No. S2110503
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND

IN THE MATTER OF OTSO GOLD CORP., OTSO GOLD OY, OTSO GOLD AB, and 2273265 ALBERTA LTD.

PETITIONERS

WRITTEN ARGUMENT

I. INTRODUCTION

1. After more than a month of directionless restructuring proceedings (the "**CCAA Proceedings**") commenced by Otso Gold Corp., Otso Gold OY, Otso Gold AB, and 2273265 Alberta Ltd. (collectively, the "**Petitioners**" or "**Otso**") under the *Companies' Creditors Arrangement Act* ("**CCAA**"), Pandion Mine Finance LP and its affiliates ("**Pandion**"), in their capacity as the first priority secured creditor of the Petitioners, seek an order terminating these proceedings and appointing a receiver over all of the Petitioners' assets, undertakings and property, in accordance with the form of order attached to the application record.

2. From the very beginning of these CCAA Proceedings, the Petitioners, under the control of their largest equity holder, Brunswick Gold Ltd ("**Brunswick**"), failed to provide the Court and stakeholders with consistent and reliable information (including in relation to the Petitioners' cashflow projections) or a strategic path forward. Pandion's loan to Otso is in default and yet, every iteration of the cash flow submitted by the Petitioners in the CCAA Proceedings demonstrated two things: (i) the Petitioners' have no hope of repaying the obligations owed to Pandion based on their current plans; and (ii) to continue these CCAA Proceedings will serve no purpose except the erosion of Pandion's security.

3. At the eleventh hour, the Petitioners sought debtor-in-possession financing ("**DIP Financing**") from Pandion. Despite Pandion's best efforts to reach a resolution with the

Petitioners that would have permitted the CCAA to continue, Otso was unwilling to agree to Pandion's terms of the proposed DIP Financing. Otso therefore lacks financing to continue any operations beyond the end of next week.

4. The Petitioners did not serve materials by January 11, 2022, and in the absence of application material for further relief under the CCAA, the Monitor filed its second report dated January 12, 2022 (the "**Second Report**") which notes, *inter alia*, that:

    (i) the Petitioners and Pandion were not able to progress discussions on DIP Financing; and

    (ii) these CCAA Proceedings cannot be continued, as Otso does not have sufficient resources to advance the restructuring and meet its obligations.

5. At this juncture, and as detailed further below, Pandion submits that it is just and convenient to terminate these CCAA Proceedings and appoint a receiver over the Petitioners' assets, undertakings and properties for the following reasons:

    (i) the Monitor has recommended that the CCAA proceedings should be terminated and that this Court should provide for the orderly transition to an alternative proceeding;

    (ii) Pandion, the largest and first priority secured creditor of the Petitioners, has a contractual right to appoint a receiver under its security documents;

    (iii) without DIP Financing, the Petitioners will not have sufficient financing to fund care and maintenance at the Otso Gold Mine. The Petitioners' major asset, the Otso Gold mine is in Northern Finland. If the mine is not appropriately maintained over the winter, the Petitioners' major asset and Pandion's security in such asset will be put in jeopardy, reducing the likelihood of recoveries for all stakeholders;

    (iv) there has been a significant breakdown between Pandion and Otso Gold/Brunswick, which has been further exacerbated by the commencement of legal proceedings by Brunswick against Pandion (and others) in the United States and British Columbia, which contain unfounded allegations against Pandion. It should be of little surprise that, given these

spurious allegations, Pandion does not have confidence that the Petitioners' current leadership will act in the best interests of Otso's stakeholders and preserve the value of Pandion's collateral.

6. Pandion respectfully requests that the Court enter the receivership order to preserve the value of the Petitioners' primary asset: the Otso Gold Mine.

7. Capitalized terms used herein have the same meaning ascribed to them in Affidavit #1 of Joe Archibald, sworn on January 7, 2022 (the "**First Archibald Affidavit**").

II. STATEMENT OF FACTS

A. Background

8. Otso Gold is a publicly traded mineral exploration and development company, and is incorporated pursuant to the laws of Alberta and extra-provincially registered in British Columbia.[1]

9. Otso Gold has three wholly-owned subsidiaries:

   (a) Otso AB, which is incorporated pursuant to the laws of Sweden;

   (b) 2273265, which is incorporated pursuant to the laws of Alberta; and

   (c) Minera Acero Del Feuga SA.[2]

10. Otso AB has one wholly-owned subsidiary, Otso OY, which is incorporated pursuant to the laws of Finland. As detailed further below, Otso OY is the operating entity of a gold mine located in Finland (the "**Otso Gold Mine**").[3]

11. Pandion is the largest and sole secured creditor of Otso, having advanced the following sums to the Petitioners:

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[1] First Affidavit of Joe Archibald, sworn January 7, 2022 the ["First Archibald Affidavit"], at paras 3–4, and Exhibits "A" and "B".

[2] *Ibid* at para 5.

[3] *Ibid* at para 6.

(a) pursuant to the PPF Agreement, USD$20.6 million, as a prepayment for the purchase of 67,155 oz of gold to fund, *inter alia*, its acquisition of the Otso Gold Mine[4];

(b) pursuant to the Amendment & Forbearance to PPF Agreement, USD$7million (paid as prepayment for the purchase of an additional 25,960 oz of gold)[5];

(c) pursuant to the MLA, USD$5,849,030, for care and maintenance costs[6]; and

(d) pursuant to the Debenture Agreement and Put Agreement, USD$1.5 million.[7]

12. As detailed further below, despite forbearing and deferring Otso's obligations on numerous occasions, Otso defaulted on its obligations to repay a reduced sum (i.e., the Deferred Payment Amounts) on December 7, 2021. As a result of this failure, and pursuant to the terms of the Amended & Consent Agreement, Otso's obligations reverted to the total amounts due and payable to Pandion pursuant to the Transaction Documents (i.e., the Early Termination Amount).

13. Pandion has provided the Petitioners and the Monitor with a detailed calculation of the Early Termination Amount, which totals USD$95,350,406.[8]

14. A detailed description of the Transaction Documents under which the Early Termination Amount is owing, as well as the security Pandion now seeks to enforce, is set out below.

B. The Transaction Documents and Security

i. The PPF Agreement

15. On or about November 10, 2017, PFL Raahe, a wholly owned subsidiary of RiverMet (PFL Raahe was a wholly owned subsidiary of Pandion Mine Finance until December 31, 2020,

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[4] *Ibid* at para 9.

[5] *Ibid* at para 24.

[6] *Ibid* at paras 31–32.

[7] *Ibid* at para 49, and Exhibit "P".

[8] *Ibid* at para 56, and Exhibit "U".

at which point it was sold to RiverMet), and Otso Gold (then known as Firesteel Resources Inc., and referred to herein as "**Firesteel**") entered into a Pre-Paid Gold Forward Purchase Agreement (the "**PPF Agreement**").[9]

16. Pursuant to the PPF Agreement, PFL Raahe and Firesteel agreed, *inter alia*, as follows:

    (a) PFL Raahe would make a cash payment to Firesteel in the amount of USD$20.6 million as a prepayment for the purchase of 67,155 oz of gold, and pay an additional amount equal to the market price less a fixed discount of USD$500/oz upon each delivery of gold (as detailed therein);

    (b) the proceeds of the gold prepayment would be used to fund: (i) an investment in the Finnish OpCo with respect to the Otso Gold Mine; and (ii) the extinguishment of certain liabilities and obligations;

    (c) Firesteel would sell the Contract Quantity of Gold to PFL Raahe, free and clear of all Liens;

    (d) Firesteel would deliver the Contract Quantity of Gold to PFL Raahe on each Monthly Delivery Date by Delivery of the Scheduled Monthly Quantity, in accordance with the terms thereof;

    (e) failure to Deliver any amount of Gold, as required by the terms thereof, would constitute an "Event of Default"; and

    (f) upon the occurrence of an Event of Default by an Obligor, PFL Raahe was entitled to: (i) demand payment of the Early Termination Amount (calculated in accordance with section 5(8) thereof); and (ii) enforce against the Collateral.[10]

17. Further details regarding the use of the proceeds paid to Otso Gold pursuant to the PPF Agreement are also set out at Exhibit B-3 to the PPF Agreement.

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[9] *Ibid* at para 7, and Exhibit "C".

[10] *Ibid* at para 9.

18. As security for the obligations under the PPF Agreement, Pandion was granted, *inter alia*, a Lien over and in respect of any and all of Firesteel's (and its subsidiaries') real and personal property, assets, rights, titles and interests, whether tangible or intangible, presently held or after acquired, and all products and proceeds of the foregoing, including insurance proceeds.[11]

19. At the time the PPF Agreement was executed, Nordic Oy owed approximately EUR$31.1 million (USD$36.2 million) to Nordic Mines AB (the former parent company of Otso AB), consisting of an intercompany loan in the outstanding amount of EUR$24.1 million, and a capital loan in the outstanding amount of EUR$7 million (referred to in the PPF Agreement, and referred to herein, as the "**Finnish OpCo Debts**").[12]

20. The PPF Agreement contemplated, *inter alia*, that the Finnish OpCo Debts would be assigned to Otso Gold (then known as Firesteel), and that Firesteel would thereafter grant "Security in respect of such Finnish OpCo Debts…for the benefit of [Pandion]" (PPF Agreement, section 3(1)(xvii)).[13]

ii. The PPF2 Agreement

21. On December 8, 2017, and as contemplated by the PPF Agreement, the following additional agreements were executed:

    (a) Nordic Gold OY (formerly known as Nordic Mines OY) and Nordic Gold Corp. (formerly known as Firesteel Resources Inc.) entered into a Second Pre-Paid Forward Gold Purchase Agreement, as amended and restated on November 8, 2018 (the "**PPF2 Agreement**"). The PPF2 Agreement provided that Otso Oy (previously Nordic Mines Oy) could satisfy its obligations relating to the delivery of gold to Firesteel (as the Buyer under the PPF2 Agreement), or by making deliveries directly to PFL Raahe, and thus created back-to-back obligations between Otso Oy (then called Nordic Mines Oy) and Firesteel that corresponded to the obligations between Firesteel and Pandion under the PPF Agreement. In

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[11] *Ibid* at para 11.

