

Court File No. 31-2215095

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)**

THE HONOURABLE

JUSTICE

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FRIDAY, THE 25th

DAY OF JANUARY, 2019



IN THE MATTER OF THE BANKRUPTCY OF BRAINS II,
INC., of the Town of Markham, in the Province of Ontario

Court File No. 31-2215100

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)**

IN THE MATTER OF THE BANKRUPTCY OF BRAINS II, CANADA
INC., of the Town of Markham, in the Province of Ontario

ORDER

(Assignment of a claim to a creditor – BIA s. 38)

THIS MOTION made by A. Farber & Partners Inc., in its capacity as trustee ("TNG Trustee") in bankruptcy of TNG Acquisition Inc. ("TNG"), for an order pursuant to section 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

("BIA") was heard this day at the court house, 330 University Avenue, Toronto, Ontario, M5G 1R7.

ON READING the Affidavit of Stuart Mitchell sworn January 23, 2019, and on hearing the submissions of counsel to the TNG Trustee, no one else appearing, although duly served as appears from the affidavit of service of Erin Craddock, sworn January 23, 2019,

AND UPON being advised of the consent of Schwartz Levitsky Feldman Inc., in its capacity as trustee in bankruptcy ("**Trustee**") of Brains II Canada, Inc. ("**Brains II**") and Brains II, Inc. ("**Brains II**", collectively with Brains II Canada, the "**Brains Entities**")

AUTHORITY TO COMMENCE CLAIM

1. **THIS COURT ORDERS** that the TNG Trustee may, and is hereby authorized to, commence and prosecute all claims, suits, causes of action, demands, debts, rights, indemnities, rights of contribution, subrogation rights, guarantees and assurances, obligations and other liabilities of any nature whatsoever arising from the appointment of the Trustee, or vesting in the Trustee as a result of its appointment as trustee in bankruptcy of the Brains Entities (collectively, the "**Claims**") against the officers, directors and shareholders of the Brains Entities and entities related to the Brains Entities (collectively, the "**Defendants**"), including, in particular, the following:

- (a) claims under sections 95, 96, 97, 98, 98.1, and 101 of the BIA;

- (b) claims under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, as amended;
- (c) claims under the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended; and
- (d) claims arising out of fraud, embezzlement, misappropriation or defalcation of the assets of the Brains Entities by any of the Defendants,

in the name of the TNG Trustee, on behalf of TNG, and at the expense and risk of the TNG Trustee, in accordance with section 38 of the BIA.

NOTICE OF ORDER

2. **THIS COURT ORDERS** that the notice of the granting of this order upon the other creditors of the Brains Entities shall be deemed to be sufficiently served by mailing such notice in a prepaid addressed envelope by registered mail to each creditor who has filed a proof of claim against the Brains Entities at the creditor's place of business or address as shown in the creditor's proof of claim

3. **THIS COURT ORDERS** that service of notice granting this order shall be deemed to be made on the day following the date on which the same is mailed in accordance with paragraph 2 hereof.

BENEFIT OF CLAIMS

4. **THIS COURT ODRERS** that all benefits to be derived from the Claims, together with the costs of the same, shall belong exclusively to the TNG Trustee and to such other creditors of the Brains Entities who may within 30 days of the service upon them of the notice of the granting of this order as provided herein, agree to contribute *pro rata* according to the amount of their respective claims filed with the Trustee in the Brains Entities' bankruptcy proceedings to the expense and risk of the Claims, and who within such time signify their agreement in writing directed to David Ward, Cassels Brock & Blackwell LLP, 2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2, solicitors for the TNG Trustee.

5. **THIS COURT ORDERS** that the costs of the TNG Trustee and of such other creditors of the Brains Entities as may join with the TNG Trustee in the Claims shall be paid, and after paying such costs in full, the balance, if any, shall be divided between the TNG Trustee and any creditors who may contribute under paragraph 4 hereof *pro rata* according to the respective amounts of their claims filed with the Trustee in the Brains Entities' bankruptcy proceedings, in addition to any dividends that they may be entitled to out of the Brains Entities' other assets, but only to the extent of their said claims.

6. **THIS COURT ORDERS** that if a surplus in respect of any recovery of the Claims should exist after payment of the following:

(a) the costs of pursuing the Claims; and

(b) the claims of the TNG Trustee and any other creditors who may choose to participate according to the priority of the same on a *pro rata* basis as set out above in paragraph 4 of this Order;

such surplus ("**Surplus**") shall be paid to the Trustee in augmentation of the Brains Entities' estates.

7. **THIS COURT ORDERS** that if any creditor or creditors of the Brains Entities fail to join in the agreement provided for in paragraph 4 of this Order within the time specified therein, they shall be thereafter excluded from participating in the benefits to be derived from the Claims except to the extent that the Trustee makes a distribution from the Surplus to the creditors of the Brains Entities.

8. **THIS COURT ORDERS** that the costs of this motion shall be at the direction of the Court hearing the Claims and shall be recoverable as costs in accordance with the provisions of this Order.

OBLIGATIONS OF THE TRUSTEE

9. **THIS COURT ORDERS** that the Trustee shall provide the TNG Trustee, within five days of the date of this order, with a list of the names and addresses of all creditors who have filed claims against the Brains Entities' estate.

10. **THIS COURT ORDERS** that the Trustee shall within five days of the date of this order execute an assignment agreement assigning all its right, title and interest in the Claims to the TNG Trustee.

MISCELLANEOUS

11. **THIS COURT ORDERS** that leave be and is hereby granted to any interested person to seek the direction of this Court with respect to any question arising from this Order, provided that any motion seeking direction shall be returnable on seven days' notice to the Trustee and to all other interested persons.

12. **THIS COURT ORDERS** that the TNG Trustee, and any other creditors who join in the Claims, shall have the same right as the Trustee to conduct examinations under section 163(1) of the BIA.

A handwritten signature in blue ink, appearing to read "Hainey", is written over a horizontal line. The signature is stylized and cursive.

IN THE MATTER OF THE BANKRUPTCY OF BRAINS II CANADA, INC., of the
City of Markham, in the Province of Ontario

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Town of Markham, in the Province of Ontario

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

ORDER

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Inc., in its Capacity as Trustee-in-Bankruptcy of the
estate of TNG Acquisition Inc.