Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and –

MIZRAHI (128 HAZELTON) INC. AND
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

FACTUM OF THE APPLICANT

RECEIVERSHIP APPLICATION
RETURNABLE MAY 13, 2024

CASSELS BROCK & BLACKWELL LLP
Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
jdietrich@cassels.com

Jessica Zagar LSO #: 57305Q
Tel: 416.869.5449
jzagar@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Lawyers for the Applicant

TO: **THE SERVICE LIST**

Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and –

MIZRAHI (128 HAZELTON) INC. AND
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

TABLE OF CONTENTS

Page No.

PART I - OVERVIEW

1. CEI, as a secured creditor, seeks the appointment of KSV as Receiver over the Real Property[1] and all assets, undertakings, and properties of the Debtors, including all related proceeds, pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 and section 101 of the *Courts of Justice Act*, RSO 1990, c. C-43.[2]

2. Hazelton and Retail owe CEI more than $47 million under secured lending facilities. CEI made demands for payment and delivered demands and notices to enforce security under section 244 of the BIA[3] to the Debtors but the Indebtedness remains unpaid.

3. CEI has lost confidence in Mizrahi and the Mizrahi Group's ability to fulfill their financial obligations, past and ongoing. The development of the Hazelton Project, a luxury condominium development in the heart of Yorkville, is at a standstill because of the lack of funding and the breakdown in the relationship between CEI and Mizrahi, to the detriment of stakeholders, including other lenders and the occupants of the Hazelton Project. In addition, based on Mizrahi's most recently delivered budget, the cost of the Hazelton Project will exceed Mizrahi's initial budget by over $50,000,000 and the estimated completion date is more than five years behind schedule based on Mizrahi's current estimates.[4] Additional funding is necessary to complete the Hazelton Project and the only viable lender is CEI. It is certainly not Mizrahi or the Mizrahi Group.

4. The Debtors do not dispute that the Indebtedness was advanced by CEI, that security was granted to CEI, or that, despite proper demand for payment, the Indebtedness has not been paid.

---

[1] The Real Property is legally described in the Affidavit of Robert Hiscox sworn February 23, 2024 (the "**First Hiscox Affidavit**") at para 2 and in Schedule "A" attached.
[2] Capitalized terms not otherwise defined herein have the meaning given to them in the First Hiscox Affidavit or the Reply Affidavit of Robert Hiscox sworn April 15, 2024 (the "**Reply Hiscox Affidavit**"), as applicable.
[3] *Bankruptcy Insolvency Act* [BIA].
[4] First Hiscox Affidavit at paras 4, 42.

5. Indeed, instead of filing responsive evidence to this application, the Debtors—or rather, just one of them—initiated an action against CEI and its principals. The Amended Statement of Claim does not contest the Indebtedness, security, or delivery of the demands. Notably, the Amended Statement of Claim *accepts as fact* that the Indebtedness was advanced to the Debtors and that the Loan and Security Documents were entered into by the Debtors.[5] Instead, Retail and other Mizrahi Group entities make bare and unparticularized allegations of "bad faith" and breach of duties allegedly owing by the defendants. That action, if pursued, will be vigorously defended and the subject of a motion to strike.[6]

6. CEI seeks to appoint the Receiver in furtherance of its contractual right to do so and with a view to preserving and realizing on the Property.[7] In the circumstances, it is just and convenient to appoint the Receiver over the Property.

7. CEI has commenced a parallel receivership application in respect of the Mizrahi Group's equity interests in the 180 Steeles Project, another condominium development jointly operated and developed by CEI and Mizrahi, which is being heard at the same time as this application.[8]

PART II - SUMMARY OF FACTS

A. The Parties

8. CEI is a Toronto-based private real estate fund dedicated to acquiring, developing, and managing properties in Canada and abroad. Since 2015, CEI has assisted in the financing of the Hazelton Project.[9]

---

[5] Supplementary Affidavit of Sam Mizrahi affirmed April 8, 2024, Exhibit "A" at paras 26 and 28 ("**Second Mizrahi Affidavit**").
[6] Reply Hiscox Affidavit at para 4.
[7] First Hiscox Affidavit at para 12.
[8] Court File No. CV-24-00715326-00CL. See First Hiscox Affidavit at paras 19-21.
[9] First Hiscox Affidavit at para 13.

9. Hazelton is the borrower under the DUCA Commitment, the 2015 Credit Agreement, the 2020 Grid Note, and the 2021 Grid Note. The shares in the capital of Hazelton are owned 50% by CEI and 50% by MDI, an entity which Mizrahi controls.[10]

10. Hazelton is the registered owner of the Real Property. The Real Property is Hazelton's primary asset and consists of 10 condominium units within Hazelton Project, a nine-storey, 20-unit luxury condominium building located in the Yorkville neighbourhood, along with one ground floor commercial retail space and the parking spaces allocated to the units and the retail space.[11] CEI's role in the Hazelton Project is limited to a lender and shareholder. The development and construction of the Hazelton Project was outsourced by Hazelton to Mizrahi Inc. and there have been significant cost overruns and delays in respect of the Hazelton Project.[12]

11. Retail is the borrower under the Retail Note. Retail is wholly owned by Mizrahi or his designee. Mizrahi is the sole director of Retail, and its registered office is located at Mizrahi's personal residence.[13]

12. Retail's primary asset is the Retail APS, which provides Retail the right to purchase a unit in the Hazelton Project, together with four parking spaces and one locker for $2,393,000.[14]

B. Summary Of Debt and Security Structure

13. A summary of the uncontested debt owed to CEI and security structure, including the defaults that have not been cured and the notices and demands delivered, are set out in the table below and more fully set out in the First Hiscox Affidavit:

[10] First Hiscox Affidavit at para 14.
[11] First Hiscox Affidavit at para 4.
[12] First Hiscox Affidavit at paras 4, 14, and 42.
[13] First Hiscox Affidavit at para 5.
[14] First Hiscox Affidavit at para 5.

Borrower	Agreement	Security	Default	Demand	Amount[15]
Hazelton	DUCA Commitment[16] Debt Purchase Agreement[17]	First-ranking mortgage[18] General Security Agreement[19] General Assignment of Rents[20]	October 8, 2023[21]	December 6, 2023[22]	$13,015,116.36 i.e., the Hazelton Priority Indebtedness
Hazelton	2015 Credit Agreement[23]	Third-ranking mortgage[24] General Security Agreement[25] General Assignment of Rents[26]	June 30, 2020[27]	February 27, 2024[28]	$31,041,763.16 i.e., the Hazelton Subordinate Indebtedness
Retail	Retail Note[29]	General Security Agreement[30] Option Agreement[31] Retail Guarantee[32]	February 28, 2022[33]	September 22, 2022[34]	$2,854,278 i.e., the Retail Indebtedness

[15] This amount is as of February 29, 2024 and is exclusive of interest accruing from and after February 29, 2024 and legal fees and disbursements incurred and accruing before and after that date.
[16] First Hiscox Affidavit at Exhibit “E”.
[17] First Hiscox Affidavit at Exhibit “L”.
[18] First Hiscox Affidavit at Exhibit “F”.
[19] First Hiscox Affidavit at Exhibit “G”.
[20] First Hiscox Affidavit at Exhibit “H”.
[21] First Hiscox Affidavit at para 26.
[22] First Hiscox Affidavit at para 28 and Exhibit “K”.
[23] Reply Hiscox Affidavit at Exhibit “B”.
[24] Reply Hiscox Affidavit at Exhibit “C”. Aviva has a second priority registration against the Real Property for certain deposit insurance indemnification obligations (subordinate to CEI’s security in respect of the DUCA Commitment), securing the maximum amount of $18,500,000.
[25] Reply Hiscox Affidavit at Exhibit “E”.
[26] Reply Hiscox Affidavit at Exhibit “D”.
[27] First Hiscox Affidavit at paras 41-43.
[28] Reply Hiscox Affidavit at para 6 and Exhibit “A”.
[29] First Hiscox Affidavit at Exhibit “N”.
[30] First Hiscox Affidavit at Exhibit “P”.
[31] First Hiscox Affidavit at Exhibit “Q”.
[32] First Hiscox Affidavit at Exhibit “R”.
[33] First Hiscox Affidavit at para 35.
[34] First Hiscox Affidavit at para 36 and Exhibit “S”.

C. The Secured Unpaid Debts Owing by Hazelton

(i) Hazelton Priority Indebtedness

14. On January 27, 2017, DUCA made available certain demand credit facilities to Hazelton to finance construction of the Hazelton Project totalling $34,460,000 (the "**DUCA Loan**").[35] As security, Hazelton granted DUCA:

(a) a first-ranking mortgage against the Real Property;

(b) a general assignment of rents; and

(c) a general security agreement, which includes a contractual right for the lender to seek a court-appointed receiver over the Property pursuant to section 13.1 of the agreement (collectively the "**DUCA Security**").[36]

15. On October 8, 2023, Hazelton breached the DUCA Commitment by failing to vacate or discharge a construction lien registered on title to the Real Property within ten days of registration.[37]

16. On November 15, 2023, DUCA delivered a letter to Hazelton explaining that DUCA had transferred the Hazelton facility to its Special Assets group due to:

(a) concerns regarding publicly available information in respect of an appointment of a court-appointed receiver and manager of "The One" project (one of Mizrahi's other development projects in Toronto);

(b) ongoing construction delays of the Hazelton Project, which resulted in the loan not being repaid by the maturity date of September 30, 2023; and

[35] First Hiscox Affidavit at para 23.
[36] First Hiscox Affidavit at paras 24 and 55(a).
[37] First Hiscox Affidavit at para 26.

(c) the inability to control closing dates of remaining units.[38]

17. On December 6, 2023, DUCA delivered the Hazelton Demand to Hazelton.[39] On January 19, 2024, DUCA commenced a receivership application in this Court to appoint a receiver and manager over all of the assets, undertakings, and properties of Hazelton.[40]

18. On February 1, 2024, DUCA assigned its rights, benefits, and interest in and to the DUCA Commitment and the DUCA Security to CEI pursuant to a debt purchase agreement. As a result, on February 9, 2024, DUCA obtained an order dismissing its receivership application without prejudice.[41]

19. Notwithstanding that Hazelton has had over four months to repay the Hazelton Priority Indebtedness, it remains outstanding.[42] As of February 29, 2024, the amount owing under the DUCA Loan (i.e., the Hazelton Priority Indebtedness) and secured by the DUCA Security is $13,015,116.36.[43]

20. The Hazelton Priority Indebtedness also includes various condominium fee payments that have been made by CEI on Hazelton's behalf. CEI is entitled to pay expenses, including the condominium fees, on behalf of Hazelton to preserve and protect its collateral pursuant to the DUCA Commitment and DUCA Security.

21. To preserve the value of Hazelton's Property and protect CEI's collateral, on March 11, 2024 and April 5, 2024, CEI made payments in the respective amounts of $31,765.17 and $38,142.89 directly to the condominium corporation, TSCC 2967, on account of condominium

[38] First Hiscox Affidavit at para 27.
[39] First Hiscox Affidavit at para 28.
[40] First Hiscox Affidavit at para 29.
[41] First Hiscox Affidavit at para 31.
[42] First Hiscox Affidavit at para 6(a).
[43] First Hiscox Affidavit at para 3(a)(A). This amount is exclusive of interest accruing from and after February 29, 2024 and legal fees and disbursements incurred and accruing before and after such date.

common expense fees that Hazelton had failed to pay when due (collectively, the "**Condominium Fee Indebtedness**").[44] The amounts paid become due and owing and are added to the principal amount owing under the DUCA Commitment.[45]

22. These payments of common expense fees are indicative of the predicament faced by CEI. CEI is the only entity that has and will be in the position in the future to lend the funds necessary to complete the Hazelton Project. It certainly has not been, and will not be, Mizrahi and the Mizrahi Group. CEI has already purchased construction lien indebtedness registered against the title to the Real Property in an effort to preserve the Hazelton Project.[46]

(ii) Hazelton Subordinate Indebtedness

23. CEI also advanced a non-revolving loan facility to Hazelton in the principal amount of $21,000,000 pursuant to the 2015 Credit Agreement.[47] As security, Hazelton granted CEI:

(a) a third-ranking mortgage against the Real Property;

(b) a general assignment of rents; and

(c) a general security agreement by Hazelton, which includes a contractual right for CEI to seek a court-appointed receiver over the Property pursuant to section 5.13 of the agreement.[48]

24. CEI granted a subordination, assignment, postponement and standstill agreement in favour of DUCA on June 22, 2017, pursuant to which CEI subordinated its third in priority mortgage to DUCA.[49]

---

[44] Reply Hiscox Affidavit at para 10.
[45] *Condominium Act*, 1998, SO 1998, c 19, s 84(1). See Reply Hiscox Affidavit at para 11.
[46] First Hiscox Affidavit at para 11, 26, 38(f), 48, 52.
[47] First Hiscox Affidavit at para 40.
[48] Reply Hiscox Affidavit at para 6.
[49] First Hiscox Affidavit at para 40; Exhibit "W".

25. The loan advanced under the 2015 Credit Agreement matured on June 30, 2020.[50]

26. On February 27, 2024, CEI delivered to Hazelton a demand letter and notice of intention to enforce security under section 244 of the BIA in relation to the Hazelton Subordinate Indebtedness.[51]

27. Notwithstanding the maturity of the loan, budget overruns and construction delays, CEI did not take steps to enforce upon its security in connection with the 2015 Credit Agreement or otherwise seek repayment of the Hazelton Subordinate Indebtedness earlier, because doing so was not permitted under the DUCA Commitment.[52]

28. Hazelton has not repaid the Hazelton Subordinate Indebtedness, which remains outstanding. As of February 29, 2024, the amount owing under the Hazelton Subordinate Indebtedness is $31,041,763.16.[53]

D. Secured Unpaid Debts Owing by Retail

(i) Retail Indebtedness

29. On November 10, 2020, CEI advanced loans to Retail in the aggregate principal amount of $2,174,130 (the "**Retail Note**"). As security, Retail granted CEI:

(a) a general security agreement, which includes a contractual right for CEI to seek a court-appointed receiver over the Property pursuant to section 12.03(j) of the agreement; and

[50] First Hiscox Affidavit at para 41. The loan maturing was subject to a 90-day extension in limited circumstances in accordance with the terms of the 2015 Credit Agreement.
[51] Reply Hiscox Affidavit at para 6.
[52] First Hiscox Affidavit at para 43.
[53] First Hiscox Affidavit at para 3(a)(B). This amount is exclusive of interest accruing from and after February 29, 2024 and legal fees and disbursements incurred and accruing before and after such date.

