

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CRH FUNDING II PTE. LTD.

Applicant

- and -

SAGE GOLD INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED

**FACTUM OF THE APPLICANT
(Application Returnable on July 13, 2018)**

July 12, 2018

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Guy Martel
Tel: (514) 397-3163
Email: gmartel@stikeman.com

Kathryn Esaw LSUC#58264F
Tel: (416) 869-6820
Fax: (416) 947-0866
Email: kesaw@stikeman.com

Lawyers for the Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN :

CRH FUNDING II PTE. LTD.

Applicant

- and -

SAGE GOLD INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED

**FACTUM OF
THE APPLICANT**

PART I - OVERVIEW

1. This Application is made by CRH Funding II PTE. Ltd. (“**CRH**”), in its capacity as first ranking secured creditor of Sage Gold Inc. (“**Sage**”), for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”) appointing Deloitte Restructuring Inc. (“**Deloitte**”) as receiver, without security, of all the assets, undertaking and properties of Sage.

2. As at the date of this Application, Sage has defaulted on several of its obligations to CRH under a *Gold Prepayment Agreement* (the “**GPA**”) wherein, *inter alia*, Sage agreed to sell to CRH, and CRH agreed to purchase from Sage, certain defined quantities of refined gold, which was to be delivered in accordance with the terms and conditions specified in the GPA.

3. As at June 25, 2018, an aggregate amount of \$38,782,223, on account of principal, plus interest accrued thereon and other fees payable pursuant to the GPA was owing by Sage to CRH.

4. Sage is an insolvent person within the meaning set forth in Section 2 of the BIA, since:

- (a) it is unable to meet its obligations as they generally become due; and
- (b) the aggregate of its property is insufficient to enable the payment of all of its obligations, due and accruing due.

5. In fact, on June 13, 2018, Sage issued its audited consolidated financial statements for the fifteen month period ended December 31, 2017 and year ended September 30, 2017 (the “**Audited Financial Statements**”) which revealed the following:

- (a) as at December 31, 2017, the book value of its assets totaled \$3,911,244, in comparison with liabilities totaling \$21,431,405, resulting in a shareholders’ deficiency of \$17,520,161;
- (b) during the fifteen month period ended December 31, 2017, Sage has also generated a negative cash flow from its operations, reporting a net loss of \$21,562,565, with a negative working capital of \$7,351,031 as at that date; and
- (c) according to Sage’s auditors, its financial situation indicate the existence of a “*material uncertainty that may cast significant doubt about [Sage]’s ability to continue as a going concern*”, and “[Sage] *will require significant additional financing within the next twelve months in order to meet its liabilities as they come due and fund its operations.*”

6. On June 25, 2018, Sage advised CRH by email that, *inter alia*, given its limited liquidities:

- (a) Sage was no longer in the financial position to continue the care and maintenance of its principal asset, the Clavos Property, absorb the costs of the ongoing burn rate (which, according to Sage, exceeded \$175,000 per month) and pay to its employees their unpaid wages for previous payrolls; and

- (b) Absent additional and immediate funding, Sage would be forced to close the Clavos Property, and allow it to flood, with approximately \$400,000 worth of equipment (at liquidation value) left underground.

7. In these circumstances, CRH is left with no other choice than to seek the appointment of Deloitte as receiver, on an urgent basis, in order to undertake all measures deemed appropriate in the circumstances in order to efficiently and safely put the Clavos Property in care and maintenance, while, at the same time, preserving its value (along with the remaining Property's value) for the benefit of all creditors and stakeholders.

PART II - FACTS

8. The facts relevant to this Application are set out in detail in the affidavit of Andrew Wehrley, dated July 10, 2018 (the "**Wehrley Affidavit**"). Below is a brief summary of those facts.

General

9. Sage is a publicly traded company headquartered in Toronto, Ontario, with its common shares listed on the TSX Venture Exchange under the ticker symbol "SGX". As of the date of this Application, Sage is a reporting issuer under applicable securities legislation in the provinces of British Columbia, Alberta and Ontario.

Wehrley Affidavit, at para. 11.

10. Sage is primarily engaged in the exploration for and development of gold in Ontario Canada, its main properties consisting in the Clavos property located near Timmins (the "**Clavos Property**") and the Onaman property located northeast of Thunder Bay (the "**Onaman Property**").

