2025 **Hfx. No. 539955**

SUPREME COURT OF NOVA SCOTIA

In the matter of the receivership of Annapolis Management, Inc., Ruby, LLP, BSL Holdings Limited, 3337151 Nova Scotia Limited and 4551650 Nova Scotia Limited

Between:

Douro Capital Limited, Graysbrook Capital Limited, Atlantic Central, League Savings and Mortgage Company, Assumption Mutual Life Insurance Company and **3046475 Nova Scotia Limited**

Applicants

- and -

Annapolis Management, Inc., Ruby, LLP, BSL Holdings Limited, 3337151 Nova Scotia Limited and 4551650 Nova Scotia Limited

Respondents

WRITTEN SUBMISSIONS OF THE RESPONDENTS
Annapolis Management, Inc., Ruby, LLP, BSL Holdings Limited, 3337151 Nova Scotia Limited and 4551650 Nova Scotia Limited

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PART I - Overview

1. This memorandum is filed by the Respondents, Annapolis Management, Inc. ("**Annapolis**"), Ruby, LLP ("**Ruby**"), BSL Holdings Limited ("**BSL"),** 3337151 Nova Scotia Limited ("**331 NSL**") and 4551650 Nova Scotia Limited ("**455 NSL**"), which are collectively referred to herein as the "**Caryi Group of Companies**" in opposition to the application filed by the Applicants for, *inter alia*, an order:

   (a) abridging the time to file this Notice of Application pursuant to the *Bankruptcy and Insolvency General Rules* and the *Nova Scotia Civil Procedure Rules*;

   (b) abridging and waiving the 10-day notice period for service of the section 244 Notices to Enforce Security pursuant to section 243(1.1) of the *Bankruptcy and Insolvency Act* ("**BIA**");

   (c) lifting the stay of proceedings pursuant to section 69.4(4) of the BIA;

   (d) approving the appointment of a Receiver over the Caryi Group of Companies pursuant to section 243 of the BIA, or

   (e) alternatively, terminating the Notice of Intention to Make a Proposal ("NOI") filed by the Respondents pursuant to section 50.4(11) of the BIA and appointing an interim receiver pursuant to section 47.1 of the BIA.

2. The application filed by the Applicants should be denied in its entirety.

PART II – Concise Statement of Facts

3. Capitalized terms used in this memorandum and not otherwise defined herein have the meaning given to them in the affidavit of Joanne Caryi sworn on January 8, 2025. (the "**Caryi Affidavit**").

4. Steven Caryi had a vision to revitalize heritage properties by combining both the modern and historic elements, resulting in a new purpose and life for the older buildings Mr. Caryi purchased over the years and specific to this proceeding.

5. The Caryi Group of Companies are incorporated pursuant to the laws of Nova Scotia save and except Annapolis and Ruby which are extra provincially companies incorporated pursuant the laws of the United States of America.

6. The Caryi Group of Companies own various buildings in downtown Halifax and one in Charlottetown, Prince Edward Island, which contain rental and commercial tenants. Additionally, most of the buildings are in mid-construction.

7. They have various credit facilities secured against them, and in particular:

   (a) the National Film Board is secured by a mortgage extended by League and Graysbrook;

   (b) the Halifax Club is secured by a mortgage extended by Assumption and Graysbrook;

   (c) the Free Mason's Building is secured by a mortgage extended by Atlantic Central and Graysbrook;

   (d) the Young Property is secured by a mortgage extended by CIBC and Graysbrook;

   (e) Granville Hall is secured by a mortgage extended by Atlantic Central and Graysbrook;

   (f) the property in Prince Edward Island is secured my a mortgage extended by Saltwire Network Inc. and Assumption;

(f) the Tramway is secured by a mortgage extended by League and;

(h) the Sonic Building is secured by a mortgage extended by 4518276 Nova Scotia Limited and 3046475 Nova Scotia Limited.

8. The Caryi Group of Companies are indebted to the secured lenders in the amount of approximately $47,000,000.00 and Mr. Caryi (his estate) has guaranteed approximately $29,000,000.00 of that indebtedness.

