

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

BENNETT JONES LLP

Applicant

- and -

ELEMENTA GROUP INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE APPLICANT
(Returnable November 30, 2015)**

November 27, 2015

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Gavin H. Finlayson (LSUC #44126D)
Danish Afroz (LSUC #65786B)

Tel. (416) 863-1200
Fax (416) 863-1716

Lawyers for the Applicant, Bennett Jones LLP

TO: **ELEMENTA GROUP INC.**
Suite 302, 509 Glendale Avenue East
Niagara-on-the-Lake, ON L0S 1J0

John Ashbourne
john@ashbournemanagement.com

Chairman of the Board

AND TO: **RICHTER ADVISORY GROUP INC.**
181 Bay Street, Suite 3320
Bay-Wellington Tower
Toronto, ON M5J 2T3

Adam Sherman
Email: ASherman@richter.ca
T: 416.488.2345, ext. 2318

Paul van Eyk
Email: pvaneyk@richter.ca
T: 416.485.4592

Proposed Receiver

AND TO: **GOLDMAN, SLOAN, NASH AND HABER LLP**
480 University Avenue, Suite 1600
Toronto, ON M5G 1V2

Mario Forte
Email: forte@gsnh.com
T: 416.587.9922

Counsel to the Proposed Receiver

AND TO: **GARY BLOKHUIS**
37 Pine Ridge Avenue
Woodbridge, ON L4L 2H8

AND TO: **GARY BLOKHUIS**
D.B.A. BLOKHUIS HOLDINGS
37 Pine Ridge Avenue
Woodbridge, ON L4L 2H8

AND TO: **LOOPSTRA NIXON LLP**
600 – 135 Queens Plate Drive
Etobicoke, ON M9W 6V7

R. Graham Phoenix
Email: gphoenix@loonix.com

Agent for: 2124732 Ontario Inc.

AND TO: **HER MAJESTY IN RIGHT OF ONTARIO
REPRESENTED BY THE
MINISTER OF FINANCE**
[Collections Branch
EHT BN#899366603 248/746]
Legal Services Division
College Park
11th Floor, 777 Bay Street
Toronto, ON M5G 2C8

Michael Waterston
Email: Michael.waterston@ontario.ca

Nicole Symeonides
Email: Nicole.symeonides@ontario.ca

AND TO: **ESC CORPORATE SERVICES LTD.**
445 King Street West, 4th Floor
Toronto, ON M5V 1K4

Email: finance@eservicecorp.ca
T: 416.595.7177

Agent for Sharon D'Amico

AND TO: **ESC CORPORATE SERVICES LTD.**
445 King Street West, 4th Floor
Toronto, ON M5V 1K4

Email: finance@eservicecorp.ca
T: 416.595.7177

Agent for David D'Amico

AND TO: **SCARFONE HAWKINS LLP**
1 James Street South, 14th Floor
Hamilton, ON L8P 4R5

David Thompson
Email: Thompson@shlaw.ca

Brent Marshall
Email: bmarshall@shlaw.ca

Lawyers for Jayson Zwierschke and Leonard Zwierschke

AND TO: **Jayson Zwierschke**
229 Creekside Drive
Welland, ON L3C 0B6

Email: jay_zwierschke@yahoo.com

AND TO: **Leonard Zwierschke**
229 Creekside Drive
Welland, ON L3C 0B6

Email: jay_zwierschke@yahoo.com

PART I: OVERVIEW

1. The Applicant, Bennett Jones LLP ("**Bennett Jones**") seeks an order (the "**Order**") appointing Richter Advisory Group Inc. ("**Richter**") as receiver (in such capacity, the "**Receiver**"), without security, over all of the present and after-acquired assets, properties and undertakings (collectively, the "**Property**") of the Respondent, Elementa Group Inc. ("**EGI**" or the "**Company**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, ("**CJA**") as amended.

2. Bennett Jones acted as legal counsel for EGI. Bennett Jones has ceased to act for EGI. EGI owes secured and unsecured creditors, including Bennett Jones, in excess of \$10 million. EGI owes Bennett Jones \$2,922,329, inclusive of fees, disbursements, interest and taxes. EGI is a development company that holds intellectual property rights. EGI has no operations, no current paid employees, no source of revenue, and no realistic prospect of servicing its debt. EGI has defaulted under the security arrangements in place between it and Bennett Jones. Bennett Jones, as first ranking secured creditor, is seeking the appointment of a receiver pursuant to its contractual right to do so.