(b) an unlimited guarantee by Mizrahi of all obligations owing by Retail to CEI (the "**Retail Security**", and together with the DUCA Security and the Subordinate Indebtedness Security, the "**Loan and Security Documents**").[54]

30. In February 2022, $250,000 of monthly interest had accrued under the Retail Note. In accordance with its terms, after the $250,000 had accrued, Retail was required to make monthly interest payments to CEI on the last day of each calendar month thereafter. Retail failed to do so. Accordingly, as of February 28, 2022, Retail was in default of its obligation to make the required interest payments.[55]

31. On September 22, 2022, CEI delivered the Retail Demand to Retail.[56] CEI refrained from taking enforcement steps in connection with the Retail Security earlier because of the relatively small quantum of the Retail Indebtedness and the complex relationship between CEI and the Mizrahi Group.[57]

32. Notwithstanding that Retail has had at least 18 months to repay the Retail Indebtedness, it remains outstanding. As of February 29, 2024, the amount owing under the Retail Note and secured by the Retail Security is $2,854,278.[58]

E. Other Creditors and Indebtedness

33. In addition to the security granted in favour of CEI described above, Hazelton has granted security in its personal property and a second priority mortgage to Aviva for certain deposit

[54] First Hiscox Affidavit at para 34.
[55] First Hiscox Affidavit at para 35.
[56] First Hiscox Affidavit at para 36.
[57] First Hiscox Affidavit at para 37.
[58] First Hiscox Affidavit at para 3(b). This amount is exclusive of interest accruing from and after February 29, 2024 and legal fees and disbursements incurred and accruing before and after such date.

insurance indemnification obligations (subordinate to CEI's security in respect of the DUCA Commitment), securing the maximum amount of $18,500,000.[59]

34. In addition to the Hazelton Priority Indebtedness, the Hazelton Subordinate Indebtedness, and the Retail Indebtedness, Hazelton is also indebted to CEI pursuant to the 2020 Grid Note and the 2021 Grid Note, in the aggregate principal amount of $3,200,000 and $1,500,000, respectively. [60]

35. There are also certain other construction liens registered on title to the Real Property. The only entity that has been willing to meaningfully address the liens and preserve the Hazelton Project is CEI. The indebtedness relating to a construction lien registered on title by Ozz Electric Inc. on January 31, 2024 was recently purchased by CEI and the related registration on title has been removed.[61]

F. The Breakdown in the Relationship

36. CEI has lost confidence in the ability of Mizrahi Group to perform its obligations under its various agreements with CEI, including without limitation the Loan and Security Documents.[62] The Mizrahi Group has had a considerable amount of time to pay the Indebtedness, including since the issuance of the demands and the commencement of this application, but they have failed to do so.[63]

37. Hazelton's recent inability to pay its portion of the common expenses for the Hazelton Project is particularly troubling. Hazelton is responsible for almost half of the total common

[59] First Hiscox Affidavit at paras 11 and 45. Also, as described in the First Hiscox Affidavit at paragraphs 45 and 46, Retail has also granted security in its personal property in favour of Mizrahi Constantine (180 SAW) LP to secure a guarantee by Retail in favour of Mizrahi Constantine (180 SAW) LP, guaranteeing certain obligations of Sam M (180 SAW) LP Inc. to Mizrahi Constantine (180 SAW) LP to make certain contributions. These contributions are no longer required, such that no obligations are outstanding in respect of this registration.
[60] First Hiscox Affidavit at para 48.
[61] First Hiscox Affidavit at para 48; Reply Hiscox Affidavit at paras 3(d), 13-14.
[62] First Hiscox Affidavit at para 50.
[63] Reply Hiscox Affidavit at para 15(a).

expenses and TSCC 2967 relies on timely payment when due to properly maintain the Hazelton Project. Although CEI recently advanced the funds on Hazelton's behalf, Hazelton will not necessarily have the funds required to pay condominium fees going forward as and when due.[64]

38. Indeed, without the appointment of the Receiver, Hazelton's expenses will not be paid unless CEI continues to directly pay costs on account of Hazelton to preserve and protect its collateral, including condominium fees and amounts required to complete the Hazelton Project units so they can be sold. If Hazelton's expenses are not paid in a timely manner, there is a significant risk that the value of the Property will be materially diminished because of the potential safety and maintenance issues relating to not properly maintaining the building and the potential stigma that could become associated with the Hazelton Project where there are a large number of vacancies in the building because construction on the Hazelton Project units is not completed for an extended period of time.[65]

39. In addition to the defaults described above, CEI recently issued a capital call notice to MDI pursuant to the Contribution Agreement. The purpose of the capital call was to request the additional funds required to complete and sell the Hazelton Project units, which amounts were required to be paid no later than March 14, 2024.[66] MDI failed to make its required contributions, further evidencing that Hazelton will not be able to meet its obligations.[67]

40. The Mizrahi Group's failure to fund its obligations in respect of the Hazelton Project and the breakdown in the relationship between CEI and the Mizrahi Group creates significant risk that the value of the Property will be materially negatively impacted unless the Receiver is appointed

[64] Reply Hiscox Affidavit at paras 8-11.
[65] Reply Hiscox Affidavit at para 15(c)(A).
[66] First Hiscox Affidavit at paras 15 and 52, Exhibit "C". The Contribution Agreement require entitles CEI to require that CEI and MDI equally contribute capital if CEI has reasonable grounds for believing that a budget deficit is likely to take place within the next 90-day period.
[67] Reply Hiscox Affidavit at para 15(b).

to ensure that the Property is realized upon in an orderly, transparent manner for the benefit of CEI and other stakeholders.[68]

41. This would not be the first time that the assistance of a receiver was required to bring a Mizrahi-led development project to completion. Mizrahi and the Mizrahi Group are currently facing myriad of other ongoing challenges, including the development project located at Bloor Street and Yonge Street in Toronto known as the "One", which is in a Court-supervised receivership proceeding.[69]

42. There is also a real concern that the Mizrahi Group will intentionally delay or interfere with the completion and monetization of the Hazelton Project at the expense of CEI.[70] The only directors and officers of Hazelton are the respective nominees of MDI and CEI, being Mizrahi for MDI and Robert Hiscox for CEI. Decision-making in respect of Hazelton is equal among the shareholders, and the shareholders' relationship is governed by a unanimous shareholders agreement. The breakdown in the relationship has and will continue to negatively impact decision-making in respect of Hazelton.[71] With Mizrahi as a partner, there is no path to monetize the Property for the benefit of CEI and Hazelton's other stakeholders.[72]

43. CEI's intention is for the Receiver to take steps to complete the sale of units already subject to agreements of purchase and sale, to facilitate the final phase of construction of the Hazelton Project required for completion of units where necessary, and to facilitate the marketing and sale of the remaining condominium units in order to realize on the value of the Property and repay creditors. CEI anticipates that the Receiver, if appointed, will bring a motion for approval by

[68] First Hiscox Affidavit at paras 53 and 54.
[69] First Hiscox Affidavit at para 50.
[70] First Hiscox Affidavit at para 51.
[71] First Hiscox Affidavit at para 53.
[72] Reply Hiscox Affidavit at para 15(c)(B).

the court of a sales process in connection with such realization efforts and enhance transparency.[73]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

44. The only issue on this application is whether this Court should appoint KSV as Receiver over the Property. CEI submits that it is appropriate for this Court to appoint KSV as Receiver because:

(a) the technical requirements for the appointment of the Receiver under the BIA have been met; and

(b) it is just and convenient to appoint the Receiver under the BIA and CJA in the circumstances.

A. The Technical Requirements to Appoint a Receiver are Met

45. Section 243 of the BIA authorizes the Court to appoint a receiver on an application by a secured creditor over the property of an insolvent person. Subsection 243(1.1) of the BIA requires that a notice of intention to enforce security as required by section 244 of the BIA is delivered to the insolvent person prior to such application.[74]

46. There is no dispute that the technical requirements for the appointment of the Receiver have been met. CEI is the primary secured creditor of the Debtors and has standing to bring this application. Notices of intention to enforce security under s 244 of the BIA were delivered to the Debtors. The Retail Demand, Hazelton Demand, and Hazelton Subordinate Demand were

[73] First Hiscox Affidavit at para 57. With respect to Retail, CEI understands that if appointed, the Receiver would also bring a motion for approval by the court of a sale process in connection with its assets. In that respect, CEI currently intends to submit a bid as a stalking horse purchaser in connection with such process. See First Hiscox Affidavit at para 58.
[74] BIA, ss 243, 243(1.1) and 244(2).

delivered on September 22, 2022, December 6, 2023, and February 27, 2024, respectively.[75] In each case, the 10-day notice periods have expired.

47. KSV is qualified to act as Receiver in accordance with subsection 243(4) of the BIA and has provided its consent to act.[76]

B. Appointing KSV as Receiver is Just and Convenient

48. Section 101 of the CJA and subsection 243(1) of the BIA each permit the appointment of a receiver where it is "just or convenient".[77]

49. It is well-established that the extraordinary nature of the appointment of a receiver as a remedy "is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements […] The relief becomes even less extraordinary when dealing with a default under a mortgage."[78]

50. Where the creditor's security provides for the appointment of a receiver:

(a) there is no requirement for the Applicant to establish that it will suffer irreparable harm if the proposed receiver is not appointed;[79] and

(b) a receiver should be appointed where the secured creditor has lost faith in the debtor, unless there is good reason to deny the appointment.[80]

---

[75] First Hiscox Affidavit at paras 28 and 36 and Exhibits "K" and "S"; Reply Hiscox Affidavit at para 6 and Exhibit "A".
[76] BIA, ss 2 and 243(4); First Hiscox Affidavit at para 59 and Exhibit "BB".
[77] Courts of Justice Act, RSO 1990, c C.43 [CJA], s 101; BIA, s 243(1).
[78] *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, 2020 ONSC 1953 at para 43. See also *C & K Mortgage* at paras 17-18.
[79] See also *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 at paras 24 and 28 [*Carnival National*], citing *Freure Village* at para 10.
[80] *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382 at para 100 (See Schedule "C" of this Factum for a copy of this decision). See also *PricewaterhouseCoopers Inc. v Northern Citadel,* 2023 ONSC 37 at paras 92-94.

51. In this case, the Indebtedness is secured by Loan and Security Documents that expressly provide for a court-appointed receiver over the Property in the circumstances.

52. In determining whether the appointment of a receiver is “just or convenient”, the Court must consider “all of the circumstances but in particular the nature of the property and the rights and interests of all relevant parties.” [81]

53. The discretionary factors historically considered in the determination of whether it is appropriate to appoint a receiver were recently cited by Justice Osborne of this Court and include among others:

(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 where the appointment 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 balance of convenience to the parties;

(e) the fact that the creditor has the right to appoint a receiver under the documentation providing for the loan;

[81] *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ) [*Freure Village*] at para 10. See also *C & K Mortgage et al v 11282751 Canada Inc et al*, 2024 ONSC 1039 at para 16 [*C & K Mortgage*].

(f) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously;

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

(h) the conduct of the parties.[82]

54. There is no "checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient."[83]

55. In the circumstances, it is just and convenient for this Court to appoint the Receiver over the Property for the following reasons, among others:

(a) CEI's secured indebtedness is approximately $44 million and $2.8 million in relation to Hazelton and Retail, respectively;

(b) defaults have occurred and are continuing under the Loan and Security Documents;[84]

(c) CEI is entitled to the appointment of the Receiver pursuant to the terms of the Loan and Security Documents;[85]

---

[82] *C & K Mortgage* at para 19, citing *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, 2022 ONSC 6186. Courts cite *Bennett on Receivership*, 4th ed. (Toronto, Carswell, 2021) for this consolidated list of factors (See Schedule "D" of this Factum).
[83] *C & K Mortgage* at para 20, citing *Pandion* at para 54.
[84] First Hiscox Affidavit at paras 10, 49.
[85] First Hiscox Affidavit at para 55.

(d) There does not appear to be sufficient assets available to satisfy the Debtors' secured creditors;[86]

(e) MDI has failed to make its required financial contributions to Hazelton, such that Hazelton will not have the funds necessary to complete and sell the remaining Hazelton Project units or maintain the Property;[87]

(f) CEI has lost confidence in Mizrahi as a partner and developer, and the Mizrahi Group's ability to perform its obligations under its various agreements with CEI;[88]

(g) the relationship between the Mizrahi Group and CEI has broken down which has and will continue to adversely impact decision-making in respect of Hazelton and preclude monetization of the Property;[89]

(h) important decisions with respect to the completion and sale of the remaining Hazelton Project units cannot be made due to the breakdown in the relationship between the Mizrahi Group and CEI;[90] and

(i) there is a serious risk that the value of the Property will materially decline because of the potential safety and maintenance issues relating to the Hazelton Project and the potential stigma that could become associated with the Hazelton Project.[91]

[86] First Hiscox Affidavit at para 53.
[87] Reply Hiscox Affidavit at para 15(b).
[88] First Hiscox Affidavit at para 50.
[89] Reply Hiscox Affidavit at para 15(c)(B).
[90] First Hiscox Affidavit at para 53; Reply Hiscox Affidavit at para 15(c)(B).
[91] Reply Hiscox Affidavit at para 15(c)(A).

56. In addition, the appointment of a receiver is also appropriate where a debtor has failed to pay its creditors despite its creditors permitting a reasonable time for payment following the debts becoming due.[92]

57. In fact, a secured creditor seeking to appoint a receiver is subject to the good faith requirement under section 4.2 of the BIA, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings.[93] Where a secured creditor provides the debtor a reasonable length of time for re-payment and demands for payment have been issued, it objectively provides a good faith basis for the appointment of a receiver.[94] Put differently, absent an improper purpose, a secured creditor "pursuing its interests and asserting its rights within the bounds of, and for purposes squaring with, the Canadian insolvency system i.e. recovering its loans" will be considered to be acting in good faith.[95]

58. CEI seeks the appointment of the Receiver in good faith. CEI provided the Debtors with a reasonable length of time for payment and is simply pursuing its interests and asserting its contractual rights. The Debtors have had a reasonable opportunity to pay the debts owing but have not done so. Instead, the nature and extent of the debts continue to mount.[96]

59. Furthermore, the appointment of the Receiver will:

(a) allow for the completion of the sale of units already subject to agreements of purchase and sale;

---

[92] *Bank of Montreal v Sherco Properties Inc.,* 2013 ONSC 7023 at paras 47-48.
[93] *CWB Maximum Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at para 59 and BIA, s 4.2.
[94] *KingSett Mortgage Corporation v 30 Roe Investments Corp.,* 2022 ONSC 2777 at para 34.
[95] *Schendel Management Ltd*, 2019 ABQB 545 at para 35.
[96] First Hiscox Affidavit at paras 28 and 36; Reply Hiscox Affidavit at para 6.

