

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

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BUCKINGHAM SECURITIES CORPORATION

Respondents

MOTION RECORD OF CSTC INC.
(Assignment of Receiver's Claim Against Miller Bernstein LLP)
Returnable: February 18, 2021

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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B E T W E E N:

ONTARIO SECURITIES COMMISSION

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BUCKINGHAM SECURITIES CORPORATION

Respondent

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Court File No. 01-CL-4192

**ONTARIO
SUPERIOR COURT OF JUSTICE
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B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BUCKINGHAM SECURITIES CORPORATION

Respondents

FRESH AS AMENDED NOTICE OF MOTION
(Assignment of Receiver's Claim Against Miller Bernstein LLP)
Returnable: February 18, 2021

CSTC INC. ("CSTC"), formerly known as 1253884 Ontario Inc. ("**125 Ont.**"), will make a motion before a Judge sitting on the Commercial List on Thursday February 18, 2021, starting at 10:30 am, by judicial videoconference via Zoom at Toronto, Ontario, due to the COVID-19 pandemic. Conference details in order to attend are attached as **Schedule "A"**. Please advise if you intend to join the conference by emailing Paul Guy at paul@kalloghlianmyers.com and Chris Burr at chris.burr@blakes.com.

PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR:

1. An Order assigning to CSTC, or such entity as it may direct, all of the right, title and interest held by BDO Canada Limited, formerly known as BDO Dunwoody Limited, in its capacity as court-appointed receiver (the "**Receiver**") of Buckingham Securities Corporation ("**Buckingham**"), in the claim commenced by the Receiver in the Ontario Superior Court of Justice (Toronto) as Court File No. 03-CV-260914CM3, with the style

of cause *BDO Dunwoody Limited as Court-Appointed Receiver for Buckingham Securities Corporation, et al. v. Miller Bernstein LLP* (the “**Receiver’s Action**”).

2. An order terminating the stay of proceedings that was imposed on the Receiver’s Action by this Court in March, 2009.
3. An order transferring the Receiver’s Action to the Commercial List.
4. Such further relief as counsel may request and this Court deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Buckingham was a securities dealer registered under Ontario securities law.
2. The Ontario Securities Commission (“**OSC**”) conducted a compliance audit on Buckingham in June 2001 and discovered significant violations of Ontario securities law.
3. The next month, on July 26, 2001, the Receiver was appointed by this Court over Buckingham on application of the OSC. This precipitated the failure of Buckingham.
4. Miller Bernstein LLP (“**MB**”) was Buckingham’s auditor at all material times.
5. The Receiver commenced the Receiver’s Action against MB in December 2003 for, among other things, damages in the amount of \$10 million on account of MB’s alleged negligence and breach of contract in relation to the professional accounting services provided by MB to Buckingham.
6. In March 2009, this Court stayed the Receiver’s Action pending the outcome of a class action that had been brought in parallel to the Receiver’s Action (the “**Class Action**”).
7. The Class Action was brought on behalf of Buckingham’s customers and alleged that MB’s audit of Buckingham was negligent and had caused class members to lose the funds and securities held in their customer accounts with Buckingham.
8. The Class Action involved allegations that were similar to those made in the Receiver’s Action, but they were not identical. The Class Action was brought on behalf of a class

consisting of Buckingham's customers. The Receiver's Action was brought directly in the name of Buckingham.

9. The Class Action was ultimately dismissed in 2019.
10. The stay of proceedings imposed on the Receiver's Action is now unnecessary given the dismissal of the Class Action.
11. The Receiver has acknowledged that it could revive and prosecute the Receiver's Action against MB, but that the Receiver is unable to do so because the Receiver has insufficient funds to pay its outstanding professional fees, let alone fund ongoing litigation.
12. CSTC is Buckingham's largest creditor and has a remaining claim (after deducting a dividend that was paid by the Receiver in 2005) of \$679,272.49. The claim is held in the name of 125 Ont.
13. CSTC is ready, willing and able to take an assignment of the Receiver's Action and prosecute it to judgment.
14. CSTC is also prepared to assume the potentially significant adverse cost exposure that would accompany an assignment of the Receiver's Action.
15. CSTC's Motion Record will be served using the same Service List that was used by the Receiver for its last motion returnable September 30, 2020, in which the Receiver sought fee approval and a discharge and release order. A notice is also being posted in the Globe & Mail (National Edition) as was done with the Receiver's motion.
16. Given the history of this receivership proceeding, the subject matter of the Receiver's Action, and the length of time that has elapsed since Buckingham's failure, it is in the interests of all parties to have the Receiver's Action transferred to the Commercial List, which will allow for active case management and an expedited schedule.
17. *The Rules of Civil Procedure*, RRO 1990, Reg 194, as amended, in particular Rule 37.
18. Such further and other grounds as counsel may advise and this Court deem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Gerry Feldman, sworn February 3, 2021.
2. The Twenty-Third Report of the Receiver, dated September 8, 2020, and any subsequent report or material submitted by the Receiver in connection with this motion.
3. Such further and other evidence as counsel may advise and this Court permit.