9. Mr. Caryi died on December 25, 2023. Following his death Laurie Caryi and Joanne Caryi met individually with the secured creditors starting in January 2024. They met with them individually to advise them that they intended to maximize the value of the portfolio of properties by assessing the buildings and strategically divesting of them to satisfy all of the obligations outstanding.

10. From their initial meetings, they had various conversations and exchanged various correspondence with the secured lenders to provide them updates on the progress of the sales process and efforts to maximize the value of the buildings. They also sought feedback throughout the process from the lenders.

11. On or about December 12, 2024, the Respondents had a meeting with the secured creditors to provide information regarding the buildings and to advise that the Respondents intended to seek protection under the *Companies' Creditor Arrangements Act*. No secured creditor opposed that at that time.

12. On December 17, 2024, the Respondents forwarded a letter to the Applicants regarding the CCAA which contained the sales process timelines and a cash flow forecast.

13. On or about December 19, 2024, the Respondents had a further meeting with the secured creditors to provide information regarding the buildings and on the CCAA. Again, no secured creditor was opposed to the CCAA.

14. The Respondents filed their application on January 9, 2025.

15. On January 13, 2025, the day before the return date, and without prior notice, Douro filed an application for, *inter alia*, an order to appoint Doane Grant Thornton as interim receiver over the Respondents. League and Atlantic Central advised the Respondents on that same date that they would also seek to appoint Doane Grant Thornton as interim receiver.

16. The Respondents withdrew their CCAA application based on the concerns raised by the those Applicants, which will be addressed in more detail below.

17. The Respondents, as of right, filed notices of intention to make a proposal pursuant to section 50.4 of the BIA. They were accepted as filed by the Office of Superintendent of Bankruptcy on January 20, 2025. There is therefore a stay of proceedings

PART III - Issue

18. The application filed by the Applicants for the various relief addressed at the outset of this submission should be denied in its entirety.

PART IV – Law and Argument

A. 244 Notice

19. The Respondents concede that the application filed by the Applicants is properly before this Honourable Court.

20. The Respondents assert that League, Atlantic Central, Assumption, Graysbrook, and 3046475 Nova Scotia Limited cannot proceed with the appointment of a receiver because the statutory ten-day notice period has not expired.

21. Sections 244 of the BIA states, in part, the following:

> **Restriction on appointment of receiver**
> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

...

Advance notice
244 (1) A secured creditor who intends to enforce a security on all or substantially all of
(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice
(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

...

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

22. The ten-day notice period imposed on a creditor seeking to enforce its security under section 244 of the BIA was codified in 1992. The notice period was added to safeguard debtors from abuse of power by secured creditors. See, *CBJ Developments Inc. v. 1180554 Ontario Limited*, 2023 ONSC 6773 at para. 16.

23. The purpose of the notice requirement has been recognized over time to be, in broader terms: "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs". It gives a debtor breathing room to react, negotiate and to reorganize its financial affairs to avoid enforcement. See, *CBJ Developments Inc., supra,* at paras 17-18.

24. The Respondents forwarded via email various demand letters and notices to enforce security as follows:

- January 11, 2025, Douro sent them to 455 NSL;
- January 14, 2025, Assumption sent them to Annapolis and BSL;
- January 15, 2025, League and Atlantic Central sent them to Annapolis, Ruby, BSL and 333 NSL; and
- January 17, 2025, Graysbrook sent them to Annapolis, Ruby, and BSL January 17, 2025, 3046475 Nova Scotia Limited forwarded them to 455 NSL.

25. The Respondents are entitled to a ten-day statutory stay of proceedings until their expiry, unless or until this Honourable Court lifts the stay of proceedings or abridges the time to appoint a receiver.

B. Lifting 244 ten-day notice period

26. This ten-day notice period has expired as regards Douro. As such, they must lift the stay of proceedings pursuant to section 69.4 of the BIA in order to have a receiver appointed, which will be discussed in more detail later on in this submission.