(b) facilitate the final phase of construction of the Hazelton Project required for completion of units where necessary;

(c) facilitate the marketing and sale of the remaining Hazelton Project units in order to realize on the value of the Property and repay creditors; and

(d) preserve the value of the Property and allow for its realization in a transparent manner in the interests of all stakeholders.[97]

60. In all the circumstances, it is just and convenient to appoint the Receiver.

C. The Amended Statement of Claim

61. The Debtors chose not to file substantive affidavit evidence in response to CEI's affidavit evidence and elected not to cross-examine CEI's affiant.

62. Instead, the Debtors filed a series of short, vague affidavits from Mizrahi, the first of which contains nothing more than a bare, unsupported allegation that CEI and its principals have acted in bad faith and breached duties allegedly owed by CEI.[98] Mizrahi's affidavit and supplementary affidavit also attach a Statement of Claim and an Amended Statement of Claim, which make bare and unparticularized allegations of bad faith.

63. Weeks after Mizrahi's responding evidence was due, he also served a further supplementary affidavit with the bare assertion that the appointment of the Receiver was "unnecessary". [99] Mr. Hiscox's evidence clearly demonstrates that the assistance of an

[97] First Hiscox Affidavit at para 57.
[98] Affidavit of Sam Mizrahi sworn April 5, 2024 ("**First Mizrahi Affidavit**") at para 3 and Exhibit "A".
[99] Further Supplementary Affidavit of Sam Mizrahi affirmed April 22, 2024 ("**Further Supplementary Mizrahi Affidavit**"). The service of the Further Supplementary Affidavit was purely tactical, and contains evidence that was available at the time that the First Mizrahi Affidavit and the Second Mizrahi Affidavit were affirmed. It should be disregarded by the Court or given very little weight.

independent, court-appointed officer is needed and Mizrahi's own affidavit evidence only bolsters that need.

64. For example, Mizrahi seems to suggest in his evidence—though it's not entirely clear—that *if* the sale of certain condominium units close and *if* further occupancy is achieved, the obligations on Hazelton will be lower and the Indebtedness reduced (though *not* eliminated).[100] However, Mizrahi neglects to contend with the reality that (1) the units are not closed (2) there is no obligation to close, and in some cases, the units have not even been sold much less finished so that they can be sold,[101] (3) to close various units, significant discounts and credits have been offered[102] and (4) even if the units do close, *it will not eliminate the Indebtedness.* The total Indebtedness owing exceeds $44 million, and the total revenue Mizrahi *hopes* Hazelton will receive from the sale of units is approximately $27 million, none of which takes into the account the additional costs to complete the Hazelton Project, carry the debt while the Hazelton Project is being completed, and pay off the existing unsecured creditors, much less that almost $13 million of that amount is entirely speculative and relates to units that have not even been sold.[103]

65. In other words, Mizrahi's hopes for revenue would barely make a dent in the outstanding financial obligations even if those hopes somehow materialized in short order and do nothing to address the breakdown in the relationship. Mizrahi himself does not assert to the contrary. His vague and speculative evidence about what could or should have been does not detract from the fact that the Debtors have defaulted on their secured lending obligations and CEI is entitled to seek the appointment of the Receiver in the circumstances under the relevant Loan and Security

---

[100] Further Supplementary Mizrahi Affidavit at para 2.
[101] Mizrahi led no evidence that the units are in a position to close because there is no evidence that notices of occupancy have been issued for each unit, that standard licence fees have been paid, or that the relevant agreements have been signed.
[102] See, for example, Further Supplementary Mizrahi Affidavit Exhibit "A", which shows that the purchaser of unit 402 has been credited $600,000 because the unit is not habitable and that unit 901 has been discounted $1,000,000.
[103] Hazelton is insolvent because there are not enough funds to pay expenses and creditors and Mizrahi did not lead any evidence to support that the deposits or funds are available (which they are not).

Documents. Furthermore, the Amended Statement of Claim also addresses Mizrahi's allegations about occupancy and closing, such that a court will have the opportunity to fully consider the matter on a full evidentiary record.[104]

66. Mizrahi's bare allegations of bad faith and the mere existence of the Amended Statement of Claim do not detract from the need and propriety of the appointment of the Receiver.

67. The courts have been clear that allegations of bad faith against the applicant in a receivership application that are unproven, uncertain or vague will not lead to a finding of bad faith.[105]

68. In *Vancouver Coastal,*[106] the Supreme Court of British Columbia recently considered a contested receivership application where the respondent argued that the receivership order should not be granted because it had filed a civil claim against the applicant in the weeks leading up to the hearing. In the civil claim, the respondent alleged breach of the duty of honest contractual performance and that the applicant and other defendants conspired to cause the respondent to suffer financial distress so as to create conditions for the applicant's "hostile takeover" of the respondent's operations. The respondent sought damages and an injunction to restrain the applicant from seeking the appointment of a receiver.

69. In appointing a receiver, the Court rejected the respondent's arguments because the civil claim did not attack the validity of the loan and security documentation or the amount of the debts. The civil claim simply sought damages. In particular, the Court held:

> **Yet, the relief sought in the NOCC [Notice of Civil Claim] does not attack the validity of the loan and security documentation; nor is the amount of the debt and loans put in dispute**. The NOCC only seeks a *stay* of any enforcement proceeding. What I

[104] Further Supplementary Mizrahi Affidavit at para 3.
[105] See for example, *Carnival National* at para 32, *Pandion Mine Finance Fund LP v Otso Gold Corp.*, 2022 BCSC 136 at paras 62-64 [*Pandion*] and *Vancouver Coastal Health Authority v Seymour Health Centre Inc.*, 2023 BCSC 1158 at paras 120-123 [*Vancouver Coastal*].
[106] *Vancouver Coastal Health Authority v Seymour Health Centre Inc,* 2023 BCSC 1158 [*Vancouver Coastal*].

> take from this pleading and counsel's submissions is that Seymour Health's overall strategy appears to be that it hopes to prosecute its claim against the defendants and, assuming the petition is converted to a trial, file a counterclaim to this proceeding. From there, if and when Seymour Health is successful in proving its allegations, the damage award will be offset against the amounts owing to VCH.
>
> […] **What the defendant seeks is not really a defence to the debt or contractual claim to security; rather, it is an entirely separate cause of action that may give rise to a counterclaim to set off against the debt owing**.[107] (**emphasis added**)

70. In deciding to appoint the receiver in that case, the Court cited *Western Holdings,*[108] where the British Columbia Court of Appeal stated that even where there is a bona fide dispute concerning the debt and/or security, a receiver may be appointed in circumstances where there is evidence of serious potential prejudice or jeopardy to a creditor's rights to recover under its claim and security interest.[109] The Court in *Vancouver Coastal* then went on to distinguish the cases cited by the respondent to refuse or adjourn the appointment of a receiver pending resolution of a *bona fide* dispute since in *Vancouver Coastal* – as in this case – the property subject to the applicant's security was in jeopardy and there were important interests at risk, including those of the applicant and others.[110]

71. Similarly, the Supreme Court of British Columbia in *Pandion Mine*[111] also recently appointed a receiver in the face of litigation by a shareholder of the respondent alleging conspiracy and bad faith. In appointing a receiver, the Court held:

> **Brunswick's [the plaintiff shareholder of the respondent] allegation that Pandion engaged in a conspiracy is disputed. I**

---

[107] *Vancouver Coastal* at paras 125-126. In addition to seeking a "*stay* of any enforcement proceeding" the respondent plaintiff's notice of civil claim sought millions of dollars in damages against the applicant defendant: see *Vancouver Coastal* at para 2.
[108] *Western Holdings Corp v Brosseuk,* 2022 BCCA 32.
[109] *Vancouver Coastal* at paras 127.
[110] *Vancouver Coastal* at paras 128-9.
[111] *Pandion Mine Finance Fund LP v Otso Gold Corp*, 2022 BCSC 136.

> **am unable to determine on this application whether it is well founded**.
>
> **I cannot find that Pandion is pursuing its claim against Otso and seeking appointment of a receiver in bad faith**. Whether or not Pandion is liable to Brunswick, it is undisputed that Otso owes more than US$25 million to Pandion. It is undisputed that Pandion has the status of a secured creditor. (**emphasis added**)

72. Similar to *Vancouver Coastal*, Retail does not attack the validity of the Loan and Security Documents or the amount of the Indebtedness in the action—it simply seeks damages. Retail does not challenge the appointment of the Receiver and importantly Hazelton is not even a party to that action. Simply put, baseless and unparticularized allegations of bad faith in the tactically issued Amended Statement of Claim are not reasons to deny the appointment of the Receiver. In any event, the appointment of the Receiver will not prejudice or end the plaintiffs' ability to advance the claims set out in the Amended Statement of Claim against CEI and its principals, which will be vigorously defended.

PART IV - ORDER REQUESTED

73. CEI submits that for these reasons, it is just and convenient to appoint KSV as Receiver of the Property. CEI respectfully requests an order substantially in the form attached at Tab 1.A of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2024.

Cassels Brock & Blackwell LLP

CASSELS BROCK & BLACKWELL LLP
Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
jdietrich@cassels.com

Jessica Zagar LSO #: 57305Q
Tel: 416.869.5449
jzagar@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007
2. *Bank of Montreal v Sherco Properties Inc.,* 2013 ONSC 7023
3. *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ)
4. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, 2020 ONSC 1953
5. *Bennett on Receivership*, 4th ed. (Toronto, Carswell, 2021)
6. *C & K Mortgage et al v 11282751 Canada Inc et al*, 2024 ONSC 1039
7. *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, 2022 ONSC 6186
8. *CWB Maximum Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137
9. *KingSett Mortgage Corporation v 30 Roe Investments Corp.,* 2022 ONSC 2777
10. Pandion Mine Finance Fund LP v Otso Gold Corp., 2022 BCSC 136
11. *PricewaterhouseCoopers Inc. v Northern Citadel,* 2023 ONSC 37
12. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382
13. *Schendel Management Ltd*, 2019 ABQB 545
14. *Vancouver Coastal Health Authority v Seymour Health Centre Inc.*, 2023 BCSC 1158
15. *Western Holdings Corp v Brosseuk,* 2022 BCCA 32

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Duty of Good Faith

Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

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.

Trustee to be appointed

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

Place of filing

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

Orders respecting fees and disbursements

(6) 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.

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.

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

Injunctions and receivers

101 (1) 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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Condominium Act, 1998, SO 1998, c 19

Contribution of Owners

84 (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration. 1998, c. 19, s. 84 (1).

SCHEDULE “C”

See attached.

CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382
COURT FILE NO.: CV-18-607303-00CL
COURT FILE NO: CV-18-00609634-00CL
DATE: December 10, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF 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 JUJSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS (RICHMOND HILL) LIMITED PARTNERSHIP, ATLAS SHOULDICE HEALTHCARE LTD., ATLAS SHOULDICE HEATHCARE LIMITED PARTNERSHIP, ATLAS HEALTHCARE (BRAMPTON) LTD. and ATLAS BRAMPTON LIMITED PARTNERSHIP, Respondents

AND RE:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS SHOULDICE HEALTHCARE LTD., ATLAS HEALTHCARE (BRAMPTON) LTD., ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS HEALTHCARE ASSET MANAGEMENT LTD., ATLAS GLOBAL HEALTHCARE LTD., GRIGORAS DEVELOPMENTS LTD. AND ATLAS INVESTMENTS AND SECURITIES COPORATION

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Preger* and *Linda Corne*, for Romspen Investment Corporation

Clifton Prophet, for Meridian Credit Union Limited

Marc Wasserman and *Mary Paterson*, for the Atlas Respondents and the Applicants under the *Companies' Creditors Arrangement Act* application

Robert Chadwick and *Andrea Harmes*, for PointNorth Capital Inc., the Proposed DIP Lender

Eric Golden, for Ernst & Young Inc., Proposed Receiver

Mario Forte, for KSV Kofman Inc., the Proposed Monitor

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

[2] In the first application (the "Receivership Application"), Romspen Investment Corporation ("Romspen") applies for the appointment of Ernst & Young Inc. as receiver, manager and construction lien trustee of the undertaking, assets and properties of the Respondent, Atlas Healthcare (Richmond Hill) Ltd., and as receiver and manager of the undertakings, assets and properties of the remaining Respondents including Atlas Healthcare (Richmond Hill) Limited Partnership ("Richmond Hill"), Altas Shouldice Healthcare Limited Partnership ("Shouldice") and Altas Brampton Limited Partnership ("Brampton") (collectively, Richmond Hill, Shouldice and Brampton are referred to as the "Debtors").

[3] In the second application (the "CCAA Application"), certain corporations related to the Debtors including the general partners of the Debtors (collectively, the "CCAA Applicants") request certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") including an initial stay of proceedings in respect of the Debtors and approval of a proposed debtor-in possession facility in respect of Richmond Hill (the "DIP Facility").

[4] On December 3, 2018, the Court advised the parties that the CCAA Application was denied and that the Receivership Application was granted for written reasons to follow. This Endorsement sets out the Court's reasons for these determinations.

Factual Background

The Debtors

[5] Richmond Hill is the owner of a 5.59 acre parcel of land that fronts on the west side of Brodie Drive and the east side of Leslie Street in Richmond Hill, Ontario and has a municipal address of 25 Brodie Street (the "Richmond Hill Property").

[6] Richmond Hill is currently building a six-story medical office building on the Richmond Hill Property (the "Project"), which is addressed in greater detail below.

[7] Shouldice owns a 22.467 acre parcel of land at 7750 Bayview Avenue (the "Shouldice Property") in Markham, Ontario. The Shouldice Property is currently improved with a three-storey hospital and is occupied by Shouldice Hospital Limited under a lease (the "Hospital Lease").

[8] Atlas owns a 4.59 acre parcel of land at 241 Queen Street East in Brampton, Ontario (the "Brampton Property"). The Brampton Property is currently improved with a single-storey commercial building. The building is currently vacant.

[9] In this Endorsement, the Richmond Hill Property, the Shouldice Property and the Brampton Property are referred to collectively as the "Properties".

Financing of the Project

[10] The Project has been financed by a combination of loans from third-party lenders and equity contributions of Richmond Hill, representing equity contributed principally by the limited partners of Richmond Hill.

