File No. CI23-01-43781

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

PRICEWATERHOUSECOOPERS INC.
(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds),

Plaintiff,

- and -

DAKOTA PLAINS FIRST NATION, CHIEF AND COUNCIL OF DAKOTA PLAINS FIRST NATION (solely in their capacity as representatives of DAKOTA PLAINS FIRST NATION), DAKOTA PLAINS WAHPETON OYATE ACTIVE PURSUITS LIMITED PARTNERSHIP, DAKOTA PLAINS WAHPETON OYATE ECONOMICS DEVELOPMENT CORPORATION, DAKOTA PLAINS WAHPETON OYATE MANAGEMENT CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE GP CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE LIMITED PARTNERSHIP, and 356 ASSINIBOINE AVENUE LTD.,

Defendants.

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 of *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BRIEF OF THE PLAINTIFF
HEARING DATE: THURSDAY, MARCH 28, 2024, AT 10:00 A.M.
BEFORE THE HONOURABLE JUSTICE CHARTIER

PITBLADO LLP
2500 - 360 Main Street
Winnipeg, Manitoba R3C 4H6

Catherine E. Howden
Phone No. 204-956-0560
Fax No. 204-957-0227
(File No.11364.112)

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TABLE OF CONTENTS

PART I

LIST OF DOCUMENTS TO BE RELIED UPON

1. Statement of Claim, filed November 7, 2023;

2. Affidavit of Graham Page, sworn March 19, 2024 (the "**Page Affidavit**"); and

3. Consent of Deloitte Restructuring Inc. ("**Deloitte**"), dated March 18, 2024.

PART II

STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

TAB

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended, s. 243(1);
2. *The Court of King's Bench Act*, C.C.S.M. c. c280, s. 55;
3. *Court of King's Bench Rules,* Man Reg 553/88, Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37;
4. *Bank of Montreal v Carnival National Leasing Ltd.*, 2011 ONSC 1007;
5. *Bank of Montreal v Linden Leas Limited*, 2018 NSSC 82;
6. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023;
7. *White Oak Commercial Finance, LLC v Nygård Holdings (USA) Limited et al*, 2020 MBQB 58;
8. *KingSett Mortgage Corporation v 30 Roe Investments Corp.*, 2022 ONSC 2777;
9. *Business Development Bank of Canada v 2197333 Ontario Inc.*, 2012 ONSC 965; and

A. Compare of draft Receivership Order (Schedule "A" to Notice of Motion) to the Manitoba Model Receivership Order.

PART III
STATEMENT OF FACTS

Overview

1. This is a motion for an order to appoint Deloitte Restructuring Inc. ("**Deloitte**") as receiver and manager (in such capacity, the "**Receiver**"), without security, of all current and future assets, undertakings, and properties (collectively, the "**Property**") of each 356 Assiniboine Avenue Ltd. ("**356**"), Dakota Plains Wahpeton Oyate Real Estate GP Co. Ltd. ("**Real Estate GP**"), Dakota Plains Wahpeton Oyate Real Estate Limited Partnership ("**Real Estate LP**"), Dakota Plains Wahpeton Oyate Economics Development Corporation ("**DevelopmentCo**"), Dakota Plains Wahpeton Oyate Management Co. Ltd. ("**ManagementCo**"), and Dakota Plains Wahpeton Oyate Active Pursuits Limited Partnership ("**Pursuits LP**" and collectively with 356, Real Estate GP, Real Estate LP, DevelopmentCo, and ManagementCo, the "**Receivership Defendants**"), acquired for, used or relating to a business carried on by or on behalf of the Receivership Defendants, including, but not limited to, the lands and premises municipally known as 356 Assiniboine Avenue, Winnipeg, in the Province of Manitoba, and more specifically described as: LOT 241 BLOCK 2 PLAN 129 WLTO (W DIV) IN RL 1 PARISH OF ST. JOHN (the "**Real Property**"), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "**BIA**") and section 55 of *The Court of King's Bench Act*, C.C.S.M. c. C280 (the "**KB Act**"); and such further and other relief as this Honourable Court may deem just.

2. No relief is being sought on this motion in respect of Dakota Plains First Nation ("**Dakota Plains**") or Chief and Council of Dakota Plains (solely in their capacity as representatives of Dakota Plains) ("**Chief and Council**").

Notice of Motion
Page Affidavit, paras 2, 3
BIA s. 243(1) [TAB 1]
KB Act, s. 55 [TAB 2]

The Parties

3. All capitalized terms not expressly defined herein are defined, and have the meanings set forth in the Affidavit.

4. PricewaterhouseCoopers Inc. is the court-appointed receiver and manager (in such capacity, the "**Bridging Receiver**") of Bridging Finance Inc. ("**BFI**) and certain related entities and investment funds (collectively, "**Bridging**") by orders of the Ontario Superior Court of Justice (Commercial List) dated April 30, 2021, May 3, 2021, and May 14, 2021.

Page Affidavit, paras 5, 6

5. BFI was a privately held investment management firm based in Toronto that, prior to the appointment of the Bridging Receiver, offered alternative investment options to investors through various bridging investment funds managed by BFI (the "**Bridging Funds**"). BFI, among other things, raised capital from investors through the Bridging Funds for the purpose of extending private debt loans to third-party borrowers. BFI acted as an agent on behalf of the applicable Bridging Fund(s) that advanced funds to third-party borrowers.

Page Affidavit, para 7

6. 356 is a corporation incorporated under the laws of the Province of Manitoba and carries on business as a real estate holding company. 356 holds legal title to the Real Property, the primary asset of the Receivership Defendants, as nominee, agent, and bare trustee for Real Estate GP on behalf of Real Estate LP.

Page Affidavit, paras 17, 18

7. Real Estate GP (formerly Dakota Plains First Nation Real Estate GP Co. Ltd.) is a corporation incorporated under the laws of the Province of Manitoba and carries on business as a management company.

Page Affidavit, para 27

8. Real Estate LP (formerly Dakota Plains First Nation Real Estate Limited Partnership) is a limited partnership formed under the laws of the Province of Manitoba and carries on business as a real estate holdings company.

Page Affidavit, para 26

9. DevelopmentCo (formerly Dakota Plains First Nation Economics Development Corporation) is a corporation incorporated under the laws of the Province of Manitoba and carries on business as an economic development company for Dakota Plains.

Page Affidavit, para 25

10. ManagementCo (formerly Dakota Plains First Nation Management Co. Ltd.) is a corporation incorporated under the laws of the Province of Manitoba and carries on business as a management company.

Page Affidavit, para 24

11. Pursuits LP (formerly Dakota Plains First Nation Active Pursuits Limited Partnership) is a limited partnership formed under the laws of the Province of Manitoba and carries on business as a management company. Its general partner is ManagementCo.

Page Affidavit, para 23

The Loan

12. Pursuant to a term sheet dated March 22, 2019 (the "**Term Sheet**"), a non-revolving demand loan in the principal amount of $5,550,000.00 plus interest (the "**Loan**"), was made available to Dakota Plains by BFI, as agent for certain of the Bridging Funds.

13. The funds from the Loan were used to purchase the Real Property and to fund the renovations of the building situated thereon (the "**Wellness Centre**").

Page Affidavit, para 29

14. The Term Sheet was subsequently amended by a demand promissory note dated May 22, 2019, executed by Dakota Plains and the Receivership Defendants (collectively, the "**Borrower Parties**"), which increased the credit facility to $5,555,000.00 plus interest (the "**Note**" and together with the Term Sheet, the "**Loan Agreement**").

15. The Note provides that each of the Borrower Parties is jointly and severally liable and that each of the Receivership Defendants agrees to be bound by the Term Sheet (as amended by the Note) as if they were an original party thereto with Dakota Plains.

Page Affidavit, para 30

16. Under the Loan Agreement, the Borrower Parties agreed unconditionally to repay the Loan on the earliest of: (i) demand; (ii) the occurrence of an event of default; (iii) the receipt by the Borrower Parties of the proceeds of any financing; and (iv) twelve months from the date of the advance of funds with the right to renew for twelve additional months.

Page Affidavit, para 32

17. Pursuant to a band council resolution dated May 21, 2019, the Chief and Council of Dakota Plains ratified, approved, and confirmed that Dakota Plains agreed to the Loan and properly entered into the Loan Agreement.

Page Affidavit, para 34

18. The Borrower Parties retained Samuel A. Goszer of Duboff Edwards Haight & Shachter Law Corporation (the "**Borrower Parties' Counsel**") as independent legal counsel in connection with the Loan. The Borrower Parties' Counsel provided Bridging and its counsel with an opinion dated May 29, 2019, confirming that the Loan Agreement and various related documents had been duly authorized, executed, and delivered by the Borrower Parties.

Page Affidavit, para 36

19. The maturity date of the Loan was extended from May 22, 2020, to May 22, 2021, by amending agreement dated May 20, 2020.

Page Affidavit, para 33

20. As at February 29, 2024, the total amount owing by the Borrower Parties under the Loan is $11,228,727.00 (the "**Indebtedness**")

Page Affidavit, para 39

The Security

21. As security for all present and future indebtedness and obligations of the Receivership Defendants to Bridging under the Loan Agreement, each of the Receivership Defendants granted to Bridging, among other things, security over all its personal property pursuant to a separate general security agreement, each dated May 21, 2019 (collectively, the "**General Security Agreements**").

Page Affidavit, para 41

22. Section 4 of each of the General Security Agreements provides that a receiver may be appointed by Bridging upon the occurrence of a default (an "**Event of Default**") under the General Security Agreement, or under any other agreement in favour of Bridging.

Page Affidavit, para 48

23. Bridging duly registered its security interest in respect of each of the Receivership Defendants against all classes of collateral other than consumer goods pursuant to *The Personal Property Security Act* (Manitoba), which are the only registrations against the Receivership Defendants.

Page Affidavit, para 46

24. 356 also granted Bridging, among other things, a mortgage in respect of the Real Property (the "**Mortgage**"), the terms of which provide that a receiver may be appointed over the Real Property upon occurrence of an Event of Default.

Page Affidavit, paras 42, 49

25. Bridging is the only secured creditor registered on title to the Real Property. The only registrations other than those in favour of Bridging are: (1) a public pathway easement in favour of the City of Winnipeg registered in 1991; and (2) the beneficial interest in the Real Property held by Real Estate GP, which was registered after the Mortgage.

Page Affidavit, para 47

26. 356 and Real Estate GP, and Real Estate LP executed a subordination agreement (the "**Subordination Agreement**") in favour of Bridging dated May 21, 2019, pursuant to which any debts, shares, and units which are now or may hereafter become due or owing by 356 and the Beneficial Owner shall be subordinated in all respects to the payment of any and all obligations to BFI.

Page Affidavit, para 43

Default

27. The Borrower Parties are in default of their obligations under the Loan Agreement as a result of their failure to repay the amounts outstanding under the Loan when due, which is an Event of Default under the Loan Agreement. The Borrower Parties have failed to make any payments in reduction of the Loan since April 13, 2023.

Page Affidavit, para 50

28. Notwithstanding the Borrower Parties' failure to make payments under the Loan, the Bridging Receiver engaged in discussions with the Borrower Parties regarding potential refinancing and/or repayment proposals. To facilitate such proposals, the Bridging Receiver required detailed financial reporting (the "**Financial Reporting**") from the Borrower Parties. The Bridging Receiver made multiple requests from the Borrower Parties by email and telephone. Although certain historical financial reporting had been provided by the Borrower Parties, they did not provide all the required documentation.

Page Affidavit, paras 51-55

29. On August 22, 2023, the Bridging Receiver made demand (the "**Demand Letters**") and delivered Notices of Intention to Enforce Security (the **"BIA Notices**") pursuant to the BIA to each of the Borrower Parties.

Page Affidavit, para 56

30. By email dated September 25, 2023, the Bridging Receiver confirmed with the Receivership Defendants that the 10-day notice period under the BIA Notices had expired, and that there was no agreement by the Bridging Receiver to extend or toll the running of that notice period.

Page Affidavit, para 58

31. On November 7, 2023, the Bridging Receiver issued a Statement of Claim in respect of the Borrower Parties, pursuant to which the Bridging Receiver seeks repayment of all amounts owing under the Loan.

Page Affidavit, para 59

32. The Borrower Parties made two requests to extend the deadline to file their statements of defence. The Bridging Receiver agreed to the first request dated November 17, 2023, which extended the deadline until January 15, 2024.

Page Affidavit, paras 61, 62

33. In response to the Borrower Parties' second extension request dated January 12, 2024, the Bridging Receiver sent a letter dated January 22, 2024 (the "**January Letter**"), in which it raised various concerns regarding the defaults of the Borrower Parties under the Loan Agreement, and advised that it was prepared to grant an extension provided that:

(a) each of the Borrower Parties delivered the outstanding Financial Reporting;

(b) the Borrower Parties provided written confirmation that 356 and/or the other Borrower Parties are current on all property taxes and any other priority payables in respect of the Real Property;

(c) the Borrower Parties arranged for a conference call between the Bridging Receiver, the Borrower Parties, and Fusion Capital in its capacity as property manager of the Real Property to provide an update on the status of the Real Property and the related business; and

(d) the Borrower Parties provided a written list of each of the Borrower Parties whose liability under the Loan will be disputed in any forthcoming statement of defence.

Page Affidavit, paras 63, 64

34. The Borrower Parties failed to comply with any of the conditions in the January letter and served their Statement of Defence on February 2, 2024.