Wehrley Affidavit, at para. 12.

11. The Clavos Property comprises 2,540 hectares in total area, and is located within the Timmins mining camp in German, Stock and Clergue townships. This property is comprised of 69 patented and leased claims and 14 unpatented claims, all of which are 100% owned by Sage.

Wehrley Affidavit, at para. 14.

12. Sage's involvement with the Clavos Property began in February 2010, when Sage earned a 60% interest in the mining project related to the Clavos Property (the "**Clavos Project**") and became its operator pursuant to a joint venture with St. Andrew Goldfields Ltd. ("**St. Andrew**"), the owner of the remaining 40% interest in this project, who was then acquired in January 2016 by Kirkland Lake Gold Ltd. ("**Kirkland Lake**").

Wehrley Affidavit, at paras. 15, 16 and 17.

13. In November 2016, Sage entered into a transaction with CRH and CRH Mezzanine PTE. Ltd. ("**CRH Mezzanine**") which allowed Sage to benefit from an \$11.5 million financing package to fund the development and restart of the Clavos Project (the "**CRH Transaction**"). This financing package comprised of:

- (a) a \$9.65 million gold prepayment investment by CRH, which was to be effected in three (3) tranches, in accordance with the terms of the GPA; and
- (b) a \$1.85 million equity investment by CRH Mezzanine, which was to be effected in accordance with the terms of an Investment Agreement.

Wehrley Affidavit, at paras. 18 and 20.

14. The CRH Transaction allowed Sage to repay some of its debts and acquire Kirkland Lake's 40% interest in the Clavos Project, resulting in Sage now owning 100% of the Clavos Property.

Wehrley Affidavit, at paras. 21 and 22.

15. The Onaman Property is located northeast of Thunder Bay, Ontario, and hosts several base and precious metal occurrences and significant mineralized zones in what may be a Mattabi-type submarine volcanogenic massive sulfide setting.

Wehrley Affidavit, at para. 23.

17. The Onaman Project comprises of the following:

- (a) The “*Lynx Project*”, which is a polyametallic copper, gold and silver project;
- (b) The “*Headway Project*” located 200 meters stratigraphically above the Lynx Project, where, according to Sage, lead and gold mineralization has been historically documented; and
- (c) Other mineralized zones where, again according to Sage, different combinations of base and precious metals (copper-lead-zinc and silver-gold) have been historically documented, in variable proportions.

Wehrley Affidavit, at para. 24.

18. On May 3, 2006, Sage signed an option agreement with two (2) arms’ length individuals to earn a 100% interest in the Onaman Property. However, as part of this agreement, Sage agreed to grant to these vendors a 2% Net Smelter Return (“NSR”) royalty on base metals and a 3% NSR royalty on precious metals, both of which can be reduced to 1% and 2%, respectively, in exchange for a payment by Sage of \$1,000,000. Today, Sage is required to make advanced royalty payments to these vendors of \$25,000 per year.

Wehrley Affidavit, at paras. 25 and 27.

Sage’s Financial Situation

19. As previously mentioned, Sage has been experiencing significant financial difficulties for some time.

Wehrley Affidavit, at para. 28.

20. On June 13 and 14, 2018, respectively, Sage issued its Audited Financial Statements as well as its Management’s Discussion and Analysis (the “**MD&A**”), which both revealed the extent of Sage’s financial difficulties.

22. As appears from the Audited Financial Statements and the MD&A:

- (a) as at December 31, 2017, the book value of Sage's assets totaled \$3,911,244, in comparison with liabilities totaling \$21,431,405, resulting in a shareholders' deficiency of \$17,520,161;
- (b) Since 2016, Sage has also not generated any revenue, resulting in a negative cash flow from its operations and reporting a net loss of \$21,562,565, with a negative working capital of \$7,351,031 as at that date;
- (c) due to its dire financial situation, Sage was required to book a write-down in its Audited Financial Statements against the carrying value of mine development and mineral property expenditures of \$12,275,416.

Wehrley Affidavit, at paras. 29, 30, 31 and 32.

23. According to Sage's auditors:

- (a) Sage's financial situation indicate the existence of a "*material uncertainty that may cast significant doubt about [Sage]'s ability to continue as a going concern*"; and
- (b) "[Sage] *will require significant additional financing within the next twelve months in order to meet its liabilities as they come due and fund its operations*".