[12] *Ibid* at para 12.

[13] *Ibid* at para 13.

this respect, section 4.1 of the Direct Agreement provides that PFL Raahe (as the Buyer) may, in the case of a default under the PPF Agreement, step into Otso Gold's shoes and exercise any/all of its rights arising under and pursuant to the PPF2 Agreement; and

(b) PFL Raahe (as Buyer), Firesteel and Nordic Mines OY entered into a Direct Agreement, in connection with the PPF2 Agreement and as a condition under the PPF Agreement.[14]

22. As security for the obligations arising under the PPF2 Agreement, Nordic Mines OY irrevocably and unconditionally pledged to Otso Gold, as a first priority pledge, the mining right and a business mortgage. Otso Gold further pledged the same assets to Pandion as security for its obligations under the PPF Agreement.[15]

iii. Pandion's Security

23. As detailed and acknowledged at paragraph 60 of the First Koshkin Affidavit, the obligations owed by Otso under the Transaction Documents are secured, and the security is duly registered in the respective jurisdictions (including in Canada, Sweden, and Finland).[16]

24. The security granted by Otso includes:

(a) a security interest in all of its present and after-acquired real and personal property pursuant to a General Security Agreement, dated December 2017 (the "**GSA**") to secure performance of the "Obligations" (as such term is defined in article 1.01 thereof); and

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[14] *Ibid* at para 14, and Exhibit "D".

[15] *Ibid* at para 17, and Exhibit "E".

[16] First Affidavit of Victor Koshkin, sworn December 3, 2021 ["First Koshkin Affidavit"], Exhibits "O", "P", "Q", "R", "S", "T", "U", "V", "W" and "X".

(b) pledge agreements, relating to the shares in Nordic Mines Marknad AB, certain options, and a loan, each of which is dated December 8, 2017.[17]

25. Pandion's security interest has been perfected in Canada through the following registrations:

(a) Registration No. 17112810682 made on November 28, 2017, against Otso Gold in the Alberta Personal Property Registry; and

(b) Registration No. 425756K made on November 28, 2017, against Otso Gold in the British Columbia Personal Property Registry.[18]

C. Otso's Default under the PPF Agreement

26. Otso (then known as Firesteel) subsequently defaulted on certain of its obligations under the PPF Agreement.[19]

27. On October 15, 2018, and following these defaults, the parties agreed to amend the PPF Agreement pursuant to an "Amendment and Forbearance No. 1 to the Pre-Paid Forward Gold Purchase Agreement" (the "**Amendment & Forbearance to PPF Agreement**").[20]

28. Pursuant to the terms of the Amendment & Forbearance to PPF Agreement, the parties agreed *inter alia*, as follows:

(a) PFL Raahe would provide additional funding of USD$7 million, in two supplemental tranches, as prepayment for the purchase of 25,960 oz of gold (for a total purchase of 93,115 oz of gold for all three tranches), and pay an additional amount equal to the market price less a fixed discount of USD$500/oz upon each delivery of gold (as detailed therein);

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[17] First Archibald Affidavit, *supra* note 1at para 19, and Exhibits "G" and "H".

[18] *Ibid* at para 20, and Exhibit "I".

[19] *Ibid* at para 22.

[20] *Ibid* at para 23, and Exhibit "J".

(b) PFL Raahe would shift the start date of gold deliveries under the PPF Agreement to Jan-2020 from May-2019; and

(c) PFL Raahe would remove Section 23 from the PPF Agreement, the Contract Quantity Exchange Option concept;

(d) In return, the parties agreed to the following;

(i) 19.9% of the outstanding common shares provided to PFL Raahe;

(ii) a USD$1.5m Buyer Fee paid to PFL Raahe within six months of entering into the Amendment & Forbearance to PPF Agreement; and

(iii) a 2.5% net smelter return on gold production from the Otso Gold Mine.[21]

D. The Royalty Agreement

29. Pursuant to the Amendment & Forbearance to PPF Agreement, in exchange for removing an option in the PPF Agreement, on November 8, 2018, PFL Raahe, Nordic Gold OY, and Nordic Gold Corp., entered into a Net Smelter Returns Royalty Agreement (the "**Royalty Agreement**"), pursuant to which PFL Raahe was granted a 2.5% Net Smelter Returns Royalty (the "**Royalty**") payable on all Minerals mined or otherwise recovered from the Mine Properties, the Mining Concessions and/or the Mine.[22]

30. Pursuant to the terms of the Royalty Agreement, the parties agreed *inter alia* as follows:

(a) the grant of the Royalty would be binding upon the successors and assigns of the Owner, and all successors of the Owner in title to the Mine Properties;

(b) the Royalty would run with the Mine Properties and the Owner's title to the Mine Properties, and to the extent permitted in law, would constitute a vested interest in and a covenant running with the Mine Properties and Minerals and the respective titles thereto and all accessions thereto or successions or derivations thereof; and

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[21] *Ibid* at para 24.

[22] *Ibid* at para 26, and Exhibit "L".

(c) PFL Raahe could, at its own expense register or record notice of the Royalty Agreement against title to the Mine, the Mine Properties and the Mining Concessions.[23]

31. In addition, a Mining Right Certificate was pledged to Pandion as first priority security under the PPF Agreement (first by Otso Oy to Otso Gold pursuant to the agreement referred to in paragraph 18 above and then by Otso Gold to Pandion pursuant to the agreement referred to in paragraph 18(b) above), and as second priority security under the Royalty Agreement.[24]

32. The handwritten notes on the Mining Right Certificate constitute a security endorsement of the first priority for the PPF Agreement and the second priority for the Royalty, and the pledge was subsequently registered (i.e., registered in the Mining Register).[25]

E. Care and Maintenance – Maintenance Loan Agreement

33. Following the execution of the Amendment & Forbearance to PPF Agreement and the Royalty Agreement, Otso Gold poured gold until March 2019 at which time, and a result of various issues (including, *inter alia*, poor management and issues with the mill), Otso Gold ran out of working capital. As detailed further at paragraph 20 of the First Koshkin Affidavit, the Otso Gold Mine was then placed on care and maintenance from pre-commercial production, effective April 1, 2019.[26]

34. On April 17, 2019, and in order to protect the value of its collateral in the Otso Gold Mine, PFL Raahe entered into a Maintenance Loan Agreement (the "**MLA**") with Otso Gold, pursuant to which it agreed to provide care and maintenance funding in the principal sum of up to EUR350,000 per month. In addition, the MLA provides *inter alia* that:

(a) the MLA was a "Transaction Document" under the PPF Agreement; and

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[23] *Ibid* at para 27.

[24] *Ibid* at para 29, and Exhibit "F"; First Koshkin Affidavit, *supra* note 16, Exhibit "Y".

[25] First Archibald Affidavit, *supra* note 1at para 29.

[26] *Ibid* at para 30.

(b) the Obligations (as defined in the MLA) were payable on demand.[27]

35. PFL Raahe provided care and maintenance funding to Otso Gold until December 3, 2019, in the amount of USD$5,849,030 to allow Otso Gold to maintain the site and pay down its liabilities.[28]

F. The PFL Raahe Sales Process

36. Prior to entering into the MLA, Pandion also engaged Cutfield Freeman (Independent Global Mining Finance Advisors) ("**Cutfield**") in March 2019, to market and sell PFL Raahe's claims and rights related to the Otso Gold Mine (the "**PFL Raahe Sales Process**").[29]

37. Cutfield subsequently developed a target company list of over 100 companies, which included any direct inquiries that Pandion had previously (or subsequently) received.[30]

38. The PFL Raahe Sales Process was conducted from approximately April 2019 until September 17, 2019, and generated expressions of interest from approximately ten companies. However, due to the circumstances that existed at the mine during this time (i.e., lack of drilling and gold reserves, selective mining, lack of a feasibility study, etc.), the interest in moving forward with fuller due diligence and a potential transaction was limited: of the ten companies that expressed an interest, Pandion only received two non-binding offers – both of which were made by Chinese mining companies (the "**Interested Companies**").[31]

39. The Interested Companies conducted site visits in July 2019, but by September 17, 2019, both had communicated they were not interested in pursuing the opportunity further.[32]

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[27] *Ibid* at para 31.

[28] *Ibid* at para 32.

[29] *Ibid* at para 33.

[30] *Ibid* at para 34.

[31] *Ibid* at para 35.

[32] *Ibid* at para 36.