Page Affidavit, para 65

35. By emails dated February 22 and 26, 2024, BDO advised the Bridging Receiver that Fusion Capital was no longer acting as property manager for the Wellness Centre and that the Wellness was now being managed by an individual named Ramon Merino Jr. The Bridging Receiver has received no communication from the new property manager regarding the status of the Real Property and the related business, and therefore, has no insight into its primary source of collateral.

Page Affidavit, para 66

PART IV

ISSUES

36. Should service of the within Notice of Motion and supporting materials (collectively, the "**Motion Materials**") be abridged and validated?

37. Is the appointment of a receiver just or convenient?

PART V

ARGUMENT

Service of the within Motion Materials should be abridged and validated.

38. Notwithstanding the ordinary requirements for service pursuant to the *King's Bench Rules*, this Court has authority to abridge time requirements, validate defective service, and to dispense with service where necessary in the interests of justice.

***Court of King's Bench Rules*, Man Reg 553/88**
Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended [TAB 3]

39. As such, the Bridging Receiver submits that, to the extent it may be necessary, service of the Motion Materials ought to be abridged and/or validated.

The appointment of a receiver is just or convenient in this case.

40. Section 243 of the BIA provides as follows:

> **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.

BIA, s. 243 [TAB 1]

41. Section 55 of the KB Act further confirms this Honourable Court's jurisdiction to appoint a receiver where it appears just or convenient to do so:

> **Injunctions and receivers**
> **55(1)** The court may grant a restrictive or mandatory interlocutory injunction or may appoint a receiver or receiver and manager by an

> interlocutory order where it appears to the judge to be just or convenient to do so.
>
> **Terms on injunction or appointment**
> **55(2)** An order under subsection (1) may include such terms as are considered just.

KB Act, s. 55 [TAB 2]

42. In *Bank of Montreal v Carnival National Leasing Ltd.*, 2011 ONSC 1007, the Ontario Superior Court of Justice cited with approval a number of passages from *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont. SC), relating to the appointment of a receiver by a secured creditor:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 1984 CanLII 2343 (SK KB), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

***Bank of Montreal v Carnival National Leasing Ltd.*, 2011 ONSC 1007 at para 24 (emphasis added) [*Carnival National*] [TAB 4]**

43. The Court in *Carnival National* further stated that while the appointment of a receiver has been considered an "extraordinary remedy" in certain circumstances, it is considerably less extraordinary where a secured creditor has the express right to have a receiver appointed under the terms of the applicable security agreements in the face of a default. The Court confirmed that analysis in *Bank of Montreal v Linden Leas Limited*, 2018 NSSC 82.

***Carnival National, supra* at paras 25 and 27-28 [TAB 4]**

***Bank of Montreal v Linden Leas Limited*, 2018 NSSC 82 at paras 21-22 [*Linden Leas*] [TAB 5]**

44. In *Bank of Montreal v Sherco Properties Inc.*, the Ontario Superior Court of Justice granted an application for the Court-appointment of a receiver, stating that a lesser burden applies to an applicant where the applicant is seeking to enforce a term of a security agreement giving it authority to appoint a receiver upon default:

> Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. 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.

***Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 at para 42 [TAB 6]**

45. When determining whether it is just or convenient to appoint a receiver, the courts have considered the following factors:

(a) the nature of the property;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets;

(c) the balance of convenience to the parties;

(d) the fact that the creditor has the right to appoint a receiver under the relevant security documentation;

(e) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(f) the conduct of the parties;

(g) the likelihood of maximizing return to the parties; and

(h) the goal of facilitating the duties of the receiver.

***Linden Leas, supra* at para 21 [TAB 5]**

***White Oak Commercial Finance, LLC v Nygard Holdings (USA) Limited et al*, 2020 MBQB 58 at para 16 [TAB 7]**

46. More recently, the Ontario Superior Court of Justice in *KingSett Mortgage Corporation v 30 Roe Investments Corp.* held that there are four additional factors that courts may consider when determining whether it is just or convenient to appoint a receiver, as set out by the Ontario Courts in *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, 2020 ONSC 1953 and *Confederation Life Insurance Co v Double Y Holdings Inc.*, [1991] OJ No 2613, (Ontario Court of Justice Gen. Div.). The four additional factors are:

(a) the lenders' security is at risk of deteriorating;

(b) there is a need to stabilize and preserve the Receivership Defendants' business;

(c) loss of confidence in the Receivership Defendants' management; and

(d) positions and interests of other creditors.

***KingSett Mortgage Corporation v 30 Roe Investments Corp.*, 2022 ONSC 2777 at para 29 [*KingSett*] [TAB 8]**

47. In *Kingsett*, by way of commitment letter dated March 29, 2019, and amendments thereto, the applicant advanced a loan to the respondent which was secured by a second mortgage against the respondent's real property. As security for the payment and performance of its obligations under the commitment letter, as amended, the respondent executed, among other things, a General Assignment of Rents and Leases relating to its real property, in favour of the applicant, an Assignment of Material Agreements in favour of the applicant, and a General Security Agreement granting the applicant a security interest in all of its present and future undertakings and property. Various amendments to the commitment letter had extended the maturity date of the loan three times to an ultimate maturity date of December 1, 2021, and provided that the applicant was entitled to appoint a receiver upon default by the respondent under the commitment letter (as amended).

***KingSett, supra* at paras 17-19 [TAB 8]**

48. In granting the applicant's application for the appointment of a receiver of the respondent's real property, the Court considered the length of time that had passed since the respondent defaulted under the loan agreements and noted that the respondent could have taken steps to cure its default, but had failed to do so. Further, the Court accepted the applicant's evidence that it had lost all confidence in the respondent's management, stating:

> The Applicant's mortgage loan matured on December 1, 2021, and the Respondent has had five months to refinance but has not done so.
>
> [...]
>
> The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. [...]
>
> The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it."

***KingSett, supra*, at paras 32 and 34-35 [TAB 8]**

49. The fact that the respondent has been in default for a considerable period of time has been considered an important factor in determining whether the appointment of a receiver is justified in other Ontario decisions.

***Business Development Bank of Canada v 2197333 Ontario Inc.*, 2012 ONSC 965 at para 21 [TAB 9]**

50. The Bridging Receiver submits that, based on the circumstances of this case, it is just or convenient to appoint a receiver over the Receivership Defendants' assets for, *inter alia*, the following reasons:

(a) the Borrower Parties are jointly and severally indebted to Bridging, a secured creditor, in the amount of $11,228,727.00 under the Loan.

(b) the Borrower Parties retained independent legal counsel, who provided a legal opinion confirming the validity and enforceability of the Loan Agreement and the Security;

(c) the Borrower Parties have been in default of their respective obligations under the Loan Agreement and Security since at least April 13, 2023, and have repeatedly failed and/or refused to cure such defaults;

(d) notwithstanding the issuance of the Demand Letters, the BIA Notices, and the Statement of Claim, the Borrower Parties have failed to make any payment on account of their indebtedness under the Loan;

(e) the statutory 10-day notice period under the BIA Notices expired September 1, 2023;

(f) as a result of the defaults described herein, the Bridging Receiver is contractually entitled under the Security to seek appointment of a receiver over all or part of the Property, including the Real Property;

(g) the books and records of Bridging and the limited financial reporting provided to Bridging to date indicate that: (1) the Receivership Defendants have stopped paying their current obligations in the ordinary course as they generally become due; and/or (2) the Receivership Defendants are unable to satisfy the Indebtedness, and are therefore insolvent;

(h) the Bridging Receiver has lost confidence in the management of the Receivership Defendants and will not support any continuation of the *status quo;*

(i) the Receivership Defendants have failed to provide reasonable financial reporting and have otherwise been unresponsive to the Bridging Receiver's requests for repayment and/or refinancing plan. The Receivership Defendants continue to enjoy the use of the Wellness Centre and the income it generates, but refuse to repay the Loan that funded the acquisition and renovation of the Wellness Centre;

(j) the Borrower Parties, in their Statement of Defence take the position that they are not obligated to repay the Loan and dispute the validity of the Security. The Bridging Receiver has significant concerns that further steps will be taken by the Receivership Defendants to jeopardize the interests of Bridging (and its investors whose funds were used to advance the Loan).;

(k) the Bridging Receiver is also concerned that the continuation of the *status quo* will result in Bridging never receiving full repayment on the Loan, as the Indebtedness continues to grow. Additionally, there is the potential that Bridging's security

position could erode over time without appropriate care and maintenance of the Receivership Defendants' Property;

(l) the Bridging Receiver has acted in good faith towards the Receivership Defendants at all times and has provided the Receivership Defendants with ample opportunity to cure their respective defaults, which they have failed to do; and

(m) court appointment is necessary to enable the proposed receiver to carry out its duties more efficiently.

51. The Bridging Receiver respectfully submits that there are no other remedies short of the appointment of a receiver available to it that will adequately protect the interests of stakeholders. When the foregoing factors are considered, the balancing of the parties' interests favours the Bridging Receiver and the appointment of a receiver.

52. Consistent with the Court's decision in *Kingsett,* the Bridging Receiver is entitled to take steps under its security to enforce payment of the Indebtedness.

53. Deloitte is a professional and experienced insolvency trustee, and has consented to act as receiver and manager, if appointed.

PART VI

CONCLUSION

54. In light of the above, the Bridging Receiver respectfully submits that it is just or convenient for this Court to appoint Deloitte as receiver of the Property of the Receivership Defendants.

55. A proposed form of Receivership Order is attached as Schedule "A" to the Notice of Motion filed in this matter. A comparison between the Model Receivership Order and the proposed Order in this proceeding is attached at Tab A hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of March, 2024.

PITBLADO LLP

Per: _____
Catherine E. Howden
Counsel for the Plaintiff

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

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province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

TAB 2

MANITOBA

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

As of 19 Mar. 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 19 mars 2024. Son contenu était à jour pendant la période indiquée en bas de page.

PART X

INTERLOCUTORY PROCEEDINGS

Injunctions and receivers
55(1) The court may grant a restrictive or mandatory interlocutory injunction or may appoint a receiver or receiver and manager by an interlocutory order where it appears to the judge to be just or convenient to do so.

Terms on injunction or appointment
55(2) An order under subsection (1) may include such terms as are considered just.

No injunction re personal services
56(1) The court shall not grant an injunction which requires a person to work or perform personal services for an employer.

No contempt re personal services
56(2) No person shall be held in contempt of court by reason only of a refusal, neglect or failure of the person to work or perform personal services for an employer.

No injunction re freedom of speech
57(1) Subject to subsection (3), the court shall not grant an injunction that restrains a person from exercising the right to freedom of speech.

"Exercise right to freedom of speech"
57(2) For the purposes of this section, the communication by a person on a public thoroughfare of information by true statements, either orally or through printed material or through any other means, is an exercise of the right to freedom of speech.

PARTIE X

PROCÉDURES INTERLOCUTOIRES

Injonctions et séquestres
55(1) Le tribunal peut accorder une injonction interlocutoire de faire ou de ne pas faire ou peut nommer un séquestre ou un administrateur-séquestre au moyen d'une ordonnance interlocutoire, dans tous les cas où le juge estime qu'il est juste ou approprié d'agir ainsi.

Conditions
55(2) L'ordonnance prévue au paragraphe (1) peut être assortie des conditions que le tribunal estime justes.

Injonction portant sur des services personnels
56(1) Le tribunal ne peut accorder une injonction qui enjoint à une personne de travailler pour un employeur ou de lui rendre des services personnels.

Outrage au tribunal
56(2) Une personne ne peut être condamnée pour outrage au tribunal pour la seule raison qu'elle a refusé, négligé ou omis de travailler pour un employeur ou de lui rendre des services personnels.

Liberté d'expression
57(1) Sous réserve du paragraphe (3), le tribunal ne peut accorder une injonction qui restreint l'exercice de la liberté d'expression d'une personne.

Définition de l'« exercice de la liberté d'expression »
57(2) Pour l'application du présent article, la communication de renseignements qu'une personne fournit sur une voie publique au moyen de déclarations véridiques, soit verbalement, soit par documents imprimés ou par tout autre moyen, constitue un exercice de la liberté d'expression de cette personne.

TAB 3

Court of King's Bench Rules, M.R. 553/88

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

...

EXTENSION OR ABRIDGMENT

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Expiration of time

3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Consent in writing

3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

...

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

...

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

...

SERVICE OF NOTICE

Required as general rule
37.06(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

Notice not required
37.06(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

Consent order without notice of motion
37.06(2.1) The court may make an order on consent without a notice of motion being filed.

Interim order without notice
37.06(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

Service of order
37.06(4) Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

Where notice ought to have been served
37.06(5) Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person.

Time for service
37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

TAB 4

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.C Conduct of parties

Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Debtor was in business of leasing motor vehicles — Debtor was indebted to creditor bank; vehicles guaranteed indebtedness to $1.5 million — Creditor held security over assets of debtor including general security agreement under which it had right to appoint receiver of debtor or to apply to court for appointment of receiver — Under terms of wholesale leasing facility, total advances for used vehicle financing were not to exceed 30 percent of approved lease portfolio credit line — Creditor's account manager was informed that used car lease portfolio was 60 percent of leases financed by creditor, well in excess of 30 percent condition of loan — Creditor delivered demands for payment — Creditor applied for appointment of receiver — Application granted — Debtor relied on decision in which judge was critical of actions of bank in overstating its case and making unsupportable allegations of fraud — In case at bar there was no basis to refuse order sought because of alleged misconduct on part of creditor or its counsel — If anything, shoe was on other foot as factum filed on behalf of debtor was replete with allegations of false assertions on behalf of creditor, none of which were established — Cited case was relied upon in which it was held that where security instrument permits appointment of private receiver, extraordinary nature of remedy sought is less essential to inquiry — It was preferable to have court appointed receiver rather than privately appointed one as debtor stated that if private appointment was made it would litigate its right to do so.