27. With respect to League, Atlantic Central, Graysbrook and 3046475 Nova Scotia Limited, the ten-day notice period can only be abridged by this Honourable Court only this Honourable Court deems it appropriate to lift the stay imposed by section 244 of the BIA

pursuant to section 243(1.1) of the BIA and then "just and convenient" to appoint a receiver pursuant to section 243 of the BIA.

28. Section 243 of the BIA states, in part:

> **Court may appoint receiver**
> **243** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> **Restriction on appointment of receiver**
> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.

29. It is well known that the test to appoint a receiver is an under section 243 of the BIA is whether it is "just and convenient to do so". This is an extraordinary remedy and will be discussed later on in this submission. The following lines address whether it is appropriate to appropriate to lift the ten-day stay.

30. In *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2022 NLSC 25 when Orsborn, J., held that it would be appropriate to abridge the ten-day notice period if there is no prejudice to the debtor:

> [28] Justice Orsborn noted at paragraph 44 of his decision that, "the court's appointment of a receiver over the property of a person is an extraordinary order". He went on to state:
>
> > [45] The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver.
> > [46] The party asking the Court to appoint a receiver must persuade the Court that the appointment would be just or convenient. **The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question. To put it simply, is it fair or necessary that the authority of the Court be used to pass control of, in this case, the debtor's assets to a receiver who will deal with those assets pursuant to court supervision?**
>
> [29] In cases where a notice has not been sent in accordance with s. 244 of the BIA or the notice period has not yet expired, the Applicant seeking appointment of a receiver pursuant to s. 243 must also show that it is "appropriate" to appoint a receiver before the expiry of that 10-day notice period, in accordance with s. 243(1.1)(b).
>
> [30] In *Pandion* , the British Columbia Supreme Court addressed the factors that might be considered in determining whether it is appropriate to abridge the notice period under s. 244, stating:
>
> > **[46] In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to [the creditor] resulting from the requirement, and the possibility of prejudice to [the debtor] if it is waived.**
>
> [31] Whether one seeks the appointment of an interim receiver pursuant to s. 47(1) or a receiver pursuant to s. 243(1) and (1.1) will likely depend on the required duration of the receivership order and whether there are aspects of the order sought which might step outside of the ambit of s. 47(2). [emphasis added]

31. There is no prejudice real or perceived for this Honourable Court to abridge the ten-day notice period of League, Atlantic Central, Graysbrook and 3046475 Nova Scotia Limited.

32. The Respondents' assets are real property. There is no evidence that the properties are being dissipated or that they are losing value. Most likely they could be accruing value as they are all located in the downtown core of Halifax.

33. Mr. Caryi died on December 25, 2023. Mrs. Caryi and Ms. Caryi met and exchanged correspondence with the secured creditors from January 2024 up to and including December 17, 2024.

34. At no time did any secured creditor object, or look to, replace Mrs. Caryi or Ms. Caryi with the operation and management of the Caryi Group of Companies. Instead, the secured creditors accepted their operation and management of the same and, as a result, never demanded on their respective security.

35. Indeed, the Applicants did not advise the Caryi Group of Companies that they would oppose their CCAA application when they advised them, they intended to file the same in discussions in December 2024.

36. On January 9, 2025, the Caryi Group of Companies filed its CCAA Application. In response, only Douro issued a demand letter and notice to enforce security. Their security is over only the Sonic Building.

37. Despite issuing that demand and notice to enforce security, no other creditor demanded or advised they would oppose the CCAA Application. It was not until January 13, 2025, at 2:44 pm that a secured creditor would oppose the application, to wit, Douro, when it filed an application to appoint Doane Grant Thornton as an interim receiver.

38. This filing occurred five days after the Caryi Group of Companies filed and served their CCAA Application, and on eve of the return date.

39. Thereafter, League and Atlantic advised that they too sought to appoint an interim receiver.

40. The only affidavits filed in support of the application were Charles Ackerman, who is a principal of Douro and Mark Horne who is a Director of Commercial Lending with League and Atlantic Central. Graysbrook and Assumption did not file an affidavit in support of the application and their silence means they also have no concerns with Mrs. Caryi or Ms. Caryi.