[11] At the present time, the principal financing arrangements in place are the following:

(1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and

(2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

[12] Pursuant to a credit agreement dated March 2, 2017 (the "Meridian Credit Arrangement"), Meridian extended a loan in the maximum principal amount of $59 million to Richmond Hill. In addition, pursuant to an agreement dated July 27, 2018, Meridian extended an interim loan of $4.4 million to Richmond Hill. As of November 7, 2018, Richmond Hill owed $43,371,985 under these loan arrangements and certain other facilities extended by Meridian (collectively, the "Meridian Loan"). Interest has not been paid on the Meridian Loan since August 2018 and continues to accrue. As mentioned, the Meridian Loan is secured by a first ranking charge, the Meridian Charge, in the principal amount of $75 million.

The Romspen Loan Arrangements

[13] The Romspen loan arrangements comprise a loan made to the Debtors and an outstanding loan acquired by Romspen, which will be addressed in turn.

The Romspen Loan

[14] Pursuant to a financing commitment dated December 11, 2017, as amended by a supplement dated June 10, 2018 (collectively, the "Commitment"), Romspen loaned the amount of $81.2 million to the Debtors on a joint and several basis (the "Romspen Loan"). The Romspen Loan was evidenced, among other things, by a joint and several promissory note of the

Debtors in the principal amount of $81.2 million. Of this amount, approximately $49 million was loaned to Shouldice and $10 million was loaned to Brampton, in each case to repay all outstanding debt in respect of these properties. In addition, $19.5 million was loaned to Richmond Hill to partially repay the Bridging Finance Loan (defined below) and $3,280,500 was loaned to Richmond Hill for use in respect of the Project.

[15] The Romspen Loan is fully advanced. Interest accrues on the Romspen Loan at the rate of 11.45 percent per annum. As of November 1, 2018, according to a schedule derived from the records of Richmond Hill, $22,382,788 was owed in respect of the monies loaned to Richmond Hill (I note that Romspen calculates a slightly larger amount that is used below but the difference is not material for these proceedings), $49,324,156 was owed in respect of the monies loaned to Shouldice, and $10,071,200 was owed in respect of the monies loaned to Brampton, for a total of $81,778,143 owing on a joint and several basis by the Debtors. Interest has not been paid on the Romspen Loan since August 2018 and is accruing at the rate of slightly less than $1 million per month.

The Bridging Finance Loan and the Bridging Charge

[16] The Bridging Charge secures a loan made by Sprott Bridging Income Fund LP to Richmond Hill pursuant to a commitment letter dated February 9, 2016, as amended. This loan was originally in the principal amount of $15,840,201 but was subsequently increased in stages to $40,850,000 (the "Bridging Finance Loan"). In this Endorsement, the Romspen Loan and the Bridging Finance Loan are collectively referred to as the "Loan".

[17] Pursuant to the Commitment, Romspen loaned Richmond Hill $19.5 million, which was used to reduce the outstanding amount of the Bridging Finance Loan. The outstanding balance of the Bridging Finance Loan and the security therefor, including the Bridging Charge, were then acquired by Romspen by way of a transfer upon payment by Romspen to Bridging Finance Inc. of $19,590,206.47.

[18] At the present time, Romspen says approximately $25 million is owing in respect of monies advanced to Richmond Hill. There is an issue regarding whether the amount secured by the Bridging Charge is limited to the amount outstanding at the time of the transfer of the Bridging Finance Loan to Romspen plus accrued interest or is the principal amount of the Bridging Charge, being $40.85 million. However, this is not an issue to be determined in these proceedings. I have proceeded on the basis that the total amount owing by the Debtors jointly and severally secured against the Properties is the amount of the Romspen Loan and therefore the resolution of this issue does not affect the analysis or the determinations made below.

The Romspen Security in the Properties

[19] As security for the Bridging Finance Loan and the Romspen Loan, Romspen holds the following:

(3) a second charge on the Project in the principal amount of $40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the "Bridging Charge");

(4) a third charge against the Project in the principal amount of $5 million (the "Romspen Charge");

(5) a subordinate general assignment of rents of the Project;

(6) a first charge over the Shouldice Property in the principal amount of $81.2 million (the "Shouldice Charge"), together with a general assignment of rents and a specific assignment of the Hospital Lease; and

(7) a first charge over the Brampton Property in the principal amount of $81.2 million (the "Brampton Charge") together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

[20] The Project is over budget. Based on the most recent report dated November 23, 2018 of Pelican Woodcliff Inc. ("Pelican") (the "Pelican Report"), the Project's cost consultant, the net project budget has increased by approximately $39,000,000 from $83,000,000 to $122,000,000 (including holdback and reserves).

[21] Meridian stopped funding the Project under the Meridian Loan in early 2018 due to increases in the construction budget. Since then, the Debtors have funded construction costs, including the costs of certain remediation work required as a result of cracks in the slab-on-grade, which are the subject of a dispute between Richmond Hill and Dineen Construction Corporation ("Dineen"), the former general contractor for the Project.

[22] The Project is also behind schedule. Based upon the latest construction schedule, construction was to have been completed on October 1, 2018. However, at the present time, it is only 80 percent complete. Moreover, construction has effectively ceased, apart from a small amount of work that is proceeding as a result of settlement agreements with three lien claimants, which have enabled these trades to continue to work on the Project.

[23] Richmond Hill originally contracted with Dineen as the general contractor for the Project. In August 2018, Dineen terminated its contract, prompted by Dineen's concern for payment after learning that Meridian was no longer advancing funds to finance the construction and that Meridian had refused to confirm that it would advance the funds necessary to complete the Project.

[24] Between August 3, 2018 and September 28, 2018, Dineen and eleven trades filed construction liens totalling $16,542,335.75 against the Richmond Hill Property (collectively, the "Liens"). The largest Lien was registered by Dineen. Richmond Hill says Dineen's Lien claim duplicates the other claims of the trades with respect to the Project. Richmond Hill says that currently approximately $8 million is required to discharge all the Liens in respect of the Project. Romspen and Meridian acknowledge there is duplication in the Lien claims.

[25] Because the Loan was fully advanced and Meridian had stopped advancing monies under the Meridian Loan, the Debtors, and in particular Richmond Hill, have experienced a liquidity crisis commencing August 2018. Since that time, the Debtors have made serious, but unsuccessful, efforts to enter into a sale or refinancing transaction that would pay out Romspen and Meridian.

[26] Richmond Hill has selected a different general contractor, Greenferd Construction Inc. ("Greenferd"), to manage the interior works to make the Project suitable for the future tenants, referred to as the "Fit-Out Works". Richmond Hill has recently also engaged Greenferd to take over the role of general contractor for the remaining construction of the Project.

[27] Richmond Hill says that it now expects substantial completion of the Project to occur during May 2019. In view of the construction delay, Richmond Hill has sought and obtained signed acknowledgements regarding the new target occupancy date from future tenants who have contracted for 72 percent of the gross leasable space in the Project and who represent 76 percent of the total projected rent roll. These acknowledgements have provisions that permit Richmond Hill to extend the commitments of these tenants to May 30, 2018.

[28] Meridian's consultant on the Project, Glynn Group Incorporated ("Glynn"), has reviewed the Pelican Report and has made a number of comments, including the following.

[29] First, Glynn agrees with Pelican that construction of the Project will only be back up and running in a productive manner by the middle of January 2019. Second, given the volume of construction remaining, the Project requires "extremely intensive" supervisory, scheduling and management oversight" to achieve the timelines contemplated by Pelican and the Debtors. Third, the selection of a new general contractor/construction manager is "pivotal" to the success of the Project going forward. Fourth, the scenario of a new general contractor/construction manager working with the existing trades is the best scenario and is contemplated by the budget reviewed by Pelican. However, Pelican was also of the opinion that it may not be possible to convince these trades to return to the Project given the recent history of non-payment and the existence of the Liens.

Demands under the Loan and the Meridian Loan

[30] The registration of the Liens and the failure of the Debtors (and the other guarantors under the Loan) to remove the Liens from title to the Richmond Hill Property constitutes a default under the Commitment under and each of the Meridian Charge, the Romspen Charge, the Shouldice Charge, the Brampton Charge and the Bridging Charge (collectively, the "Charges").

[31] The existence of the Liens on the Richmond Hill Property also constitutes a serious material adverse change under the Loan. Section 16.16 of the Commitment provides that if, in the opinion of Romspen, an adverse material change occurs in respect of any of the Debtors, its business, a charged property or Romspen's security, the whole balance of the Loan becomes immediately due and payable and becomes enforceable. The Bridging Finance Loan and the Meridian Credit Agreement contain similar provisions.

[32] In addition, the failure to pay municipal taxes when due also constitutes a default under the Commitment and the Charges. It is understood that tax arrears are owing in respect of each of the Properties and that further arrears are being incurred.

[33] On September 12, 2018, Romspen made demand on the Debtors (among others) and issued notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). On November 12, 2018, Meridian also made demand on Richmond Hill, among others, and issued similar notices under s. 244 of the BIA. The Debtors do not deny that they are in default under the Commitment, the Bridging Finance Loan, the Meridian Loan and the Charges.

[34] The Debtors also do not dispute that each Charge held by Romspen and Meridian in respect of the Properties provides for the appointment of a receiver in the event of default under the Loan and the Meridian Loan. The Romspen Charge also expressly contemplates the appointment of a construction lien trustee under the *Construction Act*, R.S.O. 1990, C. 30 (the "CA") in the event of default.

The Receivership Application

[35] As mentioned, in the Receivership Application, Romspen seeks the appointment of a receiver over the properties and assets of Richmond Hill having the necessary powers to engage third parties to complete the construction of the Project. Romspen also seeks the appointment of a receiver over the assets of Shouldice and Brampton.

[36] The receivership order sought by Romspen included the power to sell the assets of each of the Debtors. However, the principal purpose of the Romspen application in respect of Richmond Hill is the appointment of a receiver to supervise the completion of construction of the Project. Romspen also says the principal purpose of the appointment of a receiver over the assets of Shouldice and Brampton is to ensure that the priority of funds advanced under the proposed Receivership Financing (defined below) is preserved in respect of these Properties as well as the Richmond Hill Property. Accordingly, Romspen has indicated that it is prepared to exclude the power of sale in respect of the Properties from any order that the Court may grant.

[37] Romspen has filed a report of Ernst & Young Inc., the proposed receiver (the "Proposed Receiver"), which sets out its proposed course of action. The Proposed Receiver states that it intends to engage Elm Development Corp. as the construction manager for the Project.

[38] Meridian supports the Receivership Application of Romspen and has committed to the Receivership Financing (defined below) with Romspen. In this Endorsement, the term "Receivership Applicants" refers to Romspen and Meridian in the circumstances in which they join in making the same submissions in these proceedings.

The Receivership Financing

[39] Romspen and Meridian have provided the Court with a signed term sheet for a joint financing in the amount of $35 million to fund the proposed receivership (the "Receivership Facility"). The following are the principal terms of this Facility.

[40] The principal amount of the Facility of $35 million is available in two tranches – a tranche of $15 million to be provided by Romspen (the "Romspen Tranche") and a tranche of $20 million to be provided by Meridian (the "Meridian Tranche"). The Meridian Tranche is to be available only after specified construction work described in a schedule to the Pelican Report (although the term sheet refers to a prior Pelican report dated October 21, 2018) is completed, in which event the loan/value covenant under the Meridian Credit Agreement would be brought into compliance permitting further advances under that Agreement.

[41] The Receivership Facility would have a one-year term, and would bear interest at a rate of 15 percent under the Romspen Tranche and at the rate provided for under the Meridian Credit Agreement for the Meridian Tranche. The Receivership Applicants say this would result in a blended rate of approximately nine percent.

[42] Advances under the Romspen Tranche of the Receivership Facility are to be secured by a charge ranking behind the Meridian Charge but ahead of all other charges on the Properties, including the Liens. Advances under the Meridian Tranche are to be secured on the Richmond Hill Property in priority to all other charges on that Property.

[43] The Receivership Facility contemplates fees of three percent of the maximum amount of the Romspen Tranche to Romspen and of $170,000 to Meridian.

The CCAA Application

[44] In addition to opposing the Receivership Application, the CCAA Applicants, which effectively includes the Debtors, have brought an application for certain relief under the CCAA, including an initial stay of proceedings and the appointment of KSV Kofman Inc. as the Monitor in respect of the proposed proceedings. The order sought also includes approvals of the DIP Facility and related charge (the "DIP Charge"), of a financial advisor agreement dated October 19, 2018 between Atlas Global Healthcare Ltd., one of the CCAA Applicants, and FTI Capital Advisors – Canada ULC ("FTI") and a related charge (the "FTI Charge"), of a directors' and officers' charge in the aggregate amount of $500,000, and of an administration charge in the aggregate amount of $1.5 million.

The DIP Facility

[45] In the CCAA Application, the CCAA Applicants have included a signed term sheet dated as of November 26, 2018 respecting the DIP Facility between PointNorth Capital (PNG) LP and PointNorth Capital (O) LP (collectively, "PointNorth"), as lenders on behalf of certain funds and accounts (collectively "PointNorth"), on the one hand, and each of the CCAA Applicants, on the other. The following sets out the principal terms of the DIP Facility.

[46] The DIP Facility is a non-revolving facility that accrues interest at 15 percent per annum compounded monthly and has a term of one year, subject to earlier termination under certain circumstances. The total availability under the DIP Facility is $50 million to be funded in two equal tranches – the first upon the issuance of the initial order sought under the CCAA including approval of the DIP Facility and the second on or about February 1, 2019. The DIP Facility also includes provision for an additional loan of up to $2,830,000 to cover overrun construction costs (the "Bulge Facility").

[47] The DIP Loan requires payment of a commitment fee of $750,000, a monthly administration fee of $50,000 and an early exit payment fee on repayment of any portion of the DIP Facility to top up aggregate interest payments to $6,875,000.

[48] The DIP Facility contemplates the following use of proceeds: (1) to pay advisory, consultant and legal fees of the lenders, the CCAA Applicants and the Monitor; (2) to pay interest, fees and other amounts owing under the DIP Facility; (3) to fund the working capital requirements of Richmond Hill and property taxes and insurance of the other Debtors during the CCAA proceedings; and (4) to fund the costs to complete the Project in accordance with the budget for the Project, estimated to be $28.261 million plus certain amounts to address certain Lien claims.