3. It is just and convenient that the Court appoint a Receiver. More than 10 days will have elapsed from the sending of the required demand and notice by the time this Application is heard. No payment has been made and there is no realistic prospect of payment. Moreover, Bennett Jones has concerns about the erosion of its security interest and the preservation of the Property due to reports it has received of serious dysfunction between Board members,

misappropriation of Company funds and Property, physical altercations, and a dispute as to the current constitution of the Board and the control of the Company and its Property.

4. There is therefore a risk of an erosion of the value available to satisfy the claims of stakeholders if a receiver is not appointed by this Court, and a concomitant necessity to secure and protect the Property while value maximization strategies are explored by a Court supervised receiver.

PART II: THE FACTS

A. Description of EGI

5. EGI is an early stage development company that owns and controls intellectual property rights to a steam reformation method of reforming carbonaceous municipal waste into synthesis gas.

Affidavit of Eden Oliver, sworn November 27, 2015 (the "**Oliver Affidavit**") at para. 6.

6. EGI is incorporated under the *Business Corporations Act* (Ontario) ("**OBCA**"). EGI has its registered office at 509 Glendale Avenue E., Suite 302, Niagara-on-the-Lake, Ontario, L0S 1J0.

Oliver Affidavit at para. 7; Exhibit "A", Application Record, Tab A.

7. EGI is the sole limited partner of Elementa Algoma LP, an Ontario limited partnership whose general partner is Elementa Algoma Inc., also an OBCA corporation. The shares of Elementa Algoma Inc. are wholly owned by Elementa Holdings Ltd., an OBCA corporation. The shares of Elementa Holdings Ltd. are wholly owned by EGI. EGI, Elementa Algoma LP, its

general partner Elementa Algoma Inc., and Elementa Holdings Ltd. are collectively referred to as the "**Elementa Group**".

Oliver Affidavit at para. 8; Exhibit "B", Application Record, Tab B.

8. Elementa Algoma LP is a party to certain contracts (the "**SSM Project Contracts**") in relation to the planned construction of a municipal waste processing facility to produce electricity in the City of Sault Ste. Marie (the "**Project**"). Pursuant to one such contract, the construction of the Project must commence on or before May 1, 2016. The undertaking to construct the Project requires the Elementa Group to raise a significant amount of capital in the order of approximately \$50-55 million. EGI holds 99.9% of Elementa Algoma LP's units, and controls 100%.

Oliver Affidavit at para. 9.

9. EGI owns and controls all of the intellectual property rights of the Elementa Group (the "**Technology**").

Oliver Affidavit at para. 10.

10. EGI is not an operating business and has no current source of revenue. EGI operates out of leased office space, which is in arrears under the terms of the lease, and has no current paid employees. EGI owes in excess of \$10 million to its secured and unsecured creditors, including Bennett Jones, that it has no realistic prospect of satisfying.

Oliver Affidavit at para. 11.

11. As of November 18, 2015 the board of EGI (the "**Board**") was comprised of John Ashbourne, Bruce Gowan, Garry Rawson, Ernie Dueck, Jayson Zwierschke, and Leonard Zwierschke. However, there is currently a dispute between Board members as to the proper constitution of the Board that has not been resolved. As a result, there is a dispute as to who is in control of the Company and its Property.

Oliver Affidavit at paras. 12, 14; Exhibit "C", Application Record, Tab C.

B. Bennett Jones' Engagement to Act for EGI

12. Bennett Jones was engaged to act as legal counsel for EGI pursuant to an engagement letter between Bennett Jones and EGI dated May 3, 2012, and executed on behalf of EGI by Jayson Zwierschke (then President & CEO of EGI) on May 4, 2012 (the "**Engagement Letter**").

Oliver Affidavit at para. 15; Exhibit "D", Application Record, Tab D.

13. Pursuant to the terms of the Engagement Letter, and on instructions from EGI, Bennett Jones provided extensive legal services to EGI in a broad variety of matters.

