor to voting. The Chairperson also advised that any decision made by the Chairperson could be reviewed by court if a creditor disputed the decision.*
>
> ***The Chairperson is of the opinion that there is a non-arms' length relationship between Oragin Foods as parent of Organic Garage.*** *The additional reasons*

[94] Emphasis added

> *provided, that in the twelve months prior to bankruptcy they had a common director and management in Matt Lurie and their tax filing indicated that they were related.*
>
> *Allan Rutman asked the Chairperson what section of the Bankruptcy and Insolvency Act (the Act) the Chairperson was referring to and did she consider sec. 108(3).**The Chairperson confirmed that she was referring to Section 109(6) and Directive 22R2 and not sec.108(3).***
>
> *The Chairperson states that they were requesting an adjournment of the meeting as the adjournment would permit the creditor to request a court review of **the Chairperson's decision that creditor Oragin Foods could not vote because they were a related party** and therefore subject to restrictions under sec. 109(6) and Directive 22R2.*[95]

74. The denial of the Trustee's right to vote was an error of law. The decision is not supported by either section 109(6) of the *BIA*, or Directive 22R2. Section 109(6) is as follows.

> *Vote of creditors not dealing at arm's length*
>
> *(6) If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.*

75. Section 109(6) presumes (i) that the non-arm's length party is a creditor, and (ii) that that creditor has voted. In this case, the OR has (i) denied that the Trustee is a creditor (by her unexplained objection to the Proof of Claim), and (ii) refused to allow the Trustee to vote at all. By so refusing, the OR acted as if section 109(6) had not been amended in 2009. Before 2009, non-arm's-length parties were barred from voting unless they obtained court approval to vote prior to the meeting. The amended provision allowed non-arm's-length parties to vote at the meeting,

[95] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1566-A1567), emphasis added

ensuring that the meeting was not delayed while the party seeks court permission to vote.[96] The OR appeared to rely upon the pre-2009 procedure when she stated that:

> *they were requesting an adjournment of the meeting as the adjournment would permit the creditor to request a court review of the Chairperson's decision that creditor Oragin Foods could not vote…*[97]

76. By adjourning the meeting, the OR has caused exactly the mischief the 2009 amendment was drafted to prevent.

77. Appendix B of Directive 22R2, similarly, states that a related party may (subject to sections 113(3) and 109(6)) vote on a motion, an ordinary resolution, a special resolution, and (against) a proposal.

78. The OR's denial of the Trustee's right to vote is contrary to the *BIA* and the applicable directive and should be set aside.

ISSUE THREE: THE RECONVENED MEETING IS A NULLITY

79. After adjourning the meeting so that the Creditor's appeal could be heard, the OR declined to execute the forms necessary to schedule a case conference in advance of that hearing. The OR asked the Creditor to withdraw or adjourn the appeal indefinitely, and when the Creditor refused to do so, the OR scheduled the "re-convened" first meeting, over the written objections of counsel for the Creditor.[98]

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[96] *Houlden & Morawetz*, § 6:39. Voting by Restricted Creditors—Restriction on Voting by Non-Arm's Length Creditors

[97] Minutes, Rutman Affidavit, Motion Record, Vol. II, at Exhibit "L" (Caselines A1566-A1567)

[98] Rutman Affidavit, Motion Record, Vol. II, at Exhibit "M", (Caselines A1571-A1572)

80. When the Re-Convened Meeting began,[99] counsel for the Creditor cited a passage from *LeBlanc v. York Catholic District School Board*,[100] in which Justice Blair (as he then was) approved the following statement of the law:

> *After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court . . .* [101]

81. In the same case, Justice Blair approved a complimentary statement, as follows.

> *The rights of an appellant cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service.*[102]

82. Justice Newbould, formerly of the Commercial List, in turn cited this element of *LeBlanc* in *Schreiber v Mulroney*,[103] which concerned actions taken while a motion was pending. The legal result is that the Re-Convened Meeting, and the decisions taken during it, are nullities to be "*ignored by the Court*."