[49] The DIP Facility contemplates a charge over all the property and assets of the CCAA Applicants, including the Richmond Hill Property, ranking prior to all other charges other than the Meridian Charge. Accordingly, the DIP Facility requires a charge ranking behind the security in favour of Meridian on the Richmond Hill Property but ahead of the security in favour of Romspen on each of the Properties. Further, the DIP Facility contemplates subordinate charges over a fourth property (the "Mississauga Property") that is not subject to any security in favour of either Meridian or Romspen.

Applicable Law

[50] The appointment of a receiver and manager is governed by s. 43 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, both of which provide that the Court may appoint a receiver where it is "just or convenient" to do so. Although s. 68 of the CA does not specify that the requirement for the appointment of a construction lien trustee is satisfaction of the "just or convenient" test, Ontario courts have relied on this test in making such an appointment: see, for example, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CanLII 31188 (Ont. S.C.).

[51] It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto: see, for example, *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. C.J. (Gen. Div.)), at para. 11.

[52] The granting of a stay of proceedings on an initial application under s. 11.02(1) of the CCAA requires the applicant demonstrate that it is a "debtor company" as defined in s. 2(1) of the CCAA and that circumstances exist that make the order appropriate.

[53] For this purpose, I adopt the following description of the purpose of the CCAA in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at p. 88:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the

> Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

[54] There is no dispute that each of the CCAA Applicants are debtor companies for the purposes of the CCAA. Further, each of the Debtors is insolvent in that, regardless of the values of the Richmond Hill Property on completion of the Project, and of the Shouldice Property after redevelopment of that Property, they are currently unable to meet their respective obligations as they fall due.

[55] In the present case, because the CCAA Application also requires approval of the DIP Facility at this time, the provisions of s. 11.2 of the CCAA governing the approval of any charge to secure debtor-in-possession financing, while not technically applicable unless the CCAA Application is granted, also inform the determinations made in this Endorsement. In this regard, s. 11.2(4) provides that, among other things, in deciding whether to approve such a charge, a court is to consider the following factors:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report, if any.

Analysis and Conclusions

[56] There is no obvious priority of consideration of the Receivership Application and the CCAA Application. Moreover, each must be judged independently on its own merits. It is at least theoretically possible that each application could be denied. However, as a practical matter, the parties require that the Court grant the relief sought in one of the applications in order that construction of the Project can restart under the supervision of either a court-appointed receiver or Richmond Hill as a debtor-in-possession. Further, the considerations respecting the merits of each application are broadly similar. Accordingly, I propose to address the considerations raised by the parties first and then to set out my determinations regarding the applications.

[57] The considerations raised by the parties fall broadly into four categories – operational issues, the nature of the property involved, the respective rights and interests of the parties and the respective costs of the prospective proceedings. I will deal with each of these considerations in turn.

Operational Issues Pertaining to the Competing Applications

[58] The CCAA Applicants have raised two considerations that they urge the Court to take into account pertaining to the manner in which it is proposed to conduct the remaining construction of the Project: (1) the comparative feasibility of the respective financial plans of the parties; and (2) the comparative feasibility of the respective construction plans of the parties. I will address each of these considerations separately before addressing whether one of the operational plans is demonstrably superior to the other.

The Competing Financial Plans

[59] The CCAA Applicants argue that their financial plan is more realistic than the Romspen receivership plan, which they suggest is unrealistic in the sense of not feasible.

[60] The financial plan of the CCAA Applicants contemplates an availability of $50 million under the DIP Facility. In the current cash flows provided to the Court, which also form the budget for the purpose of the DIP Facility, Richmond Hill would have a cushion of approximately $5 million to cover cost overruns. In addition, the DIP Facility provides for the possibility of the Bulge Facility to cover further cost overruns.

[61] The financial plan of the proposed receivership is based on the Receivership Facility. It is limited to $35 million, of which the Meridian Tranche of $20 million is available only if the hard construction costs do not materially exceed those contemplated in a schedule to the Pelican Report. The Receivership Facility also does not have any significant amount of cushion for cost overruns. However, each of Romspen and Meridian are of the view that these costs are achievable and that they will deal with any unanticipated cost overruns. They are also of the view that the budget of the CCAA Applicants includes certain costs in amounts that are either unnecessary or larger than necessary.

[62] The principal differences between the two plans pertain to lower interest costs and professional fees of the Receivership Financing as well as a different view of the amounts required to pay the Lien claimants and a larger cushion for contingencies under the DIP Facility.

[63] While there is some benefit in the greater flexibility provided by the DIP Facility, I am not persuaded that, on balance, the financial plan for the receivership is unrealistic, as the CCAA Applicants suggest. It is consistent with the estimate of capital costs to completion of Pelican, Richmond Hill's own quantity surveyor, which the CCAA Applicants also use in their budget. Those capital costs have also been reviewed and approved by Meridian's quantity surveyor. Further, as Romspen acknowledges, the terms of the Receivership Financing, as well as the limited scope of the proposed receivership order in respect of Shouldice and Brampton, effectively require Romspen to fund any cost overruns provided they will translate into increased equity in the Project. In addition, as mentioned, a principal difference between the two plans is a more conservative estimate of certain payments (i.e. involving larger payments) in the financial

plan of the CCAA Applicants. It is not possible to estimate these latter costs with any degree of certainty at the present time.

[64] Based on the foregoing assessment of the considerations raised by the parties, I conclude that the evidence before the Court does not establish that the financing plan of the Receivership Applicants is unrealistic in the sense that it is not feasible or that the financing plan of the CCAA Applicants is materially better than the plan of the Receivership Applicants.

The Competing Construction Plans

[65] The CCAA Applicants also argue that their construction plan is more reliable than that of the proposed receivership. In particular, the CCAA Applicants argue that they are better placed to get the construction restarted because of their prior familiarity with the construction plan and schedule, as well as their relationship with the trades. Romspen and Meridian say that Elm is experienced in workout construction projects and is therefore more than capable of restarting the Project in a reasonable time.

[66] I do not think that the record provides a basis for preferring one construction plan over the other for the following reasons.

[67] First, while Richmond Hill has more experience of, involvement in, and knowledge of, the Project, this cuts both ways. Under its supervision, the capital costs of the Project have increased very significantly. While Richmond Hill disputes the $38 or $39 million figure of Pelican, it acknowledges at least $32 million in cost overruns. There are, therefore, valid grounds for concern regarding the ability of Richmond Hill's management to control construction costs. In addition, under Richmond Hill's supervision, the trades previously working on the Project have ceased working and registered construction liens. A decision will have to be made on an individual trade basis whether to settle with, or to replace, the trade. This may be affected in part by the state of the current relationship between Richmond Hill and each of the affected trades.

[68] Second, Richmond Hill has been forced to engage a new general contractor for the construction, Greenferd. Both Greenferd and Elm appear to have a similar degree of familiarity with the Project and a similar challenge of "getting up to speed". I cannot find that Elm is any more of a risk than Greenferd on the record before the Court.

[69] Third, the more aggressive construction schedule proposed by Richmond Hill in the affidavit of Peter Grigoras, sworn November 14, 2018 (the "Grigoras Affidavit"), is not consistent with the opinion of Pelican, its own quantity surveyor. As noted above, Pelican is of the view that construction would restart in early January and that substantial performance would not be achieved until late June 2019. I see no basis for concluding that there will be no "ramp-up" time under a CCAA proceeding, as the CCAA Applicants suggest.

[70] Fourth, the CCAA Applicants say the Court should be mindful of the specialized nature of the Project as a hospital and the fact that Richmond Hill has engaged specialized employees and consultants to address the complicated issues associated with construction of such a building. However, to the extent that Richmond Hill has engaged any such individuals as employees or consultants, a receiver would also be in a position to engage them to receive the benefit of their

expertise. The real significance of this consideration, if any, lies in the increased costs that would be incurred beyond those currently contemplated by the Receivership Facility but are apparently included in the budget used for the DIP Facility.

[71] Fifth, the CCAA Applicants also suggest that the involvement of OMERS, as an investor in PointNorth, and of Dream Alternatives Lending Services LP, as a participant in the DIP Facility, is a significant advantage. They suggest that the expertise of these organizations will translate into better cost administration and the availability of construction expertise. While such involvement would be desirable, there is nothing to demonstrate that such benefits will accrue to the Project. Moreover, each of PointNorth and Romspen has expertise in the administration of construction projects in a workout situation and an incentive to require careful oversight.

[72] Lastly, while I agree that, in certain circumstances, a debtor-in-possession restructuring may impart greater confidence in the financial stability of the debtor than a receivership, I am not persuaded that this is an important consideration in the present case. The liquidity problems of Richmond Hill have been transparent to all of the trades working on the Project for some time and to the future tenants. It is not clear that a CCAA proceeding would restore confidence in Richmond Hill if the same management continued to be involved with the Project, even with a new general contractor.

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

[73] Each of the proposed plans for completing the Project of the Receivership Applicants and the CCAA Applicants carries its own risks. I have considered whether, when viewed in their entirety, the construction and financing plans of one of these parties is materially superior to the other, or more credible than the other, such that this should be a consideration to be taken into account in the Court's determination. Given the evidence before the Court, I am not persuaded, however, that the plan of either the CCAA Applicants or the Receivership Applicants is materially superior to, or more credible than, the other. In particular, I cannot conclude that either the CCAA Applicants' plan or the Receivership Applicants' plan is more likely to achieve construction completion on time and on budget. Given the number of variables involved, any such determination would be highly speculative at this time. Nor do I think that the CCAA Applicants have demonstrated that the Receivership Application, if granted, will result in the Project failing to be completed, as the CCAA Applicants suggest. Accordingly, I do not consider the operational features of the plans of the parties to be a significant consideration weighing in favour of either the CCAA Application or the Receivership Application.

The Nature of the Property

[74] An important consideration in this proceeding is the nature of the property at issue.

[75] The Receivership Applicants say that each of the Debtors is a single-project real estate development company. Romspen says that courts have generally held that there is no principled basis for granting a stay under the CCAA to prevent real estate lenders from enforcing their security. Meridian submits that courts will generally refuse to grant a stay where CCAA protection would place the value of the security of secured creditors at risk. Both rely on the

decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 83 B.C.L.R. (4th) 214 and in *Dondeb Inc. (Re)*, 2012 ONSC 6087, 97 C.B.R. (5th) 264.

[76] In *Cliffs Over Maple Bay Investments*, Tysoe J.A. stated the following at para. 36:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[77] In *Dondeb Inc.*, after referring to the above statement of Tysoe J.A., C. Campbell J. went on to refer with approval to the following comments of Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 A.R. 296, at para. 17:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[78] The CCAA Applicants do not deny this line of cases but suggest that it is not applicable in the present circumstances. They suggest that the circumstances are much closer to the circumstances in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, 96 B.C.L.R. (4th) 77 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, in which courts ordered a stay under the CCAA in preference to the appointment of a receiver.

[79] In *Forest & Marine Financial Corp.*, at para. 26, Newbury J.A. distinguished the circumstances from those in *Cliffs Over Maple Bay Investments* as follows:

> In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[80] The same analysis was applied by Fitzpatrick J. in *Pacific Shores Resort & Spa Ltd.*, at para. 39:

> I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The CCAA proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

[81] The CCAA Applicants suggest that Richmond Hill in particular should be treated as a business because it has approximately 20 employees and consultants and because it has contracted with approximately 20 future tenants. They also suggest that the relationships among the CCAA Applicants and the Debtors are complex with the result that a CCAA proceeding is more appropriate.

[82] I do not think that any of the Debtors can properly be characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. There is no demonstrated ongoing business of any of the Debtors. There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time. Nor have the CCAA Applicants demonstrated that the relationship between themselves is sufficiently complex to require a CCAA proceeding to properly identify the respective stakeholder interests in the debtor companies and ensure fair treatment of such interests.

[83] More generally, the circumstances in the cases relied upon by the CCAA Applicants are very different from the present circumstances in a number of significant respects. In *Forest & Marine Financial*, the debtor companies were engaged in a very different business from real estate development – that of providing financing and advisory services. The assets of the debtor companies comprised a loan portfolio of many types of assets as well as an office building and the liabilities included both secured debt and "investment receipts" issued to the public. In *Pacific Shores Resort & Spa*, the debtor companies employed approximately 250 persons and were in the business of selling vacation ownership products and deeded ownership products, and the management of such interests, including the management of several resorts. Moreover, and significantly, in both cases, the court concluded that the secured creditors were well covered by the equity in the debtor companies. In my view, therefore, the present circumstances are much closer to those in *Dondeb* and *Cliffs Over Maple Bay Investments* than they are to the circumstances in *Forest & Marine Financial* and *Pacific Shores Resort & Spa*.

[84] The foregoing analysis suggests that there are no features of the business of the Debtors, or of the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership proceeding and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order. This consideration weighs in favour of a receivership order in the present circumstances. To be clear, however, I think that the judicial preference for a receivership over a CCAA proceeding in the circumstances of a single-project real estate development corporation is not so much a free-standing rule, as Romspen suggests, as it is the outcome of a consideration of the other factors discussed below.

Legal Rights and Interests of Meridian and Romspen

[85] Meridian and Romspen submit that where the contract between a lender and a borrower provides for the appointment of a receiver in the event of a default, a court should not ordinarily interfere. In short, they argue that the Court should give effect to their contractual rights.

[86] As mentioned, the Court is required to assess whether the appointment of a receiver is "just or convenient" having regard to all of the circumstances. In this context, I do not think that the rights of secured creditors who choose to seek the benefits of a court-appointed receiver over a privately-appointed receiver are as unqualified as Romspen suggests. Nevertheless, the legal rights of Meridian and Romspen are an important consideration in making a determination regarding the appropriateness of relief under the CCAA as well as the application of the "just or convenient" test for the appointment of a receiver. In this regard, two considerations are of particular significance.

The Security Position of Meridian and Romspen

[87] First, there is a real possibility that the consequence of the priority to be afforded the DIP Charge, which is a condition of any CCAA proceeding, would be to diminish the security of Romspen and, to a lesser extent, of Meridian. For clarity, it should be noted, however, that the security of these creditors will only be "primed" as a practical matter to the extent that the monies advanced under the DIP Facility exceed the monies that would otherwise be advanced under the Receivership Financing, given that prior-ranking construction financing is required under each plan to complete the Project.

[88] The CCAA Applicants argue that, on the basis of their evidence, both Romspen and Meridian are fully secured with the result that there is no practical significance to this concern. I agree that, given the terms of the DIP Facility, and subject to the resolution of one issue acknowledged by counsel for PointNorth, it is unlikely that Meridian would be adversely affected by the imposition of that Facility in priority to the Meridian Loan. However, the situation in respect of Romspen is not as clear. This requires a consideration of the evidence in the record.