41. The only affidavit germane to this discreet issue is that of Mr. Horne. The ten-day notice period with respect to Douro has expired so his affidavit will be canvassed in a different section of this submission.

42. In Mr. Horne's affidavit he does not provide any evidence that he lost faith in Mrs. Caryi or Ms. Caryi or that their operation of the Caryi Group of Companies was an issue for his clients.

43. While he does reference an email regarding insurance, the Caryi Group of Companies **intend** to pay all insurance and liabilities as they become due within the NOI. Further, Ms. Caryi has not resigned as a Director of the various companies listed in her affidavit.

44. As set out in *PricewaterhouseCoopers Inc., supra,* whether to appoint a receiver prior to the ten-day notice period is a question of prejudice. With respect, League, Atlantic Central, Graysbrook and 3046475 Nova Scotia Limited cannot demonstrate they will suffer any prejudice.

45. The prejudice to the Respondents is that cannot sell the properties in an orderly and efficient manner which will benefit all creditors and stakeholders.

46. It is respectfully submitted that it is in not appropriate to lift the statutory ten-day notice period.

C. Lift Stay of Proceedings

47. Douro and, perhaps the remaining Applicants also seek to lift the stay of proceedings pursuant to section 69.4 of the BIA to have Doane Grant Thornton appointed as a receiver over the Caryi Group of Companies. This should also, with respect, be denied in its entirety.

48. Section 69.3(1) and 69.4 of the BIA states, in part:

> **Stays of proceedings — bankruptcies**
> **69.3 (1)** Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
>
> ...
>
> **Court may declare that stays, etc., cease**
> **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

49. The Supreme Court of Newfoundland and Labrador provided a set of useful principles relevant to an application to lift a stay of proceedings in *Great Northern Data Ltd. (Re)*, 2020 NLSC 105:

> [7] *Re Advocate Mines Limited*, [1984] O.J. No. 2330 (O.S.C., in Bankruptcy) provides a useful synopsis of circumstances in which a Court may remove an automatic stay of proceedings under section 69.3 of the *BIA*. Registrar Ferron lists five circumstances that might be "appropriate cases" for lifting a stay:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.

2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *Bankruptcy Act* inappropriate.

3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.

4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.

5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

(*Advocate Mines*, paragraphs 3-7)

[8] While Registrar Ferron's "list" is comprehensive and is frequently cited, it is generally recognized as a beginning and not the endpoint for discussing the issue.

...

[11] From my review of section 69.4 of the *BIA*, these are some of the principles that are relevant to its application:

A creditor applying under section 69.4 of the *BIA* must meet at least one of the two criteria stated in the section, not both;

A creditor applying under section 69.4 of the *BIA* does not have to show it has a *prima facie* case in its action against the bankrupt: *Ma, Re*;

The bankruptcy court need only consider the merits of the proposed action to see whether there are 'sound reasons' for lifting the stay: *Ma, Re*;

A bankruptcy court on a leave application must ensure that sound reasons exist for relieving against the automatic stay of proceedings: *Re Francisco*;

It is an error of law to accept the five circumstances enumerated in *Advocate Mines Ltd., Re* as a "limiting or exhausting instrument" *Re, Franciso.*

> If the creditor satisfies the court that one or more of the grounds referred to in *Advocate Mines Ltd., Re* is present and that the creditor is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings: *Panorama Parkview Homes Ltd. (Re)*, 2017 BCSC 2071 (B.C. S.C.); and,
>
> Fraud alleged by a creditor to have been committed by the bankrupt is a complex matter which should not ordinarily be dealt with on a summary basis and without a full hearing: *Taylor Ventures Ltd., Re*, 2002 BCSC 82 (B.C. S.C. [In Chambers]).

