

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

BANK OF MONTREAL

Applicant

- and -

2TH, INC. and DR. MISLAV PAVELIC DENTISTRY PROFESSIONAL CORPORATION

Respondents

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

STATEMENT OF LAW OF THE APPLICANT

October 11, 2023

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Overview:

1. The Applicant, Bank of Montreal (“**BMO**”), commenced the within application to appoint KSV Restructuring Inc. as receiver and manager, without security, of all of the assets, properties and undertakings of each of 2th, Inc. (the “**Borrower**”) and Dr. Mislav Pavelic Dentistry Professional Corporation (“**Pavelic DPC**” and collectively, the “**Respondents**”) acquired for or used in relation to a business or businesses carried on by the Respondents (the “**Property**”).
2. The Borrower is a Canadian corporation incorporated on September 7, 2018, of which Dr. Mislav Pavelic (“**Dr. Pavelic**”) and Brian Holland (“**Holland**”) are the directors.¹
3. Pavelic DPC is a company incorporated pursuant to the laws of the Province of Ontario, of which Dr. Pavelic is the sole director and officer.²
4. The Borrower currently owns substantially all of the personal property in a dental clinic called “2th Dental @ St. Clair Bathurst” located Unit 2, 1500 Bathurst Street, Toronto, Ontario (the “**St. Clair Dental Clinic**”). The goodwill of the St. Clair Dental Clinic is owned by Pavelic DPC. The Respondents’ only assets of any value are located at the St. Clair Dental Clinic.³
5. In April 2022, Pavelic DPC engaged a broker to market the business for sale. The marketing process resulted in the sale of two of the three clinics operated by the Respondents, with the St. Clair Dental Clinic being the only remaining dental clinic that was not sold.⁴

¹ Affidavit of Michaela Wolf sworn October 3, 2023 at [para 3](#) and [Exhibit A](#), Application Record of Bank of Montreal dated October 3, 2023 [“**Wolf Affidavit**”]

² Wolf Affidavit at [para 5](#) and [Exhibit B](#).

³ Wolf Affidavit at [para 9](#).

⁴ Wolf Affidavit at [paras 10-12](#).

6. There has been a breakdown in the relationship as between Dr. Pavelic and Holland as the principals and shareholders of the Borrower, leading to a standstill as it relates to the marketing and sale of the St. Clair Dental Clinic.⁵

7. On December 23, 2022, BMO entered into a forbearance agreement with, among others, the Respondents, based on defaults existing as at that time. Following an extension, the forbearance agreement expired on August 31, 2023.⁶

8. BMO issued demands on September 20, 2023, following the expiry of the forbearance period. As of September 20, 2023, the Borrower was indebted to BMO in the amount of \$2,599,218.74 in principal and interest, plus accruing interest and recovery costs of BMO (including, without limitation, BMO's legal and other professional fees) with respect to certain loans and credit facilities made available by BMO to the Borrower.⁷

9. The Borrower's obligations to BMO pursuant to the Loan Agreement are guaranteed by Pavelic DPC, among other personal and corporate guarantors not being pursued on this application.⁸

10. The Respondents have not repaid the amounts owing to BMO.

The test for the appointment of a receiver under s. 243(1) of the BIA and s. 101 of the CJA:

11. Subsection 243(1) of the *Bankruptcy and Insolvency Act* provides that, on application by a secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court deems advisable over that property and over

⁵ Wolf Affidavit at [para 27](#).

⁶ Wolf Affidavit at [paras 17-19](#) and [Exhibits L](#) and [M](#).

⁷ Wolf Affidavit at [para 23](#) and [Exhibit O](#).

