



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: CV-22-00685876-00CL DATE: 4 November 2022

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TITLE OF PROCEEDING: **GOLDSILVER et al V EVASHKOW et al**

BEFORE JUSTICE: **OSBORNE**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

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**ENDORSEMENT of JUSTICE OSBORNE:**

**Context of Motion and Relief Sought**

1. The Applicants allege oppression. They seek the interim and interlocutory appointment of a monitor to oversee and supervise the business and operations of the respondent, blueRover Inc. [”blueRover”] pursuant to section 248 of the OBCA and section 101 of the CJA, together with related interim relief which would, among other things, impose limits on the ability of the respondent Douglas Evashkow [”Evashkow”] to make material changes while the monitor is engaged and the underlying application is determined or resolved.

2. This matter was originally before me on August 24 for a scheduling appointment, on which date Mr. Evashkow did not appear. The Applicants encountered challenges in confirming service upon him via the email address that he had utilized in the course of conducting company business, or via any other means. He retained counsel and the motion proceeded on the merits before me on September 6.
3. The Applicants have submitted a draft order. The respondent Evashkow consents to the interim relief sought by the Applicants in respect of the appointment of A. Farber & Partners Inc. as monitor [the “Monitor”]. Evashkow also consents to the imposition of certain constraints on his [Evashkow’s] ability to perform certain business functions related to blueRover, subject to the consent of the Monitor and provided that the same conditions apply also to certain actions of the Applicants.
4. The draft order submitted by the Applicants provides for the appointment of the Monitor. Counsel advised me that the relief that is contested is that described in paragraphs 11 – 14 of the draft order.
5. Given the consent of the parties and the reasons set out below, I am satisfied that the appointment of the Monitor is appropriate, on the terms set out in the draft order, and in particular paragraphs 2 – 10 thereof.
6. The balance of the relief sought, which I am advised is contested even on an interim basis, includes the following:
  - a. an interim declaration that the directors of blueRover are those individuals who were directors prior to July 27, 2022 [Ralph Goldsilver, Michael Smith, Robert MacBean, Robin Patterson and Evashkow];
  - b. an interim declaration that the officers of blueRover are also those who were directors prior to July 27, 2022 [David Melia, Robert MacBean, Michael Smith and Evashkow];
  - c. an interim order that Meridian Credit Union, blueRover’s banker [“Meridian”], is authorized to recognize David Melia as president and as an authorized signing officer on the Meridian account [in substitution for Saccucci], and to provide Mr. Melia and the Monitor with access to the blueRover bank account with Meridian; and
  - d. an interim order which is really in the nature of an interim and interlocutory injunction, restraining Evashkow or anyone under his direction or control from taking any action on behalf of blueRover without the consent of the interim Board and the Monitor. This action would specifically include Evashkow holding himself out as having signing authority on any bank accounts or credit facilities, taking any steps to interfere with the operation of blueRover’s bank accounts or credit facilities, terminating any director, officer, employee or contractors, or calling any shareholders or directors meetings.
7. The Application and this motion arise out of a dispute between two groups of shareholders over the business of blueRover, an Ontario corporation in the technology sector located in Cambridge, Ontario.
8. The Applicants, Messrs. Melia, Goldsilver, MacBean and Smith are directors, officers and shareholders of blueRover who allege oppression. The Applicant Michael Smith [“Smith”] was one of two initial shareholders and sole officers and directors until 2020. The other, Loreto Saccucci [“Saccucci”], is a non-party, and Smith remains a director and the Chief Operating Officer.
9. In May, 2021, a new shareholders agreement was entered into between blueRover on the one hand and all of its shareholders on the other. Pursuant to that shareholders agreement, each of Saccucci and Smith are entitled to a designated seat on the board, provided that they or their family members hold at least 15% of the company’s shares.