Wehrley Affidavit, at paras. 33 and 34.

24. In fact, according to Sage itself, the decline in the price of its common share (which was trading at \$0,01 on June 28, 2018, with a market cap of approximately \$1.1 million) "*significantly increased the risk that [Sage] will not be able to raise sufficient funds through financing initiatives to meet its financial obligations*".

Wehrley Affidavit, at para. 36.

Sage's Defaults Under the GPA & The Debenture

25. Pursuant to the GPA, in consideration for a \$9.65 million gold prepayment investment to be made by CRH, Sage committed to deliver to CRH 15% of the gold produced at the Clavos Property, over a 72-months initial period, with a minimum of 16,100 ounces of refined gold, but up to a maximum of 26,000 ounces of refined gold (the “**Maximum Delivery Obligation**”), starting after the commercial production has been achieved, but in any event no later than December 27, 2017.

Wehrley Affidavit, at para. 37.

26. The \$9.65 million gold prepayment investment by CRH was to be effected in three (3) tranches, as further described in the Wehrley Affidavit. As at the date of this Application, all of the above three (3) tranches have been paid by CRH to Sage.

Wehrley Affidavit, at paras. 28 and 39.

27. Despite such payment having been made, Sage has failed to meet its gold delivery obligations to CRH, as set forth in the GPA, and has also failed to reach commercial production at the Clavos Property by May 31, 2018, as was provided in the GPA (the “**Commercial Production Deadline**”), thereby giving right to CRH to, *inter alia*:

- (a) demand all cash amounts and deliveries of refined gold owing by Sage to CRH pursuant to the GPA;
- (b) terminate the GPA and, without limitation, demand all losses suffered or incurred as a result of the events of default and termination, including, demanding the net present value of CRH's rights to acquire refined gold under the GPA, up to the Maximum Delivery Obligation;
- (c) enforce its rights pursuant to all agreements and documents ancillary to the GPA, including the Debenture.

Wehrley Affidavit, at para. 40.

28. On or about May 3, 2018, CRH issued to Sage a Notice of Default (the "**Notice of Default**"), advising it of the occurrence of several events of default under the GPA (collectively, the "**Events of Default**"), and demanding that Sage immediately deliver to it the specified amount of gold set out in the GPA by way of gold credits or such other form as contemplated by the GPA, and all other amounts of cash and gold owing by Sage to CRH, while reserving its rights pursuant to the GPA and related agreements and documents.

Wehrley Affidavit, at para. 41.

29. On May 7, 2018, Sage sent to CRH a response to the Notice of Default ("**Sage's Response**"), in which Sage recognized the occurrence of the Events of Default, and advised CRH that:

- (a) Sage was not in a position to pay to CRH the current stream payments owed to it pursuant to the GPA, whether in gold or cash, as Sage was not generating positive cash flow in excess of what was required to simply maintain its mining operations at the Clavos Property;
- (b) Further defaults under the GPA were "*looming*"; and
- (c) The start of commercial production at the Clavos Project, which was to begin by no later than May 2018 (i.e. the Commercial Production Deadline), would be delayed to an "*unspecified time in the future*".

Wehrley Affidavit, at para. 42.

30. On May 11, 2018, Sage issued a news release (the "**May 11, 2018 News Release**") whereby it disclosed to its stakeholders the fact that it had received the Notice of Default from CRH, and that, subject to any applicable cure periods, CRH, as secured lender, was in a position to terminate the GPA and enforce its security interests over the Clavos Property.

32. On June 25, 2018, Sage advised CRH by email that, *inter alia*, given its limited liquidities:

- (a) Sage was no longer in the financial position to continue the care and maintenance of the Clavos Property, absorb the costs of the ongoing burn rate (which, according to Sage, exceeded \$175,000 per month) and pay to its employees their unpaid wages for previous payrolls; and, therefore,
- (b) Absent additional and immediate funding, Sage would be forced to close the Clavos Property, and allow it to flood, with approximately \$400,000 worth of equipment (at liquidation value) left underground.

Wehrley Affidavit, at para. 43.

33. In addition to the above, CRH was also recently advised that Sage has also apparently failed to make various payments to some of its equipment lessors and service providers, some of which would have alleged to benefit from a construction lien over the Property of Sage, in priority to CRH's security interest thereon, thereby constituting yet another default under the GPA and the Debenture.