G. Services Agreement with Lionsbridge and Westech

40. Over the course of the PFL Raahe Sales Process, Pandion contacted Lionsbridge an arms-length party to discuss the opportunity. Lionsbridge executed a confidentiality agreement in order to gain access to the data room that had been prepared by Cutfield for the PFL Raahe Sales Process.[33]

41. On May 23, 2019, Lionsbridge informed Pandion that, having completed its technical review and having engaged with potential investors/sources of capital, it was unlikely that it would be able to buy out PFL Raahe's claims and rights related to the Otso Gold Mine.[34]

42. Through its review of the project, Lionsbridge identified a pathway for production to resume at the Otso Gold Mine and indicated an interest in assisting with managing this process.[35]

43. Thereafter, and on July 2, 2019, Otso Gold, Lionsbridge, and Westech International Pty Ltd. ("**Westech**"), entered into a services agreement (the "**Services Agreement**"), pursuant to which the parties agreed, *inter alia*, that: (i) Lionsbridge would provide Otso Gold with corporate management services; and (ii) Westech would, subject to independent approvals, provide Otso Gold with the technical services it had identified as necessary to return the Otso Gold Mine back to production.[36]

44. The Services Agreement was subject to TSX-V approval and, as detailed further in the Press Release "Nordic Gold Announces Changes in Board and Management Annual & Special General Meeting set for August 28, 2019", was approved by Otso Gold's board of directors (the "**Otso Board**") on July 2, 2019.[37]

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[33] *Ibid* at para 38.

[34] *Ibid* at para 39.

[35] First Affidavit of Clyde Wesson, sworn December 12, 2021 ["First Wesson Affidavit"], at para 12.

[36] First Koshkin Affidavit, *supra* note 16, Exhibit "C".

[37] First Archibald Affidavit, *supra* note 1at para 41, and Exhibit "M".

45. The Services Agreement was subsequently approved by the shareholders of Otso Gold, as was the election of, *inter alia*, Brian Wesson and Clyde Wesson to the Otso Board.[38]

H. Obligations and Debt Restructuring – Consent and Agreement

46. Following the approval of the Services Agreement, Otso Gold negotiated a restructuring of Otso Gold's liabilities to Pandion resulting in the execution of the "Consent and Agreement to Pre-Paid Forward Gold Purchase Agreement and Maintenance Loan Agreement" on October 7, 2019 (the "**Consent & Agreement**").[39]

47. Pursuant to section 2.1 of the Consent & Agreement, the obligations otherwise owing under the PPF Agreement were deferred on the following terms:

> *Recharacterization of Obligations: Deferment of Deferred Payment Amounts until the Deferment Termination Date*. Subject to the terms hereof, the Buyer hereby agrees that (1) the Obligations of the Obligors under the PPF Agreement and the obligations of Nordic Gold Oy under the Maintenance Loan Agreement shall be recharacterized and consolidated under this Agreement to a $23,000,000 payable of the Seller owing to the Buyer and (2) on and after the Deferment Effective Date until the Deferment Termination Date any payments due under the PPF Agreement (as modified by this Agreement) and the Maintenance Loan Agreement shall be deferred until the Deferment Termination Date. The deferment and consolidation granted pursuant to this Section 2.1 shall automatically terminate on the Deferment Termination Date and the Deferred Payment Amounts, together with all other amounts due on such date under this Agreement and the Transaction Documents, shall be immediately due and payable on such date. The period from and including the Deferment Effective Date through but excluding the Deferment Termination Date shall be referred to herein as the 'Deferment Period.'[40]

48. Section 5.1 of the Consent & Agreement provides that, *inter alia*, the following would constitute "Deferment Termination Events":

(a) any of the Obligors defaults in the observance or performance of its obligations arising under the Consent & Agreement; and

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[38] *Ibid,* Exhibit "N".

[39] *Ibid* at para 43, and Exhibit "O"; First Wesson Affidavit, *supra* note 35 at para 12.

[40] First Archibald Affidavit, *supra* note 1at para 44, and Exhibit "O".

(b) any Obligor: (i) becomes insolvent or generally not able to pay its debts as they become due; (ii) admits in writing its inability to pay its debts generally or makes a general assignment for the benefit of creditors; (iii) institutes or has instituted against it any proceeding seeking (x) to adjudicate it a bankrupt or insolvent, (y) liquidation, winding-up, reorganization, arrangement, adjustment protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of Petitioners including any plan of compromise or arrangement or other corporate proceeding involving or affecting its creditors, or (z) the entry of an order for relief or the appointment of a receiver, receiver and manager, trustee, monitor, custodian or other similar official for it or for any substantial part of its properties and assets, and in the case of any such proceeding instituted against it (but not instituted by it), either the proceeding remains undismissed or unstayed for a period of thirty (30) days, or any of the actions sought in such proceeding (including the entry of an order for relief against it or the appointment of a receiver, interim receiver, receiver and manager, trustee, monitor, custodian or other similar official for it or for any substantial part of its properties and assets) occurs; or (iv) takes any corporate action to authorize any of the above actions.[41]

49. Pursuant to the Consent & Agreement, the parties agreed *inter alia*, as follows:

(a) the sum of USD$23 million, the Deferred Payment Amounts, payable in two equal instalments of USD$11.5 million within eighteen and twenty-four months of entering into the Consent & Agreement (April 7, 2021 and October 7, 2021, respectively), would be paid to PFL Raahe in full satisfaction of the amounts otherwise due under the PPF Agreement and Maintenance Loan Agreement;

(b) a contingent payment of USD$1.56 million, payable in common shares of Otso Gold, pro rata upon the completion of up to CAD$7 million equity raise for purposes of providing PFL Raahe with ownership of Otso Gold common shares not to exceed 19.9%;

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[41] *Ibid* at para 45, and Exhibit “O”.

(c) permit Otso Gold to repurchase the Royalty for USD$15 million; and

(d) PFL Raahe would provide additional amounts not exceeding USD$900,000 pursuant to the MLA in order to fund maintenance expenditures relating to the site during the three months following execution of the Consent & Agreement.[42]

50. The purpose of entering into the Consent & Agreement was to, among other things: (i) permit Otso Gold to move forward with raising funds to restart operations at the Otso Gold Mine; (ii) recapitalize the company; (iii) do necessary drilling, technical work, and complete a feasibility study; and (iv) ensure that the value created by successfully restarting operations at the Otso Gold Mine would not be consumed by its existing liabilities.[43]

51. On December 16, 2019, Nordic Gold changed its name to Otso Gold.[44]

I. Additional Funding – Convertible Debentures

52. On March 26, 2020, PFL Raahe agreed to provide additional funding to Otso Gold in the amount of USD$1.5 million, in the form of unsecured convertible debentures with a maturity date of March 26, 2023 (the "**Convertible Debentures**") pursuant to the terms of a Debenture Agreement, dated March 26, 2020 (the "**Debenture Agreement**"), as well as a "put option", pursuant to a Put Agreement dated March 26, 2020 (the "**Put Agreement**"), to require Otso Gold to purchase the Convertible Debentures on or after September 25, 2020.[45]

53. In consideration of PFL Raahe subscribing for the Convertible Debentures, each of Lionsbridge and Brian Wesson absolutely, unconditionally and irrevocably guaranteed, on a joint and several basis to PFL Raahe the full and timely payment of all debts and liabilities, present and future, matured and unmatured, owing by Otso Gold to PFL Raahe under the Convertible Debenture, including the Put Option and the Call Right arising therefrom (and as such terms are defined in the Debenture Agreement), together with all

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[42] *Ibid* at para 46, and Exhibit "O".

[43] *Ibid* at para 47.

[44] *Ibid* at para 48.

[45] *Ibid* at para 49, and Exhibit "P".

costs and disbursements incurred by PFL Raahe in order to recover such amounts, pursuant to a Guarantee and Call Agreement, dated March 26, 2020.[46]

54. On December 13, 2020, PFL Raahe agreed to amend the Consent & Agreement to, *inter alia*, provide that the Deferred Payment Amounts would be payable in one lump sum due on December 7, 2021 (the "**Amended Consent & Agreement**").[47]

55. The Amended Consent & Agreement was negotiated directly with Vladmir Lelekov in October, 2020.[48]

J. The CCAA Proceedings

56. December 3, 2021, Petitioners commenced the CCAA Proceedings and, thereafter, failed to pay the Deferred Payment Amounts otherwise due on December 7, 2021 pursuant to the Amended Consent & Agreement.[49]

57. On December 8, 2021, Pandion, through its legal counsel, delivered a summary of the amounts owing pursuant to the Transaction Agreements (i.e., the Early Termination Amount).[50]

58. On December 23, 2021, at the request of the Monitor, Pandion's counsel delivered the following documents (collectively referred to as the "**ETA Calculation Documents**") to Otso Gold's legal counsel, and to the Monitor in the CCAA Proceedings (and the Monitor's counsel):

    (a) a chart summarizing the Early Termination Amount (the "**ETA Chart**"), with pinpoint references to the relevant agreement;

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[46] *Ibid* at para 50, and Exhibit "Q".

[47] *Ibid* at para 51, and Exhibit "R".

[48] *Ibid* at para 52, and Exhibit "S".

[49] *Ibid* at para 53.

[50] *Ibid* at para 54, and Exhibit "T".

(b) a spreadsheet with various underlying calculations from which the Early Termination Amount has been derived; and

(c) a detailed summary of the Transaction Documents, pursuant to which the Early Termination Amount is owed.[51]

59. As detailed in the First Archibald Affidavit, the Early Termination Amount totals USD$95,350,406, calculated as follows:

Line Item	**Amount**	**Legal Authority**	**Detailed Calculation**
Early Termination Amount	**$95,350,406**	**Consent and Agreement, § 2.1 ("The deferment and consolidation granted pursuant to this Section 2.1 shall automatically terminate on the Deferment Termination Date and the Deferred Payment Amounts, together with all other amounts due on such date under this Agreement and the Transaction Documents, shall be immediately due and payable on such date."); PPF, § 14(4)(i); Amendment No. 1 (definition of "Early Termination Amount")**	**See below.**
Clause (i)	$47,242,554	Amendment No. 1 (clause (i) of definition of "Early Termination Amount")	Contract Quantity of Gold: $46,557,500 *plus* Default Interest for Contract Quantity of Gold that remains unpaid on each Monthly Delivery Date: $685,054
Clause (ii)	$0	Amendment No. 1 (clause (ii) of definition of "Early Termination Amount")	None.
Clause (iii)	$8,939,395	Amendment No. 1 (clause (iii) of definition of "Early Termination Amount")	Aggregate disbursements under Maintenance Loan Agreement: $5,849,030 *plus*

[51] *Ibid* at para 55, and Exhibit "U".