Table of Authorities
Cases considered by *Newbould J.*:
Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to
Bank of Nova Scotia v. D.G. Jewelry Inc. (2002), 2002 CarswellOnt 3443, 38 C.B.R. (4th) 7 (Ont. S.C.J.) — considered
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed
Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 35 O.A.C. 305, 62 D.L.R. (4th) 277, 1989 CarswellOnt 191 (Ont. C.A.) — referred to

Royal Bank v. Boussoulas (2010), 2010 ONSC 4650, 2010 CarswellOnt 6332 (Ont. S.C.J.) — considered

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — distinguished

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Toronto Dominion Bank v. Pritchard (1997), 154 D.L.R. (4th) 141, 104 O.A.C. 373, 1997 CarswellOnt 4277 (Ont. Div. Ct.) — considered

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — not followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — referred to

s. 243(1) — considered

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

s. 101 — considered

Newbould J.:

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet

done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.

. . .

On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva

injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

TAB 5

2018 NSSC 82
Nova Scotia Supreme Court

Bank of Montreal v. Linden Leas Limited

2018 CarswellNS 497, 2018 NSSC 82, 293 A.C.W.S. (3d) 685, 61 C.B.R. (6th) 322

Bank of Montreal (Applicant) v. Linden Leas Limited (Respondent)

Peter P. Rosinski J.

Heard: March 20, 2018
Judgment: April 11, 2018
Docket: Tru. 470166

Counsel: Bruce Clarke, Q.C., Leon Tovey, for Applicant
Jillian Foster, for Respondent

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Debtor was corporate farm which controlled cattle herd — Bank was lender under agreement in which herd was guarantee — Debtor did not make required payments on loan — Bank brought application to appoint receiver over herd — Application granted — Bank had not established irreparable prejudice might occur if no receiver was appointed by court, although it was not essential to demonstrate irreparable harm — Herd had value of approximately $1 million and debtor had significant equity in assets — Cattle herd was ever-changing group of living assets that by nature required intensive monitoring, handling and care, by trained or experienced personnel — Realistically, monitoring must be done by members of debtor, although it could be under auspices of court-appointed receiver — All parties were motivated to protect herd as asset — Amount of indebtedness was in dispute — Farm corporation had no particularized plan to pay debt — Creditor had right to appoint receiver under documentation provided for in loan — Court appointment was necessary to enable receiver to carry out its duties more efficiently — No misconduct by parties.
Table of Authorities
Cases considered by *Peter P. Rosinski J.*:
Bank of Montreal v. Linden Leas Limited (2017), 2017 NSSC 223, 2017 CarswellNS 607, 51 C.B.R. (6th) 270, 9 C.P.C. (8th) 46 (N.S. S.C.) — considered
Bank of Montreal v. Sherco Properties Inc. (2013), 2013 ONSC 7023, 2013 CarswellOnt 16848 (Ont. S.C.J. [Commercial List]) — considered
Brett v. Amica Mature Lifestyles Inc. (2004), 2004 NSCA 100, 2004 CarswellNS 321, 226 N.S.R. (2d) 188, 714 A.P.R. 188 (N.S. C.A. [In Chambers]) — referred to
British Columbia (Attorney General) v. Malik (2011), 2011 SCC 18, 2011 CarswellBC 923, 2011 CarswellBC 924, 76 C.B.R. (5th) 56, [2011] 6 W.W.R. 383, 1 C.P.C. (7th) 374, 17 B.C.L.R. (5th) 1, 330 D.L.R. (4th) 577, 414 N.R. 332, 303 B.C.A.C. 1, 512 W.A.C. 1, [2011] 1 S.C.R. 657 (S.C.C.) — followed
Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 128, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 1084 A.P.R. 108, 343 N.S.R. (2d) 108 (N.S. S.C.) — considered
Statutes considered:
Bank Act, S.C. 1991, c. 46
s. 427 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(1) — referred to
Companies Act, R.S.N.S. 1989, c. 81
s. 77 — referred to
Judicature Act, R.S.N.S. 1989, c. 240
s. 43(9) — referred to
Rules considered:
Civil Procedure Rules (1972), N.S. Civ. Pro. Rules
R. 38.14 — considered
Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
Generally — referred to

R. 5.05(5) — considered

R. 39.06 — considered

R. 73 — referred to

R. 73.07(a) — referred to

***Peter P. Rosinski J.*:**

Introduction

1 Linden Leas Ltd. (LL) is a corporation. However, its embodiment is the Foster family.

2 Frank and Edna Foster and their children started, and continue to grow, a distinctive herd of cattle, which are highly sought after by buyers. They have collectively worked and managed the farm that sustains the cattle herd that is its core enterprise. Their daughter, Jillian, is a veterinarian and intimately involved with the farm. Even in the documents filed herein, the respondent Corporation is referred to by the Fosters as the "Farmer". [1]

3 The Bank of Montréal (BMO) are presently the *only* secured creditor having as security the farm's cattle herd. Its financial dealings with LL stretch back to at least May 2001. [2] It seeks a receivership order in relation to the cattle herd.

4 LL contests the application. It does not deny that it owes approximately $200,000 in principal payments, while recognizing BMO is claiming a further $220,000 for legal *and* receiver fees to date, some of which began accruing between 2012 and 2017, and $165,000 in accrued interest on those outstanding amounts.

5 BMO made a demand for the immediate full payment of those outstanding amounts on September 20, 2017. [3]

6 LL has made no payments towards the claimed indebtedness since October 2016. [4]

7 LL says, based on various arguments, including that they were unnecessary and unreasonable, that it should not be responsible to pay a substantial portion of the legal and receiver fees to date and accrued interest thereon.

8 BMO says that throughout, it is has made sustained diligent and good faith efforts to provide financing to LL, and particularly so over the course of the years 2011 to present, but that LL has not paid its indebtedness as agreed. BMO therefore no longer has confidence in the financial management of the farm by the Fosters. BMO is no longer prepared to place itself at such a level of ongoing risk. Its primary security is the herd, and it proposes to have the receiver sell off not more than $40,000 worth of cattle per month (without an express "total amount owing" limit in the draft order), which it suggests will still allow the herd to retain a critical mass for viability. BMO also wants the receiver to have the power to insure the herd.

9 LL says that the farm is a "going concern", and still has a bright future, without the appointment of a receiver as suggested by BMO. It strenuously argues that insuring the herd is prohibitively expensive. From the evidence and representations presented I infer that no insurance is presently in place, nor has there been in the past [5]

10 As Justice Moir summarized it in his recent decision, when the bank made its application for an interlocutory receivership:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

The evidence presented at the hearing

11 BMO presented only the affidavit of Rachel Chemtob, sworn January 25, 2018. No notice of intent to cross-examine was filed - Civil Procedure Rule (CPR) 5.05(5), nor was there a request to do so at the hearing. [6]

12 LL presented no evidence. I note that Jillian Foster, who was authorized to speak on behalf of the Corporation, indicated in her written materials that she wished to rely upon previous decisions of, and evidence from, proceedings in this court contained in files Tru. No. 408708 and Amh. No. 348700, including affidavits filed therein.

13 I advised Ms. Foster that I would not be reviewing the contents of those files [7] or the affidavits therein, because BMO had provided evidence that was up-to-date and superseded any evidence presented therein; and our Civil Procedure Rules require that the affidavits be related to the same "proceeding". In my view that is not the case here. I have as the "proceeding", an originating application in chambers before me. [8]

14 CPR 39.06 reads:

> (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit filed a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

15 Thereafter, Ms. Foster spontaneously suggested that she wished to call as witnesses to give *viva voce* evidence to the court on the application, her brother Robert Foster, and David Boyd (the proposed receiver), both of whom were present.

16 I ruled against her request. Nevertheless, I do believe that some of her representations of fact/opinion made by way of inclusion of her unsigned September 14, 2012 affidavit from the proceeding in Amh. No. 390679, found at Tab 8 of LL's "brief", are not disputed by the bank and remain relevant at present. Those representations include:

> I am a veterinarian with 25 years of professional experience in livestock medicine and health. I have witnesses [sic] firsthand on clients' farms in the Maritimes, and Ontario and through observation in Alberta, the effects of moving cattle from their "homes". Movement of cattle where unnecessary, results in direct costs and losses to health, life and consequently value and food safety.
>
> . . .

a) the gestational period, the time from breeding or conception to calving or giving birth, for the common North American cattle breeds is between 275 and 292 days, with 285 being used as average.

b) The ideal is for breeding females to calve or give birth to one calf every year (12 months)

c) the weaning age in days used as an industry standard for calculations to compare animals is 205 days. Weaning is the graduation of calves from being dependent on their mother's milk for nutrition to not. Premature weaning causes stress to both calf and cow and consequentially results in a loss in value and becomes a welfare issue.

d) Cows or breeding females ideally are already 3 to 5 months pregnant when their calves are weaned.

e) Premature weaning of calves results in excess stress and consequently even if safeguarded for, can result in substantial losses and welfare concerns (see [reference to "shipping fever"]).

f) Bred females are most safely moved between four and six months of gestation, after the risk of early embryonic death caused by change of home and stress, when their calf is naturally weaned and before they become heavy in calf. The calf they are pregnant with gets big.

g) Pregnancy tested cattle, *certified safe in calf* at least four months, have a market value above that of *exposed to the bull* and not confirmed pregnant and substantially more than *open not bred* cattle.

h) The Linden Leas herd is synchronized to optimize the benefits of the seasons and grass growth.

i) Calving. Cows calve or give birth on grass with most births occurring in the summer months.

j) Breeding. Insemination. Eligible females are bred by bulls at pasture starting at the beginning of August.

k) Natural weaning of calves occurs between December and February as calves reach adolescence. At this age they are ruminating and able to forage on their own.

. . .

'Shipping fever' is the common term used to describe the diseases of cattle that occur when they are moved from their home. Orderly weaning, proper "preconditioning" at least five weeks ahead of shipping and an adequate period of bunk adjustment are preventative measures that can make a substantial difference to losses. Given the time that is needed to travel to the next "home" destination for calves weaned early the price paid by buyers is reflective of the expected morbidity and mortality rates that occur from purchasing "high risk" calves. The associated price drop per pound can be 50% of optimal for calves of the same weight as the losses can be substantial to the buyer not to mention the unnecessary suffering and deaths that occur.

The position of BMO

17 The bank has established that no payments have been made since October 2016, and that at least $200,000 in principal payments presently remain outstanding. *Prima facie*, approximately $220,000 in legal counsel and receiver fees and $165,000 in interest are also presently outstanding. The bank has permitted LL to have the benefit of five Forbearance Agreements (October 4, 2012; February 7, 2013; June 24, 2013; September 4, 2014; and April 30, 2015). Mr. Clarke represented to the court that most of the legal counsel expenses arose not as a result of litigation, but rather solicitor work, in preparing and dealing with the forbearance agreements etc. Notably, within each Forbearance Agreement, LL acknowledged the debt outstanding, and that it was in default. There was no rectification to those defaults, and on September 20, 2017, the debt was again demanded to be immediately paid. On the limited evidence presented, I infer that it is more likely than not, that LL is insolvent.

18 There is a provision in the contractual documentation for the bank to have a receiver appointed in circumstances such as in evidence before the court. BMO emphasizes that it is seeking the receivership as a "final remedy", and not as a typical

interim receivership. It points out that the Model Order from this court does *not* require a judgment amount to be determined before such appointment. [9]

19 BMO relies on several legal bases to support its application in chambers, filed October 30, 2017, for the court-ordered appointment of a receiver:

1- Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA)-"... 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 of the court considers advisable over that property and over the insolvent persons or bankrupt's business; or

c- take any other action that the Court considers advisable."

2- Section 77 of the *Companies Act*, RSNS 1989, C. 81-"upon an application by a receiver or receiver manager, whether appointed by a court or under an instrument, or upon an application by any interested person, *a court may make any order it thinks fit including*, without limiting the generality of the foregoing,

a-*An order appointing*, replacing or discharging *a receiver* or receiver manager and approving his accounts;

. . .

c-An order fixing the remuneration of the receiver or receiver manager;

. . . "

3- Civil Procedure Rule 73 and specifically 73.02(2)(b) and 73.04 -

73.01 (1) This Rule provides for receivership as a final remedy, such as an order appointing a receiver to liquidate mortgaged property or to sell a business as a going concern.

(2) An interlocutory or interim receivership may be obtained under Rule 41...

(3) A receivership may be ordered and conducted in accordance with this Rule.

73.02 (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.

(2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:

(a) the party is entitled to the order under Rule 8 - default judgment, or Rule 13 - summary judgment;

(b) *a judge determines, after* the trial of the action or *hearing* of the application in which the claim is made, *that the appointment should be made*.

4- Section 43(9) of the Nova Scotia *Judicature Act*, RSNS 1989 c. 240 - "A... receiver [may be] appointed by an interlocutory order of the Supreme Court, in all cases in which *it appears to the Supreme Court to be just or convenient* that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just..." based on principles established pursuant to the equitable common-law jurisdiction of this Superior Court.

20 The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 (N.S. S.C.); and the decision of Justice Morawetz, in *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (Ont. S.C.J. [Commercial List]), which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.