34. In fact, CRH was recently named as a defendant to a Statement of Claim (the "**Battlefield Statement of Claim**") filed on or about May 31, 2018 by Toromont Industries Ltd., registered under the business name of Battlefield Equipment Rentals ("**Battlefield**"), in which Battlefield, a supplier of rental equipment and related services retained by Sage, claimed the following:

- (a) A payment from Sage in the amount of \$238,321.42, apparently representing the amount owed by the latter for the lease of various equipment used at the Clavos Mine; and
- (b) A declaration that its construction lien in the amount of \$88,683.12, which was registered against the Clavos Mine on March 29, 2018, has priority over CRH's security interest thereon, which CRH contests, and reserves all of its rights in connection with such claim.

Wehrley Affidavit, at paras. 45 and 46.

35. Faced with the above, CRH was left with no other choice but to issue to Sage, on June 25, 2018, a Notice of Intention to Enforce Security pursuant to section 244 of the BIA, with a view of appointing a receiver to Sage's Property.

Wehrley Affidavit, at para. 47.

PART III - ISSUES

36. The following issues are to be resolved in this Application:

- A. Does this Court have jurisdiction to appoint Deloitte as receiver to the assets, undertakings and properties of Sage?
- B. Is it just or convenient for the Court to appoint Deloitte as receiver to the assets, undertakings and properties of Sage?
- C. If Deloitte is appointed as receiver, are the terms of the order requested appropriate?

PART IV - ARGUMENT

A. This Court has Jurisdiction

37. Subsection 243(5) of the BIA specifies that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

BIA, s. 243(5) [Schedule "B" to this Factum]

38. The term "*locality of a debtor*" is defined in section 2 of the BIA as follows:

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated

BIA, s. 2 [Schedule "B" to this Factum]

39. Sage's head office is located at 67 Yonge Street, Suite 808, in the city of Toronto, Province of Ontario, where all management, corporate, accounting and other administrative functions are conducted.

40. In light of the foregoing, the "locality" of Sage is in Toronto, such that this Court has the proper jurisdiction to hear the present Application.

B. It is Both Just and Convenient to Appoint a Receiver

41. Pursuant to section 243 of the BIA, the Court may, on application by a secured creditor, appoint a receiver to take any action that the court considers advisable if it considers it to be "*just or convenient*" to do so.

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

a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

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

c) take any other action that the court considers advisable.

BIA, s. 243 and CJA, s. 101 [Schedule "B" to this Factum]

42. Although the BIA does not provide any factors to determine under what circumstances the appointment of a receiver would be "*just or convenient*", it is well recognized that the purpose of the appointment of a receiver pursuant to Section 243 of the BIA is to enhance and

facilitate the preservation and realization of a debtor's assets for the benefit of all its creditors, including its secured creditors.

43. Over the years, Canadian courts have relied on several non-exhaustive factors in order to determine whether or not the appointment of a receiver is "*just or convenient*" in the circumstances. In the matter of *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. (as he then was) described the basic principles governing the judicial appointment of a receiver as follows:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so [citation omitted]. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently [citations omitted]. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver manager is not appointed [citation omitted].

Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List)) ("**Freure Village**"), at para. 10 [Book of Authorities, **TAB 1**]; *1529599 Ontario Ltd v. Dalcour Inc.*, 2012 ONSC 5707, 2012 Carswell Ont 12474 (Commercial List) ("**Dalcour**") at para. 40 [Book of Authorities, **TAB 2**]

44. In the matter of *Maple Trade Inc.*, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been taken under consideration by other courts in the determination of whether it is appropriate to appoint a receiver.

"There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

- 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."*

Maple Trade Inc. v. CY Oriental Holdings Ltd., 2009 CarswellBC 2982 (BCSC), at para. 25 [Book of Authorities, **TAB 3**]; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, 2010 CarswellBC 855 ("**Textron**"), at paras. 50, 52 and 55 [Book of Authorities, **TAB 4**].