Line Item	**Amount**	**Legal Authority**	**Detailed Calculation**
			Accrued interest on disbursements under Maintenance Loan Agreement: $1,590,365 *plus* Buyer Fee Cash Payment: $1,500,000
Clause (iv)	$0	Amendment No. 1 (clause (iv) of definition of "Early Termination Amount")	None.
Clause (v)*	$39,168,456	Amendment No. 1 (clause (v) of definition of "Early Termination Amount")	The greater of zero and the product of: (A) 50% of the Monthly Payable Production of gold for the later of: (x) 69 months following the Effective Date, and (y) the final Scheduled Delivery Month, as applicable; and Calculation Under Clause (A): 67,375oz (50% *multiplied by* 134,750oz Monthly Payable Production of Gold from Jan-2022 through Sep-2023) (B) an amount equal to the then current Settlement Price minus the applicable Base Spot Price; provided that any amounts that have been satisfied or paid to the Buyer prior to the date of any early termination pursuant to this Section 5(8) shall only be considered once for purposes of any calculation under this Section 5(8). Calculation Under Clause (B): $581.35/oz ($1,781.35/oz *minus* $1,200.00/oz) Product of Clauses (A) and (B): $39,168,456
* For clarity, the same amounts referenced within Section 24(1)/(4) pursuant to the Amendment & Forbearance to PPF Agreement.			

K. Pandion has lost confidence in the Current Board and Management

60. Given Pandion's efforts described above, which have not resulted in the payment of the liabilities owed to it, and the facts described below, Pandion does not have confidence that the Petitioners will be able to successfully restructure their liabilities and restart operations at the Otso Gold Mine.

61. Pandion has identified the following specific concerns:

(a) Otso Gold restarted operations at the Otso Gold Mine in November 2021 pursuant to a long-term mining plan (the "**Boyd Plan**") prepared by Boyd Company and a shorter-term mining plan for the initial month of restarted operations. Otso Gold does not appear to have formulated a short-term mining plan for any period after December 15, 2021, and has apparently made the decision to abandon the Boyd Plan (which decision is cited and relied upon as Otso Gold's reason for ceasing operations at the Otso Gold Mine as of December 17, 2021). A shorter-term mining plan for the succeeding month (i.e., December 2021) ought to have been prepared based on the results of operations during the month of November 2021;

(b) Even though Otso Gold appears to have restarted operations at the Otso Gold Mine through November 2021 with adequate safety measures, its current management is at least uncertain that the existing safety measures are sufficient and Otso Gold has cited safety concerns as an additional reason for ceasing operations in mid-December;

(c) In support of the initial order (the "**Initial Order**") sought pursuant to the CCAA, Otso Gold filed cash-flow projections that contemplated equity injections to fund operations at the Otso Gold Mine. At or about the time operations at the Otso Gold Mine were suspended, new cash-flow projections were submitted to the Court which do not include or contemplate any equity injections whatsoever. The lack of equity injections, and the corresponding lack of funding, is a cause for the suspension of operations at the Otso Gold Mine as of December 17, 2021;

(d) As a consequence of suspending operations at the Otso Gold Mine, significant funding will be required to restart operations, if indeed it is contemplated that such

operations will be restarted. No evidence of funding to restart operations has been presented;

(e) Affidavits filed in connection with the CCAA Proceedings reflect no dispute about the following facts:

(i) there have been and are significant differences and disputes among directors and officers of Otso Gold (some affiliated with Brunswick entities and others with Lionsbridge, but all holding director and/or officer positions on the board); and

(ii) the composition of the board of directors has recently changed and that there have been significant changes in management during in the past month.

Although the First Koshkin Affidavit states that these differences, disputes and the resulting instability have been prejudicial to Otso Gold, they reflect the internal affairs of the Company, Pandion should not be asked to bear the cost of these issues through a continuation of these CCAA Proceedings (or otherwise);

(f) Affidavits filed in the CCAA Proceedings contemplate that operating expenses of Otso Gold (including costs resulting from the disputes among officers and directors of Otso Gold and the resulting instability), have been (or will be) paid using the proceeds of sales of gold mined at the Otso Gold Mine, which gold is collateral and pledged by the Petitioners to secure the obligations owed to PFL Raahe. The dissipation of this collateral is prejudicial to PFL Raahe;

(g) None of the materials filed in connection with the continuation of these CCAA Proceedings provide for or contemplate: (i) the repayment of amounts owed to PFL Raahe, the Petitioners' sole secured creditor; (ii) funding of operations at the Otso Gold Mine; (iii) the sale of the Otso Gold Mine and/or Otso Gold's assets for the purposes of realizing value to creditors;

(h) It is unlikely that Otso Gold will be able to put a plan forward that will be acceptable to Pandion, as the obligations owed to Pandion appear to significantly exceed the value of the Otso Gold Mine;

(i) Otso Gold defaulted on its obligation to pay the Deferred Payment Amounts, and the liabilities owed to Pandion have, since the commencement of the CCAA Proceedings, reverted to the Early Termination Amount (which totals USD$95,350,406), whereas the value of the Otso Gold Mine is listed at $55,853,164 (see paragraph 52 of the First Koshkin Affidavit);

(j) The Petitioners were unable to negotiate terms of a DIP Financing with Pandion (or acceptable terms with another party) during the Stay Period; and

(k) The cash-flow forecasts demonstrate that the Petitioners will run out of cash, having failed to secure DIP Financing.[52]

62. In addition to the foregoing, there is significant distrust and animosity between the parties.

63. Following the commencement of these CCAA Proceedings, Otso Gold's majority shareholder, Brunswick, commenced legal proceedings against Pandion (among others) in Connecticut state court against not only Pandion, PFL Raahe, and RiverMet, but Joseph Archibald and another Pandion partner, Ryan Byrne, in their personal capacity (collectively, the "**Pandion Defendants**"), alleging violations of the Connecticut Unfair Trade Practices Act ("**CUTPA**"), fraud and conspiracy to defraud, and aiding and abetting fraud in connection with Brunswick's investments in Otso Gold (collectively, the "**CT Claims**").[53]

64. Brunswick has also commenced substantively duplicative proceedings against the Pandion Defendants in British Columbia (together with the CT Claims, the "**Brunswick Claims**").

65. The Pandion Defendants intend to deal with the Brunswick Claims at the appropriate time and in the appropriate forum, as it is evident they were filed for strategic reasons in an effort to generate leverage in its negotiations with Pandion in the context of these CCAA Proceedings.

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[52] *Ibid* at para 57.

[53] *Ibid* at para 59, and Exhibit "V".

66. The Monitor's Second Report notes that Brunswick issued a press release describing the Brunswick Claims as "following investigation at Otso Gold." The Monitor then requested that the the board of directors confirm that no information received in their capacities as directors had been used to inform and advance litigation on behalf of Brunswick, but that no such confirmations were provided.[54]

67. As Brunswick effectively controls the Otso Board (and the directors have not confirmed that they will use information solely for the benefit of Otso), it is necessary to ensure that the collateral is managed by an independent party under the supervision of this Court rather than a litigant who is seeking to recover its own costs rather than increase the value of the assets for other creditors.

Conclusion

68. Given all of the foregoing, the appointment of a Receiver over the undertakings, property and assets of the Petitioners is necessary and proper to protect the interests of Pandion (and other creditors) and to preserve and maximize the value of the Otso Gold Mine.

III. ISSUES

69. The only issue on this application is:

(a) Should this Court dismiss the CCAA Application and appoint a receiver on the terms set out in the proposed order?

IV. LAW AND ARGUMENT

A. Test for Appointment of a Receiver

i. Statutory Authority

70. There are three statutory bases for this application. First, the *Bankruptcy and Insolvency Act* ("**BIA**") provides that, on application by a secured creditor, this Honourable Court may appoint a receiver where it is just and convenient to do so.[55] Second, the *Law and Equity*

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[54] Second Report of the Monitor, (January 13, 2022), ["Second Report"] at para 43.

[55] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1) [BIA].

Act ("**LEA**") provides that the Court may appoint a receiver where it is just and convenient to do so.[56] Third, The *Supreme Court Civil Rules* provide that the Court may appoint a receiver in any proceeding either unconditionally or on terms.[57]

71. Section 243(1.1) of the BIA provides that

> 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…
>
> (b) *the court considers it appropriate to appoint a receiver before then.*[58]

72. The Petitioners argue that because Pandion has not delivered a notice under section 244(1) (a "**244 Notice**"), it may not apply for a receiver under section 243 of the BIA. The Petitioners' argument neglects the very terms of the statute and this Court's order dated December 15, 2021, which granted Pandion leave to file a receivership application.[59]

73. The purpose of a 244 Notice is to allow a debtor a reasonable time to refinance or reorganize its affairs before a secured creditor begins enforcement proceedings.[60] Here, the Petitioners have had notice of Pandion's intent to bring an application for a month and they have been in possession of the draft materials since January 7, 2021. During that time, the Petitioners have already solicited alternatives with no success.[61] Similar to Justice Koehnen's observations in *Kew Media*, "this is not a situation where the receivership application has come out of the blue."[62] Providing the Petitioners with another

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[56] *Law and Equity Act,* RSBC 1996, c 253, s 39 .