21 Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) 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;
>
> (b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;
>
> (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) The effect of the order on the parties;
>
> (l) The conduct of the parties;
>
> (m) The length of time that a receiver may be in place;
>
> (n) The cost to the parties;
>
> (o) The likelihood of maximizing return to the parties; and
>
> (p) The goal of facilitating the duties of the receiver.
>
> 27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:
>
> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the

receiver appointed. 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. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; Freure Village, supra; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc.* offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) The terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
>
> (b) The terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) The value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

22 *Crown Jewel* involved a request for the appointment of a receiver to effect a final remedy. As was the case there, here, a security instrument contains an express clause permitting the creditor to appoint a receiver. Justice Edwards reiterated the importance of appreciating the distinction between a court-appointed and private receiver:

> 40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. *A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court.* Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.
>
> 41 *The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However*, in Houlden, Morawetz and Sarra at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> 42 Finally, the authors note at p. 1024 of The 2013-2014 Annotated Bankruptcy and Insolvency Act that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In *Romspen Investment Corp. v.*

1514904 Ontario Ltd. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.
>
> [My italicization]

23 Notably, although Justice Moir was dealing with a request for an interlocutory appointment of a receiver in *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.), he did state in relation to the appointment of receivers to effect a final remedy:

> 19 While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order....
>
> 20 The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against pre-judgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

24 *An examination of some factors relevant to whether it is just and equitable to appoint a receiver* [10]

a) 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) [11]

25 Although BMO's security contains a provision permitting it to have a private receiver appointed, insofar as a court-appointed receiver is concerned, it still bears the onus. Its evidence as contained in the Chemtob affidavit suggests that:

> i) On January 25, 2018 the outstanding amounts were: $203, $314.36 in principal; $220,419.12 in legal and receiver fees; and $164,915.63 in interest, for a total of $588,649.11.
>
> ii) That indebtedness is also secured by the May 18, 2001 personal guarantees of Frank Foster and Edna Foster (limited to $200,000); the July 26 2004 personal guarantees of Frank Foster, Edna Foster, Jillian Foster and Robert Foster, (limited to $100,000) the July 26, 2004 guarantee of Robert Foster (limited to $100,000); and the July 26, 2004 guarantee of Jillian Foster (limited to $100,000).
>
> iii) LL and the Nova Scotia Farm Loan Board are the registered owner of 24 real properties in Nova Scotia. The cattle herd has grown from 650 in 2012 to approximately 850 head in 2016. The 2017 financial statements of LL indicate the value of its cattle to be more than $1 million.
>
> iv) "BMO is concerned about Linden Leas' ability and willingness to take necessary steps to reduce the Indebtedness... [and] is therefore of the view that a receiver needs to be appointed by the court with the authority to begin selling some of the company's cattle in order to reduce the amount of the Indebtedness.

26 In its brief, BMO argued that there exists a risk of such harm to its security. Because the herd is the company's most valuable asset,and is BMO's only direct security, BMO may be at greater risk. To the extent that there are valid concerns about the company's financial ability to care for the herd, and no insurance on the herd, its security is presently particularly vulnerable.

27 On the facts and representations herein, I cannot conclude that BMO has established irreparable prejudice might occur, if no receiver is appointed by the court. I accept that, at law, it is not essential that BMO demonstrates irreparable harm.

b) The risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets, while litigation takes place

28 As set out above, the cattle herd, which is the primary security that BMO can claim, has an estimated $1 million value. [12] The debtor's equity in the assets appears to be significant.

c) The nature of the property

29 The cattle herd is an ever-changing group of living assets. By its nature, it requires intensive monitoring, handling and care, by trained or experienced personnel in order to ensure its maximum value. Realistically, this monitoring must be done by the Fosters, although it could be under the auspices of a court-appointed receiver.

d) The apprehended or actual waste of the debtor's assets

30 This is not a significant concern here.

(e) The preservation and protection of the property pending judicial resolution (i.e. material reduction or elimination of the Indebtedness)

31 While this is a significant concern given that the cattle herd is BMO's primary security (beyond any risk reduction attributable to the personal guarantees), LL, and the Fosters collectively, are similarly motivated to preserve and protect the cattle herd.

f) The balance of convenience as between the parties.

32 LL argues that the receiver should not be appointed, but more importantly even if appointed, should not be permitted to sell off *any* of the cattle herd without its consent; and in particular not to do so to pay down the indebtedness attributable to past receiver and legal fees or any interest accruing on those amounts. The amount of that indebtedness is in dispute. In contrast, the approximately $200,000 in principal owing is not seriously in dispute. LL suggested at the hearing, it will be in a position within several weeks to pay close to $200,000 to BMO. [13]

33 However, LL has presented no particularized plan to pay off, or pay down, the Indebtedness. BMO has received no payments since October 2016 - this is suggestive of a failing business. BMO could fairly comment that there is no evidence, but only a somewhat vague representation by Ms. Foster at the hearing, that there has been an accumulation by LL of such vast stores of surplus monies, now available to it to pay BMO $200,000.

34 I observe that, if issued including terms to an order appointing a receiver is limit the sale of cattle to the amount of the principal owing such monies are paid, then LL would be able to avert the sale of any of the herd *at this time.*

g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan

35 This factor generally strongly supports BMO's position that the Court should appoint a receiver.

h) The enforcement of rights under security instrument where the security holder encounters, or expects to encounter, difficulty with the debtor and others

36 BMO and LL have fundamentally different perspectives on how to resolve the financial dispute between them. I repeat Justice Moir's recent comments:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

37 If the court appoints a receiver with conditions that ensure that the Foster family have meaningful input[14] into the decisions of the receiver which affect the viability of the herd, it would expect a genuine good faith collaborative effort by the parties will emerge.

i) The principle of the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly

38 While this is generally true, here the contractual provisions between the parties permit a private receiver to be engaged, and LL does not seriously dispute that it owes at least $200,000 to BMO under the security, and has not made a payment since October 2016, thereon.

j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently

39 I am satisfied that this is the case. The receiver is responsible to the court. This heightened fiduciary responsibility is to the benefit of both parties.

k) The effect of the order on the parties

40 The Foster family is understandably very protective of its hands-on management of the cattle herd, and the farm generally. They have invested their lives, as much as their money and talent, in creating and growing this distinctive and valuable herd. However, while they appear to have had the determination, knowledge, and resources to be outstanding farmers, they have not managed their financial affairs to that same standard. The bank is entitled to be paid according to law. They have sought the Court's intervention to effect payment by LL of the Indebtedness. The appointment by the court of a receiver, who is an officer of the court, and must take instructions from the court, and not favour the interests of the debtor or creditor, can be an effective means of resolving disputes such as the one before the court. It is intended to let the Fosters be farmers, and the receiver be a conduit through which BMO can receive sufficient payments towards its indebtedness to alleviate its concerns.

l) The conduct of the parties

41 There is no evidence of past misconduct, nor any anticipated.

m) The length of time that a receiver may be in place.

42 If the receiver is entitled to sell some of the herd over time in order to satisfy at least the $200,000 principal indebtedness, and if the 850 head of cattle have a value of $1 million, then, in static terms, roughly speaking 20% of them (170 head) would need to be sold in order to generate $200,000. If BMO's proposal to sell *no more* than $40,000 worth per month is accepted by the court, that would see no more than 34 cattle sold monthly (presuming their price is approximately $1200 per head), for five months to reach 170 head in total.

43 I am reluctant to arbitrarily set out a fixed monthly maximum allowable sale of the cattle by the receiver. No particulars were offered in evidence regarding such a timetable. Even presuming 20 head are sold per month continuously, that could entail roughly 8 consecutive months of sales. Given LL's legitimate concerns about sustaining a critical mass and mix required for

herd viability, and the requirement to sell approximately 170 head in total to pay back $200,000, the receiver may need to be in place for an indefinite period of time. This cannot be calculated with precision. The court must accord the Receiver the necessary discretion to effect an orderly and thoughtful reduction of the debt.

Conclusion

44 Upon consideration of all the circumstances, viewing those through the factors noted above, and collectively pursuant to the statutory and equitable jurisdiction of the court, [15] I am satisfied that it is convenient or just to appoint a receiver.

The order to issue

45 Specifically, I appoint Price Waterhouse Coopers Inc., without security. [16]

46 Although, it is not necessary to articulate a precise amount of indebtedness in the order, I am satisfied it is more likely than not that LL is indebted to BMO for an amount of at least $200,000 as at March 23, 2018.

47 The Receiver will effect a reasonably timely reduction of LL's indebtedness to BMO, only toward payment for any true principal and interest thereon outstanding as of March 23, 2018, and to a maximum of $200,000. [17] The Receiver will reduce that indebtedness, by making payments to BMO arising from the revenue generated by sales of portions LL's cattle herd. The timing, content, and amounts thereof to be in the Receiver's sole discretion, *but* only after having had genuine and timely collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for viability. LL will fulsomely facilitate the Receiver's patent and patently implied responsibilities to effect the debt reduction.

48 I decline to order LL to be responsible for the cost of any herd insurance.

49 I believe it appropriate for the court to order the parties to attend at a mutually convenient time for a status update in approximately six months. [18]

Costs

50 Typically, an application in chambers set for one half day, would justify an order of approximately $1,000 in costs as against the Respondent. I note that in the *Crown Jewel*, Justice Edwards ordered $1,500 costs. BMO has suggested deferring the determination of the costs of this proceeding to the date when the legal, professional fees and outstanding interest amounts are assessed. I believe this can best be addressed at a future date.

Application granted.

Footnotes

1 Some of the background is contained in Justice Moir's decision - *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.); the herd had grown between 2012 and 2016 from 650 to 850 head - para. 52 Rachel Chemtob affidavit sworn January 25, 2018

2 See comprehensive affidavit of Rachel Chemtob, sworn January 25, 2018

3 Exhibit "R", Chemtob affidavit

4 The only payments made in 2015, were pursuant to the Fifth Forbearance Agreement, and limited to: $2000 in January; $900 in June; $1000 in August; and $1000 in December; the only payments made in 2016 were: $1000 in March, $1000 in August, and lastly $10,000 in September and October - see Exhibit "Q" and paras. 41-46, Chemtob affidavit

5 See also para. 26 *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.).

6 Rachel Chemtob was present at the hearing

7 Keeping in mind the principles in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 (S.C.C.)

8 Under the old Rule 38.14, see Justice Fichaud's comments at paras. 15-18, *Brett v. Amica Mature Lifestyles Inc.*, 2004 NSCA 100 (N.S. C.A. [In Chambers]). Moreover, although the Truro file might have been readily available as we were sitting in Truro, the Amherst file was not.

9 However, in these specific circumstances, the bank requests the Receiver be appointed soley to sell cattle and effect a pay down of the debt. In my view, the better practice is to determine a fixed amount that this Receiver will be authorized to reduce over time by sales of cattle (as well as payment of its own reasonable fees and disbursements, and any statutory claims having priority to the bank's security).

10 While these factors arise in the general context of interlocutory receivership applications, they do provide a ready starting point for determining whether, as a final remedy for a secured creditor, it is "just or convenient" to appoint a receiver.

11 In the circumstances of this case, there is a serious concern that *any* culling of the herd could precipitously undermine the viability, and value of the cattle operation.

12 The bank's security includes the cattle specifically, pursuant to s. 427 *Bank* Act security documentation registered April 19, 2010 - see Exhibit "C" Chemtob affidavit referred to at paras. 4-6.Linden Leas also owns real property.

13 At the hearing, Jillian Foster alluded to monies LL had received from timbering operations, and suggested $200,000 would shortly be available to pay BMO.

14 A right to be meaningful consulted in a timely manner regarding, but not a right to veto, decisions of the receiver in determining, which cattle, and how many should be sold, and when.

15 As reflected in s. 43(9) of the *Judicature Act*, and s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 77 of the *Companies Act (Nova Scotia)* and our *Civil Procedure Rule* 73

16 I am satisfied that this is appropriate - see Rule 73.07(a).

17 The Receiver shall also pay from the proceeds before paying BMO's indebtedness: its costs incurred in acting as Receiver, including its own fees, charges and expenses; any statutory claims due and owing, which have prioirity over the secured claim of BMO.

18 The mutually convenient date will be ascertained in advance and inserted into the body of the court's order. BMO also sought payment of the legal and Receiver fees and disbursements with interest to date, but were agreeable to defer the court's assessment of their reasonableness to a future date. I will leave it to the parties to arrange any further hearings required, on notice to all parties including the guarantors, regarding the remaining claimed indebtedness beyond $200,000, and costs of this Application. I direct the Applicant to draft the form of order.

TAB 6

2013 ONSC 7023
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Sherco Properties Inc.

2013 CarswellOnt 16848, 2013 ONSC 7023, 235 A.C.W.S. (3d) 682

Bank of Montreal, Applicant and Sherco Properties Inc., Sherk Farm Limited, Cosher Properties Inc., and Donald Sherk, Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: December 3, 2013
Docket: CV-13-10244-00CL

Counsel: S.D. Thom, for Applicant
R.B. Moldaver, Q.C., for Respondents

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.C Mortgagee

Headnote
Bankruptcy and insolvency --- Receivers — Appointment
S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank — Application granted — Terms of security held by bank in respect of S Inc. and S Ltd. permitted appointment of receiver — Terms of mortgages permitted appointment of receiver upon default — Value of security continued to erode as interest and tax arrears continued to accrue — S had been unable to accomplish refinancing or sale of properties — It was appropriate to appoint receiver to arrange sale of properties.
Debtors and creditors --- Receivers — Appointment — Application for appointment — Person entitled to make application — Mortgagee

S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank — Application granted — Terms of security held by bank in respect of S Inc. and S Ltd. permitted appointment of receiver — Terms of mortgages permitted appointment of receiver upon default — Value of security continued to erode as interest and tax arrears continued to accrue — S had been unable to accomplish refinancing or sale of properties — It was appropriate to appoint receiver to arrange sale of properties.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — referred to

Bank of Nova Scotia v. Sullivan Investments Ltd. (1982), 1982 CarswellSask 452, 21 Sask. R. 14 (Sask. Q.B.) — considered

Canadian Tire Corp. v. Healy (2011), 2011 ONSC 4616, 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. White Cross Properties Ltd. (1984), 34 Sask. R. 315, 1984 CarswellSask 33, 53 C.B.R. (N.S.) 96 (Sask. Q.B.) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

s. 244 — referred to

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

s. 101 — considered

***Morawetz J.*:**

1 This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

2 Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

3 The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

4 The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

5 Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

6 Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

7 In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

8 As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

9 Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

10 Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

11 In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

12 The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

13 The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

14 In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

15 At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

16 Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

17 As of September 9, 2013, interest arrears total approximately $124,346.79.

18 In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;

(b) 325 Estate Court: $59,596.49.