45. In the present case, having regard to all of the circumstances, CRH respectfully submits that it is both just and convenient for this Court to appoint a receiver over the assets, undertaking and property of Sage, namely for the following reasons:

- (a) Several events of defaults have occurred and are continuing under the GPA and the Debenture;
- (b) Over the past few months, CRH has explored with Sage various strategic alternatives, none of which have come to fruition;
- (c) CRH has lost confidence in Sage's management's ability to implement any strategic or restructuring alternative, which would allow the repayment of the Indebtedness;
- (d) As at June 25, 2018, based on CRH's calculations, Sage was indebted to CRH in the amount of up to \$38,782,223, on account of principal, plus interest accrued thereon and other fees payable pursuant to the GPA (the "**Indebtedness**");
- (e) Sage's currently faces major financial difficulties, with virtually no cash on hand and no alternative source of funding, which prevents it from satisfying its obligations and paying its Indebtedness to CRH, but also taking the appropriate measures to safely put the Clavos Property in care and maintenance;
- (f) As things currently stand, based on the book value of the Property, as reflected in its Audited Financial Statements, it appears that any proceeds resulting from its sale will not be sufficient to enable a payment in full of the Indebtedness;

Dalcor, supra at para. 41 [Book of Authorities, **TAB 2**]; *Business Development Bank of Canada v. 2197333 Ontario Inc*, 2012 ONSC 965. 2012 CarswellOnt 2062 (Commercial List) ("**BDC**") at para. 21 [Book Of Authorities, **TAB 5**]

46. Moreover, although Canadian courts have recognized that in general, the appointment of a receiver will be regarded as an extraordinary equitable remedy, the same courts have also recognized that such is not the case where the relevant security document permits the appointment of a receiver.

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. 2013 ONSC 6866, para. 27 [Book of Authorities, **TAB 6**]; *Freure Village*, supra at para. 13 [Book of Authorities, **TAB 1**]; *Dalcor*, supra at para. 40 [Book of Authorities, **TAB 2**]; *Textron* at paras. 50 and 55 [Book of Authorities, **TAB 4**]; *BDC*, supra at para. 21 [Book of Authorities. **TAB 5**].

47. In the present case, the Debenture executed by Sage in favour of CRH specifically provides for and contemplates that upon the occurrence and during the continuance of any event of default, CRH may, *inter alia*, appoint any person qualified under applicable laws to be a receiver of the Property or any part thereof, with the powers to, *inter alia*, take possession of the Property, carry on all or any part of Sage's business, to borrow money on the security of the Property, and to sell, lease or otherwise dispose of the whole or any part of the collateral.

48. In light of the circumstances previously discussed, CRH believes that the appointment of Deloitte will:

- (a) facilitate the undertaking of all measures deemed appropriate in the circumstances in order to efficiently and safely put the Clavos Property in care and maintenance, while, at the same time, preserving its value (along with the remaining Property's value) for the benefit of all creditors and stakeholders, which Sage is unable to do, given its financial situation; and

- (b) allow a transparent, orderly and safe marketing and sale process for Sage's Property, including the Clavos Property and the Onaman Property.

49. If such relief is not granted, CRH is of the view that significant value may irrevocably be destroyed, and the safe and structured wind down and subsequent sale of Sage's mining operations at the Clavos Property and the Onoman Property may ultimately not be achievable.

C. The Terms of the Order Sought are Appropriate

50. The draft order sought in this Application (the "**Receivership Order**") is based on the Ontario model receivership Order. As part of this Receivership Order, CRH seeks the relief discussed below.

(i) The Stay of Proceedings

51. In order to provide some stability during the receivership process, courts will usually order that no proceedings may be taken or continued against the debtor (or its property) or the receiver.

To maintain some semblance of order and control, the initial order appointing the receiver usually provides that no action or proceeding may be taken or continued against the debtor or receiver without leave of the court. The court has the inherent jurisdiction to control its own processes and protect and supervise its own officers.

Frank Bennett, Bennett on Receivership, 3rd Ed., 2011, Carswell at p. 220 [Book of Authorities, TAB 8]

52. In order to allow the receiver to properly manage the debtor's property so that an orderly liquidation/sale process of the debtor's assets may be undertaken, it is important that the receiver be given the opportunity to exercise its powers and duties without interference.

Once an initial order is made, there is need to freeze or stay the rights of creditors from continuing or commencing proceedings against the debtor, its property and the receiver without leave of the court. The stay is required to give

the receiver an opportunity to manage the debtor's business without interference and ultimately realize on the assets.