[57] *Supreme Court Civil Rules,* BC Reg 168/2009, r 10-2.

[58] BIA s. 243(1.1) (emphasis added).

[59] Amended and Restated Initial Order dated December 15, 2021.

[60] *Leby Properties Ltd. v. Manufacturers Life Insurance Co.*, 2006 NBCA 14 at para 63-65.

[61] Affidavit #5 of Thomas Dillenseger, sworn on January 12, 2022, at para 14.

[62] Unofficial Transcript of the Endorsement of Justice Koehnen, Court File No. CV-20-00637081-00CL (February 28, 2020)

10 days will not serve the purposes of the BIA, nor would it further the reorganization interests of the CCAA.

74. Moreover, section 244(3) of the BIA exempts from the 10-day notice requirement, any secured creditor that has applied to Court for relief from the applicable BIA stay provisions. While Petitioners are not subject to BIA proceedings, Pandion made a request to the Court to permit its receivership application on December 15, 2021. This Court granted that request, and the order pronounced on December 15, 2021 (the "**December 15 Order**"), expressly authorizes Pandion to bring its application on January 14, 2022. To now require Pandion to separately deliver a 244 Notice is illogical, inconsistent with the December 15 Order, and encourages a reading of the CCAA that is not harmonious with the BIA.

ii. Judicial Interpretation

75. In weighing whether the appointment of a receiver is just and convenient, courts in British Columbia have consistently examined the following factors:

(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 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 which 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 upon 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.[63]

76. This analysis requires the court to "fully balance the rights and interests of the parties" and to "consider all relevant circumstances and view the matter holistically".[64]

77. In short, while the case law provides relevant factors for consideration, appointment of a receiver requires careful analysis of the facts and circumstances before the Court. Pandion submits that this is an instance where all such factors militate in favour of the order requested.

B. It is Just and Equitable to Appoint a Receiver

78. Appointment of a receiver on the terms requested by Pandion is appropriate in the circumstances.

i. Appointment is a Contractual Remedy

79. While courts have acknowledged that the appointment of a receiver is an extraordinary remedy, when the parties have contracted for appointment of a receiver, "the extraordinary nature of the remedy is less central to the inquiry."[65] Modern courts have "placed considerable weight on the parties' contractual agreement."[66]

80. It is undisputed that Otso is in default of its obligations to Pandion, that Otso has no plans to repay Pandion, and that the Security permits appointment of a receiver as an exercise

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[63] *Maple Trade Finance Inc. v CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para 25.

[64] *Prospera Credit Union v Portliving Farms (3624 Parkview) Investments Inc*., 2021 BCSC 2449 at paras 24–25.

[65] *Ibid* at para 24.

[66] *Textron Financial Canada Limited v Chetwynd Motels Ltd., 2010* BCSC 477 [*Textron*] at paras 55.

of remedies.[67] Pandion submits that it is appropriate to honour the contracting parties' intentions in these circumstances.

ii. Irreparable Harm, Risk to the Security Holder and Preservation of the Property

81. While the law is clear that irreparable harm is not required, a showing of irreparable harm or risk to the value of the property will weigh in favour of the requested order. The authorities consistently demonstrate that a court must give serious consideration to the wishes of the creditor(s) holding the most significant economic interests in the proceeding.[68] By contrast, the wishes of owners who will only recover in the narrowest of circumstances need to be considered for what they are. As the court in *Textron* explained when granting a receivership application "[t]he [owners] seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the [secured creditor]."[69]

82. The objective sought through appointment of receiver is "to safeguard the property for the benefit of those ultimately entitled to it."[70] Where there is a question of whether the assets are being appropriately protected pending judgment, a receiver can be appointed to preserve and protect the assets while the ultimate entitlements are sorted.[71]

83. If a receiver is not appointed at this time, there is a serious risk of irreparable harm to Pandion and other stakeholders, particularly because the value of the mine is unknown and immediate steps are required to preserve whatever value may exist. At this time, there is no funding to develop a new short-term mining plan or put the mine into care and maintenance. No projections beyond April 8, 2022 have been provided and there is no estimate of when the mine may be cash flow positive again. The Affidavits from A&M demonstrate that the Petitioners' books and records are unreliable, and the accounting

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[67] First Archibald Affidavit, *supra* note 1, Exhibit "G".

[68] *Textron*, *supra* note 66 at paras 81–85*; see White Oak Commercial Finance, LLC v Nygård Holdings (USA) Limited et al.,* 2020 MBQB 58 at para 16.

[69] *Textron*, *supra* note 66 at para 84

[70] *Toronto Dominion Bank v First Canadian Land Corp,* 1989 CarswellBC 376 at para 8 (BC SC).

[71] *Textron*, *supra* note 66 at paras 81–85.

records are disorganized and decentralized.[72] At the same time, the Monitor has advised that the mine is experiencing technical and infrastructure issues and unmitigated safety risk.[73] A receiver is necessary to stabilize the situation.

84. A receiver is an independent court officer. Once appointed by the Court, it does not act at the direction of the secured creditor, but in the best interests of all creditors of the debtor's estate.[74] Given the uncertainty that currently exists in the business, appointment of a neutral third party is necessary to protect the interests of all stakeholders.

85. Pandion has made its preference for a receiver clear. By contrast, hours before this application, Brunswick advised that it would be opposing the Receivership application on unspecified grounds. Brunswick is an equity holder, meaning that under the priority scheme established under both the BIA and CCAA, its claims are subordinate to all other claims, secured and unsecured and a path that prioritizes Brunswick's recovery over those of creditors should not be sanctioned by this Court.[75] Brunswick offers no alternatives and no financing, but asks this Court to elevate the rights of the majority shareholder over the interests of the secured creditors.

86. While Petitioners have alleged that the quantum of the Pandion debt is uncertain (which Pandion disputes), Otso's books and records acknowledge a claim of at least USD$29 million.[76] No determination on the value of the claim is necessary at this time. The ultimate value of Pandion's claim can and should be determined by an independent receiver in connection with a distribution motion. A receiver with the fulsome powers set out in the proposed order, including the ability to commence a sale process if appropriate, is required to maximize value.

iii. The Receiver Should Be Appointed Over Any Litigation Claims

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[72] Fifth Affidavit of Thomas Dillensager, sworn January 5, 2022 at para 10.

[73] Second Report at para 23.

[74] *YBM Magnex International Inc, Re*, 2000 CanLII 28169 (AB QB), at paras 32-35.

[75] BIA s 140.1 and *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. s6(8); *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras 69-71 and 87-90.

[76] Second Report, supra note 54 at para 18.

87. By seeking Court-appointment of a receiver over all of the property, assets and undertakings of Otso, Pandion is requesting that a Court officer take possession and control of all of the property, including any litigation claims that might belong to the Petitioners. The model receivership order grants a receiver the power to initiate, prosecute, continue, defend, settle or compromise proceedings. In each case, the Receiver's obligation is to act in the best interests of the company. It is trite law that a court-appointed receiver owes its duties to the creditor body and not to the appointing creditor.[77]

88. In the present circumstances, Pandion seeks the appointment "of a Receiver who is a court officer"[78], and pursuant to the terms of the order sought, "it is the Receiver and not the lender who will advise and determine whether or not it is appropriate" to continue with or pursue a particular cause of action.[79] Therefore the "absurdity" referred to in the Petitioners' response to Pandion's application does not arise.[80]

89. By contrast, Brunswick, the out of the money equity holder of the Petitioners, is an interested party, with duties only to itself. The suggestion that a foreign equity holder with a penchant for baseless litigation is better situated than a Canadian Licensed Insolvency Trustee to determine whether there are valid claims by and against a company that sought voluntary insolvency protection in Canada defies logic.

90. Moreover, allowing a third party to control litigation claims of the company has the potential to damage the Receiver's ability to liquidate the assets. Any litigation commenced by a third party would necessarily involve information requests directed to the Receiver on behalf of the company. It is not possible to separate the burdens of the litigation from the overall reorganization of the company at this stage. In the future, if the Receiver determines that a sale of claims or other disposition is appropriate, the Receiver may seek such relief from the Court.

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[77] See *Philip's Manufacturing Ltd., Re*, 1992 CarswellBC 490 at para 17 (BC CA); *Forjay Management Ltd. v 0981478 BC Ltd*., 2018 BCSC 527 at para 21.

[78] *Central 1 Credit Union v UM Financial Inc*, 2012 ONSC 1893, at para 9.

[79] *Ibid*, at para 11.

[80] Application Response of the Petitioners, dated January 13, 2022, at Part 5 para 3.

V. CONCLUSION

91. If a Receiver is not appointed, Pandion will be irreparably harmed by the damage to its collateral. No party has provided an alternative path forward or evidence to suggest that a court-appointed Receiver would not faithfully discharge its duties as a court officer.

92. Pandion respectfully requests that the Court grant the proposed order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of January, 2022.