19 The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

20 On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

21 On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

22 The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

23 The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

24 Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

25 The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

26 The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

27 Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

28 Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

29 In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

30 The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;

(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;

(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and

(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

31 The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

32 From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

33 Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

34 Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers 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.

40 Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a 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.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. 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. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Sask. Q.B.) where Estey J. (as he then was) reasoned as follows:

> ...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.).

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

(b) the terms of the mortgages permit the appointment of a receiver upon default;

(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

48 In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

49 In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

50 I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

51 However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

52 In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

53 The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

54 The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

55 The Bank is also entitled to its costs on this application.

Application granted.

TAB 7

2020 MBQB 58
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2020 CarswellMan 174, 2020 MBQB 58, 317 A.C.W.S. (3d) 238, 79 C.B.R. (6th) 44

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 26, 2020
Docket: Winnipeg Centre CI 20-01-26627

Counsel: Marc Wasserman, Jeremy Dacks, Catherine Howden, Eric Blouw, for Applicant
Wayne Onchulenko, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere (articling student), for Richter Advisory Group Inc.
David Jackson, Shayne Kukulowicz, Hylton Levy, for proposal trustee, A. Farber & Partners Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote
Bankruptcy and insolvency --- Receivers — Appointment
WC LLC, lender, advanced funds to N Group to fund their payroll — Funding was advanced by WC LLC because N Group had not confirmed that sufficient funds were deposited in corporate account — N Group did not deposit necessary payroll funds, and WC LLC funded payroll to ensure that employee payroll was not interrupted during crucial time frame — New evidence was received, which included that N Group provided no indication of how they intended to fund payroll, that WC LLC had responded to N Groups funding request, but that N Group did not respond to WWC LLC's proposal — WC LLC brought application for R LLP to be appointed as receiver — Application granted — Further evidence satisfactorily showed that N Group had not been acting in good faith and with due diligence — As result of N Group failing to provide accurate and timely information to proposal trustee and WC LLC, proposal proceedings were untenable — Further, N Group had no plan to continue to fund its operations and no other lender had stepped up to provide necessary financing to pay out WC LLC — It was fundamental, for purpose of proposal process to continue, that N Group cooperate with proposal trustee and this had not occurred — Unilateral closing of its retail stores, distribution centres and website, without consulting with WC LLC or proposal trustee, was in breach of Credit Agreement and court order.

Table of Authorities
Cases considered by *Edmond J.*:
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to
Callidus Capital Corp. v. Carcap Inc. (2012), 2012 ONSC 163, 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — followed

Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 95, 2019 CarswellMan 772 (Man. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — pursuant to

s. 243(1) — considered

s. 244(1) — referred to

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 55(1) — considered

***Edmond J.*:**

Introduction

1 The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*") and s. 55(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as amended ("*QB Act*") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

2 By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

3 The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

4 The respondents filed an affidavit of Greg Fenske, affirmed March 11, 2020 and a supplemental brief for the hearing that proceeded on March 12, 2020. After hearing submissions from all parties, the court reserved its decision on whether Richter should be appointed as a receiver and ordered the Nygård Group to continue to fully comply with the terms of the Credit Agreement entered into with Lenders, Second Avenue Capital Partners LLC and White Oak Commercial Finance, LLC ("Lenders") dated December 30, 2019 ("Credit Agreement") and that no Collateral (as defined in the Credit Agreement) would

be disposed of outside of the ordinary course of business without the prior written consent of the applicant and the proposal trustee, A. Farber & Partners Inc.

5 During the course of the hearing on March 12, 2020, the court was advised that the Lenders advanced funds to the Nygård Group to fund their payroll due on March 12, 2020. The payroll funding was advanced by the Lenders because the Nygård Group had not confirmed that sufficient funds were deposited in the Nygård corporate account, by way of cash injection, to fund the payroll which was to be paid out by electronic fund transfer to employees. The Nygård Group had confirmed before the March 12, 2020 hearing that the payroll would be funded by way of a cash injection. Paragraph 10(a) of the proposal trustee's first report states:

> the Proposal Trustee attended on a call with representatives of the Nygard Group where the Proposal Trustee was advised that (i) funds sufficient to satisfy the payroll obligation had been deposited with the Nygard Group and evidence of such funding had been provided to Osler as required by the Winnipeg Court; (ii) the short term primary focus of the Nygard Group was to obtain funds to repay the Lenders in full so as to permit the Nygard Group to focus on a restructuring and rationalization of its business.

6 Contrary to the representations made to the proposal trustee, the Nygård Group did not deposit the necessary payroll funds. The Lenders therefore funded the payroll to ensure that the employee payroll was not interrupted during this crucial time frame. During the course of the hearing on March 12, 2020, counsel for the Nygård Group advised that an advance of payroll funding had been received and the Lenders' advance of payroll would be reimbursed from those funds.

7 The court was further advised later in the afternoon during the same hearing held March 12, 2020 that the payroll advance had been transferred from the Nygård Group bank account to a bank account of Edson's Investments Inc. The supplementary affidavit of Robert L. Dean affirmed March 17, 2020, states that Edson's Investment Inc. is an entity controlled by Mr. Nygård which is not part of the Nygård Group named as respondents in this proceeding and is not a party to the Credit Agreement.

8 The primary submission advanced by the respondents at the March 12, 2020 hearing was that the Canadian entities had filed Notices of Intention to make a Proposal in Bankruptcy ("NOIs") pursuant to s. 50.4 of the *BIA*, the stay of proceedings pursuant to s. 69(1) of the *BIA* applied and accordingly, the court should permit the proposal process to continue and stay the applicant's proceeding. Further, Nygård Group submitted that they had more than sufficient equity to pay out the Lenders in full and intended to have a proposal to do so by March 20, 2020.

9 On March 13, 2020, the court provided oral reasons for decision regarding the application and the motion made by the applicant to lift or terminate any stay of proceedings granted regarding the proposal process. To summarize, the court ordered:

a) The proper jurisdiction to hear the application and the NOI proceedings is Manitoba;

b) The NOI proceedings are not invalid or a nullity and the proposal proceedings should proceed in this court;

c) The draft cash flow statements prepared by the Nygård Group and provided to the proposal trustee must be provided to counsel for the applicant;

d) The application by the Lenders for the appointment of Richter as the receiver was adjourned until Friday, March 20, 2020;

e) The respondents were directed to continue to fully and promptly comply with all terms and provisions of the Credit Agreement and all documents ancillary thereto, and, without limitation, comply with s. 6.10 of the Credit Agreement;

f) Until further of the court, no steps would be taken by the respondents to dispense with or dispose of Collateral, as that term is defined in the Credit Agreement, other than:

> i. by way of the sale of Collateral at the respondents' retail outlets in the ordinary course of business of such retail outlets; or

ii. with the advance written consent of the applicant and the proposal trustee;

g) All additional responding affidavit material must be filed in court by no later than 2:00 p.m. on Thursday, March 19, 2020;

h) In accordance with the undertaking given by counsel for the Nygård Group, the court directed the Nygård Group to return the payroll funds that were earmarked for payroll, which funds were transferred or removed from the Nygård Group corporate bank account on March 12, 2020;

i) The application was adjourned and the motion by the applicant to terminate or lift the stay of proceedings in effect pursuant to s. 69(1) of the *BIA* was denied at that time, although the court stated that the imminent necessity for appointing a receiver may change if reasonable steps were not taken by the Nygård Group to pay the outstanding indebtedness to the applicant and/or further evidence established that the Nygård Group failed to comply with the Credit Agreement during the period of the stay;

j) The respondents were given one week to cooperate with the proposal trustee in the proposal process in accordance with the *BIA* and act in good faith and with due diligence, including take reasonable steps as noted above.

New Evidence Received since March 13, 2020

10 A further affidavit affirmed by Robert L. Dean on March 17, 2020, confirmed, among other things:

a) The funds that the Nygård Group was supposed to have deposited in the Nygård Group bank account sufficient to satisfy the payroll obligation was not deposited. Funds were deposited, but then were removed or transferred out as noted above.

b) The proposal trustee forwarded a cash flow forecast to applicant's counsel during the March 12, 2020 hearing and the cash flow forecast contemplated continued funding by the Lenders despite the termination of the funding commitment.

c) A funding request from the Nygård Group included approximately $1.032 million Canadian for payroll, source deductions and rent. The Nygård Group provided no indication of how they intended to fund the payroll for the week of March 15, 2020.

d) On March 15, 2020, the Lenders responded to the Nygård Group's funding request advising they were prepared to provide funding on the following terms:

(a) The Lenders will fund the advance request (subject to review by Richter);

(b) The Nygard Group will engage a third-party liquidator to negotiate with Perry Ellis and liquidate US wholesale (and other assets immediately available for sale);

(c) The Nygard Group will confirm that the Lenders are authorized to speak to wholesale customers and Perry Ellis;

(d) The proceeds of any wholesale sale shall be immediately repaid to the Lenders;

(e) White Oak will receive a release from the Loan Parties and Peter Nygard on the same terms as White Oak previously communicated in the pay-off letter it previously provided, which shall be effective immediately;

(f) The Nygard Group will agree to remove the $20 million cap on the real estate Collateral;

(g) The Nygard Group will sign up a stalking horse (sic) bidder (with an approximately 10% deposit) with respect to the sale of the Toronto real estate, with any deal to close in 30 days (subject to a higher and better bid at auction);

(h) The Nygard Group will pay a $500,000 accommodation fee if the amounts owed to the Lenders are not repaid in full on or before March 20, 2020;

(i) The Nygard Group will agree to consent to the appointment of a receiver if the amounts owed to the Lenders are not repaid in full by March 20, 2020.

The Nygård Group did not respond to the Lenders' proposal.

e) On March 16, 2020, counsel for the applicant wrote to the proposal trustee regarding the payroll advance. On the same day, Richter wrote to the proposal trustee making inquiries about the continuing erosion of the Collateral requesting numerous updates, including:

(a) The status of discussions with Perry Ellis with respect to the U.S. wholesale inventory;

(b) The status of discussions with Great American on the potential refinancing of the Lenders' secured debt;

(c) The status of discussions with the party interested in the Toronto real property located at 1 Niagara St.;

(d) The Nygard Group's funding requirements for the current week and its plans on meeting its obligations on a go-forward basis.

(e) The return of the Late Transfer Funds that Mr. Nygard transferred out of the Nygard Group's bank account;

(f) The timing on receipt of a realistic cash flow forecast given the Nygard Group's current circumstances;

(g) The Nygard Group's plans to continue normal course operations given the closure of its Winnipeg and Toronto offices, including the potential layoff of corporate staff; and

(h) The Nygard Group's plans to curtail expenditures in the coming weeks in response to the significant decrease in retail sales.

f) The Nygård Group closed all of its distribution centres effective the evening of March 13, 2020, after courier and transportation companies refused to provide go forward service without guarantee of payment.

g) On March 17, 2020, the applicant received a copy of an e-mail from the Nygård Group indicating that the Nygård Group would be immediately shutting down its retail stores and website due to the recent COVID-19 outbreak. The e-mail made numerous additional representations about the Lenders' actions, which the Lenders submit are false and materially impact the Lenders' ability to realize on their Collateral.

h) The Nygård Group did not consult with the applicant, Richter or the proposal trustee regarding the potential closure of the retail stores and their business operations.

i) The Lenders have no faith that proper procedures to protect their Collateral will be undertaken by the Nygård Group.

11 On March 17, 2020, the proposal trustee issued its second report. The report confirms the following:

a) The proposal trustee requested that Nygård Group and management provide the proposal trustee with information respecting:

(a) the status of the reimbursement of the Payroll Funding;

(b) the status of funding for ongoing operations during for the week ending March 20, 2020;

(c) the cash flows and the underlying assumptions., drafts of which were prepared by each of the members of the Nygard Group and provided to the Proposal Trustee on the evening of Wednesday, March 11, 2020 and the four wall forecasts provided on Sunday March 16, 2020;

(d) the status of operations of the Nygard Group including measures being taken in response to the Covid-19 crisis (i.e. whether or not the stores and/ or distribution centres are to remain open);

(e) financial information relating to the Nygard Group's operations;

(f) electronic contact information for all employees of the Nygard Group (or access to internal email system) to provide the statutory required notices of the NOI proceedings; and

(g) the status of refinancing efforts of the Nygard Group.

b) Despite repeated requests for information, limited information was provided to the proposal trustee as established in the e-mails sent by the proposal trustee attached as Exhibits B and C to the second report.

c) The proposal trustee received information from the Nygård Group regarding efforts to sell real property located at 1 Niagara Street in Toronto, Ontario (the "Toronto Property"). The potential purchaser indicated that the offer to purchase is confidential. The proposal trustee advised the Nygård Group that it is not in a position to advise the court or stakeholders that the offer is fair or reasonable.

d) The proposal trustee received a copy of a notice entitled "Nygård closing 180 retail stores". The proposal trustee was not consulted in advance of the notice.

e) The second report concludes:

20. Based on the foregoing, the Proposal Trustee is not in a position to advise that the Nygard Group is acting with good faith or due diligence at this time.