Frank Bennett, Bennett on Receivership, 3rd Ed., 2011, Carswell at p. 185 [Book of Authorities, TAB 8]

53. The rationale behind a court-ordered stay of proceedings, in part, to prevent a premature race to the debtors assets between its creditors, as the intention and purpose of the BIA is to confer upon the court a certain degree of control of insolvency proceedings and to administer justice between a debtor and its creditors.

Subject to leave being obtained, the court does not allow the court-appointed receiver's possession of the debtor's assets be disturbed by anyone, however good his or her claim may be. Any interference with the receiver's possession without leave of the court is a contempt of court order. It is no defence to a contempt proceeding that the person has an honest belief that he or she is entitled to the asset and has priority. If a person has a valid claim, it should be advanced through court proceedings rather than taking the matter into his or her own hands. Such a rule is necessary in order to enable the court to administer justice among the conflicting parties. If anyone interferes with the gathering of the assets, the receiver may take proceedings to commit such person or corporate officer to jail or it may commence an action restraining such person from interfering with the collection of the assets."

Frank Bennett, Bennett on Receivership, 3rd Ed., 2011, Carswell at p. 221 [Book of Authorities, TAB 8]

54. In the present case, considering the proposed receiver's plan to eventually proceed with an orderly sale process of Sage's assets in order to maximize the recovery of its creditors, CRH submits that it is appropriate, under these circumstances, to order a stay of proceedings as set forth in the Receivership Order.

(iii) The Receiver's Borrowing Charge

55. As cited above, section 243 of the BIA provides a short summary of the powers which may be granted to a receiver, which includes the broad power to take any action that the court considers advisable, including borrowing money and granting security on the debtor's property. Section 31(1) of the BIA specifically provides that a receiver within the meaning of subsection 243(2) may incur obligations and borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

BIA, s.31 [Schedule "B" to this Factum]

56. Since a receiver will usually require some working capital at the outset to supplement the debtor's cash flow and cover certain necessary expenses, the court, under certain circumstances, grant a receiver the power to borrow funds necessary or desirable for the purpose of funding the exercise of its powers and duties.

57. Accordingly, a receiver will usually be allowed to seek interim financing from either a creditor of the debtor or a third party lender, which interim financing will be secured by a super-priority charge over the assets of the debtor.

A court-appointed receiver is generally afforded a power to borrow moneys. Where the receiver is privately appointed, the security instrument usually contains a provision permitting the receiver to borrow moneys as the need arises. In so borrowing, the receiver may borrow from the security holder who initiates the appointment or from a third party. In both cases, the receiver delivers receiver's certificates to the lender, which certificates may be secured against the assets in receivership and in priority to the interest of the principal security holder.

Frank Bennett, Bennett on Receivership, 3rd Ed., 2011, Carswell at p. 421 [Book of Authorities, TAB 8]

58. In determining whether to grant a receiver the power to seek interim financing conditional upon a court-ordered super-priority charge upon the assets of the debtor, a Court must keep in mind the overall objective of the receivership proceedings.

17. The amounts borrowed by the receiver and manager from the purchaser and Torstar Corporation are the subject of receiver's certificates issued in accordance with that receivership order. The certificates create a charge on all assets of ITI, but such charge ranks subordinate to the right of the receiver and manager to be indemnified out of the assets in respect of its costs and expenses incurred as receiver and allowed by this Court.

(...)

21. So, the question put by the applicant Ernst & Young for determination of this Court is this, do the charges under the receiver's certificates and the receiver manager's claim for indemnity for its costs and expenses, have priority to the interests of the lessor to the personal property subject to the lease?

(...)

29. It is beneficial to remember why this order was granted. Why did the court exercise that kind of power The appointment of the receiver and manger (sic) preserved the assets of ITI for the benefit of all the interested parties, in order to allow the receiver and manager an opportunity to find a purchaser for those assets. The funds borrowed under the receiver's certificates were used to continue the operation of the ITI schools across Canada, pending the closing of the sale to the purchaser. There were some thirteen hundred students attending those schools at the time. It was a court order, made for good reason. The court order granting these charges against the property of those creditors creates a charge that is created by operation of law."