⁸ Wolf Affidavit at [para 14](#) and [Exhibit H](#).

the insolvent person's business, in circumstances where it is "*just or convenient*" to do so.⁹ Similarly, the CJA enables the court to appoint a receiver where such appointment is "*just or convenient*".¹⁰

12. In determining whether it is "just or convenient" to appoint a receiver under either the BIA or the CJA, Ontario courts have applied the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Claire Creek*.¹¹ Blair J. held that the court "*must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto,*" which includes the rights of the secured creditor under its security.¹²

13. In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* and *Bennett on Receivership*, this Court listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

- (a) Whether irreparable harm might be caused if no order is made, although as stated above, where the appointment is authorized by the security documentation, it is not essential for a creditor to establish that it will suffer irreparable harm if a receiver is not appointed;
- (b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

⁹ [Bankruptcy and Insolvency Act \(R.S.C., 1985, c. B-3\)](#), s 243 [BIA].

¹⁰ [Courts of Justice Act, RSO 1990](#), c C. 43 at s 101 [CJA].

¹¹ [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ONSC).

¹² [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 at [para 11](#) (ONSC).

- (c) The nature of the property;
- (d) The apprehended or actual waste of the debtor's assets;
- (e) The preservation and protection of the property pending judicial resolution;
- (f) The balance of convenience to the parties;
- (g) The fact that the creditor has a right to appointment under the loan documentation;
- (h) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- (i) The principle that the appointment of a receiver should be granted cautiously;
- (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- (k) The effect of the order upon the parties;
- (l) The conduct of the parties;
- (m) The length of time that a receiver may be in place;
- (n) The cost to the parties;
- (o) The likelihood of maximizing return to the parties; and

- (p) The goal of facilitating the duties of the receiver.¹³

14. Where the enumerated rights of the secured creditor under its security include the right to seek the appointment of a receiver, the burden on the applicant is significantly relaxed. As stated by Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

*... where the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. That is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.*¹⁴

15. It is not essential that the moving party establish, prior to the appointment of a receiver, that:

- (a) It will suffer irreparable harm; or
- (b) That the situation is urgent.¹⁵

16. Where the history and evidence of the behaviour of a debtor indicate that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver is warranted.¹⁶

Appointment of a receiver against backdrop of owner disputes:

17. In *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*,¹⁷ the Court held that it was just and convenient to appoint a receiver to conduct a sales process in respect of the real estate project in

¹³ *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 at [para 25](#), citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at [para 25](#).

¹⁴ *Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.*, 2013 ONSC 6866 at [para 27](#).

¹⁵ *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at [paras 28-29](#).

¹⁶ *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 at [para 13](#) (ONSC).

¹⁷ *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2022 ONSC 4135.

circumstances where the relationship between the owners of a joint venture had irrevocably broken down, and the parties had made allegations of oppressive conduct against each other.¹⁸

18. In *Garratt v. Charlton*,¹⁹ the Court appointed a receiver-manager of the business—and refused to defer the appointment—in circumstances where the parties operating the business had had a falling out that led to a deadlock and effectively ceased the business’ operations.²⁰

19. In light of the foregoing, BMO respectfully requests that this Court grant the relief sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October, 2023.



Kyle Plunkett / Matilda Lici

¹⁸ [Rose-Isli Corp. v. Frame-Tech Structures Ltd.](#), 2022 ONSC 4135 at [para 22](#).

¹⁹ [Garratt v. Charlton](#), 2012 ONSC 1129.

²⁰ [Garratt v. Charlton](#), 2012 ONSC 1129 at [paras 32-33](#).

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of Montreal v. Carnival National Leasing Ltd.*](#), 2011 ONSC 1007
2. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), 1996 CanLII 8258 (ONSC)
3. [*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*](#), 2022 ONSC 6186
4. [*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.*](#), 2013 ONSC 6866
5. [*Garratt v. Charlton*](#), 2012 ONSC 1129
6. [*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*](#), 2009 BCSC 1527
7. [*Rose-Isli Corp. v. Frame-Tech Structures Ltd.*](#), 2022 ONSC 4135

**SCHEDULE “B”
RELEVANT STATUTES**

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

PART XI

Secured Creditors and Receivers

Marginal note: 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.

Courts of Justice Act, RSO 1990, c. C. 43

Interlocutory Orders

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).

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Proceedings commenced at Toronto

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