Per: 

Signature of Lawyer for Application Respondent, Pandion Mine Finance LP

Mary I.A. Buttery, Q.C. and Jared Enns
Cassels Brock & Blackwell LLP

TABLE OF AUTHORITIES

Tab	Description
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 243(1)
2.	*Law and Equity Act,* RSBC 1996, c 253, s 39
3.	*Supreme Court Civil Rules,* BC Reg 168/2009, r 10-2
4.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
5.	*Leby Properties Ltd. v. Manufacturers Life Insurance Co*., 2006 NBCA 14
6.	*Maple Trade Finance Inc. v CY Oriental Holdings Ltd.,* 2009 BCSC 1527
7.	*Prospera Credit Union v Portliving Farms (3624 Parkview) Investments Inc.*, 2021 BCSC 2449
8.	*Textron Financial Canada Limited v Chetwynd Motels Ltd., 2010* BCSC 477
9.	*White Oak Commercial Finance, LLC v Nygård Holdings (USA) Limited et al.,* 2020 MBQB 58
10.	*Toronto Dominion Bank v First Canadian Land Corp,* 1989 CarswellBC 376 (BC SC)
11.	*YBM Magnex International Inc, Re*, 2000 CanLII 28169 (AB QB)
12.	*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953
13.	*Philip's Manufacturing Ltd., Re,* 1992 CarswellBC 490 (BC CA)
14.	*Forjay Management Ltd. v 0981478 BC Ltd*., 2018 BCSC 527
15.	*Central 1 Credit Union v UM Financial Inc*, 2012 ONSC 1893

1992 CarswellBC 490
British Columbia Court of Appeal

Philip's Manufacturing Ltd., Re

1992 CarswellBC 490, [1992] 5 W.W.R. 549, [1992] B.C.W.L.D. 1683, 12 C.B.R. (3d) 149, 15 B.C.A.C. 247, 27 W.A.C. 247, 34 A.C.W.S. (3d) 443, 69 B.C.L.R. (2d) 44, 92 D.L.R. (4th) 161

PHILIP'S MANUFACTURING LTD. v. COOPERS & LYBRAND LIMITED (Receiver-Manager of PHILIP'S MANUFACTURING LTD.) and HONGKONG BANK OF CANADA

Hinkson, Taylor and Cumming JJ.A.

Heard: June 4, 1992
Judgment: June 23, 1992
Docket: Doc. Vancouver CA015543/CA015587

Counsel: *Murray A. Clemens* and *Gordon Turriff*, for appellants.
David Lunny, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.ii Stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iv Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act
Receivers --- Actions by and against — Actions against receiver
Receivers — Costs and remuneration — Advances — Receiver-manager entitled to pay itself only "reasonable amounts".
The company obtained an ex parte order for protection under the *Companies' Creditors Arrangement Act*, staying proceedings against it and authorizing it to file a plan of reorganization within six months. A bank that held a debenture of the company successfully applied to have the stay lifted. An interim receiver was appointed in the bankruptcy proceeding and the bank appointed a receiver-manager; one party served for both appointments. The company's appeal from the order setting aside the stay was later allowed and the receiver-manager was ordered to return control of the company to its officers and directors. By that time, the receiver-manager had advanced more than $320,000 to itself for its fees and legal expenses. Of that amount, $146,204 was taken in reliance on a discretionary-advances provision in the order appointing the receiver-manager on the eve of its removal from control of the company's affairs. On application by the company, the receiver-manager was ordered to return the $146,204. The receiver-manager and the bank appealed.

Held:

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The appeals were dismissed.

The order allowing discretionary advances was not a right, but a special privilege. As an officer of the court the receiver-manager had to exercise such privilege fairly and with due regard to its fiduciary duties. The receiver-manager had no right to advance itself moneys in fear that the order by which it was appointed would be terminated or stayed. The advances taken were not reasonable ones, fairly taken for the purposes for which the privilege was granted.

Table of Authorities

Cases considered:

Canada Deposit Insurance Corp. v. Greymac Mortgage Corp. (1991), 2 O.R. (3d) 446 (Gen. Div.) [affirmed (1991), 4 O.R. (3d) 608 (C.A.)] — *referred to*

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.) [additional reasons at (1991), 8 C.B.R. (3d) 31 at 55, 84 Alta. L.R. (2d) 257, 86 D.L.R. (4th) 567, 3 C.P.C. (3d) 100, 120 A.R. 309, 8 W.A.C. 309 (C.A.), leave to appeal to S.C.C. refused (1992), 8 C.B.R. (3d) 31n, 7 C.E.L.R. (N.S.) 66n, 83 Alta. L.R. (2d) 1xvi (note), 86 D.L.R. (4th) 567n] — *referred to*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160 (P.C.) — *referred to*

Royal Trust Co. v. Montex Apparel Industries Ltd., 17 C.B.R. (N.S.) 45, [1972] 3 O.R. 132, 27 D.L.R. (3d) 551 (C.A.) — *referred to*

Statutes considered:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Appeals from order reported at 12 C.B.R. (3d) 133, 91 D.L.R. (4th) 105, 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537 (S.C.), additional reasons at (1992), 91 D.L.R. (4th) 766 (B.C. S.C.) directing receiver-manager to return advances that it had paid to itself.

The judgment of the court was delivered by *Taylor J.A.*:

1 These are appeals from a decision of Mr. Justice Macdonald [12 C.B.R. (3d) 133, 68 B.C.L.R. (2d) 162, 91 D.L.R. (4th) 105, [1992] 5 W.W.R. 537 (S.C.), additional reasons at (1992), 91 D.L.R. (4th) 766 (B.C. S.C.)] directing that the receiver-manager appointed by court order in a bank debenture action repay $146,204 which it took from the debtor in advances against its charges and legal expenses during and after the hearing of an appeal to this court which resulted in the receivership being stayed.

2 A partial account of the history of this action and the related litigation is necessary in order to explain the unusual problem which has led to the appeals.

3 The respondent Philip's Manufacturing Ltd., a building materials supplier, having fallen into financial difficulty, obtained ex parte on September 3, 1991, an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, appointing a "monitor" and restraining legal proceedings against the company for six months so that it might make an arrangement with its creditors. The existence of this order made it impossible for the appellant Hongkong Bank of Canada, the company's principal creditor, to enforce its debenture securing the company's indebtedness to it of more than $2,500,000. The period of protection has since been extended to August 28, 1992.

4 On December 9, 1991 the Hongkong Bank brought on an application to set aside Mr. Justice Macdonald's order and this application was granted by Mr. Justice Scarth [(1991), 9 C.B.R. (3d) 17, 4 B.L.R. (2d) 134 (B.C. S.C.)].

5 On that same day another of the company's creditors obtained an order under the *Bankruptcy Act* [R.S.C. 1985, c. B-3] appointing the appellant Coopers & Lybrand interim receiver of the company's assets pending hearing of its petition. On the following day, December 10, 1991, the bank commenced action on its debenture. On December 11, 1991 the company applied for leave to appeal Mr. Justice Scarth's order and that application was denied the next day by a judge of this court in chambers. On December 13, 1991 the bank obtained from Mr. Justice Josephson an order in its debenture action appointing the appellant

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Coopers & Lybrand receiver-manager. The order authorized the bank to take advances in a "reasonable amount" from time to time against its fees and disbursements prior to the fixing of its remuneration and passing of accounts.

6 Less than a week later, on December 19, 1991, the company applied to this court for a review of the refusal of the chambers judge to grant leave to appeal the order of Mr. Justice Scarth. Coopers & Lybrand (to which I shall refer simply as "the receiver") had by then assumed its duties as interim receiver and receiver-manager. On December 30, 1991 the company was declared bankrupt, and the receiver appointed trustee.

7 On January 17, 1992 this court reversed the decision of its chambers judge and granted the company leave to appeal the order of Mr. Justice Scarth.

8 Shortly thereafter, on January 29, 1992, Mr. Justice Lambert made an order in chambers, to which I shall later refer, staying the order of Mr. Justice Scarth and rendering the receiver's function that of a "caretaker" pending disposition of the appeal. The appeal was heard on March 16 and 17, and allowed on March 18, 1992 [(1992), 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25, 4 B.L.R. (2d) 142 (C.A.)]. The result was to revive the order of Mr. Justice Macdonald under the *Companies' Creditors Arrangement Act*, with the consequence that all further proceedings against the company including those in the bank's debenture action were again stayed. The order was made effective two days later, so as to allow for orderly re-transfer of control of the business from the receiver to the directors of the company.

9 During the period of just over three months for which it had been in control of the company's affairs — that is to say, from December 9, 1991 to March 20, 1992 — the receiver withdrew more than $320,000 in advances against its fees and disbursements from funds received from customers of the company in payment of their accounts. Of this sum $171,204 was taken during the hearing in this court of the appeal against the order of Mr. Justice Scarth or after the appeal was allowed. The result was that on resumption of its efforts to reorganize its affairs under the *Companies' Creditors Arrangement Act* the company found itself with greatly reduced receivables and funds on hand, and with significantly diminished prospects of being able to achieve a reorganization as contemplated by the statute.

10 The matter of the advances taken by the receiver came before Mr. Justice Macdonald on April 16 and 28, 1992, and on May 4, 1992, he made the order which is the subject of the two appeals before us, one by the receiver and one by the bank.

11 Mr. Justice Macdonald noted that of the $171,204 taken by the receiver during the last five days of its control of the business $25,000 was taken without authority as an advance against its fees and expenses in the capacity of trustee in bankruptcy and that it had returned this to the company five weeks later, on April 24, 1992. The judge ordered the receiver to pay interest on that sum for the period of the withholding. The receiver's appeal against that part of Mr. Justice Macdonald's order was abandoned during the hearing before us.

12 In respect of the balance of the moneys taken, being $146,204, the receiver relied as its authority on the provision for discretionary advances contained in the order of Mr. Justice Josephson of December 13, 1991.