Torstar Corporation v. ITI Information Technology Institute Incorporated, 2002 NSSC 200 at paras. 17, 21 and 29 [Book of Authorities, **TAB 7**]

59. In the case at hand, the objective of these receivership proceedings is essentially to preserve, in the immediate, Sage's assets and to allow Deloitte, if appointed as receiver, an opportunity to find a purchaser for those assets and to maximize the recovery of Sage's creditors.

60. Accordingly, CRH therefore respectfully submits that, under these circumstances, this Court should allow Deloitte, if appointed as receiver, to borrow money as it may consider necessary or advisable for the purpose of funding the exercise of its powers and duties to be conferred by this court.

(iv) The Receiver's Charge

61. Pursuant to subsection 243(6) of the BIA, if a receiver is appointed under subsection 243(1), this Court may make an order respecting the payment of fees and disbursements of the receiver, including one that gives the receiver a charge, ranking ahead of any of the secured creditors, over all or part of Sage's property, but only if this Court is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

BIA, s.243(6) [Schedule "B" to this Factum]

62. Although CRH has advised Deloitte that it is prepared to advance the amounts required to pay Deloitte's fees and expenses that are to perform its powers and duties as receiver, up to an amount of \$1 million (provided that such funding be secured by a super-priority charge), Deloitte requires nevertheless that its fees and expenses be also secured by a super-priority charge.

63. Over the past few years, it has become customary in any receivership proceedings to grant a priority charge in favour of the receiver and its counsel, as a security for the payment of their fees.

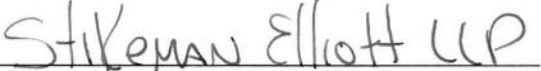
64. In the present case, CRH, the first ranking secured creditor of Sage is in agreement with the proposed Receiver's charge, and submits that all parties who may be reasonably affected by

the charges sought in the Receivership Order have been duly served with the present Application.

PART V - CONCLUSION

65. For the reasons stated herein, it is both just and convenient to appoint Deloitte as Receiver over the assets, undertaking and properties of Sage in the circumstances, and that the relief sought by CRH as part of the Receivership Order ought to be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2018.



Guy Martel/Kathryn Esaw
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Case

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List))
2. *1529599 Ontario Ltd v. Dalcour Inc.*, 2012 ONSC 5707, 2012 CarswellOnt 12474 (Commercial List)
3. *Maple Trade Inc. v. CY Oriental Holdings Ltd.*, 2009 CarswellBC 2982 (BCSC)
4. *Textron Financial Canada Ltd v. Chetwynd Motels Ltd.*, 2010 BCSC 477, 2010 CarswellBC 855
5. *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965, 2012 CarswellOnt 2062 (Commercial List)
6. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.* 2013 ONSC 6866
7. *Torstar Corporation v. ITI Information Technology Institute Incorporated*, 2002 NSSC 200

Secondary Sources

8. *Frank Bennett, Bennett on Receivership*, 3rd Ed., 2011, Carswell

SCHEDULE "B"
EXTRACT OF RELEVANT STATUTES

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

2. Definitions – In this Act

...

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated

31. (1) Borrowing powers with permission of court – With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

243. (1) Court may appoint receiver - 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.*

(1.1) Restriction on appointment of receiver - 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.*

(2) Definition of "receiver" - Subject to subsections (3) and (4), in this Part, "receiver" means a person who

- (a) is appointed under subsection (1); or*
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under*

- (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or*
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.*

(3) Definition of "receiver" — subsection 248(2) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

(4) Trustee to be appointed - Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

(5) Place of filing - The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

(6) Orders respecting fees and disbursements - If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

(7) Meaning of "disbursements" - In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

244. (1) Advance notice - 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.

(2) Period of notice - 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.

(2.1) No advance consent - For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

(3) Exception - 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.

(4) Idem - This section does not apply where there is a receiver in respect of the insolvent person.

Courts of Justice Act. R.S.O. 1990. c. C.43: Section 101

101. (1) Injunctions and receivers - In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) Terms - An order under subsection (1) may include such terms as are considered just.

CRH FUNDING II PTE. LTD.
Applicant

-and-

SAGE GOLD INC.
Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Appointment of Receiver)**

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Guy Martel
Tel: (514) 397-3163
Email: gmartel@stikeman.com

Kathryn Esaw LSUC#58264F
Tel: (416) 869-6820
Fax: (416) 947-0866
Email: kesaw@stikeman.com

Lawyers for the Applicant