50. In summary, the burden is on Douro or the other Applicants to satisfy this Honourable Court that it will be materially prejudiced or that it is equitable to make a declaration lifting the stay of proceedings, and at least one of the *Advocate Mines* criteria is present.

51. There must be compelling reasons to lift the stay of proceedings. See, *Osprey Energy Inc. (Re)*, 2006 BCSC 216 at para 15.

52. The Respondents cannot satisfy any of the *Advocates Mines* criteria. Indeed, their written submission is devoid of any discussion regarding the same. For that reason alone, the application should fail.

53. There is no material prejudice to the creditors that warrant the lifting of the stay of proceedings.

54. Before discussing this point, I must address various paragraphs in the affidavit of Mr. Ackerman. The Respondents do not want to waste judicial resources on this issue because the proper weight will be afforded by this Honourable Court, but they did want to acknowledge the following that offend *Nova Scotia Civil Procedure Rule* 39.04:

> paragraphs 28, 29, 33, 35, 45 are hearsay and are also not supported with dates of the conversations that he verily believes the statements are not proper; and

paragraphs 52 (a) and (c) through (f) and (j) through (w) and 57 and 59 contain opinion evidence that are not proper.

55. Material prejudice must be objective as opposed to subjective. In other words, it refers to the degree of prejudice suffered vis a vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. See, *Lockhart Saw Ltd., Re.*, 2007 NBQB 93 at para. 12.

56. The mere fact that a party is not entitled to exercise a contractual right for which it has bargained is not a sufficient reason to lift the stay of proceedings. See, *Alberta Energy Regulator v. Lexin Resources Ltd.*, 2019 ABQB 23 at para. 15.

57. In *Lockhart* the Court continued:

> [13] In *Acepharm Inc., Re* (1998), 4 C.B.R. (4th) 19 (Ont. Bktcy.) **the court refused to lift a stay under section 69.4 of the BIA as the moving party pleaded subjective prejudice, which did not constitute material prejudice.** At paragraph 10 the court cited with approval the following passage from *Honsberger, Debt Restructuring* at section 8-44:
>
> > what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept...the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the interest of the debtor against the **hardship incurred on the creditor**. This has been referred to as the "balance of hurt" test. [Emphasis added]

58. And in *High Street Construction, Ltd., Re*, 1993 CarswellOnt 210; [1993] O.J. No. 394 (ONSC), Leitch, J., discussed material prejudice under section 50.4(9) but the summary was apt as regards no material prejudice with real property: comments were apt that there was no material prejudice as regards real property:

> [3] ...The assets of High Street available to satisfy the indebtedness to T.D. consist entirely of three parcels of vacant land in Kitchener, Ontario owned by High Street and two parcels of vacant land in Mississauga, Ontario owned by Sweetie and 518463. **These assets are**

> **non-depreciating and cannot be dissipated. There is no suggestion by T.D. that the management of High Street will overlook or decline an opportunity to sell its assets.** The fact that realty tax and interest arrears will continue to accrue during an extension period is not sufficient evidence of prejudice to T.D. to disentitle High Street to an extension. Further, the fact that at the request of T.D. and without opposition from High Street I ordered that s. 69 of the Act shall not operate to prevent T.D. from issuing its notice of sale with respect to its mortgages on the High Street property will alleviate the prejudice to T.D. which it has complained of
>
> [4] **The president of High Street, Larry Wolynetz, has worked without compensation during the last two years and has endeavoured to sell all of the vacant land owned by High Street and its affiliates. While it is apparent that he has not been successful, there is no evidence that the lack of success has resulted from anything other than the recessionary times. There is no evidence that detracts from his assertions that all of his efforts have been in good faith and that he has diligently pursued all opportunities for sale. There is no evidence that Mr. Wolynetz is "grossly exaggerating" the value of the assets, thereby discouraging a possible sale as was the case in *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.). I find therefore that High Street has and is acting in good faith and with due diligence. [Emphasis added]**

59. The Applicants have not plead they suffered any prejudice, especially objective prejudice regarding the lifting of the stay of proceedings. This with respect is fatal as found in *Lockhart Saw Ltd., supra*, at para. 13

60. Further, the fact that the security contains a clause to appoint a receiver is also not enough to lift a stay of proceedings. See, *Alberta Energy Regulator, supra,* at para. 15.