10. The shareholders agreement also provides that one of the key investors in blueRover, Josip Kozar, [indirectly, through his company] is also entitled to nominate a director to the board, conditional upon the same 15% shareholding requirement.
11. There are other minority shareholders in addition to the shareholders referred to above. A number of minority shareholders are party to a voting trust agreement dated March 2, 2017.
12. The Applicants Ralph Goldsilver and Robert MacBean were appointed as independent directors in November, 2021. MacBean is also the CFO, having been introduced to the company and its principals by Kozar.
13. The remaining applicant, David Melia, is an executive with technology and finance experience who first became involved with blueRover in April 2020 through the provision of consulting services relating to sales and strategic planning. He became Chief Strategy Officer in May, 2020, and was then appointed President by the board on an interim basis in December, 2020 which appointment was made permanent by the shareholders in November, 2021.
14. The Respondent Evashkow became a director of blueRover on June 28, 2022. He was known to Kozar, since Kozar was an investor in a technology company called QDAC Systems of which Evashkow is the president.
15. QDAC is a competitor of blueRover. Those two parties were negotiating the potential licensing of blueRover technology to QDAC in May, 2022, during which Evashkow was first introduced to blueRover and the Applicants by Kozar. That negotiation, however, did not result in an agreement since, according to the Applicants, an agreement would have eroded blueRover's sales margins and therefore shareholder value.
16. Approximately six weeks after the negotiations were aborted, however, Kozar nominated Evashkow to the board of blueRover as his nominee, and that appointment became effective at the board meeting of June 28, 2022.
17. That date was, unfortunately however, to become the date on which discord and conflict were to begin in earnest.
18. Today, the governance and operations of blueRover are completely dysfunctional and this Application [and the motion within it] has been brought. While the parties disagree vigorously on some facts [although not many that are relevant for the purposes of the motion] and certainly disagree on their respective rights, there is no dispute about the dysfunction and the level of acrimony at present. The discourse between and among the key players is uncivil, the electronic mail correspondence is highly charged and inflammatory, and the level of distrust and conflict is palpable. All of this operates to the detriment of the business of blueRover and its stakeholders.
19. Indeed, the parties cannot even agree today on who is properly a member of the Board of Directors, who is a properly appointed officer, or on the validity of various resolutions passed by the Board or actions taken. Chaos and conflict are the only constants.
20. Pursuant to section 248(3) of the OBCA, the Court has the discretion, in connection with an application under that section, to make any interim or final order it thinks fit. I will address below the interim relief sought on this motion: appointment of a monitor, composition of the board of directors, appointment of officers, authority for banking arrangements, and restrictions on the authority and activities of the respondent Evashkow.

### Appointment of a Monitor

21. Given the consent of the parties and the current dysfunction at the company, I am satisfied that the appointment of the Monitor is appropriate, on the terms set out in the draft order, and in particular paragraphs 2 – 10 thereof. I observe that Farber has consented to act as Monitor on the terms set out in the draft order and that consent has been filed.
22. The powers of the Monitor are not unlimited but it is to be provided with full and complete access to the property, books and records and information of blueRover as is necessary to adequately monitor its business and financial affairs.
23. The Monitor is authorized to approve payment of operating expenses for the company and to report to this Court. The additional powers and duties of the Monitor specifically with respect to the banking relationship with Meridian are discussed further below.

### Balance of Relief Sought

24. The dispute about the composition of the board arises because the warring factions each delivered competing notices of a meeting of shareholders for July 27, 2022.
25. The Board of Directors consisted, as of that date, of Messrs. Melia [director and president], Goldsilver [independent director], MacBean [independent director and CFO], Smith [shareholder, director appointed by himself and COO], Robin Patterson [director appointed by Saccucci], and Evashkow [director appointed by Kozar and CEO].
26. As stated above, Evashkow had been appointed interim CEO a month earlier, by the board at a meeting of June 28, 2022. The Applicants allege that he was appointed on a temporary basis to assess the company and its strategic alternatives. It seems even this meeting was acrimonious. Evashkow moved to be appointed as interim CEO. MacBean and Smith voted against the motion. Patterson voted in favour. So too did Evashkow, apparently despite advice from corporate counsel that he was in a position of conflict.
27. According to the Applicants, Evashkow then made it clear that he expected, and would recommend, that Kozar would demand repayment of his debt owed by blueRover if Evashkow was not appointed CEO. As against that threat, Goldsilver voted in favour. That resulted in a majority, and Evashkow was appointed interim CEO [Smith Affidavit, para 13].
28. However, the Applicants allege, Evashkow immediately destabilized the company's operations by demanding the resignation of MacBean as CFO, seemingly arising out of a dispute over the practice of circulating draft minutes, and by disparaging others.
29. For his part, Evashkow takes the position that he was properly appointed to fulfil his role, and the conduct of the Applicants has been obstructionist and intended to thwart and frustrate the very change he was appointed to bring about.
30. The Applicants put in the Record various electronic mail exchanges among the parties which, whether factually accurate are not, were unhelpful and inflammatory in the circumstances in which blueRover found itself.
31. I observe that this board meeting of June 28 was Evashkow's very first board meeting. As a result of the ensuing acrimony, the Applicant directors called another board meeting for the following week, on July 6. Evashkow was opposed to this, objected to the need for a meeting, and did not attend.