February 3, 2021

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Lawyers for CSTC Inc.

TO: THE SERVICE LIST

SCHEDULE “A”**Conference Details to join the Motion via Zoom**

Time: February 18, 2021 at 10:30 am

Join Zoom Meeting

<https://us02web.zoom.us/j/81138481351?pwd=N1FIYXAwQlp3dmNaTktpRXdwZ1dsQT09>

Meeting ID: 811 3848 1351

Passcode: 560678

Court File No. 01-CL-4192

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

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BUCKINGHAM SECURITIES CORPORATION

Respondents

AFFIDAVIT OF GERRY FELDMAN**Motion for an Assignment of the Receiver's Claim Against Miller Bernstein LLP****Motion Returnable: February 18, 2021****Affidavit Affirmed: February 3, 2021**

I, GERRY FELDMAN, of Toronto, Ontario, AFFIRM:

1. I have personal knowledge of the matters set out in this affidavit, unless I indicate otherwise, in which case I have stated the source of my information and believe it to be true.
2. I swear this affidavit in support of the motion brought by CSTC Inc ("CSTC"), formerly known as 1253884 Ontario Inc. ("125 Ont."), for an order assigning to it the Receiver's Claim (as defined below).
3. I am the sole officer and director of CSTC.

My Background

4. I am a chartered accountant and the Managing Partner of DNTW Toronto LLP, a boutique firm of Chartered Professional Accountants and tax advisors, based in Toronto. The firm provides services to public and private companies and to individuals in a variety of areas, including assurance and accounting; Canadian and US tax; corporate finance; succession planning; and mergers and acquisitions.
5. I received my CPA, CA designation in 1985. My practice is focused on assurance and advisory work. I head the firm's public and private audit practice specializing in small to medium sized companies listed on stock exchanges or companies registered with provincial securities commissions.

Buckingham's Receivership

6. Buckingham Securities Corporation ("**Buckingham**") was a securities dealer registered in Ontario.
7. The Ontario Securities Commission ("**OSC**") conducted a compliance audit on Buckingham in June 2001 and discovered significant violations of Ontario securities law.
8. The next month, on July 26, 2001, on the application of the OSC, BDO Canada Limited, formerly known as BDO Dunwoody Limited, was appointed by the court as receiver over Buckingham (the "**Receiver**").
9. These events precipitated Buckingham's failure.¹

¹ Unless otherwise noted, the information in this section, and in the sections below that describe the activities of the Receiver and litigation against Buckingham's former auditor, is taken from the Receiver's 23rd Report (dated September 8, 2020).

My Claim Against Buckingham

10. I had been a customer of Buckingham for several years and had approximately \$881,105 in investments held with the firm at the time of its failure (approximately \$357,105 was held in cash and approximately \$524,000 was held in fully paid securities).
11. I held these investments through my holding company 125 Ont., now known as CSTC.
12. In 2005, I (through 125 Ont.) received an interim dividend from the Receiver as part of the interim distribution that was made to Buckingham clients with proven claims as described by the Receiver in its 22nd Report (October 13, 2017, at paras. 48-52²).
13. As set out in the Receiver's 22nd Report, the Receiver prepared an Amended Financial Summary in 2017 that reflected the balances of the amounts still owed to Buckingham's customers, net of the distributions made by the Receiver.
14. The version of the Amended Financial Summary that was included with the Receiver's 22nd Report delivered to the Service List contains redactions to protect the confidentiality and identity of Buckingham's customers.
15. I am advised by one of my lawyers, Serge Kalloghlian, that he has recently been advised by Chris Burr, counsel to the Receiver, that the remaining claim held by 125 Ont. (now known as CSTC) is \$679,272.49 and that this is the single largest remaining claim in the Buckingham estate.