61. The applicants have not provided any evidence to suggest that the real property of the Caryi Group of Companies is dissipating or is depreciating or that they did not diligently pursue efforts of sale or that the prices were grossly exaggerated.

62. Indeed, both Mr. Horne and Mr. Ackerman note that Cushman Wakefield was retained to sell the real property. The passing comment by Mr. Ackerman at paragraph 29 that the buildings were priced to high is not supportive in any evidence and frankly is an unsubstantiated opinion.

63. There is no objective evidence that the Applicants will suffer material prejudice if the stay is not lifted.

64. Thus, and based on the foregoing, there is no equitable basis to lift the stay of proceedings. The Caryi Group of Companies have a statutory right to file the NOI pursuant to the BIA. They also had the statutory right to file under the CCAA. The fact that they discontinued that action does not militate bad faith.

65. The Caryi Group of Companies will prevent a reduced sales and investment solicitation process that is cost effective, and under the BIA, completed within the statutory time frame. The Caryi Group of Companies will be presenting this before the comeback hearing which must be heard on or before February 20, 2025, less than 30 calendar days from now.

66. It is respectfully submitted that there are no equitable grounds to lift the stay of proceedings.

D. Appointing a Receiver

67. The Respondents respectfully submit that should this Honourable Court lift the ten-day notice period for League, Atlantic Central, Graysbrook 3046475 Nova Scotia Limited pursuant to section 243(1.1), and lift the stay of proceedings for Douro pursuant to section 69.4 of the BIA, it is not just and convenient to appoint a receiver over the real property of the Respondents pursuant to section 243 of the BIA.

68. Section 243 of the BIA states, in part:

> **Court may appoint receiver**
> **243** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(d) 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;

(e) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(f) take any other action that the court considers advisable.

69. It is well known that the test to appoint a receiver is an under section 243 of the BIA is whether it is "just and convenient to do so". This is an extraordinary remedy.

70. The factors that may be considered in deciding whether it is just and convenient to appoint a Receiver were set out in *Kasten Energy Inc. v. Shamrock Oil and Gas Ltd.*, 2013 ABQB 63:

> [13] Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
>
> 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, particularly where the appointment of a receiver is authorized by the security documentation;
>
> 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;

p) the goal of facilitating the duties of the receiver.

71. The factors militate against appointing a receiver of the real property of the Respondents as follows:

a) There is no irreparable harm if the order is not granted because the real property is not dissipating or depreciating;

b) There is no risk to the security holder because the real property is safeguarded by the Caryi Group of Companies has it has been since Mr. Caryi's death and before his death;

c) The nature of the property is immovable.

d) There is no waste of the Respondents' assets. The bank account is used to pay insurance and utilities and other liabilities as they become due and to collect receivables;

e) There is no risk to the security holder because the real property is safeguarded by the Caryi Group of Companies has it has been since Mr. Caryi's death and before his death;

f) The balance of convenience favours the Caryi Group of Companies. In *Fisher Investments Ltd. v. Nusbaum*, 1988 CarswellOnt 180, [1988] O.J. No. 1859, where Chadwick denied an interim receivership application because the receiver had no knowledge of operating the business:

> [5] I have some concerns about the appointment of an interim receiver to take over the operation of this nursing home for a six-week period. I have no reservation about the business, management and accounting capabilities of the proposed interim receiver, but I do have reservations about their lack of experience with the day-to-day operation of this nursing home.
>
> [6] The applicant has urged me to appoint an interim receiver because of the manner in which Mr. Nusbaum has cut the Fishers out of management participation and for other reasons as alleged. There does not appear to be any evidence to suggest that the assets will be dissipated or that Mr. Nusbaum will not effectively carry on the management of the business during this interval. Mr. Nusbaum, in his supplementary material, has filed an up-to-date affidavit outlining what he has done with reference to accounting and management decisions, and from that material the business does not appear to be in any jeopardy. The applicant has urged me to apply the "just and convenient test" referred to in s. 114 of the Courts of Justice Act.
>
> [7] In my view one has to go further than just applying the "just and convenient test" and must look at the situation in a broader context, namely, examining the effect that it will have upon the parties. In this particular case, Mr. Nusbaum has devoted the latter part of his life in establishing, developing and promoting this nursing home operation. If I issue an order appointing an interim receiver for six weeks, it would have a devastating effect upon Mr. Nusbaum and the nursing home business itself. **One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window of the business that the proprietors are not capable of managing their own affairs. If the business has to be sold, which is**

probable, the appointment could have a detrimental effect upon the price received.

Mrs. Caryi and Ms. Caryi have been operating the Companies with the knowledge of the secured creditors for eleven (11) months before they demanded on their securities. Further, they have all of the knowledge regarding the buildings and tenants. The proposed receiver has none as evidenced by Liam Murphy's email to Joshua J. Santimaw requesting all of the documentation regarding the buildings.

g) The Respondents concede the Applicants have this right;

h) There is no difficulty because the Applicant has sought to appoint a private receiver, and it was rebuffed by the Respondents.

i) The appointment is not necessary as set out herein;

j) This is neutral because the parties do have the right of foreclosure and sale

k) The effect on the order would be catastrophic to the Respondents and "run of the mill" for the Applicants. The Respondents have the knowledge, expertise and experience in dealing with the tenants and the buildings and with the estate guaranteeing approximately $29,000,000.00, the actions of the creditors in a liquidation at could diminish recovery for all stakeholders;

l) The Applicants did not inform the Respondents of any opposition to the CCAA until January 13, 2025, one day before the hearing. The Respondents provided the Application to the Respondents on January 9, 2025. This was filed after information was exchanged and conversations were conducted with the Applicants. Indeed, a cash flow was provided and questions answered regarding the same.

Further, Mrs. Caryi and Ms. Caryi were operating the Caryi Group of Companies for eleven (11) months with the knowledge of the Applicants and no objections were made.

Finally, the Respondents believe they can present a sales and investment process that any concerns of the Applicants on or before February 20, 2025, which is the comeback hearing on the NOI.

m) This is neutral

n) This is neutral

o) The Respondents will likely realize more for the real property because of the stigma of a receiver selling these heritage properties with leased tenants in a very short time (60 days or less) which will not allow for due diligence and is optimistic for a commercial properties. See, *Fisher Investments Ltd, supra*, at para. 7.

p) This is not pertinent.

72. The proposal trustee and/or a commercial realtor also have expertise in selling real estate similar to the proposed receiver. Both are multinational corporations.

E. Alternative Relief to terminate stay appoint Interim Receiver

73. The Respondents respectfully submit (which is the alternative relief sought by the Applicants) that the NOIs should not be terminated pursuant to section 50.4(11) and an interim receiver appointed pursuant to section 47.1.

74. The Respondents filed NOIs pursuant to section 50.4(1) of the BIA. There is a statutory thirty-day stay of proceedings.

75. Sections 47.1 and 50.4 and 50.4(1) and 50.4(11) of the BIA state:

Appointment of interim receiver
47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or

(c) the trustee under the notice of intention or proposal and another trustee jointly.

...

Notice of intention
50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

...

Court may terminate period for making proposal
(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty-day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

76. In summary, the Respondents have thirty (30) days from the date they filed their NOIs to file a motion for, inter alia, an extension of the stay pursuant to section 50.4(9). This application must be filed and heard before February 20, 2025. However, a creditor can seek to have the NOIs terminated prior to the expiration pursuant to section 50.4(11) and seek to have interim receiver appointed.

77. Section 50.4(11) of the BIA has been described as an unusual remedy and a serious one which requires a person moving to invoke it to establish one of the four situations on a balance of probabilities; suspicion is not sufficient. See, *Quality Meat Packers Ltd., Re*, 2014 ONSC 2296.