32. Evashkow did, however, acknowledge that it was Smith's "right under existing bylaws" to call a meeting.
33. That further board meeting was held on July 6, 2022 with all directors except Evashkow present. There is no dispute that quorum was achieved. The directors present unanimously voted to call a shareholders meeting and to limit Evashkow's mandate specifically limiting his ability to terminate any personnel or make material changes to blueRover's business.
34. The Applicants take the position that Evashkow almost immediately ignored those resolutions and purported to terminate MacBean as CFO and disrupt blueRover's banking relationships, with the effect that automatic and ordinary course payments to employees and suppliers were disrupted.
35. The Applicants rely on the Smith Affidavit and particularly email correspondence with Meridian, blueRover's banker, attached as Exhibit 16. Apparently as a result of Evashkow contacting the bank and "representing himself as the new duly-appointed CEO", Meridian has blocked all access to the account, with the result that the company is without a functioning banking relationship [Smith affidavit, paragraphs 32 – 34].
36. The Applicants point to further disruption resulting from electronic mail messages that Evashkow sent to MacBean and the Controller of blueRover on July 23, 2022, alleging that they were unprofessional and incompetent and suspending them without compensation. Both messages are entitled: "Cease and Desist".
37. The email message to the Controller, Mr. Joki, stated in part that: "obviously you are not professional nor competent as it appears you do not understand that you have no authority to act against any of my board authorized directives ..... You've made it clear you do not understand either rules or laws".
38. The email message to Mr. MacBean stated that he could not be trusted, that he was not professional nor competent, and included other statements similar to those in the message to Mr. Joki.
39. The email messages stated that any attempt to counter Evashkow's suspension notices to them would be considered an act of fraud [see Exhibits 31 and 32 to the affidavit of David Melia sworn August 29, 2022].
40. The directors other than Evashkow called a shareholders meeting for July 27, 2022, scheduled to begin at 6 PM. On the agenda was a discussion about the scope of the mandate given to Evashkow.
41. Evashkow retaliated by delivering [or causing to be delivered] on July 26, the day before the proposed meeting, and amended notice of the shareholders meeting which accelerated the start time [to 4 PM, two hours earlier] and amended the agenda, the latter specifically to include the removal of MacBean as CFO and director. Evashkow asserts that the 4 PM start time was consistent with the previous notice circulated by MacBean on July 15. The Applicants assert that the start time was unilaterally accelerated.
42. The Applicants state that "both meetings went ahead on July 27, 2022, where votes were held on conflicting resolutions and on the basis of inconsistent shareholder registries, with the result that there were competing claims to director and officer position following those meetings".
43. The Respondent Evashkow has a different perspective and states that the Applicants convened a separate meeting following the conclusion of the properly constituted 4 PM meeting
44. At the 4 PM meeting called by Evashkow, a majority of shareholders [56.4%] voted to remove MacBean as director and CFO. However, the Applicants allege that the validity of the shareholder register used at the meeting was and is disputed. They also state that the voting trust among the other minority shareholders referred to above was disputed, since Evashkow [who was brand-new to the company] took the position

that it had been dissolved at a November 16, 2021 shareholder meeting. The minutes of that earlier meeting and the voting trust documents, can be found at exhibits 12 and 37 to the Melia affidavit.