Oliver Affidavit at para. 17.

14. Bennett Jones provided accounts to the Board on a regular monthly basis through December 2014 and has provided further detailed updates and accounts since that date.

Oliver Affidavit at para. 18; Exhibit "E", Application Record, Tab E.

15. EGI has never disputed any element of these accounts and updates, and has acknowledged that all such amounts are due and owing, including for work in progress. As of November 18, 2015, EGI has accounts owing to Bennett Jones in the amount of \$2,922,329,

inclusive of fees, disbursements, interest and taxes (the "**Indebtedness**"). A table summarizing the accounts receivable, work in progress, disbursements, interest and taxes is attached to the affidavit of Eden M. Oliver as Exhibit "F".

Oliver Affidavit at paras. 3, 19-20; Exhibit "F", Application Record, Tab F.

C. Security for Indebtedness

16. As a non-operating and non-revenue generating technology development company, EGI has had limited resources at its disposal to pay for necessary legal services. In order to be able to continue to provide legal advice to EGI, Bennett Jones requested security for the Indebtedness.

Oliver Affidavit at para. 21.

17. EGI provided a general security agreement dated June 12, 2014 (the "**GSA**") as security for the Indebtedness in favour of Bennett Jones. Pursuant to the GSA, EGI granted Bennett Jones a security interest in all of the assets, property and undertaking of EGI then owned or thereafter acquired.

Oliver Affidavit at para. 22; Exhibit "G", Application Record, Tab G.

18. In the event of a default under the GSA (which includes failure to pay any amount when due), Bennett Jones is entitled to seek the Court appointment of a receiver.

Oliver Affidavit at para. 23.

19. Bennett Jones has registered financing statements to perfect the security interests memorialized by the GSA in the Province of Ontario, as registration no. 20140605 0927 1862 3349.

Oliver Affidavit at para. 24.

D. Default and Enforcement

20. In August 2015, EGI's Board met with financial advisors (including Richter) to discuss restructuring options and strategies. At that time, there was discussion about the need for EGI to retain independent counsel when the Company determined to engage in a potential restructuring process. In October 2015, the Elementa Group determined to review restructuring options and strategies and the Elementa Group was advised to and did engage separate counsel to advise it in respect of such matters.

Oliver Affidavit at para. 28.

21. On November 18, 2015, Bennett Jones issued a written demand for payment of the Indebtedness on EGI (the "**Demand**"), accompanied by a notice of intention to enforce security addressed to EGI and prepared pursuant to subsection 244(1) of the BIA (the "**BIA Notice**") and an Acknowledgement, Consent, and Waiver (the "**Waiver**"). More than 10 days have passed and EGI has not made payment.

Oliver Affidavit at paras. 4, 30; Exhibits "J", "K", and "L", Application Record, Tabs J, K, and L, respectively.

E. Corporate Governance Concerns

22. There is a pattern of troubling and dysfunctional dealings between the Zwierschke brothers and the other members of the Board, including an unresolved corporate governance dispute about the constitution of the Board and therefore the control of the Company and the Property.

Oliver Affidavit at para. 32.

23. Police reports have been made in connection with: (i) approximately \$26,000 of Company funds that are unaccounted for as a result of unauthorized withdrawals believed to have been made by Jayson Zwierschke, (ii) blank cheques that were removed when card access to the bank accounts was revoked for Jayson and Leonard Zwieschke when they were terminated by EGI for cause (although they remain directors); (iii) an unauthorized cheque written on the Company's bank account; and (iv) various physical altercations at the Company that are reported to have been initiated by Jayson and Leonard Zwierschke. These matters are the subject of ongoing police investigations.

Oliver Affidavit at para. 33.

24. On November 25, 2015, a special shareholders meeting was called by Jayson Zwierschke, Leonard Zwierschke, and Jim Dalton to replace the existing Board with a board comprised of themselves. There is an unresolved dispute among Board members as to the legitimacy of this meeting. As a result, the current constitution of the Board, and therefore the control of the Company and the Property, is in dispute.

Oliver Affidavit at para. 34.