78. In *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351, Court provided apt commentary regarding 50.4(9) and 50.4(11) and is produced in its entirety:

> [11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.
>
> [12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including

employees, unsecured creditors, as well as the secured creditor that is present before the Court.

[13] Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. **On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.**

[14] If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
[15] If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

[16] If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[17] Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

> **[18] In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.**
>
> [19] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis. [Emphasis added]

79. *Cantrail, supra,* was followed by this Honourable Court, and the comments of Registrar Balmanoukian in *Scotian Distribution Services Limited (Re),* 2020 NSSC 131 are apt:

> [19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; *and* that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.
>
> [20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.
>
> ...
>
> [24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, **but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.** [emphasis added]

80. The Applicants have offered no authorities to support their proposition that the NOIs should be terminated three days after they were filed by the Respondents and the Respondents will object therefore to them providing authorities prior to and at the hearing.

81. The Proposal Trustee has admitted that the Caryi Group of Companies has and is acting in good faith and due diligence. There is no evidence to suggest they are not. The Caryi Group of Companies has a statutory right to file the NOIs pursuant to the BIA no different than a company under the BIA can file to convert to CCAA. This is and of itself is not bad faith.

82. There is no evidence to suggest that a viable proposal cannot be made before the expiry of the thirty-day period. Mr. Ackerman filed an affidavit alluding to the fact that the Respondents cannot make a viable proposal. The debt of Douro is approximately $1,900,000.00, which is miniscule to the overall debt of the Applicants.

83. The affidavit of Mr. Horne for League and Atlantic Central does not contain any evidence that they would reject a proposal before it is presented to them pursuant to 50.4(9) and no other secured creditor filed an affidavit which is further proof that they also believe a viable proposal could be made to them.

84. The Respondents have not formulated their proposal, but it will be provided before February 20, 2025. To baldly say that "any proposal" will not accepted has been found wanting by the Courts before a plan is formulated and tendered.

85. Finally, and for the reasons set out already, the Applicants will not be materially prejudiced if there application is terminated.

86. It is respectfully submitted that the Applicants are not entitled to the appointment of an interim receiver.

87. In *Bank of Nova Scotia v. D.G. Jewelry Inc.*, 2002 CarswellOnt 3443, [2002 O.J. No. 4000], Ground, J., held that in order to appoint an interim receiver pursuant to section 47 of the BIA the Court must be satisfied that there is an actual and immediate danger of a dissipation of assets.

88. The assets in question are real property and a bank account. The bank account is an operating account of Ruby which is used to collect receivables and pay insurance, utilizes and liabilities as they become due. There is no evidence that there is an actual or immediate danger of their dissipation.

PART V - Relief Sought

89. It is respectfully submitted that the application filed by the Applicants be dismissed in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January 2025

BOYNECLARKE LLP

Joshua J. Santimaw

List of Authorities

1. *CBJ Developments Inc. v. 1180554 Ontario Limited*, 2023 ONSC 6773
2. *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2022 NLSC 25
3. *Great North Data Ltd. (Re)*, 2020 NLSC 105
4. *Osprey Energy Inc. (Re)*, 2006 BCSC 216
5. *Lockhart Saw Ltd., Re.*, 2007 NBQB 93
6. *Alberta Energy Regulator v. Lexin Resources Ltd.*, 2019 ABQB 23
7. *High Street Construction, Ltd., Re*, 1993 CarswellOnt 210; [1993] O.J. No. 394 (ONSC)
8. *Kasten Energy Inc. v. Shamrock Oil and Gas Ltd.*, 2013 ABQB 63
9. *Fisher Investments Ltd. v. Nusbaum*, 1988 CarswellOnt 180, [1988] O.J. No. 1859
10. *Quality Meat Packers Ltd., Re*, 2014 ONSC 2296
11. *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351
12. *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131
13. *Bank of Nova Scotia v. D.G. Jewelry Inc.*, 2002 CarswellOnt 3443, [2002 O.J. No. 4000]