13 The order of Mr. Justice Josephson provides, among other things, that the receiver might "employ such assistance as it may consider necessary for the purpose of preserving the assets or carrying on the business" and that its proper expenditures should form a charge on the company's assets in priority to the debenture. The order concludes as follows:

> THIS COURT FURTHER ORDERS that the Receiver Manager shall pass its accounts from time to time before a District Registrar of this Honourable Court and at the time of passing such accounts, the District Registrar may fix the remuneration and indemnification of the Receiver-Manager, who shall be at liberty before passing its accounts and applying to have its remuneration fixed *to pay itself in respect of its services as Receiver-Manager of the Assets a reasonable amount, either monthly or at such longer intervals as it deems appropriate, which amounts shall constitute an advance against its remuneration and its own expenses when fixed* and which said remuneration together with its own expenses shall form a charge upon the Assets in priority to all other charges, save and except those imposed by statute which cannot be postponed to the charge thus created.

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> THIS COURT FURTHER ORDERS that the requirement of a Receiver-Manager's Bond or Security be dispensed with.
>
> THIS COURT FURTHER ORDERS that the Receiver Manager may from time to time apply to This Honourable Court for directions and guidance in the discharge of its duties hereunder.

It is under the provision which I have emphasized, contained in the third-from-last clause of the order, that the receiver has sought to justify the taking of the funds in issue.

14 The funds which Mr. Justice Macdonald ordered returned to the company consist of moneys taken between March 16 and 20, 1992, that is to say during the two days on which the appeal against the decision of Mr. Justice Scarth was being heard and, after it had been decided adversely to the bank and the receiver, during the two-day transitional period allowed by the court. The advances taken during this period amounted to more than half of the total in advances taken by the receiver during the period of slightly over three months for which it had control of the company's affairs and included $35,000 paid directly from the company to the law firm which represented the receiver in its unsuccessful efforts to resist the company's appeal. No disclosure was made to the court of the receiver's intention to make these withdrawals, nor was any direction or guidance sought from the court with respect to the taking of advances. They were taken at a time when it was known to the receiver that the *Companies' Creditors Arrangement Act* proceedings might soon be reinstated, and after this had happened. They were taken with knowledge that the result would necessarily be to reduce significantly any possibility that those proceedings could prove fruitful.

15 At the time the advances were taken there had for almost two months been in place the order of Mr. Justice Lambert of January 29, 1992, which stayed the effect of the order of Mr. Justice Scarth pending disposition of the appeal and reduced the role of the receiver to that of a "caretaker" until the appeal had been decided. The order of Mr. Justice Lambert, if it did not suspend the order of Mr. Justice Josephson, significantly modified its effect by limiting the receiver's function.

16 In giving reasons for the decision now under appeal, Mr. Justice Macdonald dealt first with the company's contention that no funds at all could be retained by the receiver in view of the reversal of the order of Mr. Justice Scarth, which he rejected. That matter has yet to be argued in this court. The judge then continued with the following three paragraphs which relate to the issues raised on these appeals [p. 171 B.C.L.R.]:

> 3. The right to make advances contained in the December 13, 1991 order is limited to 'reasonable amounts.' In my view, the final two groups of advances totalling $146,204.86 made during argument on the appeal and after the decision thereon were unreasonable and cannot be retained.
>
> 4. In the circumstances, it was incumbent on the receiver-manager to seek directions before taking those final advances. My view is that permission to do so would have been denied, considering the amount involved in relation to the time period and the existence of the January 29, 1992 partial stay.
>
> 5. I have little confidence, considering the investigative work done by the receiver-manager, which was more properly a function of the trustee in bankruptcy, and several other factors which I have only glimpsed, that neither the receiver-manager nor its legal advisor will be able to retain, in the long term, the total of the advances now in issue. Thus it is fair in the interim that the bank, by virtue of its indemnity of the receiver-manager, should bear half of the load.

The central issue before us is whether in so deciding the judge erred in principle or in his understanding of the facts.

17 It is necessary, in my view, in disposing of these appeals, to look to certain fundamental principles governing the office of a court-appointed receiver-manager in the light of which the order of Mr. Justice Josephson is to be interpreted and applied. They are as follows:

> 1. A receiver-manager appointed by the court in a debenture-holder's action is an officer of the court responsible to the court and not to the holder of the debenture at whose instance the appointment is made: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.); *Royal Trust Co. v. Montex Apparel Industries Ltd.*, [1972] 3 O.R. 132, 27 D.L.R. (3d) 551, 17 C.B.R. (N.S.). 45 (C.A.).

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2. A receiver-manager so appointed owes fiduciary duties to all parties, including the debtor: see *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.) , and cases there referred to.

3. Such a receiver-manager is at all times subject to the supervision of the court and entitled to the court's directions: see above authorities, also *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.), and cases there cited.

An examination of the relevant parts of the order of Mr. Justice Josephson in the light of these basic principles leads, in my view, to the following conclusions.

18 The authority given by that order to the receiver to make discretionary advances to itself is not in the nature of a right but, as counsel properly conceded before us, a special privilege. The receiver-manager must therefore exercise this privilege fairly, as an officer of the court, and with regard to its fiduciary duties, especially those owed to the debtor and the creditors as a whole. The exercise of the privilege is necessarily subject to supervision by the court. The authority to take advances is not given as security for the payment of the receiver's fees and disbursements when approved by the court; these are, by the terms of the order, secured on the assets of the company. The authority to take advances serves rather as a convenience to the receiver, so that it would not need to have frequent takings of accounts in order to avoid accumulating its charges.

19 A receiver-manager has therefore no right to advance to itself the debtor's money because it fears that the order appointing it may be terminated or stayed, or may turn out to be invalid, and any advance made for purposes of that sort would not be within the scope of the order of Mr. Justice Josephson. It is, of course, to the debenture holder, not to the debtor, that the receiver must look for any assurance it requires that its fees and disbursements will be paid even though its appointment is set aside or suspended, or the assets on which they are secured prove inadequate to discharge them when fixed and approved. The receiver in this case, as would be expected, obtained an indemnity from the bank in respect of its charges.

20 The matter before Mr. Justice Macdonald was obviously an urgent one, because the company's survival was at stake. An onus in my view lay on the receiver to give a prompt account to the court of its reasons for taking the advances, and to satisfy the court that they fell within the contemplation of the order of Mr. Justice Josephson in that they were both reasonable in amount and reasonable also in the sense that they were taken fairly and in accordance with the receiver's duties to the parties and the court. As an officer of the court subject to its supervision the receiver had not only to act fairly in exercising this privilege, but had also to be seen to be acting fairly.

21 The timing of the advances suggested, of course, that they had been taken without concern for the financial position in which the company would find itself upon the creditors' arrangements proceedings being reinstated.

22 The receiver adduced no evidence showing that the advances were taken for any reason other than a desire to see its position secured before the legal basis on which its appointment rested was removed by this court. This would, of course, enable it to enter into the inevitable dispute over its entitlement to fees and disbursements with the advantage of having the debtor's funds in its hands, and the assurance that these funds would not be available for use during the reorganization effort under the creditors' arrangement statute. In order to be seen to have acted reasonably the receiver had an obligation, in my view, to satisfy the court that it was not so motivated.

23 The position taken before us on behalf of the receiver and the bank is that the propriety and reasonableness of the advances can only be determined after the fixing of remuneration and taking of accounts is completed. That position, in the circumstances of this case, is inconsistent, in my view, with the principles to which I have referred. It would mean that the privilege of taking advances could be exercised in the absolute discretion of the receiver, without supervision by the court, and this cannot, in my view, be so. The receiver's position that the matter could only be dealt with in the bank's debenture holder's action — which had, of course, by then been stayed — and could not properly be dealt with in these proceedings, was not taken below and cannot, in my view, now be acceded to.

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24 It seems to me that on the basis of the evidence before him, Mr. Justice Macdonald was entitled to find that the funds taken by the receiver had not been shown to be reasonable advances fairly taken for the purposes for which the privilege was granted, and was right, in the exercise of the court's supervisory jurisdiction, to order that the funds be returned.

25 These appeals have been concerned solely with the advances taken by the receiver on the eve of its removal from control of the company's affairs. We are told that a cross-appeal is pending in which the right of the receiver to be remunerated at all will be in issue, and the validity of earlier advances will be challenged. In those proceedings issues will arise which were not the subject of argument before us, and on which I would therefore not wish to be thought to express an opinion.

26 I would dismiss these appeals.

Appeals dismissed.

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1989 CarswellBC 376
British Columbia Supreme Court

Toronto Dominion Bank v. First Canadian Land Corp.

1989 CarswellBC 376, [1990] B.C.W.L.D. 030, [1990] C.L.D. 065, 18 A.C.W.S. (3d) 421, 77 C.B.R. (N.S.) 189

TORONTO-DOMINION BANK v. FIRST CANADIAN LAND CORPORATION LTD. et al.

Lander J. [in Chambers]

Heard: October 19, 1989
Judgment: November 22, 1989
Docket: Vancouver No. C875175

Counsel: *D. P. Tysoe*, for plaintiff.
L. M. Candido, for defendants V.M. Prescott, V.M. Prescott Ltd., First Canadian Realty Ltd., Magnum Resources Ltd. and Enviro-sonic Technologies Inc.
P. J. Reardon, for defendants 292930 B.C. Ltd. and L. W. Prescott.