21. The Proposal Trustee also notes that each of the members of the Nygard Group are required under the BIA to file cash flows by no later than Thursday, March 19, 2020 and such cash flows must be submitted to the OSB with a report from the Proposal Trustee on the reasonableness of the assumptions contained therein. The Proposal Trustee has not been provided with sufficient information to assess the draft cash flows provided and is of the view that it will not be in a position to file the required report on the reasonableness of the assumptions as required by the BIA.

12 Two affidavits affirmed by Greg Fenske, on March 18, 2020, were received by the court. The second affidavit is a confidential affidavit regarding the potential sale of the Toronto Property and the sale of certain inventory.

13 The first affidavit responds to the affidavit of Mr. Dean affirmed March 17, 2020 and can be summarized as follows:

a) An explanation is provided as to why the Nygård Group was unable to fund payroll. The Nygård Group requisitioned $1 million U.S. from an account at Stifel and the funds never made it into Nygård's Canadian bank accounts.

b) Nygård Group obtained a loan from Edson's Investments Inc. in the amount of $500,000 U.S. to fund payroll. These funds were returned or transferred back to Edson's Investments Inc. when the applicant provided the funds for payroll on March 12, 2020. While Mr. Fenske states the Nygård Group will receive funds from Stifel, as at March 18, 2020, no funds were received.

c) Nygård Group did advise the Lenders of the funds that were required to pay bills in accordance with the Credit Agreement.

d) The estimated payroll for the week of March 15, 2020, is $900,000 Canadian and "that will be funded by the Nygård Group resources". (it is unclear what that term refers to and if it is an entity, it is not a named respondent)

e) The Nygård Group received a verbal offer from Perry Ellis to purchase one-half of the inventory in the U.S. The amount is disclosed in the confidential affidavit.

f) While a proposal to pay out the Lenders was to be received from Great American Capital, no proposal was received and the Nygård Group has moved on to having discussions with other Lenders to pay out the secured debt. No concrete proposal was presented.

g) The offer to purchase the Toronto Property dated March 16, 2020 from New York Brand Studio Inc., in Trust, was attached as Exhibit B to Mr. Fenske's affidavit and the purchase price is redacted. The confidential affidavit discloses the purchase price and the amount is substantially different from the purchase price that was included in the earlier affidavit affirmed by Mr. Fenske on March 12, 2020.

h) Nygård Group states that cash will be coming in from the sale of assets until the stores are reopened.

i) Nygård Group unilaterally laid off 1370 employees and provides reasons for closing the offices and stores for the safety of the employees and customers as a result of the COVID-19 virus. Nygård Group confirms that the Lenders and the proposal trustee were not consulted prior to making the decisions.

j) The Nygård Group plans to sell real property and generate $25.4 million and pay $20 million to the applicant pursuant to the Lenders' security.

k) Mr. Nygård will divest ownership and all Nygård Group of companies will continue under different ownership allowing the purchasers to move forward with the current employees of the Nygård Group.

l) The affidavit provides information regarding the steps taken by Nygård Group to market the sale of assets. Mr. Fenske states that the consideration to be paid under the purchase and sale agreement of the Toronto Property "... is reasonable and fair and is substantially higher than a liquidation value of the Nygård Group of companies assets in a Bankruptcy or Receivership." (See para. 29 of the affidavit of Greg Fenske affirmed March 18, 2020)

m) The proceeds from the sale of the Toronto Property and sale of inventory is to be paid to the applicant with the remainder of the monies, if any, to go to the proposal trustee to make a proposal to pay the remaining creditors.

n) The respondents seek an administrative charge to pay the proposal trustee and counsel for the proposal trustee.

o) Although no motion was filed, the respondents seek an extension of time of 30 days for the Nygård Group to make a proposal in bankruptcy.

p) Mr. Fenske states "... the Nygård Group of companies has acted, and is acting, in good faith and with due diligence in the proposal proceedings to date." (See para. 38 of the affidavit of Greg Fenske affirmed March 18, 2020)

Analysis and Decision

14 The starting point for analysis is to determine whether the applicant has met the test for appointing a receiver pursuant to s. 243 of the *BIA*. Section 243(1) of the *BIA* and s. 55(1) of the *QB Act* provide that a receiver may be appointed on application by a secured creditor, where it is "just or convenient" to do so. Such an order may authorize the receiver to:

243(1)

. . . . .

(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.

15 On February 26, 2020, the applicant sent a notice of intention to enforce security as required pursuant to s. 244(1) of the *BIA*.

16 I am satisfied on the basis of my review of all of the evidence, that it is just and convenient to appoint a receiver in the circumstances. I considered the factors outlined in the various authorities including:

a) Whether irreparable harm may be caused if no order is made, although such a requirement is not essential where, as in this case, the appointment of a receiver is authorized by the security documentation including the Credit Agreement. In this case, I am satisfied that irreparable harm may be caused if no order is made due to the various steps that have been taken by the Nygård Group as I will outline below;

b) The risk to the Lenders taking into consideration the Nygård Group equity in the assets and the need for protection or safeguarding of the assets;

c) The nature of the property, including real property and inventory and the potential that the value of the inventory is being materially impacted by steps taken by the Nygård Group.

d) The balance of convenience to the parties which, in my view, favours the appointment of the receiver to ensure the assets are protected, marketed in an appropriate manner to secure the highest market value and to take reasonable steps to ensure that employees of the Nygård Group are protected.

e) The fact that the applicant has the right to appoint a receiver under the Credit Agreement.

f) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly. The evidence satisfies me that the appointment of a receiver is necessary, just and convenient in the circumstances.

g) I also considered the effect of the order on the parties, the conduct of the parties, the length of time that the receiver may be in place, the cost to the parties and the likelihood of maximizing return to the parties. All of these factors favour appointing a receiver in the circumstances. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]); *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, [2012] O.J. No. 62 (Ont. S.C.J. [Commercial List]); *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, [2014] O.J. No. 2146 (Ont. S.C.J. [Commercial List]); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]); and *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 95, [2019] M.J. No. 246 (Man. C.A.) (QL))

17 I previously found, as outlined in my reasons for decision given March 13, 2020, that the evidence filed presented a "... strong basis and rationale for the applicant to be concerned about the stability of the Nygård Group and in my view justifies the applicant taking steps to enforce its security and seek immediate repayment of the outstanding indebtedness. The Dean affidavit outlines in considerable detail the breaches of the Credit Agreement. (Exhibit D to Mr. Dean's affidavit) and the reason why the applicant has lost all confidence and faith in the Nygård Group complying with the governing Credit Agreement."

18 Had the Canadian Nygård entities not filed the NOIs, I would have had no hesitation in granting the receivership order last week. As explained in my reasons for decision delivered March 13, 2020:

The proposal provisions of the *BIA* permit insolvent persons to avoid or postpone bankruptcy by complying with the provisions by appointing a proposal trustee and making a proposal to all creditors, including secured creditors. The proposal trustee must review Nygård Group cashflow statements and the proposal for their reasonableness and file reports in court.

The proposal trustee monitors the debtors and must report regarding any material adverse change to creditors without delay after receiving information regarding any changes, which adds transparency to the proposal process.

The proposal trustee is an officer of the court and must impartially represent the interests of creditors. If the proposal trustee knows of dispositions, transfers of property or steps taken by the debtor that are material, the proposal trustee must disclose that information to creditors so that they may take such action as they deem appropriate.

It is necessary for the court to weigh the interests of all creditors in the proposal process and the interests of the primary secured party, the applicant. I am satisfied that it is in the best interests of all of the creditors to permit the respondents to restructure and make a viable proposal to the creditors pursuant to the proposal process.

That said, I am not satisfied that Nygård Group has been dealing with its lenders in good faith and the appropriate action to take is to impose deadlines on the Nygård Group to satisfy the statements made in the Fenske affidavit and made orally by the respondents' counsel in court yesterday.

In my view, it is premature to terminate or lift the 30 day stay period, particularly in light of the representations that the Nygård Group has made to this court. I am not satisfied that there is no viable proposal that can be made by the respondents as submitted by the applicant.

The evidence filed by the respondents suggests that a viable proposal may be made to creditors and to the applicant. While there is evidence that the respondents have not acted in good faith and with due diligence in their dealings with the applicant, I direct that the respondents must continue to comply with the terms and conditions of the credit agreement and ancillary documents pending receipt of the outcome of the negotiations that are presently being undertaken to pay out the indebtedness of the applicant by March 20, 2020.

I am not satisfied that the applicant will be materially prejudiced by the continuing operation of the stay of proceedings, so long as the respondents are making good faith efforts to continue to operate the Nygård Group business in the best interests of all stakeholders, including making arrangements to continue to meet the payroll and pay its employees and taking immediate steps to finalize financing to pay the outstanding indebtedness of the applicant by March 20, 2020.

In the meantime, over the course of the next week, the respondents are ordered and directed to provide RAG ongoing access to financial information by virtue of the inspection rights under the credit agreement. The Nygård Group must not dispose of any assets or transfer shares or transfer funds deposited in the corporate bank accounts to other bank accounts other than in the ordinary course of business without consent of the proposal trustee, the applicant and RAG.

If necessary, the court will make a determination if there is a dispute about a step proposed to be taken by the Nygård Group. In other words, all business of the Nygård Group, including transactions, shall continue in the ordinary course of business and in accordance with the strict terms of the credit agreement.

19 The further evidence that has been filed since March 13, 2020, satisfies me that the Nygård Group has not been acting in good faith and with due diligence. I am also satisfied that the Nygård Group cannot be left as a debtor in possession and the proposal process cannot continue. The second report from the proposal trustee states that the proposal trustee is not in a position to advise that the Nygård Group is acting with good faith or due diligence at this time. Further, the proposal trustee was not provided with sufficient information to assess the draft cash flows provided and is not in a position to file the required report on the reasonableness of the assumptions as required by the *BIA*.

20 As a result of the Nygård Group failing to provide accurate and timely information to the proposal trustee and the Lenders, the proposal proceedings are untenable. Further, the Nygård Group has no plan to continue to fund its operations and no other lender has stepped up to provide the necessary financing to pay out the Lenders.

21 The closure of the retail stores, distribution centres and website without consulting the Lenders and the proposal trustee is a serious concern that directly affects the ability of the Nygård Group to continue to operate and for the applicant to realize on the Collateral.

22 I agree with the applicant that the Nygård Group has provided no information to the Lenders about:

a) What has happened to the employees and specifically how they have been dealt with;

b) How the retail stores are being secured and locked down;

c) How the inventory located in the stores is being dealt with, if at all;

d) What is happening with the Nygård Group wholesale customers; or

e) How the Nygård Group is planning to sell its inventory other than the reference to the Perry Ellis potential offer.

23 It is fundamental for the proposal process to continue that the Nygård Group cooperate with the proposal trustee and that the proposal trustee be in a position to state specifically that the parties subject to the proposal proceeding have been acting in good faith and with due diligence. As noted above, that has not occurred.

24 In addition to the foregoing, the Nygård Group has failed to comply with orders made by this court and undertakings given by their counsel. Specifically, and contrary to their counsel's representations in court on March 12, 2020, the Nygård Group has failed to return the payroll funds to the Nygård Group's bank account and repay the applicant the payroll advance. The explanation provided in the affidavit of Mr. Fenske affirmed March 18, 2020 is inconsistent with what the court was advised on March 12, 2020.

25 The Nygård Group was directed pursuant to orders made by the court on March 12 and 13, 2020, to continue to comply with the Credit Agreement. The unilateral closing of its retail stores, distribution centres and website without consulting with the Lenders or the proposal trustee is in breach of the Credit Agreement and the court order. I also find that it is a material adverse change to the creditors which placed the proposal trustee in the position of not being able to comply with its duties under the *BIA*.

26 I agree with the applicant that in light of the events that have occurred since March 12, 2020, the appointment of Richter was urgently required and Richter was appointed as receiver effective March 18, 2020.

27 Richter is in the best position to assess the reasonableness of the offers to purchase the real estate and make a motion to court with evidence seeking approval. The evidence filed by the Nygård Group is insufficient to assess the reasonableness of the sale of the Toronto Property and the real estate located in Winnipeg. The proposal trustee stated at para. 15 of the second report that it is not in a position to advise the court or stakeholders that the offer respecting the Toronto Property is fair and reasonable.

28 The events that occurred since orders were made on March 12 and 13, 2020, are material developments that have caused or had the potential to cause a material prejudice to the Lenders and to the Nygård Group's business, creditors and stakeholders.

29 The adjournment of the receivership application on March 13, 2020 and allowing the proposal proceedings to continue with the oversight of the proposal trustee was not granting the Nygård Group a licence to operate with impunity. The court's decision on March 13, 2020, was to allow the respondents a limited period of time to make good faith efforts to repay the debt owing to the Lenders and to fully cooperate with the proposal trustee.

30 I am satisfied that the appropriate course of action is to lift the stay of proceedings that was granted pursuant to s. 69(1) of the *BIA*. The court has jurisdiction pursuant to s. 69.4 of the *BIA* to lift the stay in circumstances in which the court is satisfied:

69.4

. . . . .

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

31 In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee and the Lenders require the ability to oversee the preservation of the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

32 Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the *BIA* under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

33 While the court has the authority pursuant to s. 50.4(11) of the *BIA* to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

34 Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

35 A similar approach was taken by the Ontario Superior court in *Dondeb Inc., Re*, 2012 ONSC 6087, [2012] O.J. No. 5853 (Ont. S.C.J. [Commercial List]) and, in my view, that approach is equally applicable in this case.