[89] The CCAA Applicants have provided appraisals of the Properties that they say demonstrate that Romspen is very well secured. Conversely, Romspen has provided internal valuations for the Properties that place Romspen's security "on the cusp", in that they suggest that the aggregate value of the equity in the Shouldice Property, the Brampton Property and the completed Project, after deduction of the amount of the Meridian Loan and the DIP Facility, would be no greater than the outstanding amount of the Loan at the present time and could be materially less than such amount. Romspen also notes that, given the interest rate under the Loan, interest continues to accrue at the rate of slightly less than $1 million per month eroding any existing equity. Accordingly, under these valuations, Romspen could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding. On the other hand, using more optimistic assumptions, the same valuation models would provide a cushion of coverage for Romspen.

[90] I do not think that the appraisals provided by the CCAA Applicants are sufficiently reliable that the Court can rely on them on a balance of probabilities standard for the following reasons.

[91] With respect to the Project, the appraisal of the CCAA Applicants was conducted on a "fully built" basis. It also assumes 100 percent occupancy at certain projected rental rates. While Richmond Hill has contracted for a large portion of the rental space, there is a real risk until the Project is fully completed that the projected rental stream will not be achieved for a number of reasons. Accordingly, it logically follows that the value of the Project at the present time must be discounted from this appraisal value to reflect such risks. With respect to the Shouldice Property, the appraisal of the CCAA Applicants is based on the assumption that the Shouldice Property can be rezoned for the development contemplated in the appraisal. There is, however, no evidence on the feasibility of such development. Accordingly, neither of these appraisals provides a reliable valuation of these Properties at the present time.

[92] On the other hand, the internal valuations of Romspen make certain assumptions regarding occupancy rates and an appropriate capitalization rate that are likely to be conservative given Romspen's status as a subordinated lender to the Debtors. The sensitivity analysis provided by Romspen demonstrates a range of values as these assumptions are varied that would result in Romspen's security position falling between a material deficiency and a moderate excess of coverage. In the absence of any basis for determining the appropriate assumptions, it is also not possible to rely on these internal valuations.

[93] It is therefore necessary to seek other objective evidence regarding a realistic range of values for the Project.

[94] In this case, the best objective evidence is PointNorth's position, as the lender under the DIP Facility. If PointNorth accepted the Debtor's estimate of value, it would not have required that the DIP Charge prime the Romspen security, much less required that the CCAA Applicants provide the additional security on the Mississauga Property. Given PointNorth's requirement of these terms of the DIP Facility, I think it is a fair inference that PointNorth does not share the Debtor's confidence in the value of the Properties.

[95] In addition, the inability of the Debtors to obtain financing at the indicative values in the term sheets set out in the Grigoras Affidavit is further evidence that the appraisal values put forward by the CCAA Applicants are not reliable indicators of the current values of the Properties. In this respect, the indicative term sheet of PointNorth attached to that Affidavit is of particular relevance.

[96] Similarly, the failure of a proposed sale of the Shouldice Property on the terms, and at the value, set out in the Grigoras Affidavit due to the purchaser's failure to satisfy the financing condition is also evidence that the value ascribed to that Property by the CCAA Applicants is not credible.

[97] The foregoing evidence does not, however, establish a credible value or range of values for the Richmond Hill Property or the Shouldice Property. In these circumstances, I think the Court can find no more than that the equity in the Properties lies somewhere between the

Romspen internal values and values that are materially less than the aggregate value ascribed to them by the Debtors.

[98] The Court must therefore proceed on the basis that there is at least a reasonable possibility that the DIP Facility would adversely affect the Romspen security position. There is, therefore, a real possibility that, under the proposed CCAA proceedings, the Debtors would be "playing with Romspen's money" by virtue of the terms of the DIP Facility, as Romspen suggests. In other words, as in *Octagon Properties Group*, under the proposed CCAA proceedings, Romspen would be paying the cost to permit the Debtors to buy some time. This is also a consideration that weighs in favour of a receivership.

[99] I note, as well, that there is an inherent check and balance on the foregoing value assessment in the CCAA Applicants' favour. The grant of the requested receivership order would not prevent the CCAA Applicants from continuing to market the Properties with a view to a sale or refinancing transaction that would repay Meridian and Romspen. If the values of the Properties do in fact approach the values suggested by the CCAA Applicants, it should be possible to conclude such a transaction and, thereby, to retain the remaining equity in the Properties for the benefit of the subordinated lenders and equity holders.

The Contractual Rights of Meridian and Romspen

[100] Second, the effect of a CCAA proceeding would be to deprive Meridian and Romspen of the right to cause a change in the management of the Project in the very circumstances in which their security contemplates such a right. The Receivership Applicants have lost faith in the Debtors' management and an acknowledged default has occurred. Meridian and Romspen have bargained for the right to have a receiver take over control of, and to complete, the construction of the Project in these circumstances. There must be a good reason to deprive them of that right.

[101] In the present circumstances, however, this right has a particular significance because oversight and control of the construction costs is likely to impact the value of Romspen's security and, in an extreme case, of Meridian's security. A court-appointed receiver must justify its actions to the court and thereby to the creditors. It is exposed to potential liability if it is grossly negligent in the performance of its duties. Accordingly, secured creditors would reasonably expect to have more input into a receiver's actions than they would into the actions of the Debtors' management in a CCAA proceeding. While this might not be significant in a status quo situation, it is an important consideration in the present circumstances in which significant construction activity must take place, and significant additional debt must be incurred, to complete the Project.

[102] Accordingly, I conclude that the assertion by the Receivership Applicants of their contractual rights in the present circumstances, as well as their loss of faith in the management of the Debtors, must be important considerations for the Court.

The Interests of the Other Stakeholders in the Project

[103] Based on the foregoing, the proposed CCAA proceedings would have the two adverse or potentially adverse effects on the Receivership Applicants described above. The CCAA Applicants argue, however, that any such prejudice to the Receivership Applicants is more than

offset by the operational benefits of a CCAA proceeding and the benefits to the other stakeholders in the Project.

[104] I have dealt with the alleged operational benefits of the proposed CCAA proceeding above. I have concluded that the CCAA Applicants have not established that there are material operational benefits that make a CCAA proceeding superior to a receivership proceeding. This is therefore not a factor to be taken into consideration.

[105] The position of the CCAA Applicants that there are other stakeholders who will benefit from a CCAA proceeding and whose interests counterbalance the interests of the Receivership Applicants raises an important issue in these applications. Such stakeholders fall into two categories – future tenants and subordinate creditors and equity owners.

[106] The future tenants are critical to the success of the Project. It is of fundamental importance that the tenancy agreements in place continue and that any unrented space be rented as soon as possible. However, I am not persuaded that the future tenants who have contracted with Richmond Hill are more likely to favour a CCAA proceeding over a receivership. There is no evidence to this effect in the record. The more likely position is that the future tenants are more concerned with satisfaction that the Project, including the Fit-Out Works in respect of their space, will be completed in accordance with the timelines contemplated. In this respect, I think the future tenants are likely to be neutral as between a receivership or CCAA proceedings.

[107] The subordinated creditors of the Project comprise the trade creditors and certain unsecured lenders to the Project. The former include the Lien claimants whose priority has been established and any future trade creditors who will need to be kept current in order to complete the Project. The interests of these parties pertain to operational issues that are not affected by the nature of the proceeding that results in a restart of construction of the Project.

[108] On the other hand, the unsecured creditors and the equity holders in the Project rank junior to Meridian and Romspen. A CCAA proceeding, which entails prejudice or potential prejudice to senior ranking creditors in favour of junior ranking creditors and equity holders can only be justified, if ever, on the basis of larger societal interests.

[109] Meridian and Romspen submit that, as single-project real estate development companies, the insolvency of the Debtors, and in particular of Richmond Hill, does not raise any such interests. They rely on the decisions in *Cliffs Over Maple Bay Investments* and *Dondeb*, and in particular on the statements in those decisions cited above. Three considerations emerge from the case law set out above which are important in the present circumstances.

[110] First, where there is no business but rather a single-project real estate development company having mortgage lenders, it is not realistic to contemplate the possibility of a plan of compromise or arrangement under the CCAA that gives Meridian and Romspen less than a full payout of their indebtedness from the proceeds of any sale or a refinancing. In particular, there can be no justification for transferring value from Meridian and Romspen to more junior creditors or the equity holders.

[111] Second, for the same reason, there is no basis on which subordination of the priority position of Meridian and Romspen to that of a DIP Lender can be justified beyond the

construction costs contemplated by the financing plans of the parties to the extent such costs translate into equity in the Project and therefore do not diminish the security of these creditors.

[112] Third, for the foregoing reasons, it is questionable whether the CCAA proceedings contemplated by the CCAA Application can be said to further the purpose of the CCAA as set out above for the following reasons.

[113] In the present case, the CCAA is not being proposed with a view to "stabilizing" the present circumstances of the Debtors and allowing the Debtors the benefit of the status quo with a view to putting a restructuring plan to the stakeholders. There are two elements to this conclusion.

[114] First, it is not meaningful to talk of the maintenance of the status quo for the reason that, as discussed above, construction of the Project, being the only activity of Richmond Hill, is currently almost completely shut down. The Court is not being asked to grant relief to maintain that status quo. It is being asked to determine which of the two legal procedures – a receivership or a CCAA proceeding – should be ordered with a view to furthering a resumption of the construction of the Project under a new construction general contractor. Moreover, while the DIP Facility provides for some working capital, the DIP Facility is a non-revolving facility whose predominant purpose is to provide construction financing in a material amount which is necessary to permit construction to restart. In effect, the CCAA Applicants ask the Court to impose a third construction lender on the Project in priority to the existing lenders. This is beyond the usual nature and purpose of a DIP loan for working capital purposes. It underscores the fact that mere "stabilization" of the alleged business of the Debtors would serve no useful purpose. In short, the CCAA Applicants do not seek relief under the CCAA for the purpose of maintaining the status quo, or for "stabilizing" the situation, in the sense in which those terms are generally understood in the context of CCAA proceedings.

[115] Second, the CCAA Applicants do not contemplate a plan of compromise or arrangement as understood for the purposes of the CCAA for the reason that, as mentioned, Meridian and Romspen cannot be compelled to accept less than a complete payout of the Meridian Loan and the Loan, respectively, out of the proceeds of a sale or a refinancing. The "plan" of the CCAA Applicants is to seek to repay Meridian and Romspen out of the proceeds of a future sale or refinancing, if possible, after completion of the Project.

[116] Fundamentally, the purpose of the CCAA Application is not to restructure the business of the Debtors with a view to continuing their business but rather to maintain control of the Project by a Court-ordered imposition of new construction financing in the hope of realizing value for the subordinated lenders and equity holders. However, such control comes at the cost of prejudice to the rights, and potentially to the security position, of Romspen and Meridian. In this regard, the circumstances are similar to those in *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300.

[117] The Debtors have experienced a liquidity crisis since August 2018. None of the Debtors has any working capital with which to carry on business. The Debtors have explored a number of sales and refinancing options and have been unsuccessful. There is no sale or refinancing

option available to the Debtors at the present time. The CCAA Application is the only means available to them to preserve control over the continued construction of the Project.

[118] The purpose of the CCAA Application is to maximize the value of the Project. In the abstract, this is a desirable objective. However, in the present circumstances, it is not. It is the hope of the CCAA Applicants that sufficient value will be realized upon completion of the Project to make a sale or refinancing transaction feasible. If they are successful in realizing additional value, the subordinate creditors and the equity holders will benefit. However, if they are unsuccessful, Romspen and, in an extreme case, Meridian may well suffer a loss. The proposed CCAA proceeding therefore places the risk of a reduction in the value on Romspen and Meridian.

[119] This is inconsistent with the purpose of the CCAA which is to preserve the status quo in order to facilitate a plan of compromise or arrangement among the creditors of a debtor company, not to transfer risk, and potentially value, from senior creditors to junior creditors and equity holders without the consent of the senior creditors.

[120] Based on the foregoing, I conclude that the CCAA Applicants have failed to establish that the prejudice to the Receivership Applicants is offset by the benefits of the proposed CCAA proceeding.

The Respective Costs of a Receivership Versus a CCAA Proceeding

[121] Romspen alleges that the costs of a receivership will be less than the costs of a CCAA proceeding. While this is acknowledged by the CCAA Applicants, the parties dispute the extent of the difference. Counsel agree that the disputed difference is roughly $5-6 million i.e. between a difference of $5 million and a difference of $11 million. The difference pertains largely to the difference in the estimated costs discussed above in respect of the financing plans of the parties. Romspen says this consideration is important in respect of its position as a secured lender to the extent that the security for the Loan may not exceed, or only minimally exceeds, the current value of the Properties, which it considers to be the case.

[122] However, for the reasons discussed above, the Court is not in a position to make any determination on the likely difference in costs between these two proceedings beyond the agreed difference of $5 million. Any other figure would be speculative based on operational assumptions regarding the Project construction operations that may or may not prove to be appropriate.

[123] The more important cost considerations, which have been addressed above, are the extent to which the CCAA proceeding would result in less control over the financing of the much larger costs of completion of the Project, in a larger advance under the DIP Facility than would otherwise have been made under the Receivership Financing, and in a larger subordination of the security position of Romspen and Meridian.

[124] Accordingly, while the CCAA proceeding appears to entail costs of at least $5 million more than as receivership proceedings, the fact that a receivership proceeding would be less expensive than a CCAA proceeding is, by itself, not a significant factor in the Court's determination in this Endorsement.

Conclusions

[125] Based on the considerations addressed above, I conclude that it would not be appropriate to grant the CCAA Application and that it is instead just and convenient to grant the Receivership Application for the appointment of a receiver without a power of sale in respect of the Properties.

Wilton-Siegel J.

Date: December 10, 2018

SCHEDULE “D”

See attached.

jurisdiction to the court to appoint a receiver in situations where a corporation is under investigation for the protection of creditors and investors. Ultimately, the court may appoint an "investigative" receiver to report back to the court and to the parties with a view to liquidate the portfolio and distribute the proceeds to the investors and to the creditors. Similarly, subsection 248(3)(b) of the *Business Corporations Act* gives jurisdiction to appoint a receiver where the corporation has acted in a manner that is oppressive or unfairly prejudicial to creditors. While the legislation confers jurisdiction to appoint a receiver, they do not contain any other provisions governing the receivership. The court may appoint a receiver and manager to "manage" the corporation pending resolution as to entitlement. In these cases, the receiver and other parties must refer to the common law for guidance as the purpose of the receivership is something other than a security holder enforcing its security to recover a debt.