Subject: Corporate and Commercial; Insolvency
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.D Irreparable harm
Headnote
Receivers --- Appointment — Application for appointment — Grounds
Receivers — Application for appointment — Plaintiff applying for receiver to collect rents pending trial of whether plaintiff had interest in subject property — Property interest to be determined not being in peril — Balance of convenience lying with defendants — Court dismissing application.
The plaintiff held a debenture under which the defendant debtor went into receivership. The debtor held the beneficial interest in rental property. Leasehold interest in the property was transferred to co-defendant V. Ltd., which remained the registered lessee, although subsequent unregistered transfers to other co-defendants had occurred. The plaintiff applied for a declaration that its debenture constituted a charge against the leasehold interest in the property. The chambers judge dismissed the application and directed that the issue be tried. The plaintiff applied for appointment of a receiver to collect and hold the rents in trust pending determination of the plaintiff's claim at trial.
Held:
Application dismissed.
A receiver could be appointed to enable persons possessing rights over property to obtain the benefits of those rights and to preserve the property pending realization where ordinary remedies were defective, and to preserve property from some danger threatening it. Whether the plaintiff had a right over the property was the very issue set down for trial; therefore, such a right had not been established. There was no peril to the property as the leasehold interests had been secured by the filing of a lis pendens. The court had discretion to appoint a receiver under s. 36 of the Law and Equity Act, but the plaintiff had not discharged the onus of establishing that it would be just and convenient to do so. A receivership order at this stage could cause serious economic harm to the defendant. For the plaintiff the only ramification of waiting for final determination of its charge would be to postpone its entitlement to the revenue. The balance of convenience lay with the defendants.

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Table of Authorities

Cases considered:

B.C. Power Corp. v. A.G.B.C. (1962), 38 W.W.R. 577, 34 D.L.R. (2d) at 211 (B.C.C.A.) [reversed on other grounds 38 W.W.R. 701, 34 D.L.R. (2d) 196 (S.C.C.)] — *distinguished*

First West. Capital Ltd. v. Wardle (1984), 54 C.B.R. (N.S.) 230 (S.C.) — *referred to*

Goldschmidt v. Oberrheinische Metallwerke, [1906] 1 K.B. 373 (C.A.) — *referred to*

Royal Bank v. Cal Glass Ltd. (1978), 29 C.B.R. (N.S.) 302, 8 B.C.L.R. 345, 94 D.L.R. (3d) 84 (S.C.) — *considered*

Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd. (1980), 24 B.C.L.R. 172, 20 C.P.C. 38, 115 D.L.R. (3d) 378 (S.C.) — *referred to*

Statutes considered:

Law and Equity Act, R.S.B.C. 1979, c. 224

s. 36

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 47

Authorities considered:

Kerr on the Law and Practice as to Receivers, 16th ed. (1983), c. 1, pp. 5-6.

Application for appointment of receiver to collect and hold rents in trust.

***Lander J.*:**

1 This is an application pursuant to R. 47 of the Supreme Court Rules and s. 36 of the Law and Equity Act, R.S.B.C. 1979, c. 224, for the appointment of a receiver to collect, and hold in trust, rents accruing due under a number of leases.

2 On 3rd November 1987 Thorne, Ernst & Whinney Inc. was appointed receiver-manager of all property, assets and undertakings of the defendant First Canadian Land Corporation Ltd., by court order, in accordance with the terms of the plaintiff's debenture.

3 One of the assets of the defendant First Canadian Land Corporation Ltd. that gives rise to this application is the property located at 1075 Comox Street. This asset is composed of 170 suites. In the mid-1970s the defendant First Canadian Land Corp. Ltd. entered into a long-term lease with V.M. Prescott Ltd., leasing 168 of the 170 suites. From 1974 to 1980 V.M. Prescott Ltd. assigned the leasehold interests in 78 of the suites to third party purchasers. In 1985 the defendant First Canadian Land Corp. Ltd. purportedly transferred its interest in 1075 Comox Street to the defendant Victor Michael Prescott, who purportedly transferred his interest in 1075 Comox Street to the defendant 292930 B.C. Ltd. Neither of these transfers was registered and the defendant V.M. Prescott Ltd. remains the registered lessee of the remaining suites that were not assigned to third party purchasers.

4 Subsequent investigation by the receiver-manager revealed that First Canadian Land Corporation Ltd. had retained beneficial interest in the remaining 92 suites at 1075 Comox Street. What is now in issue is whether the plaintiff's debenture constitutes a charge against the leasehold interests in the remaining 92 suites.

5 The plaintiff made an application pursuant to R. 43 seeking a declaration that the debenture in issue charges the leasehold interests at 1075 Comox Street. This matter came before Mr. Justice Davies on 1st March 1989. He concluded that the matter should be set down for trial for a final determination of the issue. This present application is for the appointment of a receiver to receive and hold in trust all rents accruing from the suites at 1075 Comox Street until determination of the plaintiff's claim can be made at trial.

6 The plaintiff is alleging that their debenture charges the leasehold and is seeking a means of securing the revenue from these leases until a final determination. It is the plaintiff's position that if a receiver is not appointed to hold the rents in trust,

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and the debenture is deemed to charge these leasehold interests, the plaintiff may not be able to recoup the revenue that accrues between now and trial.

7 The plaintiff asks the court to exercise its jurisdiction and appoint a receiver pursuant to R. 47 and, alternatively, s. 36 of the Law and Equity Act, where the court may appoint a receiver if in the circumstances it deems it just or convenient to do so.

8 In Kerr on the Law and Practice as to Receivers, 16th ed. (1983), c. 1, p. 5, the author states that the objective sought to be achieved where a receiver is appointed is to safeguard the property for the benefit of those ultimately entitled to it:

> There are two main classes of cases in which the appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realisation, were ordinary legal remedies are defective; and (2) to preserve property from some danger which threatens it.

9 The issue set down for trial by Davies J. is whether or not the plaintiff's debenture charges the leasehold interests. One might conclude that the plaintiff has not established a right and therefore this application falls within the second category. The above text goes on to state, at p. 6, with respect to this second category:

> In all cases within this second class it is necessary to allege and prove some peril to the property; the appointment then rests on the sound discretion of the court. In exercising its discretion the court proceeds with caution, and is governed by a view of all the circumstances.

10 I have concluded that the second category identified in Kerr on Receivers is not applicable either. There is an onus on the plaintiff to prove some peril to the property in issue. This has not been established by the facts presented before me. In fact the contrary has been shown. The leasehold interests have been secured by the filing of a lis pendens against them, the result being there is no threat to the interests in question.

11 The plaintiff relied upon the case of *B.C. Power Corp. v. A.G.B.C.* (1962), 38 W.W.R. 577, 34 D.L.R. (2d) at 211 (B.C.C.A.), and in particular, the dissenting opinion of Norris J.A. at p. 603, where he addresses the appointment of a receiver:

> It has never been the law that in all cases the applicant for the appointment of a receiver or for an injunction must show probable success. The requirements of proof depend on the nature of the case and the nature of the order sought — on this appeal the nature of the order made. A distinction must be made between applications for injunctions and applications for receivers and in the latter case there is particularly to be considered the powers which the receiver will exercise. In cases such as this, in which the questions are not questions of fact, and particularly where difficult questions of law are to be determined, the requirement that probable success be shown would, in effect, be to try the case on the interlocutory application. All that need be shown is that the applicant has a *prima facie* case.

12 The plaintiff contends that they have established a prima facie case with respect to their charge against the leasehold interests and on this basis the court should exercise its discretion and appoint a receiver.

13 In *B.C. Power Corp.*, supra, the primary concern was the preservation of the assets. The plaintiff in that instance established that the property was in peril. This has not been done by the applicant in the instant case.

14 The plaintiff's position is that if a receiver is not appointed, the bank may not be able to recoup the rental income between now and trial. The defendant's position is that it will be deprived of its operating income and suffer economic hardship if the rents are withheld from it.

15 So far as this court has discretion to appoint a receiver, pursuant to s. 36 of the Law and Equity Act, where it would be just or convenient, Mr. Justice Taylor (as he then was) in *Royal Bank v. Cal Glass Ltd.* (1978), 29 C.B.R. (N.S.) 302, 8 B.C.L.R. 345, 94 D.L.R. (3d) 84 (S.C.), con cluded that an application under this section should be granted for one purpose only: "to maintain the status quo pending determination of the rights of the parties at trial". He goes on to state:

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> The applicant must discharge the onus of establishing that it is just and convenient that the court preserve the status quo for it, rather than for the respondent, until the issues between them have been resolved at trial.

16 In *First West. Capital Ltd. v. Wardle* (1984), 54 C.B.R. (N.S.) 230 at 233-34 (S.C.), Boyle L.J.S.C. also considered this element of s. 36 and adopted the criteria enunciated in *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K.B. 373 (C.A.), applied in *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172, 20 C.P.C. 38, 115 D.L.R. (3d) 378 (S.C.):

> The cases direct that, in weighing justice and convenience, the court must consider whether or not "the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of Judgment, unless what has been called equitable execution be granted ..."

17 The plaintiff contends that it may not be able to recover the interim revenue from the leasehold interests. This is not a sufficient basis to appoint a receiver and thereby visit a severe economic hardship upon the defendant. Where the plaintiff alleges an interest that has yet to be determined, and seeks an intrusive order that may cause irreparable harm to the defendant, the court must consider all of the circumstances before granting such an order.

18 If it is found that the plaintiff does have a charge against the leasehold interests, then they can start collecting the rents at that point. They have secured the interest by filing a lis pendens. For the court to intervene at this point would have serious economic ramifications on the defendant. The only ramification of waiting for a final determination as to the plaintiff's charge would be to postpone the plaintiff's entitlement to the revenue. The leases will continue to produce revenue in the future. In all the circumstances the balance of convenience lies with the defendants.

19 In summary, the interest to be determined is not in peril, nor has the plaintiff discharged its onus in establishing that it would be just and convenient to appoint a receiver. The application is dismissed.

20 Costs of this application to the defendants.

Application dismissed.

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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.

Subject: Civil Practice and Procedure; Insolvency
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.
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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
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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

APPLICATION by WC LLC for R LLP to be appointed as receiver.

***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

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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:

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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;

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(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;

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(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.

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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;

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(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.

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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.

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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

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(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.

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