Conclusion

36 The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

37 Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

Application granted.

TAB 8

2022 ONSC 2777
Ontario Superior Court of Justice

KingSett Mortgage Corporation v. 30 Roe Investments Corp.

2022 CarswellOnt 6465, 2022 ONSC 2777, 2022 A.C.W.S. 1415, 98 C.B.R. (6th) 311

KINGSETT MORTGAGE CORPORATION (Applicant) and 30 ROE INVESTMENTS CORP. (Respondent)

Cavanagh J.

Heard: May 6, 2022
Judgment: May 9, 2022
Docket: CV-22-00674810-00CL

Counsel: Richard Swan, Sean Zweig, Joshua Foster, for Applicant
Symon Zucker, for Respondent
Ben Frydenberg, Darren Marr, for Canadian Imperial Bank of Commerce
Chris Armstrong, for Proposed Receiver, KSV Restructuring Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Debtor did not pay mortgage amounts to creditor — Creditor of debtor brought application to appoint receiver — Application granted — By debiting extension fee in error, creditor did not implicitly agree to extend maturity date of debt — Application was not made in bad faith — Debtor was entitled to take steps under its security to enforce payment of indebtedness owing — Statements that creditor had lost faith in debtor to pay were taken seriously.
Table of Authorities
Cases considered by *Cavanagh J.*:
BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 1953, 2020 CarswellOnt 5156, 78 C.B.R. (6th) 299 (Ont. S.C.J. [Commercial List]) — considered
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to
Confederation Life Insurance Co. v. Double Y Holdings Inc. (1991), 1991 CarswellOnt 1511 (Ont. Gen. Div.) — referred to
Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(1) — referred to

s. 244 — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — referred to
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 39.01(5) — referred to

Cavanagh J.:

Introduction

1 The Applicant, Kingsett Mortgage Corporation, brings this application for an order appointing KSV Restructuring Inc. ("KSV") as receiver and manager, without security, of real property owned by the Respondent, 30 Roe Investments Corp., (the "Real Property") and other property as described in the Notice of Application (collectively, the "Property").

2 For the following reasons, I grant the Applicant's application.

Procedural background

3 The Real Property consists of nine residential condominium units within a thirty-five story, 397 unit, condominium known as "Minto 30 Roe" located at 30 Roehampton Avenue in Toronto. The Applicant is a second mortgagee in respect of the Real Property.

4 This application was commenced by a Notice of Application issued on January 7, 2022. The application first came before me on January 17, 2022. At that appearance, the Respondent was not represented by legal counsel. Mr. Raymond Zar, a director and principal of the Respondent, requested an adjournment of the application to allow the Respondent to retain counsel and respond to the application. The request for an adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce ("CIBC"). I granted the request for an adjournment and the application was adjourned to be heard on February 22, 2022.

5 On February 22, 2022, counsel who had just been retained appeared on behalf of the Respondent. There was evidence that the Respondent had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Respondent requested an adjournment to prepare responding materials and respond to the application. This request was opposed by the Applicant. I granted the Respondent's request for an adjournment and the application was adjourned to March 28, 2022. I directed counsel to agree on a timetable for the application.

6 A case conference was held before me on March 8, 2022. At that case conference, counsel for the Respondent advised that they were moving for an order removing them as lawyers of record for the Respondent. I was advised that the Respondent would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, I concluded that the hearing of the Applicant's application seeking the appointment of a receiver needed to be adjourned. The adjournment was opposed by the Applicant. A new hearing date for the application was set for May 6, 2022. In my endorsement, I wrote that "[t]he Respondent is responsible for retaining counsel, if necessary, and following a timetable to meet this hearing date".

7 The motion by counsel for the Respondent to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Respondent as counsel of record. The Respondent was served with the formal Order on April 20, 2022.

8 A case management conference was held before me on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6. I approved a timetable and I directed the parties to comply with it.

9 The Respondent retained new legal counsel on May 2, 2022. A supplemental affidavit of Mr. Zar was sworn on May 5, 2022. Some other documents relating to the Respondent's efforts to refinance were uploaded to CaseLines, including a letter of intent from Firm Capital Corporation dated May 4, 2022.

Analysis

10 The issues raised at the hearing of the application were (i) whether the Respondent's request for an adjournment of the hearing should be granted, and, if not, (ii) whether the Applicant's application for the appointment of a receiver should be granted.

Request for adjournment

11 The Respondent requested an adjournment of the hearing of the application for 30 days to allow time for the Respondent to complete the refinancing of the Real Property and pay out the second mortgage. The Applicant opposed this request. At the hearing, I denied the request for an adjournment. These are my reasons.

12 The Firm Capital letter of intent is not a binding commitment and is simply an expression of interest in providing refinancing. The Respondent has had many months to arrange to refinance. There is no assurance that if a further adjournment were to be granted for 30 days, as requested, the Respondent would be successful in paying out the indebtedness secured by the applicant's second mortgage.

13 I granted adjournments to allow the Respondent to retain counsel and to accommodate the motion by former counsel to move to be removed as counsel of record. These adjournments were opposed by the Applicant. I set the hearing date for this application on February 22, 2022 that would having regard to the motion by former counsel for the Respondent to be removed as counsel of record.

14 In his May 5, 2022 affidavit, Mr. Zar gives evidence of his attempts to retain counsel for the Respondent. According to his affidavit, Mr. Zar did not contact any prospective counsel between February 22, 2022 and April 11, 2022. After April 11, 2022, Mr. Zar contacted several counsel who had conflicts or were not available. Mr. Zucker was retained on May 2, 2022.

15 In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022.

16 The Applicant's mortgage loan has been past due for many months. The Applicant is entitled to seek remedies to enforce payment of this loan. In the circumstances, I concluded that it would not be just to the Applicant to grant a further adjournment to accommodate the Respondent's continuing efforts to refinance. The request for an adjournment was denied.

Has the Applicant shown that it would be just or convenient for a receiver to be appointed?

Loan and security

17 The Applicant is a party to a commitment letter dated March 29, 2019 with the Respondent pursuant to which the Applicant agreed to provide, among other things, a non-revolving demand loan secured by a second mortgage against the Real Property. This loan was originally advanced on April 8, 2019.

18 The parties entered into four amendments to the original commitment letter which, among other things, increased the loan facility from $1,500,000 to $1,875,000 and provided three extensions to the maturity date to December 1, 2021. The Applicant's evidence is that as at December 13, 2021, the total indebtedness under the commitment letter, as amended, is $1,895,958.85.

19 As general and continuing security for the payment and performance of its obligations under the commitment letter, as amended, the Respondent granted the Applicant various security including (a) a second charge/mortgage in respect of the Real Property securing the principal amount of $1,875,000, (b) a General Assignment of Rents and Leases dated April 8, 2019 pursuant to which, among other things, the Respondent assigned to the Applicant all of its rights in and to the Leases and Rents (as defined in the Assignment of Rents) in respect of the Real Property, (c) an Assignment of Material Agreements dated April 8, 2019, (d) a General Security Agreement dated April 8, 2019 pursuant to which, among other things, the Applicant was granted a security interest in all of the present and future undertakings and property of the Respondent which is located at or related to or used or required in connection with or arising from or out of the Charged Property (as defined in the second mortgage).

Default by Respondent

20 The original maturity date of the loan facility was in April 2021. The Applicant granted extensions to the maturity date to and until December 1, 2021. In the amendment letter dated October 25, 2021 in respect of the fourth amendment, the Respondent acknowledged that "there shall be no further extensions of the Term beyond December 1, 2021".

21 On December 1, 2021, the Respondent failed to make its monthly interest payment. By letter dated December 6, 2021, the Applicant advised the Respondent that (a) as result of the defaulted payment of interest, the loan facility was in default and an event of default had occurred under the loan documents; (b) the December 1, 2021 interest default was particularly concerning because it was not the first interest-related default under the loan facility; (c) the loan facility matured on December 1, 2021; and (d) unless the Respondent paid the December interest payment by 4 o'clock p.m. on December 8, 2021, the Applicant would demand the immediate repayment of the loan facility and enforce the security it held.

22 On December 13, 2021, the Applicant issued a demand letter to the Respondent advising that the mortgage was in default and demanding repayment of the indebtedness. The demand letter was delivered to the Respondent contemporaneously with a Notice of Intention to Enforce Security in accordance with s. 244 of the Bankruptcy and Insolvency Act. The Applicant demanded payment of $1,895,958.85.

23 Mr. Zar submits that there is evidence that the Applicant implicitly agreed to extend the loan until April 1, 2022 by debiting the extension fee from the Respondent's account on January 4, 2022, and again in February 2022, and leaving the interest rate at 9%. Mr. Zar's evidence is that the Applicant only returned the extension fee after he brought it to the Applicant's attention in settlement talks. He states that it was a shock and surprise to him when he heard about the application seeking the appointment of a receiver.

24 In the affidavit of the Applicant's Senior Director with responsibility for this loan, Daniel Pollack, he explains that the Applicant's finance department made an error in debiting the extension fee. A draft fifth amendment to the commitment letter (that, if agreed upon, would have extended the maturity date to January 1, 2022) had had been under consideration and would have provided for an extension fee. The draft fifth extension was not executed and did not become effective. When the error was discovered, the Applicant's finance department was instructed to correct the error (which was done when the Applicant debited the Respondent's account for the December interest payment, less the extension fee).

25 I accept the evidence from Mr. Pollack that the extension fee was debited in error and, when the error was discovered, it was corrected. I do not accept the Respondent's submission that by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022. I note that, in any event, April 1, 2022 has passed, and the mortgage debt remains unpaid.

26 Section 243 (1) of the BIA and s. 101 of the Courts of Justice Act provide that the Court may appoint a receiver where it is just or convenient to do so.

27 In determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto: Bank of Nova Scotia v. Freure Village on Clair Creek, [1996] O.J. No. 5088, at para. 11.

28 In *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*, 2013 ONSC 6866, Morawetz J., at para. 27, accepted the submission that 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. Morawetz J., at para. 28, accepted that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have a receiver appointed.

29 In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, Koehnen J., at paras. 43-44, held that when the court is dealing with a default under a mortgage, the relief becomes even less extraordinary, citing Confederation Life Insurance Co. v. Double Y Holdings Inc., 1991 CarswellOnt 1511, at para. 20. Koehnen J., at para. 45, referenced four additional factors set out by Farley J. in *Confederation Life*, at paras. 19-24, that the court may consider in determining whether it is just or convenient to appoint a receiver:

a. the lenders' security is at risk of deteriorating;

b. there is a need to stabilize and preserve the debtors' business;

c. loss of confidence in the debtors' management; and

d. positions and interests of other creditors.

30 In the third and fourth amendments to the commitment letter, the Respondent consented to the Applicant's appointment of a receiver, either privately or court appointed, in the event of a default by the Respondent beyond the applicable cure period. In the General Security Agreement, the Respondent agreed that after the occurrence of an event of default, the Applicant will have the right to appoint a receiver.

31 On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application.

32 Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed.

33 The Respondent submits that there is evidence that the Applicant is not acting in good faith by seeking to appoint a receiver. In support of this submission, the Respondent relies on the evidence of Mr. Zar in his May 5, 2022 affidavit that in discussions between his former lawyer and a lawyer for the Applicant, the Applicant's lawyer advised "in highly defamatory terms what his clients thought of me and wanted to do to me". Mr. Zar states that it was clear to him and his former counsel that the Applicant is using the application to appoint a receiver to cause him significant harm, such that this application is excessive and unnecessary, and is brought in bad faith.

34 The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. The information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said. Mr. Zar does not recite any particular statements that were made by the Applicant's counsel to the Respondent's former counsel. If Mr. Zar's hearsay evidence is admitted into evidence notwithstanding rule 39.01(5) of the Rules of Civil Procedure, it is far from sufficient to allow me to draw the inference I am invited to make, that the Applicant lacks good faith in bringing this application. I do not draw this inference.

35 The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it. The Applicant is not required to do so only through private power of sale proceedings. The appointment of a receiver will provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders.

36 I have considered the relevant circumstances and I am satisfied that the Applicant has shown that the appointment of receiver is just and convenient in the circumstances.

Disposition

37 For these reasons, I grant the Applicant's application.

38 Order to issue in form of Order signed by me today.

Application granted.

TAB 9

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 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

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.2 Jurisdiction of court to appoint

Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.
Debtors and creditors --- Receivers — Jurisdiction of court to appoint

Table of Authorities
Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — followed

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

s. 243(1) — pursuant to

s. 244(1) — referred to

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

s. 101 — pursuant to

***Morawetz J.*:**

1 Business Development Bank of Canada ("BDC") brings this application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

2 Counsel to the Respondent submits that a receiver can be appointed by an interlocutory order where it appears to the court to be just or convenient to do so. Counsel referenced *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (Ont. H.C.) for this proposition. Counsel questioned as to whether it was proper to proceed by way of application as this would result in the granting of a final order, which, he submits, is inconsistent with the view expressed by Callaghan J. (as he then was) in *National Trustco*.

3 Counsel to BDC responded by referencing *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267 (Ont. C.A. [In Chambers]), a decision of MacPherson J.A. (In Chambers). In this case, the Ministry commenced its application, including the relief to appoint a receiver and manager pursuant to s. 101 of the *CJA*. The order appointing the receiver was granted and the moving party on appeal, Shehrazad, sought a stay pending appeal. The request for the stay was opposed by the Ministry on two bases: (1) the Court of Appeal had no jurisdiction to hear the motion because the order being appealed was an interlocutory order and, therefore, the appeal would have to be taken to Divisional Court; and (2) on the merits, the moving party could not meet the test for obtaining a stay.