There is other legislation that calls for the appointment of a trustee[58] or custodian[59] to take possession of someone's assets or business pending judgment or some other resolution. In these cases, it is necessary to review the purpose of legislation as well as the similarities and differences from court appointments of receivers.

---

creditors, a test much wider in scope than the test for a *Mareva* injunction where the court is concerned about the disappearance of assets: *British Columbia (Securities Commission) v. DiCimbriani* (1996), 138 D.L.R. (4th) 263, 11 C.C.L.S. 181 (B.C. C.A.), allowing appeal from (1995), 10 C.C.L.S. 108, 1995 CarswellBC 1220 (B.C. S.C. [In Chambers]). Section 152 has been repealed. See now section 179.1

See also *Re Stenner Fin. Services Ltd.* (1988), 68 C.B.R. (N.S.) 298, 1988 CarswellBC 523 (B.C. S.C.) where the court reviewed an *ex parte* appointment of a receiver under subsection 136(3) of the *Securities Act;* and see *Superintendent of Brokers v. Victoria Mortgage Corporation Ltd.* (1985), 59 C.B.R. (N.S.) 225, 1985 CarswellBC 499 (B.C. C.A.), allowing appeal from (1985), 57 C.B.R. (N.S.) 157, 1985 CarswellBC 477 (B.C. S.C.) setting aside the receivership order.

58 *Construction Act*, R.S.O. 1990, c. C.30, section 68.

In Ontario, the Law Society of Ontario can apply to the Superior Court of Justice for an order placing all or part of a member's trust account in the name of the Society or another person appointed by the court. Such an order can be made to preserve the property, distribute it, carry on the member's practice or wind it up in situations where the member's membership has been revoked, where the member's rights are under suspension, where the member has died or has disappeared, or has neglected his or her practice or has dealt with the trust account improperly: see sections 49.44 to 49.52 of the *Law Society Act*, R.S.O. 1990, c. L.8.

59 In British Columbia, provincial legislation governing lawyers provides for the Law Society to apply for the appointment of a custodian to take possession of and control over all or part of the lawyer's practice for the protection of client's interests. In effect, the legislation is not considered a type of receivership.

See *Legal Profession Act*, R.S.B.C. 1998, c. 9, subsection 50(1): *Re Martin* (2005), 42 B.C.L.R. (4th) 380, 11 C.B.R. (5th) 255, 2005 BCSC 586 (B.C. S.C.); *Re De Stefanis* (2005), 38 B.C.L.R. (4th) 1, 9 C.B.R. (5th) 189, 2005 BCCA 156 (B.C. C.A.), dismissing an appeal from (2004), 24 B.C.L.R. (4th) 306, 50 C.B.R. (4th) 175, 2004 BCSC 10 (B.C. S.C.) where the court stated that the nature of the obligations of a custodian appointed under the Act is to protect the clients, not the creditors and is not analogous to that of a receiver or of a monitor appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

On the other hand, there are some statutes such as the *Personal Property Security Act (PPSA)*[60] that recognize the appointment of receivers and prescribe their duties and powers, but they do not confer jurisdiction to appoint a receiver.[61] In these cases, it is necessary to resort to the "just or convenient" or "just or equitable" legislation to appoint a receiver.[62]

(iii) Preservation Order

There is also jurisdiction under Rule 45.01 of the Ontario *Rules of Civil Procedure* for a court to make an interim order for the custody or preservation of property pending litigation in order to decide the rights of the parties. For example, the court may grant a preservation order against property transferred from the debtor to third parties allegedly in a fraudulent scheme[63] or against partnership property pending a trial.[64]

The court has the authority to direct that the property be sold, including situations where the property is perishable or likely to deteriorate quickly in value.

If the judge grants the order, the judge may refer the conduct of all or part of the receivership to a referee under Rule 54 of the Ontario *Rules of Civil Procedure*.[65] In practice, the conduct of the receivership usually remains with the judges of Superior Court of Justice.

(b) Under What Circumstances—Who May Apply

In determining whether it is "just or convenient" that a receiver should be appointed, the court considers many factors that vary in the circumstances and the facts of the case. While the remedy of a court-appointed receiver is usually employed by a security holder to enforce payment of a debt, other parties can employ the remedy seeking protection and preservation of assets pending adjudication of the issues. In the case where there are more than one security holders covering the same debtor's assets, the subordinate security holder may apply for the appointment of a receiver and manager where there is no prejudice to the higher-ranking security holders.[66]

---

60 See Chapters 15 and 16 below.

61 *Standard Trust Co. (Liquidator of) v. Turner Crossing Inc.* (1992), 106 Sask. R. 196, 4 P.P.S.A.C. (2d) 238, [1993] 2 W.W.R. 382 (Sask. Q.B.).

62 Such as subsection 248(3)(b) of the Ontario *Business Corporations Act* which gives the court jurisdiction.

63 *Moody v. Ashton* (1997), 48 C.B.R. (3d) 250 (Sask. Q.B.), receiving order set aside 1997 CanLII 9798 (Sask. C.A.); *Interclaim Holdings Ltd. v. Down* (1999), 15 C.B.R. (4th) 207 (Alta. C.A.).

64 *McKnight v. Hutchison*, 2011 BCSC 36, 78 C.B.R. (5th) 133 (B.C. S.C.).

65 Once a court-appointed receiver is appointed, it is doubted that the security holder can simply discontinue the action especially after the court has ordered a sale. Although the appointment of a receiver is corollary relief in an action, the receiver cannot be discharged except by the court which appointed it: see *Guar. Trust Co. of Canada v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CarswellAlta 312 (Alta. Q.B.).

66 See, for example, *Caisse Desjardins des Bois-Francs v. River Rock*, 2013 ONSC 6809 (Ont.

If the applicant is not a security holder or secured creditor, the court will recognize that the application is an extraordinary remedy that should be applied sparingly.[67] In these cases, the court will apply a more stringent test since if successful, the receivership becomes in effect execution before judgment.

This remedy to appoint a court-appointed receiver includes the court appointment of an investigative receiver where the receiver obtains powers of investigation into the financial affairs of the defendant without the power to seize and realize on its assets.[68]

The test for the appointment of a receiver is often compared to the test for an injunction, namely:

a. whether there is a serious issue to be tried,
b. irreparable harm if not granted, and
c. the balance of convenience.[69]

The court reviews these factors in reviewing the facts of each case. And in particular,the court focuses on the following general facts:

a. The existence of a debt and default;[70]
b. The nature and extent of the creditor's security;

S.C.J.), additional reasons as to costs 2014 ONSC 1426 (Ont. S.C.J.) and *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]). where a subsequently ranked mortgagee obtained the appointment of a court-appointed receiver over the objections of prior mortgagees.

67 *Alberta Treasury Branches v. COGI Limited Partnership*, 2016 ABQB 43, 33 C.B.R. (6th) 22 (Alta. Q.B.) where the court appointed receiver attempted to place its subsidiary in receivership.

See also *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.) where the court dismissed an application to appoint an interim receiver in an oppression remedy case.

See also *Katz v. Katz* (1976), 22 C.B.R. (N.S.) 198 (Ont. S.C.) where the court appointed an interim receiver to collect the rents and profits while the action proceeded.

68 *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, 25 C.B.R. (6th) 260 (Ont. C.A.), additional reasons as to costs 2015 ONCA 771 (Ont. C.A.).

See also *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) at para. 88, where the court reiterated the legal principles governing the appointment of investigative receivers; leave to appeal refused 2011 ONSC 4704 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10661 (Ont. Div. Ct.), additional reasons as to costs 2011 ONSC 4136, 89 C.B.R. (5th) 143 (Ont. S.C.J. [Commercial List]).

See also *Continental Casualty Co. v. Symons*, 2016 ONSC 4555, 39 C.B.R. (6th) 65 (Ont. S.C.J.), additional reasons 2016 ONSC 4750, 39 C.B.R. (6th) 76 (Ont. S.C.J.), additional reasons 2016 CarswellOnt 12195 (Ont. S.C.J.), additional reasons 2016 CarswellOnt 16189 (Ont. S.C.J.).

69 *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.). See, for example, *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15(e) (S.C.J.), additional reasons 2010 ONSC 4920.

70 If the security holder cannot readily establish a debt owing or that the debt is in dispute, the court will dismiss the motion or application: *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 (B.C. S.C.) where the court dismissed the application to appoint a receiver as the debtor successfully argued that the debt was settled.

c. The need for the appointment in view of the alternatives;
d. The nature of the property;
e. The likelihood of maximizing the return to the parties;
f. The costs involved;
g. The need to preserve the property pending realization;
h. The effect of an order on other creditors and other stakeholders.[71]

There are many factors and variations in determining whether it is just or convenient to appoint a receiver. The court should look at all the facts and review the matter "holistically" or on the "whole of the circumstances" to determine whether it is just or convenient to appoint a receiver.[72] These facts include the following:[73]

---

71 *Central 1 Credit Union v. UM Financial Inc.*, 2011 ONSC 5612, 84 C.B.R. (5th) 315 (Ont. S.C.J. [Commercial List]) where the court dismissed an application by a third party to intervene on an application to appoint a receiver.

72 *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) at paras. 22-24 where the court refers to the holistic approach and refers to two lines of authority for the test, namely the appointment as of right where there is default under a security agreement and where the court should nonetheless in addition to the default under the security agreement still consider whether the appointment is just or convenient..

73 These factors were considered in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 46 C.B.R. (4th) 95, 2002 ABQB 430 at paragraph 27, 2002 CarswellAlta 1531 (Alta. Q.B.); in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 at para. 25, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]); in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 C.B.R. (5th) 178 (Alta. Q.B.) at para. 13.

See also *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, 2021 ABQB 137 (Alta. Q.B.) where in reviewing these factors, the court appointed a receiver. The court reviewed several defences including whether the security holder made misrepresentations about restructuring the loans, the lack of good faith in the enforcement proceedings, the credibility of the parties, misleading the debtor about restructuring the loans, and the lack of opportunity to negotiate the forbearance agreement.

In *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) at para. 9, leave to appeal to the Divisional Court dismissed 2009 CarswellOnt 1128 (Ont. S.C.J.) where the court considered the four following factors in dismissing a motion for the appointment of an interim receiver:

"(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));

(2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));

(3) When the security interest permits the appointment of a receiver — and the circumstances of default justify the appointment — the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]))

(4) Where there is default which is not caused by the moving party where a loan had matured and there was no other means to protect the party's interest, then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List])).".

In *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242, 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69

(1) whether irreparable harm might be caused if no order were made, although it is not essential that the creditor establish that it will suffer irreparable harm if a receiver is not appointed;[74]

.B.R. (5th) 42, 2010 ABCA 191 (Alta. C.A.), the motion court considered the following ..actors in determining "just or convenient":

"In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;
b. the risk to the parties;
c. the risk of waste debtor's assets;
d. the preservation and protection of property pending judicial resolution; and
e. the balance of convenience."

See also *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477, 2010 CarswellBC 855 (B.C. S.C. [In Chambers]) and *Kumra v. Luthra*, 2010 ABQB 772, 79 C.B.R. (5th) 77 (Alta. Q.B.)

See also *Elleway Acquisitions Ltd. v. The Cruise Professionals Limited*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), where the court reviewed several other related cases in considering whether to appoint a receiver:"(a) the potential costs of the receiver;(b) the relationship between the debtor and the creditors;(c) the likelihood of preserving and maximizing the return on the subject property; and(d) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.)."

See also *Re Alexis Paragon Limited Partnership*, 2014 ABQB 65, 9 C.B.R. (6th) 43 (Alta. Q.B.) where the court considered the following factors in making the order:

1. the secured creditor's contractual right to appoint a receiver;
2. the risk of harm to the secured creditor if a receiver is not appointed;
3. the risk to the secured creditor from a sizeable deficiency;
4. the nature of the property;
5. the length of the receivership process; and
6. costs to the parties minimized if a receiver is appointed.

See also *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 (N.S. S.C.) where the court reviewed most of the factors in granting the appointment.

See also *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, 61 C.B.R. (6th) 322 (N.S. S.C.), additional reasons following debtor's redeeming bank before order was taken out 2018 NSSC 182, 62 C.B.R. (6th) 283 (N.S. S.C.).

See also *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243, 72 C.B.R. (6th) 118 (N.S. S.C.) following *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* above.

See also *Re Schendel Management Ltd.*, 2019 ABQB 545 (Alta. Q.B.) where the debtor's proposal was doomed fail.

See also *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited*, 2020 MBQB 58, 79 C.B.R. (6th) 44 (Man. Q.B.) where the debtor had not been acting in good faith and with due diligence, and had not provided the proposal trustee with accurate and timely information.

74 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) referring to *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. H.C.). In the *Odyssey* case, there was no evidence of the loans being in jeopardy of repayment while being in default.

See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) where the court focused on (1) the effect of an appointment on the parties including costs, maximizing the return and preserving the property, (2) the parties' conduct and (3) the nature of the debtor's property and the rights and interest of the parties in relation to the property referring to the *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

(2) the risk to the security holder. In considering the risk factor, the court considers the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while the litigation takes place. If the security holder can readily establish that there is going to be a sizeable deficiency in relation to the size of the loan, then the court will lean in favour of making the appointment as there is clear prejudice to the security holder. On the other hand, the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will adequately protect the security holder;[75]

(3) the nature of the property;

(4) the rights of the parties thereto;[76] If the secured creditors lose confidence in the debtor's ability to manage the business, then the court will consider this factor in favour an appointment.[77]

The *Swiss Bank* case has been distinguished and not followed in Alberta: *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that the debtor does not to prove any special hardship, much less "undue hardship" to resist an application for the appointment of a receiver.

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1993), 87 Man. R. (2d) 216, 19 C.B.R. (3d) 190, 1993 CarswellMan 30 (Man. Q.B.) where the court also took into consideration the fact that the plaintiffs had a strong *prima facie* case and that the balance of convenience favoured the appointment.

75 If there is no danger to the debtor's property, and the appointment will have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.)

See also *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. H.C.) where the court, after considering that the debtor's financial situation was desperate, appointed a receiver and manager.

In *Churchill (Local Government District) v. Costa Cartage Ltd.* (1994), 94 Man. R. (2d) 216, 1994 CarswellMan 286 (Man. Q.B.) where the debtor threatened to remove the furniture and furnishings of a hotel.