PART IV – RELIEF REQUESTED

83. The Creditor requests:

1. An order setting aside the Disallowance.

2. An order admitting the Creditor's proof of claim.

3. An order setting aside the following decisions of the OR, made at the First Meeting:

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[99] Rutman Affidavit, Motion Record, Vol. II, at Exhibit "N" (Caselines A1577-A1578)
[100] 2002 CanLII 37923 ("***LeBlanc***"), at paragraph 22
[101] *LeBlanc*, at paragraph 22
[102] *LeBlanc*, at paragraph 22
[103] 2007 CanLII 31754 (ON SC), at paragraph 24(7)

a. to "*object to the claim of Oragin Foods Inc…in the amount of $6,760,280.89*" (i.e. the proof of claim filed by the Trustee); and

b. that "*Oragin Foods [the Trustee] could not vote because they were a related party and therefore subject to restrictions under sec. 109(6) and Directive 22R.*"

4. An order admitting the Trustee's proof of claim for voting and declaring that the Trustee may vote at any meeting of creditors of the Bankrupt.

5. Cost of this appeal, the First Meeting of Creditors, and the Re-Convened Meeting of Creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

COLBY LINTHWAITE
OF COUNSEL FOR THE PLAINTIFF

November 8, 2024

SCHEDULE "A"

Authorities Cited

1. *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*, 2010 SKQB 182

2. *Summit Glen Waterloo/2000 Developments Inc., Re*, 2016 ONCA 405

3. *Galaxy Sports Inc., Re*, 2004 BCCA 284

4. *Charlestown Residential School, Re,* 2010 ONSC 4099

5. *Oil Lift Technology Inc. v Deloitte & Touche Inc.*, 2012 ABQB 357

6. *Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada*, 4th Edition at §§ 1:66, 6:39, 8:80

7. *Greco v. Frano*, 2015 ONSC 7217

8. *McLarty v. R.,* 2008 SCC 26 (S.C.C.)

9. *Swiss Bank Corp. v. Minister of National Revenue,* [1974] S.C.R. 1144 (S.C.C.)

10. *FT ENE Canada Inc, (Re)*, 2019 ONSC 5793

11. *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32

12. *LeBlanc v. York Catholic District School Board*, 2002 CanLII 37923 (ON SC)

13. *Schreiber v. Mulroney*, 2007 CanLII 31754 (ON SC)

SCHEDULE "B"

Statutes and Regulations

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

Subsection 4(2)(b)(i)

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are *related persons* if they are

…

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

…

Subsection 4(5)

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

Section 108

Chair may admit or reject proof

108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

Accept as proof

(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

In case of doubt

(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Subsection 109(6)

Vote of creditors not dealing at arm's length

(6) If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.

2. Directive No. 22R2, Proofs of Claim, Proxies, Quorums and Voting at Meetings of Creditors

Appendix B

…

Type of Creditor	Quorum	Motion	Ordinary Resolution Vote	Proposal Vote	Special Resolution Vote	Comments
Claim of related party	**Y**	**Y**	**Y**	**Y***	**Y**	Bankruptcy: Refer to the restrictions in section 113(3) of the Act for some related creditors, regarding the vote on the appointment of the trustee or inspectors. If the vote of a related party determines the outcome of a vote, the Chair shall note in the Minutes the vote of the related party and shall redetermine the outcome by excluding the related creditor's vote, in accordance with section 109(6) of the Act. *Proposal: May vote against but not for a proposal (subsection 54(3) of the Act). Refer to the restrictions in section 113(3) of the Act for some related creditors, regarding the vote on the appointment of the trustee or inspectors.

Court File No.: BK-24-03051650-0031
Estate No.: 31-3051650

IN THE MATTER OF THE BANKRUPTCY OF ORGANIC GARAGE (CANADA) LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceeding Commenced at Toronto

FACTUM OF THE APPELLANT
(Returnable November 21, 2024)

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