The Receiver's Claim Against Miller Bernstein

16. Miller Bernstein LLP ("MB") was retained as Buckingham's auditor in 1996 and was continuously retained at all material times afterwards.

² A copy of the Report can be found on the website maintained by the Receiver at: <https://www.bdo.ca/en-ca/extranets/buckingham/>

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17. In its role as Buckingham's auditor, MB certified the Form 9's that Buckingham was required to file with the OSC on an annual basis. Among other things, those forms detailed Buckingham's capital position and confirmed that Buckingham had fully segregated and held in trust for clients their fully paid and excess margin securities.
18. The Receiver examined the Form 9 submitted by Buckingham to the OSC for the year ended March 31, 2000, which form was certified by MB on June 8, 2000. The Receiver concluded and reported to this Court that this Form 9, and MB's accompanying certification, were false. The form stated that Buckingham "had properly segregated fully paid and excess margin client securities and held them in trust" when in fact "the accounting records of Buckingham clearly indicated that none of the securities were segregated or held in trust" (Receiver's 23rd Report, para 31).
19. The Receiver commenced an action against MB in December 2003 in the Ontario Superior Court of Justice (Toronto) as Court File No. 03-CV-260914CM3, with the style of cause *BDO Dunwoody Limited as Court-Appointed Receiver for Buckingham Securities Corporation, et al. v. Miller Bernstein LLP* (the "**Receiver's Action**").
20. The Receiver's Action sought damages in the amount of \$10 million on account of MB's alleged negligence and breach of contract.
21. The Receiver's Action was stayed in March 2009 pending the outcome of a class action that had been brought in parallel to the Receiver's Action (the "**Class Action**").
22. The Class Action was brought on behalf of Buckingham's customers and alleged that MB's audit of Buckingham was negligent and had caused class members to lose the funds and securities held in their customer accounts with Buckingham.
23. The Class Action involved allegations that were similar to those made in the Receiver's Action, but they were not identical. The Class Action was brought on behalf of a class consisting of Buckingham's customers. The Receiver's Action was brought directly in the name of Buckingham.

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24. The Class Action was litigated for many years through multiple levels of court, up to a leave application to the Supreme Court of Canada. The case was ultimately dismissed in May 2019.
25. With that outcome and the Class Action resolved, the Receiver's Claim could proceed. However, as set out at paragraph 46 of the Receiver's 23rd Report, delivered in September 2020, the Receiver is without funds and unable to advance the litigation against MB. Quoting from paragraphs 46 and 47 of the Receiver's 23rd Report:
46. With the Class Action terminated, the Receiver could revive and prosecute the Receiver's Action against MB, in the interests of stakeholders of the Buckingham Estate. However, this would be lengthy and complex litigation, and as disclosed in the R&D Statement (defined and discussed below), the Receiver has insufficient funds to pay its outstanding professional fees, let alone fund ongoing litigation. Lax O'Sullivan has confirmed that no steps have been taken in respect of the Receiver's Action for several years, as the parties were awaiting the outcome of the Class Action.
47. Accordingly, the Receiver sees no alternative but to discontinue the Receiver's Action. As an administrative matter, the Receiver is asking this Court to formally dismiss the Receiver's Action, on a without costs basis.
26. As a result, the Receiver moved in September 2020 for an order discontinuing the Receiver's Claim along with an order discharging the Receiver.³ The Receiver's 23rd Report was delivered in support of that motion.

My Motion for an Assignment of the Receiver's Claim

27. After reading the Receiver's 23rd Report and realizing that the Receiver would not be moving forward with the Receiver's Claim, I contacted Daniel Schwartz of Thornton

³ I am advised by Mr. Kalloghlian that a portion of the relief sought at the September 2020 motion was granted, with the balance of the relief, include the request for a discharge of the Receiver, was adjourned to February 18, 2021 to be heard at the same time as my motion for an assignment of the Receiver's Claim.