See also *Wilson v. Marine Drive Properties Ltd.* (2008), 51 C.B.R. (5th) 74, 2008 BCSC 1431, 2008 CarswellBC 2240 (B.C. S.C.).

Sequestre de Bouvidard limitee c. 3184277 Canada inc., 2017 QCCS 2293, 53 C.B.R. (6th) 162 (C.S. Que.).

See also *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, 2009 CanLII 12803, [2009] O.J. No. 1228 (Ont. S.C.J.), where the unsecured creditor's right to recovery money in a fraud situation is in serious jeopardy. In this case, the court appointed an "investigatory receiver" to locate, investigate and monitor the debtor.

See also *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* 2011 ONSC 4704 (Ont. Div. Ct.), refusing leave to appeal, additional reasons as to costs 2011 ONSC 5699 (Ont. Div. Ct.) where the court appointed an "investigative receiver" to review transfers between interconnected entities.

See *Business Development Bank of Canada v. Royal Green Enterprises Ltd.*, 2012 ONSC 478 (Ont. S.C.J. [Commercial List]), where the court appointed a receiver as security holder's collateral was eroding.

76 *Nat. Trust Co. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.); applied in *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366, 1991 CarswellOnt 469 (Ont. Gen. Div.). See also *Royal Trust Corp. of Can. v. D.Q. Plaza Holdings et al.* (1984), 36 Sask. R. 84, 53 C.B.R. (N.S.) 18, 1984 CarswellSask 38 (Sask. Q.B.).

(5) the apprehended or actual waste of the debtor's assets;[78]
(6) the preservation and protection of the property pending the judicial resolution;[79] If the business is operating, the court considers the amount of carrying costs needed to preserve the business for re-sale.

See also *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that an appointment should not lightly be granted and that the rights of both parties should be carefully balanced before an appointment is made.

In *MTM Commercial Trust v. Statesman Riverside Quays Ltd.* (2010), 70 C.B.R. (5th) 233, 2010 ABQB 647 (Alta. Q.B.) the court reviewed the test for the appointment of a receiver as being comparable to the test for an injunction, namely whether there is a serious issue to be tried, irreparable harm if not granted, and the balance of convenience: *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.).

77 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851, 81 C.B.R. (5th) 47 (Ont. S.C.J.).

78 *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver as the debtor was dissipating its assets and its property was deteriorating. However, the court stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*. The court held, at para. 14, that if a debtor is in default under a security agreement, then it is a matter of course that a receiver should be appointed unless there are compelling reasons to the contrary.

Compare *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) where the court refers to two lines of authority on the test to appoint a receiver.

79 For example, the court has the discretion to appoint a receiver in a mortgage action where the mortgagor fails to manage the buildings properly and make repairs: *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Company* (1978), 23 N.B.R. (2d) 261, 1978 CarswellNB 96 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301, 1996 CarswellOnt 430 (Ont. Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallet Fruit Farms Ltd.*, 1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.).

See also *McLennan Ross v. Paramount Life Ins. Co.* (1986), 44 Alta. L.R. (2d) 375, 63 C.B.R. (N.S.) 265, 1986 CarswellAlta 448 (Alta. Q.B.). When a mortgagee applies for a court appointment, the order does not create any new rights; it only protects existing rights. In this case, the court held that the receiver is entitled to collect rent arrears after the appointment, but the receiver cannot collect rent already collected by the mortgagor.

See also *Standard Trust Co. v. Pendygrasse Hldg. Ltd.* (1988), 71 C.B.R. (N.S.) 65, 1988 CarswellSask 27 (Sask. Q.B.) where the court, in referring to many of these factors, refused the appointment on the basis that the mortgagee already had significant control over the management board of a condominium complex and, therefore, its security was not in danger.

See also *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, 1991 CarswellOnt 1511 (Ont. Gen. Div.), where the court, in referring to many of these factors, appointed a receiver to complete a large construction project of an office building and to lease out space. Here, the debtor had no substantial equity in the project, its loans were in default and they had matured. The right to appoint a receiver becomes even less extraordinary when dealing with a default under a mortgage.

See also *Bank of N.S. v. Marbeck Well Servicing Ltd.; Bank of N.S. v. Becker* (1986), 43 Alta. L.R. (2d) 453 (M.C.) (headnote only).

See also *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 31 C.B.R. (5th) 100, 2007 YKSC 2, 2007 CarswellYukon 1 (Y.T. S.C.) where the court concluded that an interim receiver was needed where there were dangerous and unsafe conditions in a mine site that had been abandoned.

See also *Bacic v. Millennium Educational & Research Charitable Foundation*, 2013 ONSC 4545, 17 C.B.R. (6th) 162 (Ont. S.C.J.) where after an initial appointment of a receiver to

On the other hand, if the business is closed at the time of the application or motion, the court will be less concerned about these costs, but will be focused on the costs to moth-ball the business.

(7) the balance of convenience to the parties;

(8) the fact that the creditor has the right to appoint a receiver under its security upon the debtor's default is an important factor. Where this clause is present, the extraordinary nature of the remedy is less essential as a determining factor in the consideration.[80] However, the

---

protect the assets against dissipation, the applicants obtained an order expanding the powers of the receiver to mirror the appointment within bankruptcy proceedings.

See also *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905, 17 C.B.R. (6th) 169 (Ont. S.C.J. [Commercial List]) where the court appointed a receiver in order to preserve the continuity of a retirement residence as a going concern.

If the property is not in peril or the creditor is unable to demonstrate that, the court will not appoint a receiver: *Tim v. Lai and Harry Invts. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CarswellBC 575 (B.C. S.C.).

See also *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 13 C.B.R. (6th) 136 (Ont. S.C.J. [Commercial List]) at paras. 59-62, additional reasons as to costs 2014 ONSC 3480, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]) where in competing interests, the court appointed a receiver rather than allow the debtor protection under the *CCAA*.

See also *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]) where the court in choosing between a receivership or a *CCAA* process, must balance the competing interests of the various stakeholders to determine which process is more appropriate. The court will consider the following factors:

"a) Payment of the Receivership Applicants

b) Reputational damage

c) Preservation of employment

d) Speed of the process

e) Protection of all stakeholders

f) Cost

g) Nature of the business."

See also *Re 2607380 Ontario Inc.*, March 6, 2020 - referred to in *BCIMC Construction Fund Corp. Clover on Yonge Inc.*, [2020] O.J. No. 1615 (Ont. S.C.J.) - where the court granted an order under the *CCAA* rather than appointing a receiver. In this case, the debtor was supported by two of the three security holders and had a plan to present to the creditors.

But see *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver but stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*.

See also RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205, 18 C.B.R. (6th) 300 (Ont. S.C.J. [Commercial List]) where in appointing a receiver, the applicant was prepared to fund the receivership thereby preserving the debtor's enterprise value.

Instead of appointing a receiver, the security holder can request an injunction and a preservation order against the debtor pending a declaration that the security holder is entitled to enforce its security.

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

See *Alexander v. 2025610 Ontario Ltd.*, 2012 ONSC 3486, [2012] O.J. No. 2721 (Ont. S.C.J. [Commercial List]) where the parties agreed to the appointment of a receiver in a side agreement if they defaulted under a forbearance agreement.

court still has to decide on reviewing other factors whether an appointment is just or convenient and necessary to enable the receiver to carry out its work and duties more efficiently. As a result, the court should not linarily interfere with the contract between the parties, but it shoul till review other factors;[81]

(9) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;[82]

(10) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;[83] however, the fact that a creditor has the right to appoint a receiver by instrument under its security makes the "extraordinary" nature of the remedy less essential in the consideration, but the applicant must still demonstrate that the appointment is just or convenient;[84]

There are many cases following this factor.

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

There are many cases that adopt this principle: See Appendix to this Chapter.

On the other hand, there is *dicta* to the effect that the appointment of a receiver should be a matter of course in the context of a foreclosing mortgagee and that there is no need to satisfy the just or convenient test: *First West Credit Union v. 687830 B.C. Ltd.*, 2012 BCSC 908, 92 C.B.R. (5th) 198 (B.C. S.C.) referring to *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347, 2003 BCSC 640, 2003 CarswellBC 1084 (B.C. S.C. [In Chambers]).

See also below in text (10) extraordinary relief.

82 *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042, 2010 CarswellOnt 3588 (Ont. S.C.J.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

See also *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.).

But see *Visser v. Godspeed Aviation Ltd.*, 2020 BCSC 1241, 2020 CarswellBC 2070 (B.C. S.C.) where the court denied the appointment as there was no risk to the security or any potential irreparable harm. In this case, there was already a privately appointed receiver in place. The debtor had sued the creditor for misrepresentation arising out of the sale of the business to the debtor.

83 *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416 (Ont. Gen. Div.) referring to *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.).

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

See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).See also *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*, 2003 CarswellOnt 3598 (Ont. S.C.J.), appeal dismissed 2004 CarswellOnt 810 (Ont. C.A.).

See also *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), *WestLBAG v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 3510 (Ont. S.C.J. [Commercial List]) where the receiver was initially appointed under subsection 47(1) of the *Bankruptcy and Insolvency Act* and sections 68(1) and (2)(b)(c) and (d) of the *Construction Lien Act*.

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

(11) whether a court appointment is necessary to enable a private receiver to carry out its duties more efficiently;[85]

(12) the effect of the order on the parties. If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price;[86]

(13) the conduct of the parties;[87]

(14) the length of time that a receiver may be in place. Usually, a receiver appointed by the court remains in place until after judgment and realization of assets. This could last several years depending upon the nature of the business. However, where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties;[88]

(15) costs to the parties;

(16) the likelihood of maximizing the return to the parties. As set out in Chapter 7, Realization, a court-appointed receiver has a higher standard in maximizing the return to all parties whereas a privately appointed receiver has a duty to the initiating creditor to obtain a fair price for the debtor's business. The receiver, whether court or privately appointed, can close the business, operate it for a short term and ultimately liquidate its assets if it cannot be sold as a going concern

(17) facilitating the duties of the receiver;[89] and

---

85 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]); referred to in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1 (Ont. S.C.J.); and followed in *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (Ont. S.C.J.).

86 *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). In this case, the court was also concerned about the receiver's capabilities as the proposed receiver lacked experience in operating a nursing home. See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

87 See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

Royal Bank of Canada v. Chongsim Investments Ltd. (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.) where the court in rejecting the appointment of a receiver reviewed the effect of the order on the parties as well as their conduct.

88 In Ontario, the security holder seldom obtains judgment before the receiver sells the debtor's business. But see *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 56 C.B.R. (N.S.) 7, 16 D.L.R. (4th) 181 (B.C. C.A.) where the court commented about the creditor first obtaining judgment before it could sell.

89 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) where the court reviewed many of the above circumstances. In this case, the debtor had been attempting to re-finance real properties for one and a half years and was at odds with the security holder as to marketing them. In postponing the appointment for a short time to give the debtor a further opportunity to re-finance, the court concluded that a court-appointed receiver could resolve that impasse.

(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[90]

(19) the appointment will facilitate a cross border sale transaction giving the receiver power to apply to the United States Bankruptcy Court for recognition and enforcement of orders.[91]

In many cases, a security holder whose instrument charges all or substantially all of the debtor's property provides for a court-appointed receivership if the debtor is in default and fails to pay following a demand for payment.[92] *Prima facie*, the security holder is entitled to enforce its security by applying for a court-appointed receiver and manager.

If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that:

1. there is a serious issue to be tried,
2. that irreparable harm will occur if an appointment is not made, and
3. that the balance of convenience must be in the creditor's favour.

In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[93]

---

90 *Priority 1 Security Inc. v. Phasys Ltd.* (2006), 9 P.P.S.A.C. (3d) 203, 22 C.B.R. (5th) 258, 2006 ABQB 332 (Alta. Q.B.).

See also section 4.2 of the *Bankruptcy and Insolvency Act* which provides that any interested person in any proceedings under this Act shall act in good faith. If an interested person fails to act in good faith, the court has the power to "make any order that it considers appropriate in the circumstances."

91 *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]).

92 The above passage as it was written in the first edition was cited in *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343 (Alta. Q.B.).

See *Royal Bank v. Brodak Construction Services Inc.* (2002), 34 C.B.R. (4th) 107, 2002 CarswellOnt 1774 (Ont. S.C.J. [Commercial List]) referring to *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]).

93 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.). In *Anderson v. Hunking*, 2010 ONSC 4008, 2010 CarswellOnt 5191 (Ont. S.C.J.), additional reasons 2010 ONSC 4920, the Ontario court summarized the factors in dismissing an application for the appointment of a receiver where the creditors were neither judgment creditors nor secured creditors at paras. 15 and 16:

"[15] Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order 'where it appears to a judge of the court to be just or convenient to do so.' The following principles govern motions of this kind:

(a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. S.C.J.);

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer 'irreparable harm' if the motion is refused, and 'irreparable' refers to the nature of the harm suffered rather than its magnitude — evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits — that is, the 'balance of convenience' See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214(S.C.) at paras. 7 and 11;

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189 (S.C.J.). [*Degroote v. DC Entertainment Corp.* (2013), 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List])].

[16] The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As the court observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is 'just' or 'convenient' or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)]."

Followed in *Schembri v. Way* (2010), 76 B.L.R. (4th) 147, 2010 ONSC 5176, 2010 CarswellOnt 8675 (Ont. S.C.J.) and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2011 ONSC 4704, 2011 CarswellOnt 8054 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10661 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10375 (Ont. S.C.J. [Commercial List]), followed in *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759, 86 C.B.R. (5th) 49 (Alta. Q.B.) where the court extended the appointment of a receiver having been previously appointed over real estate to take possession of related companies operating a hotel on the mortgaged lands.

See also *Eaglewood Specialty Products et al v. Royal Bank*, 2017 NBQB 136, 50 C.B.R. (6th) 246 (N.B. Q.B.) where the debtor unsuccessfully applied to restrain the privately appointed receiver.

See *Murphy v. Cahill*, 2013 ABQB 335 (Alta. Q.B.) where the court dismissed an application to appoint a receiver on the basis that the applicant did not meet the triparte test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, that the parties were ready for trial,

Court File No. CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC. and MIZRAHI (128 HAZELTON) INC. AND MIZRAHI 128 HAZELTON RETAIL INC.
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT (RECEIVERSHIP APPLICATION)

CASSELS BROCK & BLACKWELL LLP
Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
jdietrich@cassels.com

Jessica Zagar LSO #: 57305Q
Tel: 416.869.5449
jzagar@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Lawyers for the Applicant