45. Evashkow, in his affidavit sworn September 1, 2022, states at paragraph 35 that he is “particularly concerned about the accuracy of the minutes and validity of the resolutions passed at the.... meetings conducted on November 16, 2021. He of course was not present, since these meetings occurred months before he was involved with blueRover. He states, however, that he is advised by Messrs. Kozar and Saccucci that the directors agreed to dissolve the voting trust agreement although the resolutions are not included in the minutes.
46. Neither Mr. Kozar nor Mr. Saccucci filed an affidavit on this motion. Nor has Mr. Evashkow directed me to any evidence in the record of either of those two directors, or anyone else, challenging the validity or accuracy of the minutes of the meetings of November 16, 2021.
47. However, Evashkow disputes whether Melia is or was entitled to vote shares said to be issued to Kaajenga blueRover which Melia controls. He references a memorandum of understanding among the company, blueRover, and Kaajenja Inc. and submits that since it expressly contemplates the parties to that memorandum entering into a definitive agreement thereafter of which there is no evidence, and since Melia has not produced share certificates confirming that the company in fact issued the disputed shares, Melia had no right to vote those shares at the November 16, 2021 meeting or otherwise. [See, for example, the Evashkow affidavit at para. 29].
48. Those disputed shares represent approximately 9% of the issued and outstanding shares of blueRover. As can be seen from the narrow margins by which various competing resolutions referred to were passed, that 9% is relevant since it could be sufficient to carry or defeat a resolution.
49. Evashkow also submits that the voting trust agreement was the subject of a resolution to dissolve at the November 16, 2021 board meeting and states in his affidavit that two of the three directors present so assert. However, as noted above, neither of those two directors has put forward evidence on this motion.
50. Two hours later, at 6 PM on July 27, the second shareholders meeting proceeded, albeit without the presence of Evashkow, Kozar or Saccucci. The Applicants take the position that a quorum was nonetheless reached [with Melia abstaining] and that those present voted to reaffirm the voting trust, remove Evashkow as interim CEO and appoint Melia, and reaffirm MacBean as CFO and director.
51. Not surprisingly, the acrimony and dysfunction continued. On August 2, after a particularly inflammatory email exchange, Evashkow demanded that Smith attend for an evaluation of his fitness to serve as COO by one of his [Evashkow’s] associates and another director, Robin Patterson. Smith was told by Evashkow that if he failed to attend, [Evashkow] in the shareholders copied on the note would “understand that you’ve chosen to tender your resignation as both a director and officer” [see Exhibit 22 to the Smith affidavit].
52. In an email to Goldsilver, Evashkow referenced his “meaningless and obviously intellectually challenged rhetoric”, in the course of demanding his resignation [see Exhibit 23 to the Smith affidavit].
53. Evashkow then contacted Meridian, the company’s banker, with respect to control over the operating account.
54. The Applicants further allege that Evashkow frustrated the normal and ordinary course of business of blueRover, harassed and disparaged the Applicants and other staff. Evashkow alleges various forms of wrongdoing and also that the Applicants were obstructing his “investigation”.

55. Evashkow called or caused to be called a further shareholders meeting for August 19, 2022. The day before the meeting, Evashkow delivered or caused to be delivered a letter purporting to detail an agenda for the meeting including proposed resolutions to amend the shareholders agreement to change the number of directors on the board and to appoint a new director.
56. The Applicants objected to the calling of a meeting and proposed withdrawal of the notice. Evashkow advise that he would seek resolutions at the meeting to remove both Smith and Goldsilver as directors and to reduce the number of board seats, including the elimination of all designated board seats.
57. Evashkow proceeded with the shareholders meeting of August 19, 2022 over the objection of the Applicants, and put forward resolutions to remove Smith and Goldsilver as directors and to appoint a new director. The Applicants say that they again objected to the shareholder register being used for the meeting.
58. Nevertheless, the meeting proceeded and by a simple majority [56.16%] resolutions described above were passed. The Applicants, in addition to objecting to the validity of the shareholder register or the propriety of the notice, argue that special shareholder approval of at least 60% was required pursuant to the shareholder agreement.
59. As is obvious, the result of the two competing meetings on July 27, 2022 and the disputed meeting of August 19, 2022 was that blueRover was now in a situation where the two competing shareholder groups each purported to have convened a meeting of shareholders, properly achieved quorum, and then proceeded to pass resolutions which resulted in completely contradictory and inconsistent versions of who was a properly appointed director and/or officer of the Corporation.
60. As noted, the Applicants objected to the accuracy and validity of the shareholder register on which the 4 PM meeting of July 27 was premised, with the further chaotic result that there is not even an agreement as to who was a registered shareholder as of that date. Following the meeting on August 19, the new director, Mr. Beck, was said by Evashkow to be properly elected but that is disputed by the Applicants.
61. The validity of the Kaajenga shares and therefore the validity of any resolutions dependent upon the voting of those shares is also disputed. The validity of the voting trust agreement for various minority shareholders, and/or the dissolution of that agreement, is equally contested.
62. The status of MacBean as CFO, Smith as COO and Melia as CEO are all challenged and are the subject of hotly contested disagreement.
63. Accordingly, the dysfunction and chaos referred to above is self-evident, as illustrated by the lack of agreement as to who are properly shareholders, officers or directors.
64. I agree with the approach of Justice Blair in *Deluce Holdings Inc. v Air Canada*, 1992 CanLII 7654 that one main objective of interim relief in the context of an oppression proceeding is to preserve the rights of the parties. To that I would add the objective of preserving the value of the business which in turn means establishing even on an interim basis a set of circumstances which allow the business to function. Here, that requires more order and less chaos.
65. I also agree with the approach of Justice Farley in *RV & S Ltd. v. Aiolos Inc.*, 2004 CanLII 24264 in rejecting that the court must make an actual finding of oppression before it can make any interim order under section 241 of the OBCA. The reasoning of the Court in that case was that such a consequence would render the power to make an interim order meaningless in most cases. The very *raison d'être* of an interim order is that the court is not in a position to make such a finding because the parties have not been able to prepare the case fully at that stage, but inequitable balance of sorts is necessary to preserve the parties' rights in the interim while they do so.