25. On November 25, 2015, Bennett Jones sent a letter to legal counsel to the Zwierschke brothers outlining the concerns it has about the preservation and protection of the Property and the duties and obligations that Jayson and Leonard Zwierschke owe to the Company and its stakeholders. The letter asked for certain undertakings to ensure the Property is safeguarded.

Oliver Affidavit at para. 36; Exhibit "M", Application Record, Tab M.

26. On November 26, 2015 at 5:39 p.m., Bennett Jones received an email from legal counsel to the Zwierschke brothers, in their individual capacities. The email stated that the brothers would address the concerns of Bennett Jones with undertakings (although the email did not provide them, but asked for a form to be provided). The email further stated that the Zwierschke brothers did not have detailed knowledge of Bennett Jones' outstanding fees and disbursements, despite the fact that the updates have regularly been provided to the Board, which includes the Zwierschke brothers. The email did not set out, or contemplate, any specific plan for payment of the Indebtedness.

Oliver Affidavit at para. 37; Exhibit "N", Application Record, Tab N.

F. The Proposed Receiver

27. More than 10 days will have elapsed by the time this Application is heard. As of the date hereof, no payment of the Indebtedness has been made. Bennett Jones has lost confidence in EGI and believes there is no reasonable prospect of payment of the Indebtedness. Bennett Jones is concerned about a possible erosion of its security interest.

Oliver Affidavit at para. 39.

28. As set out above, EGI had earlier discussions with Richter. EGI has released Richter to act as Receiver. It is proposed that Richter be appointed as Receiver since it is familiar with the affairs of EGI and its appointment as Receiver is in the best interests of all stakeholders. Richter has agreed to accept the appointment.

Oliver Affidavit at para. 42; Exhibit "O", Application Record, Tab O.

PART III: ISSUE

29. The sole issue raised on this Application is whether this Court should appoint Richter as Receiver over the Property pursuant to section 243 of the BIA and section 101 of the CJA.

PART IV: LAW AND ARGUMENT

A. The Test for Appointing a Receiver under the BIA and CJA

30. Section 243(1) of the BIA permits a court to appoint a receiver if it considers it to be "just or convenient to do so".

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, at s. 243(1) [*BIA*].

31. The test for the appointment of a receiver under section 101 of the CJA is whether it appears to the court to be "just or convenient" to do so.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101(1).

32. In determining whether it is just and convenient to appoint a receiver, a court must have regard to all of the circumstances of the case, particularly to the nature of the property and the rights and interests of all parties in relation thereto.

Bank of Montreal v. Carnival National Leasing Ltd., 2011 ONSC 1007 at para. 24 [*Carnival National Leasing*]; Book of Authorities of the Applicant [*Applicant's Book of Authorities*], Tab 1.

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) at para. 11 [*Freure Village*]; Applicant's Book of Authorities, Tab 2.

33. Where the rights of a secured creditor under the security instrument governing the relationship between the debtor and secured creditor includes the right to seek the appointment of

a receiver, the burden on the applicant seeking to have the receiver appointed is relaxed. As per Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*,

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd., 2013 ONSC 6866 at para. 27; Applicant's Book of Authorities, Tab 3.

Freure Village, *supra*, at para. 13; Applicant's Book of Authorities, Tab 2.

34. Where the creditor is entitled under its agreement with the debtor to seek the appointment of a receiver, the "just or convenient" question becomes one of the court determining whether, in the exercise of its discretion, on an examination of all the circumstances, it is in the interest of all concerned to have the receiver appointed by the court. Courts have considered many factors that vary in the circumstances of the case. These factors include the following:

- (a) the rights of the parties in the property;
- (b) the fact that the creditor has the right to appoint a receiver under its security;
- (c) the enforcement rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtors and others;
- (d) the conduct of the parties;
- (e) whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed);

- (f) the apprehended or actual waste of the debtor's assets;
- (g) the balance of convenience to the parties;
- (h) cost to the parties;
- (i) the likelihood of maximizing the return to the parties;
- (j) the best way of facilitating the work and duties of the receiver; and
- (k) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.

Freure Village, supra, at para. 13; Applicant's Book of Authorities, Tab 2.

Carnival National Leasing, supra, at paras. 26-29; Applicant's Book of Authorities, Tab 1.

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010) 67 C.B.R. (5th) 97 (B.C.S.C.) at para. 50; Applicant's Book of Authorities, Tab 4.