4 With respect to the jurisdictional point, MacPherson J.A. disagreed with the position put forth by the Ministry noting that the Ministry did not bring a motion to appoint a receiver; rather, it made an application.

5 Justice MacPherson stated the following:

> 16. It follows that the decision of this court in *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.), governs the question of which court has jurisdiction to hear the appeal in these proceedings. In *Illidge*, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.
>
> 17. The court rejected this argument. Armstrong J.A. stated at paragraph 4:
>
> > At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675, ... and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.
>
> In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for stay should be considered on the merits.

6 The above passage is, in my view, a complete answer to the position put forth by counsel to the Respondent. The Court of Appeal did not take issue with the fact that the proceeding to appoint the receiver was brought by way of application which resulted in a final order.

7 In any event, the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver.

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

(a) the credit agreement is in default;

(b) the indebtedness is not in dispute;

(c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and

(d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

23 The application is granted and the Fuller Landau Group Inc. is appointed Receiver.

Application granted.

TAB A

File No. [_____]CI23-01-43781

THE ~~QUEEN'S~~ KING'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT R.S.C. 1985, c. B-3 AS AMENDED AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c C280

BETWEEN:

[~~APPLICANT'S NAME~~]PRICEWATERHOUSECOOPERS INC.
(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Plaintiff~~Applicant,~~

-and-

[~~RESPONDENT'S NAME~~DAKOTA PLAINS FIRST NATION, CHIEF AND COUNCIL OF DAKOTA PLAINS FIRST NATION (solely in their capacity as representatives of DAKOTA PLAINS FIRST NATION), DAKOTA PLAINS WAHPETON OYATE ACTIVE PURSUITS LIMITED PARTNERSHIP, DAKOTA PLAINS WAHPETON OYATE ECONOMICS DEVELOPMENT CORPORATION, DAKOTA PLAINS WAHPETON OYATE MANAGEMENT CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE GP CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE LIMITED PARTNERSHIP., and 356 ASSINIBOINE AVENUE LTD.~~]

~~Respondent~~Defendants.

ORDER
(Appointing Receiver)

THORNTON GROUT FINNIGAN LLP
3200-100 Wellington Street West
Toronto, Ontario M5K 1K7
John L. Finnigan (LSO# 24040L)

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Tel: 416-304-0558
Email: jfinnigan@tgf.ca
Phone No. (416) 304-1616
Fax No. (416) 304-1313~~[FIRM NAME, ADDRESS, LAWYER'S NAME, TELEPHONE #]~~

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THE ~~QUEEN'S~~ KING'S BENCH
Winnipeg Centre

IN THE MATTER OF:	THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT R.S.C. 1985, c. B-3 AS AMENDED AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c C280	
THE HONOURABLE JUSTICE	)))	DAY~~WEEKDAY~~, THE # DAY OF MONTH, ~~20YR~~2024

BETWEEN:

[~~APPLICANT'S NAME~~] PRICEWATERHOUSECOOPERS INC.
(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

~~Applicant~~Plaintiff,

-and-

[~~RESPONDENT'S NAME~~] DAKOTA PLAINS FIRST NATION, CHIEF AND COUNCIL OF DAKOTA PLAINS FIRST NATION (solely in their capacity as representatives of DAKOTA PLAINS FIRST NATION), DAKOTA PLAINS WAHPETON OYATE ACTIVE PURSUITS LIMITED PARTNERSHIP, DAKOTA PLAINS WAHPETON OYATE ECONOMICS DEVELOPMENT CORPORATION, DAKOTA PLAINS WAHPETON OYATE MANAGEMENT CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE GP CO. LTD., DAKOTA PLAINS WAHPETON OYATE REAL ESTATE LIMITED PARTNERSHIP., and 356 ASSINIBOINE AVENUE LTD.

~~Respondent~~Defendants.

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[1]ORDER
(appointing Receiver)

THIS ~~APPLICATION~~ MOTION made by the ~~Applicant~~[2]Plaintiff for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and Section 55 of *The Court of King's Bench Act*, C.C.S.M. c C280 (the "**CKBA**"), appointing ~~[~~RECEIVER'S NAME~~]~~Deloitte Restructuring Inc. as receiver ~~[~~and manager~~]~~ (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of each of 356 Assiniboine Avenue Ltd., Dakota Plains Wahpeton Oyate Real Estate GP Co. Ltd., Dakota Plains Wahpeton Oyate Real Estate Limited Partnership, Dakota Plains Wahpeton Oyate Economics Development Corporation, Dakota Plains Wahpeton Oyate Management Co. Ltd., and Dakota Plains Wahpeton Oyate Active Pursuits Limited Partnership (collectively, ~~[~~DEBTOR'S NAME~~]~~ ~~(~~the "**Debtors**") acquired for, or used in relation to or arising from the ~~a~~ businesses carried on by the Debtors, including, but not limited to the lands and premises municipally known as 356 Assiniboine Avenue, in the City of Winnipeg, in the Province of Manitoba (the "**Real Property**") was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the affidavit of ~~[~~NAME~~]~~ Graham Page sworn ~~[~~DATE~~]~~March 19, 2024 and on hearing the submissions of counsel for ~~[~~NAMES~~]~~, the Plaintiff, counsel for the Defendants, no one appearing for any other interested party~~[~~NAME~~]~~[3] ~~although~~ duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of Deloitte Restructuring Inc. ~~[~~RECEIVER'S NAME~~]~~ to act as the Receiver,

SERVICE

~~[1] A receivership proceeding may be commenced by action or by application. This model order is drafted on the basis that the receivership proceeding is commenced by way of an application.~~

~~[2] Section 243(1) of the BIA provides that the Court may appoint a receiver "on application by a secured creditor".~~

~~[3] Include names of secured creditors or other persons who must be served before certain relief in this model Order may be granted. See, for example, BIA Section 243(6).~~

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1. THIS COURT ORDERS that the time for service of the Notice of ~~Application~~ Motion is hereby abridged and validated[4], so that this ~~Application~~ Motion is properly returnable today and hereby dispenses with further service thereof.[5]

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and Section 55 of the CKBA, Deloitte Restructuring Inc. ~~[RECEIVER'S NAME]~~ is hereby appointed Receiver, of the Property ~~without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "**Property**").~~[6]

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:[7]

~~[4] If service is effected in a manner other than as authorized by the Manitoba *Court of Queen's Bench Rules*, an order validating irregular service is required pursuant to Rule 16.08 of the *Court of Queen's bench Rules* and may be granted in appropriate circumstances.~~

~~[5] Where a party is located outside of Manitoba consider service issues, including whether service pursuant to the Hague Service Convention is required.~~

~~[6] Court-appointed receivers may be appointed pursuant to any number of statutes. If this Order is made pursuant to additional statutes and an appeal is brought pursuant to this Order, counsel should consider the applicable appeal period.~~

~~[7] Counsel should consider whether all of the powers sought in Paragraph 3 are appropriate on an initial basis, particularly if the application is brought without notice. Counsel should also consider whether there is sufficient evidence for granting such powers on an initial basis. If not proceeding under the BIA counsel should consider whether all of the powers granted under Paragraph 3 may be ordered.~~

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(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the businesses, or cease to perform any contracts of the Debtors;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies, rents, profits ~~and~~ accounts and other receipts now owed or hereafter owing to the Debtors arising from the Property or any part thereof and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

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(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to undertake environmental or workplace safety and health assessments of the Property and operations of the Debtors;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings.[8] The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding ~~$_____~~, $100,000, provided that the

~~[8] This model order does not include specific authority permitting the Receiver to either file an assignment in bankruptcy on behalf of the Debtor, or to consent to the making of a bankruptcy order against the Debtor. A bankruptcy may have the effect of altering the priorities among creditors, and therefore the specific authority of the Court should be sought if the Receiver wishes to take one of these steps.~~

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aggregate consideration for all such transactions does not exceed $~~_____~~; $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 59(10) of *The Personal Property Security Act* (Manitoba), ~~[~~or section 134(1) of *The Real Property Act* (Manitoba), as the case may be,~~]~~[9] shall not be required.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of ~~-~~the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof

~~[9] If the Receiver will be dealing with assets in other provinces, consider adding references to applicable statutes in other provinces. If this is done, those statutes must be reviewed to ensure that the Receiver is exempt from or can be exempted from such notice periods, and further that the Manitoba Court has the jurisdiction to grant such an exemption.~~

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for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; ~~and~~

(s) to assign the Debtors, or any of them, into bankruptcy pursuant to the BIA; and

~~(s)~~(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to

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the businesses or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

~~6.~~

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

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NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

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~~7. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.~~

~~NO PROCEEDINGS AGAINST THE RECEIVER~~

~~8.1. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.~~

~~NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY~~

~~9.~~8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court provided; however, that nothing in this Order shall affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or proceeding that is taken in respect of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body of the Court. **"Regulatory Body"** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

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NO EXERCISE OF RIGHTS OR REMEDIES

~~10.~~9. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which ~~the~~ any of the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

~~11.~~10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

~~12.~~11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such

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other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

~~13.~~12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

~~14.~~13. THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

~~15.~~14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information

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to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

~~16.~~15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, *The Environment Act* (Manitoba), *The Water Resources Conservation Act* (Manitoba), *The Contaminated Sites Remediation Act* (Manitoba), *The Dangerous Goods Handling and Transportation Act* (Manitoba), *The Public Health Act* (Manitoba) or *The Workplace Safety and Health Act* (Manitoba), and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

~~17.~~16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except

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for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

~~18.~~17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.~~10~~

~~19.~~18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of this Court, but nothing herein shall fetter this Court's discretion to refer such matters to an Associate Judge ~~Master~~ of this Honourable Court.

~~20.~~19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

~~10 Note that subsection 243(6) of the BIA provides that the Court may not make such an 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".~~

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FUNDING OF THE RECEIVERSHIP

~~21.~~20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed ~~$~~ ~~$~~200,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

~~22.~~21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

~~23.~~22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

~~24.~~23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

~~25.~~24. THIS COURT ORDERS that the ~~Applicant~~ Plaintiff and the Receiver be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or

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other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or electronic transmission to the Debtor's, the Debtors creditors or other interested parties at their respective addresses as last shown on the records of each of the Debtors and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

26.25. THIS COURT ORDERS that counsel for the Receiver shall prepare and keep current a service list (**"Service List"**) containing the name and contact information (which may include the address, telephone number and facsimile number or email address) for service to: the ApplicantPlaintiff; the Receiver; and each creditor or other interested Person who has sent a request, in writing, to counsel for the Receiver to be added to the Service List. The Service List shall indicate whether each Person on the Service List has elected to be served by email or facsimile, and failing such election the Service List shall indicate service by email. The Service List shall be posted on the website of the Receiver at the address indicated in paragraph **[27] 26** herein. **For greater certainty, creditors and other interested Persons who have received notice of this Order and who do not send a request, in writing, to counsel for the Receiver to be added to the Service List, shall not be required to be further served in these proceedings.**

27.26. THIS COURT ORDERS that the ApplicantPlaintiff, the Receiver, and any party on the Service List may serve any court materials in these proceedings by facsimile or by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Receiver may post a copy of any or all such materials on its website at www.[ ] Service shall be deemed valid and sufficient if sent in this manner.

GENERAL

28.27. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

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~~29.~~28. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor~~s~~.

~~30.~~29. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

~~31.~~30. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

~~32.~~31. THIS COURT ORDERS that the ~~Applicant~~ Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the ~~Applicant's~~ Plaintiff's security or, if not so provided by the ~~Applicant's~~ Plaintiff's security, then on a solicitor-client basis[~~11~~] to be paid by the Receiver from the Debtor~~'~~s' estate with such priority and at such time as this Court may determine.

~~33.~~32. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[DATE]

~~[11] Counsel should note that costs remain in the discretion of the Court~~

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I, [NAME] OF THE FIRM OF [NAME] HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: [INSERT] AS DIRECTED BY THE HONOURABLE [INSERT].

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SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that Deloitte Restructuring Inc.[~~RECEIVER'S NAME~~], the receiver (the "**Receiver**") of all of the assets, undertakings and properties [~~DEBTOR'S NAME~~]of each of 356 Assiniboine Avenue Ltd., Dakota Plains Wahpeton Oyate Real Estate GP Co. Ltd., Dakota Plains Wahpeton Oyate Real Estate Limited Partnership, Dakota Plains Wahpeton Oyate Economics Development Corporation, Dakota Plains Wahpeton Oyate Management Co. Ltd., and Dakota Plains Wahpeton Oyate Active Pursuits Limited Partnership (collectively, the "**Debtors**") acquired for, or used in relation to or arising from the ~~a~~ businesses carried on by the Debtors, including, but not limited to the land and premises municipally known as 356 Assiniboine Avenue, Winnipeg, in the Province of Manitoba (the "**Real Property**"), and more specifically described as: LOT 241 BLOCK 2 PLAN 129 WLTO (W DIV) IN RL 1 PARISH OF ST. JOHN and including all proceeds thereof (collectively, the "**Property**") appointed by Order of ~~The Queen's~~ Manitoba Court of King's Bench~~, Winnipeg Centre~~ (the "**Court**") dated the ___ day of _____, 20__ (the **"Order"**) made in an action having Court file number _____~~,~~ CI23-01-43781, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver

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pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ~~***, ***~~ _____.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

~~[RECEIVER'S NAME]~~, Deloitte Restructuring Inc., solely in its capacity
as Receiver of the Property, and not in its personal capacity

Per: _____
Name:
Title:

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