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Grout Finnigan LLP (“TGF”) about what options I might have, if any, to obtain recovery against MB.⁴

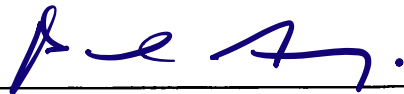
28. I had been following both the Class Action and the receivership proceedings for many years. I was frustrated that after almost two decades of litigation it appeared that MB would not be held accountable and I would not receive any further compensation in relation to Buckingham’s failure.
29. Through my discussion with Mr. Schwartz, I learned that an option to potentially obtain recovery against MB would be to seek to acquire the Receiver’s Claim through an assignment from the Receiver and then personally fund and continue that litigation against MB.
30. Mr. Schwartz advised me that I would need to bring a motion to request such an assignment, and that TGF would not be able to act for me in this regard.
31. He also told me that one of his partners, Paul Guy, was soon to depart TGF and would be joining Kalloghlian Myers LLP. I spoke with Mr. Guy and his colleague Mr. Kalloghlian about the litigation and have since retained Kalloghlian Myers LLP to act for me.
32. I have been advised by Mr. Kalloghlian that he was a member of Siskinds LLP during the time the Class Action was litigated against MB, when Siskinds LLP was acting as class counsel, and that Mr. Kalloghlian worked extensively on the Class Action.
33. I have also been advised by Mr. Kalloghlian of the significant adverse cost exposure I would assume if I obtained an assignment of the Receiver’s Claim. I understand that the Class Action was vigorously defended by MB and that I should expect a similar defence to any attempt to advance the Receiver’s Claim. I am prepared to assume this risk.

⁴ None of the statements made in this affidavit about communications I have had with Mr. Schwartz, or any other lawyer acting for me, are intended to waive any solicitor-client privilege that exists over my communications with those individuals.

Service of my Motion Record

34. I am advised by Mr. Kalloghlian that the Motion Record for my motion will be served using the same Service List that was used by the Receiver for its discharge motion originally returnable in September 2020. The only difference will be that the Service List for my motion will also include Siskinds LLP, given its role as class counsel in the Class Action.
35. I am also advised by Mr. Kalloghlian that a notice in respect of the motion will be placed in the Globe & Mail (National Edition), as was done with the Receiver's original motion. The form of the notice is set out in **Schedule "A"** to this affidavit.
36. I am advised by Mr. Kalloghlian that the notice is expected to run in the February 4, 2021 edition of the paper.
37. I am also advised by Mr. Kalloghlian that prior to its finalization a draft of the notice was provided to the Receiver for its review and comment.

AFFIRMED before me by video conference, in accordance with O. Reg 431/20, with the deponent and the commissioner both located in Toronto, Ontario, on February 3, 2021.



Commissioner for Taking Affidavits

DAUC 645
LSO # 49794K



GERRY FELDMAN

THIS IS **EXHIBIT "A"** REFERRED TO IN THE
AFFIDAVIT OF GERRY FELDMAN
SWORN BEFORE ME ON FEBRUARY 3, 2021

A handwritten signature in blue ink, appearing to read "D. E. A.", is written above a horizontal line.

Commissioner for Taking Affidavits

Court File No. 01-CL-4192

**ONTARIO SECURITIES COMMISSION V
BUCKINGHAM SECURITIES CORPORATION**

BDO Canada Limited, formerly known as BDO Dunwood Limited ("**BDO**"), acts as Court-appointed Receiver and Manager (the "**Receiver**") of the property of Buckingham Securities Corporation ("**Buckingham**") including all property held in the name of Buckingham.

TAKE NOTICE that a hearing has been scheduled for February 18, 2021 at 10:30 am to hear a motion brought by CSTC Inc., a creditor of Buckingham, for an order assigning to it, or such entity as it may direct, all of the right, title and interest held by the Receiver in the claim previously commenced by the Receiver against Miller Bernstein LLP (Court File No. 03-CV-260914CM3), Buckingham's former auditor, and other ancillary relief.

Copies of the Motion Record and other documents related to these Receivership Proceedings are posted on the Receiver's website at: <https://www.BDO.ca/en-ca/extranets/buckingham/>. The website contains information related to Court motions, including information concerning Court hearing dates should they change.

The Receiver's counsel's contact details for additional information relating to these Receivership Proceedings are:

Blake, Cassels & Grayson LLP

199 Bay Street, Suite 4000

Toronto, Ontario, M5L 1A9

Attention: Caitlin McIntyre

Tel.: 416-863-4174

Email: caitlin.mcintyre@blakes.com

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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(Assignment of Receiver's Claim Against Miller Bernstein LLP)
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