Frank Bennett, Bennett on Receiverships, 3d ed. (Toronto: Carswell, 2011) at 155-159; Applicant's Book of Authorities, Tab 5.

35. Absent fraud or want of good faith, courts will positively assist a secured creditor in the enforcement of its security interest in circumstances where the debtor or others interfere with such rights.

STN Labs Inc. v. Saffron Rouge Inc., 2010 ONSC 3042 at para. 42; Applicant's Book of Authorities, Tab 6.

B. It is Appropriate to Appoint a Receiver over the Property

36. EGI has accounts owing to Bennett Jones in the amount of \$2,922,329, inclusive of fees, disbursements, interest and taxes. Accounts and information on the Indebtedness has been

regularly provided to the Board of EGI. The Indebtedness has been acknowledged and accepted by EGI and never disputed. In any event, regardless of whether the amount owing is \$2,922,329, or some lesser or greater amount, EGI has no realistic ability to satisfy its significant debt to Bennett Jones, or the debts owed to any other secured or unsecured creditors. The GSA provides that if EGI fails to pay any amount when due the Indebtedness shall immediately become due and payable at the option of Bennett Jones. In the event of default, Bennett Jones is entitled to seek the Court appointment of a receiver. Despite the Demand and the BIA Notice, EGI has not made payment of the Indebtedness to Bennett Jones.

37. Bennett Jones has lost confidence in EGI. Moreover, there is severe dysfunction between Board members and serious corporate governance issues, including unauthorized withdrawals of Company funds, unauthorized cheques, and various physical altercations, all of which are the subject of police investigations. Moreover, there is a fundamental dispute as to the composition of the Board and the control of the Company and the Property. As such, there is a risk of erosion of the value available to satisfy stakeholders. Given the obligations of the Company, time is of the essence to put EGI into a Court supervised process, which will maximize value for all shareholders.

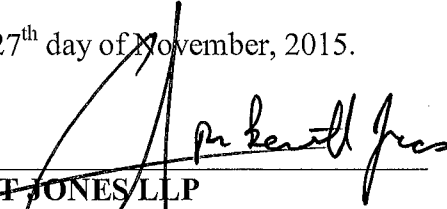
38. In examining all of the circumstances, it is just and convenient and in the interest of all stakeholders to appoint Richter as the Receiver. Bennett Jones is seeking to enforce express relief provided for in the security arrangements between the parties. The appointment of a receiver—by enforcement of a term in the GSA that was assented to by both parties—will allow Bennett Jones to protect its security, and allow for the disposal of the Property in an organized and court-supervised fashion that will also maximize value for all stakeholders.

39. As Richter is familiar with the affairs of EGI, and Richter has consented to act as Receiver, the appointment of Richter as receiver would benefit all stakeholders as it would result in a reduction of the costs associated with these proceedings.

PART V: ORDER REQUESTED

40. The Applicant seeks the granting of the Order in the form contained in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2015.



BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Gavin H. Finlayson (LSUC #44126D)
Danish Afroz (LSUC #65786B)

Tel. (416) 863-1200
Fax (416) 863-1716

Lawyers for the Applicant, Bennett Jones
LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List])
2. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List])
3. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866
4. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010) 67 C.B.R. (5th) 97 (B.C.S.C.)
5. Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Carswell, 2011)
6. *STN Labs Inc. v. Saffron Rouge Inc.* (2010) 68 C.B.R. (5th) 287 (Ont. S.C.J.)

SCHEDULE "B"

RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3)

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" – subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

- (3) This section does not apply, or ceases to apply, in respect of a secured creditor
- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
 - (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

2. *Courts of Justice Act*, R.S.O. 1990, c. C-43.

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

BENNETT JONES LLP
Applicant

-and-

ELEMENTA GROUP INC.
Respondent

Court File No. CV-15-11198-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM
(Returnable November 30, 2015)

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Gavin H. Finlayson (LSUC #44126D)
Email: finlaysong@bennettjones.com

Danish Afroz (LSUC #65786B)
Email: afrozd@bennettjones.com

Tel. (416) 863-1200
Fax (416) 863-1716

Lawyers for the Applicant, Bennett Jones LLP