66. Considering all of the factors, and trying to balance the equities between and among the parties on an interim basis, recognizing the primary objective of creating an environment for the company to function as close to normally as is possible, I direct the following, in addition to the appointment of the Monitor referred to above.
67. Mr. Melia will continue as President in the interim period and until such time as he is removed or replaced by a Board constituted on the consent of all parties or as ordered by the Court. This includes his continuing signing authority with Meridian.
68. Mr. MacBean shall continue as CFO also in the interim period and until such time as he is removed or replaced by a Board constituted on the consent of all parties or as ordered by the Court. To the extent the other provisions of this order restrict the powers or duties he might otherwise have as CFO [i.e., with respect to banking] those powers are so restricted.
69. Mr. Smith shall continue as COO, on the very same terms.
70. The officers shall naturally report to the Board. They will also cooperate fully, and because other employees of the company to go operate as may be required, with the Monitor.
71. The Board of Directors shall include Ralph Goldsilver, Michael Smith, Robert MacBean, Robin Patterson and Douglas Evashkow. The Board shall not make any decisions outside the normal and ordinary course of business, and shall not terminate any officer or restrict or materially amend the powers of any officer in this interim period and without the consent of all parties or as ordered by the Court.
72. Normalcy in the banking relationship with Meridian must be restored. The Monitor shall have full and unrestricted access to all banking, financial and management documents as may be required. This includes but is not limited to the provision of bank account information and account statements directly from Meridian.
73. The Monitor shall be given full visibility into all revenue, receipts and deposits. All payments, withdrawals and transfers outside the ordinary course of business, and all payments, withdrawals and transfers of \$10,000 or more [including related or sequential transactions the aggregate value of which equals \$10,000 or more] shall require Monitor approval.
74. My objective in making the directions in this Endorsement is to restore normalcy and a functioning business atmosphere in and at the company, without prejudice to the rights of any party as may be determined when this Application is heard on the merits and with a full record.
75. My further objective is to reduce on an interim basis friction and conflict about who is an officer and/or director, by ensuring that the Monitor has full visibility into all activities, and requiring that Monitor approval be obtained for any material transaction or payment. It ought to be less critical who the officer or director is, if any significant activities require the approval of the neutral Monitor.
76. Any party, including but not limited to the Monitor, may seek further direction from me if and as necessary by scheduling a brief attendance before me through the Commercial List Office. I would expect that, once the Monitor has had a reasonable opportunity to investigate the issues as it is tasked to do, it or one of the other parties can schedule a hearing on the merits of this Application.
77. I urge the parties, both in their own self-interest and with a view to maximizing the viability of the company and preserving the rights of other stakeholders who are effectively strangers to their dispute, to



cooperate with themselves and the Monitor, to lower the temperature in their correspondence and all dealings with one another, and to act in all respects in a businesslike manner.

78. The parties shall agree on a form of order consistent with this endorsement and submit same to me through the Commercial List office. If they cannot agree on the form of order, I will settle the terms of the order at a brief early morning attendance next week. Costs of this motion reserved to the Applications judge.

Olson, J.